CIRCUMSTANCES WHEN MEDICAL TREATMENT MAY BE FORCIBLY IMPOSED DESPITE A PATIENT'S EXPLICIT REFUSAL: A COMPREHENSIVE ANALYSIS OF PENNSYLVANIA LAW

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I. PURPOSE AND SCOPE

This article details every situation where a health care provider in the Commonwealth of Pennsylvania may forcibly administer treatment to a patient against that patient's *express* wishes. As a brazen violation of a person's liberty interest, forcible medical treatments—including involuntary commitments—must pass federal constitutional muster, particularly under the Due Process Clause of the Fourteenth Amendment. After this federal baseline is established, the various additional protections afforded by Pennsylvania law are listed as they arise in various scenarios where forcible treatment is permitted. In the mental health subsection, Pennsylvania's policies are compared with the laws of California, New York, Texas, and Florida, as the policies of these five populous American states collectively affect the most people.

The common law has long recognized that every individual has a right to possession and control of his or her own body.[1] Pennsylvania courts note that this right typically allows a person to refuse medical treatment.[2] In light of this general rule, the subsequent text addresses only situations where the patient has unequivocally attempted to exercise that right of refusal via a clear communication to his or her doctor.[3]

II. THE FEDERAL BASELINE: DEFINING STATE AUTHORITY AND DUE PROCESS RIGHTS

All state actions infringing upon a person's liberty interest are limited by the Federal Constitution.[4] Early on, the Supreme Court of the United States held

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1. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

2. *In re* Fiori, 652 A.2d 1350, 1354 (Pa. Super. Ct. 1995); *see also* Smith v. Yohe, 194 A.2d 167, 174 (Pa. 1963); Moscicki v. Shor, 163 A. 341, 342 (Pa. Super. Ct. 1932). Pennsylvania courts also consider this right to be protected by the federal and state constitutions. *In re* Fiori, 652 A.2d at 1354 n.3.

3. This paper specifically avoids commenting on procedures for dealing with *unconscious* patients in emergencies, situations where a doctor is unaware of a patient's wishes, and issues of whether a patient's consent was knowing, educated, and voluntary.

4. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

that statutes permitting forcible medical treatment necessarily infringe upon a person's liberty interest.[5] The state must (1) indicate a source of authority for its infringing action and (2) ensure that such authority is powerful enough to defeat the fundamental rights in question.[6]

A. Two Sources of State Authority: Police Power and Parens Patriae

Despite an individual's rights to due process and liberty, a state may still force medical treatment upon that person using the state's police power.[7] The Court held that "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[8]

In addition to the police power, a state may rely on its *parens patriae* power to protect citizens who cannot care for themselves.[9] The doctrine of *parens patriae* is "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp[ecially] on behalf of someone who is under a legal disability . . . ."[10] In short, the government may sue to protect someone who is mentally ill, even if the government's lawsuit is against that person in the form of a commitment proceeding.

B. Respecting Substantive Due Process Rights: Dangerousness and Treatable Disease Must Be Shown

In the seminal case of *O'Connor v. Donaldson*,[11] the Supreme Court held that a "finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely."[12] The state's police power is insufficient authority to forcibly commit a person who has not been shown to be dangerous towards anyone.[13] The state's *parens patriae* power is also insufficient when a person can survive alone or with the willing assistance of family or friends.[14]

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5. *See* Jacobson v. Massachusetts, 197 U.S. 11, 12-13, 22 (1905).

6. *See id.* at 25-26.

7. *Id.* at 24-25.

8. *Id.* at 25.

9. *See* Vidal v. Ex'rs of Girard, 43 U.S. 127, 144 (1844). "Jurisdiction over the three subjects of lunatics, infants, and charities has always gone together, and been claimed because the king is said to be *parens patriae*." *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *303; 3 WILLIAM BLACKSTONE, COMMENTARIES *47).

10. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

11. 422 U.S. 563 (1975).

12. *Id.* at 575.

13. *Id.*

14. *Id.* at 575-76. The ability to *survive* is all that a prospective patient needs to demonstrate to avoid commitment. *Id.* at 575. The state's *parens patriae* power is not strong enough to trump a person's liberty interest when the state care can raise the prospective patient's standard of living but is not required to ensure the prospective patient's survival. *Id.*

Dangerousness has been broadly defined, as a prospective patient need not commit a *violent* act.[15] In *Jones v. United States*, the Court held that a "not guilty by reason of insanity" verdict for even a non-violent criminal offense can prove dangerousness and allow automatic commitment.[16] The substantive protections usually granted to the prospective patient were easily diminished by the fact that "the *acquittee himself* advance[d] insanity as a defense," thus proving his own unacceptable—and therefore dangerous—behavior.[17] Furthermore, an insanity acquittee may be held until his dangerousness no longer exists *even if* the period of institutionalization extends beyond the maximum prison term that he could have received under a "guilty" verdict.[18]

In addition to the requirement of dangerousness, a prospective or current patient may only be confined indefinitely when the patient is shown to be afflicted with a *treatable* mental illness.[19] When commitment and correlative medical treatment have no hope of treating or controlling a mental illness, the state has no legitimate authority to force such treatment.[20] Absent the state interest in mitigating a danger to others (via the police power) or protecting an incompetent (via the *parens patriae* power), the patient's liberty interest trumps any attempt at forcible commitment. The same logic holds true for a mental illness that has been cured; when the medical treatment is useless, it must not be forced upon a patient.[21] Of course, the state may still have other justifications for seizing a person, such as when the person violates a criminal law.[22]

C. Respecting Procedural Due Process Rights: Notice, Hearing, and Clear and Convincing Evidence Must Be Provided

In any analysis attempting to delineate what procedural process is actually due before forcing a medical treatment, a court weighs three things: (1) the private interest affected, (2) the value of added safeguards reducing the risk of erroneous deprivation, and (3) the burden on the government in providing added safeguards.[23] Given the substantial liberty and substantive due process interests of a patient, the patient must always receive notice of an impending commitment or forcible treatment and an opportunity to speak with a neutral fact-finder.[24] However, "due process is not violated by use of informal traditional medical investigative techniques" and a physician as the neutral

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15. Jones v. United States, 463 U.S. 354, 365 (1983).
16. *Id.* at 366.
17. *Id.* at 367.
18. *Id.* at 368.
19. Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992).
20. *See id.* at 79.
21. *Id.* at 77.
22. *Id.* at 80.
23. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
24. *See* Parham v. J.R., 442 U.S. 584, 606-07 (1979); *In re* R.D., 739 A.2d 548, 556 (Pa. Super. Ct. 1999).

fact-finder.[25] Although states may require added protections, the Federal Constitution does not require a legal fact-finding process, as a medical fact-finding process would have an equal—if not lower—error rate.[26]

Yet, a committed patient is still entitled to periodic situational reviews by a neutral fact-finder.[27] Where such periodic or impartial review is not provided, the Court has noted that habeas corpus[28] is the proper remedy.[29] Procedural due process requirements are not changed by the relationship of the person seeking commitment or forced treatment to the prospective patient; both family members and state officials were held to be sufficient commitment initiators whose overzealousness can be tempered by the same procedures involving the same neutral fact-finders.[30]

The fact-finder in a commitment proceeding—be it a judge, jury, or medical professional—must find that the patient has a dangerous yet treatable mental illness by at least *clear and convincing* evidence.[31] The Fourteenth Amendment requires a balancing between "the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof" that will minimize erroneous judgments.[32] The United States Supreme Court conclusively performed this balancing test, ruling that an intermediate standard between "a mere preponderance" and beyond a "reasonable-doubt" must be used when depriving a person of liberty under the state's police and *parens patriae* powers.[33]

III. INTERESTS TRUMPING THE RIGHT OF REFUSAL

Pennsylvania courts do not use a flexible approach in analyzing privacy rights.[34] The right to refuse medical treatment is one such constitutionally protected privacy right and therefore can only be defeated by a compelling state interest.[35] Three possible state interests exist to override a patient's right to control personal health care decisions: (1) the Commonwealth's goal of preserving life (including the prevention of suicide), (2) Pennsylvania's interest in protecting third parties from harm, and (3) the communal benefit in

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25. *Parham*, 442 U.S. at 607.

26. *Parham*, 422 U.S. at 612-13.

27. *Id.* at 607, 613.

28. Habeas corpus is a "writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

29. *Parham*, 442 U.S. at 616 n.22.

30. *Id.* at 617-18.

31. Addington v. Texas, 441 U.S. 418, 433 (1979).

32. *Id.* at 425.

33. *Id.* at 426-31.

34. *In re* Fiori, 652 A.2d 1350, 1354 (Pa. Super. Ct. 1995) (quoting Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796, 800, 802 (Pa. 1992)).

35. *Id.* A *compelling* state interest is the most significant among three kinds of state interests that may authorize state action. The other two state interests are lesser categories of *important* state interests and *legitimate* state interests. *See generally* Price v. Cohen, 715 F.2d 87, 91-92 (3d Cir. 1983); 16B C.J.S. *Constitutional Law* § 1249 (2005).

maintaining an ethical medical profession.[36] Any of these interests may individually or collectively, when combined with other present state interests, override the patient's right under a balancing test that is "weighted" in favor of the patient.[37]

A. The Preservation of Life

A *legally competent* person's right of autonomy has generally defeated Pennsylvania's interest in preserving that person's life.[38] However, the Commonwealth may generally act to protect a *legally incapacitated* person under the doctrine of *parens patriae*.[39] For the purposes of this article, a "legally incapacitated person" includes any person who suffers from a mental illness, physical illness, or substance addiction severe enough to prevent that person from understanding or communicating a medical treatment decision.[40]

The Commonwealth may also act to protect minors under *parens patriae*.[41] Pennsylvania retains the power to protect all minors except those who are legally emancipated.[42] The legislature typically delegates this protective power to a minor's guardians.[43] The Commonwealth's interest in preserving life receives more weight when the health care decision at issue has more significant consequences.[44] Therefore, a guardian's power to force medical treatment upon a child receives the same added weight because that guardian's power is derived from the state's sovereign power to protect its interest. However, the Pennsylvania legislature has detailed several exceptions to this rubric by granting minors the statutory ability to make certain medical decisions without any state or guardian intervention.[45]

Pennsylvania's interest in preserving life also extends to unborn children.[46] Pennsylvania has the ability—and indeed exercised its power—to outlaw the abortion of a viable fetus.[47] However, state restrictions on abortions must always give way to a woman's own right to life; therefore, a woman's right to

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36. *In re Fiori*, 652 A.2d at 1354; *see also In re* Duran, 769 A.2d 497, 503 (Pa. Super. Ct. 2001).

37. *See generally In re Duran*, 769 A.2d at 503-06. The use of "weighted" in referring to the balancing test is this author's attempt to recognize that the burden of proof lies with the Commonwealth to present a *compelling* interest, which is a governmental purpose of the highest order.

38. *In re Fiori*, 652 A.2d at 1355. The right of autonomy extends into a person's incompetency where that person *clearly* expressed his or her desires regarding medical treatment *before* the incompetency arose. *Id.*

39. Commonwealth v. Nixon, 761 A.2d 1151, 1153 (Pa. 2000).

40. *See generally* BLACK'S LAW DICTIONARY 775 (8th ed. 2004).

41. *Nixon*, 761 A.2d at 1153.

42. *Id.* at 1153-54. "[A]n emancipated minor assumes all legal responsibility for his or herself." *Id.* at 1153.

43. *Id.*

44. *Id.* at 1155.

45. *Id.* at 1155.

46. Goslin v. State Bd. of Med., 937 A.2d 531, 537 (Pa. Commw. Ct. 2007). *Accord* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

47. *Casey*, 505 U.S. at 846.

life trumps her unborn child's right to life when only one life can be saved.[48] A question remains in a scenario where a pregnant woman refuses a medical treatment that poses little risk to her health but would prevent her unborn child from dying in the womb or shortly after birth. This highly politicized area of the law becomes more complex if the pregnant woman is either a minor or legally incapacitated, and the woman's guardian seeks to force her to submit to a medical procedure, be it an abortion or a treatment in the unborn child's best interest.

B. The Protection of Third Parties

Pennsylvania retained the police power over its territory when it ratified the United States Constitution.[49] This police power allows Pennsylvania's legislature to enact laws that may force medical treatments upon individuals within Pennsylvania when such treatment is necessary to preserve the health of the Commonwealth's general public.[50] Pennsylvania's current public policy makes involuntary treatment available when (1) the patient's need for care is great and (2) serious harm to the patient or third parties could result if that treatment is not rendered.[51] The Commonwealth's Mental Health Procedures Act[52] provides detailed procedures for forcing treatment upon a mentally ill person who recently posed a serious threat to others, as well as upon those patients who are unable to properly preserve their own lives.[53]

Occasionally, highly contagious physical illnesses also pose a threat to third parties. The United States Supreme Court interpreted the Federal Constitution to permit states to forcibly vaccinate or otherwise treat individuals to prevent a widespread plague.[54] The Pennsylvania Supreme Court found no additional rights conferred by the Pennsylvania Constitution that would prevent the legislature from exercising its police power to administer forcible vaccinations or even quarantines.[55] While the Pennsylvania and federal legislatures have authorized some forcible treatments of physical illnesses, the statutes tend to have several exceptions to strike a balance between protecting civil liberties and the public welfare.[56]

Pennsylvania jurisprudence has referred to the state's interest in protecting third parties as a mere evaluation of a patient's familial situation, deeming

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48. *See Casey*, 505 U.S. at 846.

49. Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905). The police power is "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice." BLACK'S LAW DICTIONARY 1276 (9th ed. 2009).

50. *Jacobson*, 197 U.S. at 25.

51. 50 PA. STAT. ANN. § 7102 (West 2001).

52. *Id.* §§ 7101-503.

53. *Id.* §§ 7301-05.

54. *Jacobson*, 197 U.S. at 31-32.

55. Stull v. Reber, 64 A. 419, 420-21 (Pa. 1906).

56. *See* 42 U.S.C. §§ 264-72 (2006); 24 PA. CONS. STAT. ANN. § 13-1303(a) (West 2006); 35 PA. STAT. ANN. § 521.16 (West 2003); 71 PA. STAT. ANN. § 541 (West 1990); 28 PA. CODE § 23.83 (2010).

forced treatment permissible when a patient's refusal would financially injure that patient's dependents.[57] However, for the purposes of this article, the protection of third parties encompasses the state's interests in preventing the spread of non-lethal diseases and protecting citizens from bodily harm. While the interest in preserving life has been deemed the weightiest,[58] the interest in protecting third parties from harm seems just as weighty when redefined to include situations where the state exercises its police power to avoid widespread harms with more than financial but less than lethal effects.

C. Preserving the Integrity of the Medical Profession

The Commonwealth's interest in protecting the integrity of the medical profession is a nebulous concept that has not been used to squarely override a refusal of treatment. To define the interest, its usage in two past cases will be analyzed. *In re Estate of Dorone*[59] involved an adult Jehovah's Witness named Darrell Dorone.[60] Dorone was in a car accident and rendered unconscious.[61] He needed two lifesaving operations to prevent brain damage and a serious blood clot.[62] Dorone's doctors received consent from his parents for both operations, but the parents refused to permit blood transfusions incident to those surgeries, citing both Dorone's and their own religious beliefs.[63] Believing the blood transfusions necessary, the doctors made a telephonic petition to the trial court to override this refusal.[64]

The trial court twice appointed the hospital administrator as Dorone's temporary guardian, knowing that the administrator would consent to the transfusions on Dorone's behalf.[65] Despite strong evidence of Dorone's religious beliefs, the Pennsylvania Supreme Court ruled that the trial court did not abuse its discretion because the clear evidence of medical necessity defeated any speculation as to whether Dorone would or would not waver in his faith when confronted with death.[66] While the analysis in this opinion did not follow the rubric that was later developed to test situations involving nonconsensual treatment, the courts clearly acted in a manner that sought to preserve Dorone's life, using the *parens patriae* doctrine to protect an unconscious citizen.

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57. *In re* Fiori, 673 A.2d 905, 910 (Pa. 1996).
58. *Id.*
59. 534 A.2d 452 (Pa. 1987).
60. *Id.* at 454.
61. *Id.*
62. *Id.* at 454-55.
63. *Id.* at 454-55.
64. *Id.* at 455.
65. *In re Estate of Dorone*, 534 A.2d at 454-55.
66. *Id.* at 455. The Pennsylvania Supreme Court emphatically wrote, "[W]here there is an emergency calling for an immediate decision, nothing less than a fully conscious contemporaneous decision *by the patient* will be sufficient to override evidence of medical necessity." *Id.* at 455 (citations omitted).

However, upon further thought, the broad rule giving doctors great latitude in emergency situations is explainable by the Commonwealth's interest in protecting the integrity of the medical profession by ensuring that doctors focus on doing what they do best—saving lives. The court created this rule in the face of the Estate's request to allow the substituted-judgment doctrine to be used in the future to enable a guardian to *refuse* medical treatment *for non-medical reasons*.[67] The appellate court's recognition of the trial court's ability to weigh the instinct for survival against the prerecorded wishes of the patient can be cynically viewed as a court-approved "end run" around the right to self-determination on behalf of the medical profession in all cases except when a competent adult patient makes the clearest refusal of treatment.[68]

In 1990, state prisoner Joseph Kallinger attempted to starve himself.[69] The courts approved the forcible feeding of Kallinger through a nasogastric tube in part because the interest in protecting the integrity of the medical profession outweighed Kallinger's reduced privacy rights.[70] In framing the state's interest in integrity, the following concerns were noted: (1) doctors have a general duty to preserve life that would be undermined if Kallinger was allowed to die in the medical staff's care, (2) the prison medical staff would suffer a drop in morale if Kallinger died in this manner, (3) other prisoner patients and their families would believe that the prison staff was not properly trained, particularly because the psychiatrists could not convince Kallinger to forego his starvation attempt, and (4) the general public would have less faith in the prison's health care system if a prisoner died in its care.[71]

The *Kallinger* court thus generally recognized that the integrity of the medical profession often depends upon the public perception of doctors' abilities. When the state fails to intervene and override a refusal of lifesaving treatment, both the state's interest in preserving life and in protecting the health care system are undermined. Therefore, significant overlap exists between the "integrity" interest and the "lifesaving" interest, which gives the state a better chance of overriding a refusal in a life-threatening case and a worse chance of overriding lesser refusals. However, there are still times

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67. *In re* Estate of Dorone, 502 A.2d 1271, 1277 (Pa. Super. Ct. 1985), *aff'd*, 534 A.2d 452 (Pa. 1987). The substituted-judgment doctrine is a "principle that allows a surrogate decision-maker to attempt to establish, with as much accuracy as possible, what healthcare decision an incompetent patient would make if he or she were competent to do so." BLACK'S LAW DICTIONARY 1567 (9th ed. 2009).

68. *See In re Estate of Dorone*, 534 A.2d at 455.

69. Dep't of Pub. Welfare v. Kallinger, 580 A.2d 887, 888 (Pa. Commw. Ct. 1990).

70. *Id.* at 892-93. The Commonwealth Court first recognized Kallinger's autonomy, despite his mental illness, writing, "he is competent in the sense that he fully understands his decision and realizes that death will result if he continues to refuse nutrition and medical treatment." *Id.* at 889. The Court then noted that "Kallinger is a convict and any rights that he may have are extremely limited and severely restricted because of the unique nature and requirements of prison custody." *Id.* Finally, the Court weighed Kallinger's limited privacy rights and the medical risks of forced feeding against the state's interests in maintaining an orderly prison system, preserving life, and protecting the integrity of the prison's medical staff to conclude that Kallinger could be forcibly fed. *Id.* at 890, 893.

71. *Id.* at 892-93.

where a clear advance directive can destroy any part that medical ethics would otherwise play in the equation, as doctors are not required to intervene against every disease.[72]

IV. PRIOR SITUATIONS WHERE FORCIBLE TREATMENT WAS PERMITTED IN PENNSYLVANIA

This section lists specific scenarios where a Pennsylvania court issued an opinion having precedential value allowing a doctor to perform involuntary medical treatment.[73] Cases that are no longer good law are not addressed for the sake of brevity. This section also surveys Pennsylvania statutes directly or indirectly permitting forcible treatment.[74]

A. Deathly Ill Patient in Custody of Commonwealth

As addressed above, Pennsylvania faced a situation where a prisoner attempted to starve himself.[75] The Eighth Amendment of the Federal Constitution requires the Commonwealth to protect the welfare of all people in its custody.[76] Considering this obligation and the state interests in preserving life, maintaining prison order, and protecting the medical profession's integrity, the Pennsylvania Commonwealth Court permitted the forced treatment of the prisoner as long as he refused to care for himself while in custody.[77]

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72. *In re* Duran, 769 A.2d 497, 503-04 (Pa. Super. Ct. 2001).

73. The United States Supreme Court, the Pennsylvania Supreme Court, the Pennsylvania Superior Court, and the Pennsylvania Commonwealth Court are all considered to create precedent that binds the state trial courts, known as the Courts of Common Pleas. However, United States Supreme Court cases are not helpful in this analysis because "a federal court's interpretation of state law does not bind a Pennsylvania state court." 1 STANDARD PENNSYLVANIA PRACTICE 2D § 2:1 (2009). In forcing medical treatment, a state attempts to override a citizen's constitutional rights. Pennsylvania could never allow a treatment in violation of the Fourteenth Amendment, which incorporates the above-noted federal constitutional barriers upon the states, but Pennsylvania courts may read the state constitution in a broader manner, granting Pennsylvanians additional rights that may weigh against forced treatment. Those judicially-created (or even statutorily-created) rights are unique to each state, and only Pennsylvania courts may interpret the law with regard to the "extra" rights, if any, Pennsylvanians have. *See generally* Robert K. Fitzpatrick, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833 (2004) (providing a historical background of judicial federalism).

74. Some statutes *directly* permit forcible treatment by mandating examination of a person who may otherwise harm a state interest. *See, e.g.*, 50 PA. STAT. ANN. §§ 7101-503 (West 2001). Other statutes *indirectly* permit forcible treatment by barring a patient's lawsuit against a doctor when the lawsuit arises solely from the allegation that treatment was rendered without consent. 35 PA. CONS. STAT. ANN. § 8151 (Supp. 2011) (amending 35 PA. CONS. STAT. ANN. § 6933 (West 2003)).

75. *Kallinger*, 580 A.2d at 888.

76. *Id.* at 891.

77. *Id.* at 892-93.

The Court recognized that the feeding procedure used to nourish the prisoner was highly invasive and could even result in death.[78] Despite the lethal risks of the procedure, the prisoner was held to have only reduced privacy rights due to his incarceration.[79] Therefore, this opinion can be read broadly to permit the forcible treatment of any prisoner using any procedure that prison doctors deem necessary for the immediate preservation of the prisoner's life. While the risks of the involuntary treatment can be of the gravest kind, the holding is limited to situations where death is imminent and more likely to occur without the compulsory intervention.

B. Large Population in Significant Jeopardy of Contracting Patient's Disease

The Disease Prevention and Control Law of 1955[80] allows various state health agencies to create and enforce regulations to curb the spread of diseases.[81] The statute expressly permits the forcible examination or institutionalization of individuals suspected of carrying "a venereal disease, tuberculosis, or any other communicable disease" by obtaining a court order.[82] When a patient known to be infected refuses appropriate medical treatment, that patient may be quarantined in a state institution via court order until the disease is rendered non-communicable.[83] Suspected sex offenders and criminals may be forcibly subjected to a broader array of tests to determine what diseases they carry.[84]

The Pennsylvania Supreme Court held that the Law's purpose was, *inter alia*, "to institute a system of mandatory reporting, examination, diagnosis, and treatment of communicable diseases."[85] While the court would not allow the results of a gonorrhea test to be subpoenaed for use at a criminal trial, it expressed no objection to the use of the test to compel the defendant to undergo treatment for his disease.[86] The states have long been held to retain a police power denied to the federal government to protect their citizens, and the power to enact testing and quarantine laws falls within a state's ambit.[87] Most of the provisions of the Law have not been directly challenged in court, so a slim possibility of unconstitutionality remains.

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78. *Kallinger*, 580 A.2d at 890.

79. *Id.* at 889.

80. 35 PA. STAT. ANN. § 521.1 (West 2003).

81. *Id.*

82. *Id. §* 521.7. A patient refusing examination may instead be quarantined until the passage of time makes it clear that he or she could not possibly be infected. *Id.* However, the option of choosing between a quarantine and a court-ordered examination rests with the applicable government officer. *Id.*

83. *Id. §* 521.11(a.1).

84. *Id. §* 521.8.

85. Commonwealth v. Moore, 584 A.2d 936, 940 (Pa. 1991).

86. *Id.* at 939-40.

87. Craig & Blanchard v. Kline, 65 Pa. 399, 408 (1870) (*citing* Gibbons v. Ogden, 22 U.S. 1 (1824)). *Accord* Nat'l Wood Preservers, Inc. v. Dep't of Envtl. Res., 414 A.2d 37, 42 n.10. (Pa. 1980).

C. Low-Risk and Minimally Invasive Diagnostic Tests in Adversary's Interest

In *Coleman v. Workers' Compensation Appeal Board*,[88] the Pennsylvania Supreme Court developed a balancing test to permit medical diagnostic tests over a patient's objection when an adversarial party had an interest in the test results.[89] In the *Coleman* case, LouAnn Coleman refused to consent to a magnetic resonance imaging (MRI) test and a triphasic bone scan requested by her employer.[90] The employer was paying Coleman workers' compensation and had a statutory right to require the test.[91] Coleman later consented to the tests to avoid losing her benefits, but the case was still heard by the appellate courts on the merits.[92]

Thus, working under the assumption that Coleman continued to actively refuse access to her body for purposes of the tests, the Pennsylvania Supreme Court found that the legislature and a court may compel a person to undergo simple medical procedures when there is an outside adversarial interest in obtaining the results of such tests.[93] In this specific case, the employer's interest was in preventing workers' compensation fraud and the state's interest was in having an independent medical expert provide the court with an unbiased report regarding LouAnn Coleman's condition.[94] Coleman had the typical personal interest in protecting her body from unwanted contact and invasion.[95] The court held that the employer could defeat Coleman's rights by showing the requested tests involved (1) a minimal risk, (2) a high probability of success, and (3) no more than a *reasonable* intrusion upon or into her body.[96]

Without going into extensive analysis of all known risks, the court recognized that an MRI subjects the body to strong magnetic fields and radio waves and that a bone scan involves the injection of a radioactive material into the bloodstream.[97] Citing Coleman's medical history, the court found a minimal risk and a high probability of success for both the MRI and the bone scan.[98] The court expressly held that the entry of a needle into the body was

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88. 842 A.2d 349 (Pa. 2004).

89. *Id.* at 355-56.

90. *Id.* at 351.

91. *Id.* at 350-51 & n.1. *See* 77 PA. STAT. § 651(a) (2002).

92. *Coleman*, 842 A.2d at 352. The appellate courts heard the case despite its technical mootness "because it was capable of repetition and likely to escape judicial review." *Id.*

93. *Id.* at 356. When the government holds the adversarial interest, the Pennsylvania Constitution requires probable cause for an "invasive" bodily search, such as blood tests to determine intoxication levels. Commonwealth v. Kohl, 615 A.2d 308, 315-16 (Pa. 1992). Furthermore, implied consent statutes are constitutionally invalid when used to bypass this probable cause requirement. *Id.*

94. *See Coleman*, 842 A.2d at 351-52.

95. *Id.* at 354.

96. *Id.* at 355.

97. *Id.* at 351 n.2. Coleman had previously underwent both "an MRI and a triphasic bone scan in 1996, with no complications aside from redness, swelling, and bruising at the injection site for 4 to 5 days." *Id.* at 351. This history of success allowed the court to ignore Coleman's hypothetical supposing an increased risk if she were allergic to the radiotracer used in the bone scan. *See id.* at 356 n.9.

98. *See id.* at 355-56.

not unreasonably intrusive due to its widespread usage in blood tests and vaccinations.[99] Additionally, the use of a foreign substance within the body is not *per se* unreasonably intrusive because the reasonableness of the intrusion directly correlates to the risk the foreign substance poses to the body.[100] The court finally deemed the actual risks to be questions of fact for a trial court to determine, but no remand was necessary for such a factual determination in this case due to the technical mootness of the matter.[101]

This case is representative of dozens of decisions where a statute or a court authorized the compulsory testing of a patient in order to further a state or private party interest in understanding a factual scenario. A person collecting workers' compensation may be forced to undergo a routine physical examination before a court will require the employer to extend or continue workers' compensation benefits.[102] A court may compel a plaintiff to undergo x-rays and electro-cardiograph testing before permitting recovery under an insurance policy.[103] The *Coleman* decision authorizes an independent doctor to forcibly perform MRI, CAT, and bone scans when an employer suspects an employee-patient of workers' compensation fraud.[104] Pennsylvania law permits a court to order an involuntary blood test to determine parentage when the fact is material to a dispute before that court.[105]

Courts are not without limits in their abilities to gather information through forcible medical testing. A four-prong test exists to ensure that the adversarial interest in compelling examination is sufficient to outweigh the patient's rights. Diagnostic tests can only be required when (1) a party has good cause to discover the facts the tests can reveal,[106] (2) the tests have a high likelihood of producing such facts,[107] (3) the patient is only at a minimal risk of harm during the procedures,[108] and (4) the tests do not intrude into the patient in an *unreasonable* manner.[109] As noted earlier, these inquiries are all questions of fact, subject to review under an abuse of discretion standard.[110] Under this deferential lens, the appellate courts have frequently refused to disturb trial courts' grants and denials of motions to compel examination.[111] Therefore, a

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99. *Coleman*, 842 A.2d at 356.

100. *Id.*

101. *Id.*

102. Pancoast v. Workers' Comp. Appeal Bd., 734 A.2d 52, 53 (Pa. Commw. Ct. 1999).

103. Myers v. Travelers Ins. Co., 46 A.2d 224, 226 (Pa. 1946).

104. *Coleman*, 842 A.2d at 351, 355-56.

105. 23 PA. CONS. STAT. ANN. § 5104(c) (West 2010).

106. PA. R. CIV. P. 4010(a)(3). Good cause is merely "[a] legally sufficient reason." BLACK'S LAW DICTIONARY 251 (9th ed. 2009).

107. *Coleman*, 842 A.2d at 355.

108. *Id.*

109. *Id.*

110. *Pancoast*, 734 A.2d at 54. *Accord* Horne v. Sentry Ins. Co., 588 A.2d 546, 547-48 (Pa. Super. Ct. 1991).

111. *See, e.g.*, Mrs. Smith Pie Co. v. Workmens' Comp. Appeal Bd., 426 A.2d 209, 210-12 (Pa. Commw. Ct. 1981) (affirming lower court's denial of employer's motion to compel examination of employee "blinded" by psychological illness resulting from workplace accident

doctor in the Commonwealth can rely upon a court order compelling a treatment to create a substantial obstacle for a patient attempting to hold that doctor liable for participation in forced treatment.[112] The issues of the treatment's necessity, likelihood of success, risk, and reasonableness are collaterally estopped from challenge absent a trial court's abuse of discretion.[113]

Doctors performing diagnostic tests at the request of the Commonwealth or its courts have additional protections as well. Doctors have been found immune from negligence actions when the courts appoint them because the experts do not owe duties to the patients in situations where the courts determined that compulsory examinations are the best courses of action.[114] The doctor-patient privilege is waived due to the diagnostic—rather than treatment-oriented—nature of the interaction, and no part of a court-appointed doctor's report or testimony may be used as the basis of a tort action.[115]

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when tests required ten-day hospitalization and administration of foul-smelling drugs to determine illness's permanency); *Pancoast*, 734 A.2d at 53 (affirming order compelling employee to submit to independent physical examination). *But see Horne*, 588 A.2d at 548-49 (reversing lower court's order compelling examination when insurance company failed to show need for independent evaluation of claimant's injury).

112. *See* Krouse v. Workers' Comp. Appeal Bd., 837 A.2d 671, 676 (Pa. Commw. Ct. 2003) (Commonwealth Court cited collateral estoppel when refusing to order employer to pay for specific medical treatments deemed by Appeal Board to be unreasonable in prior case involving same employee).

113. Collateral estoppel is the "binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based." BLACK'S LAW DICTIONARY 298 (9th ed. 2009).

114. *Coleman*, 842 A.2d at 356 n.9. The *Coleman* footnote rightfully refers to Althaus v. Cohen, 756 A.2d 1166 (Pa. 2000), which is the leading case on the imposition of duties upon doctors. *See Coleman*, 842 A.2d at 356 n.9. The *Althaus* court wrote that a court weighs several factors when creating a duty: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed . . . ; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." *Althaus*, 756 A.2d at 1169. However, court-ordered treatment will necessarily involve (1) a forced, non-private, and possibly adversarial relationship between the doctor and the patient, (2) a high social utility in true diagnosis, evidenced by the court's finding of good cause, (3) a low risk in treatment, evidenced by the court's order, (4) typical considerations of protecting court experts, and (5) a strong public interest in true diagnosis and expert protection. *See generally id.* at 1170-71; Craddock v. Gross, 504 A.2d 1300, 1302-03 (Pa. Super. Ct. 1986) (finding doctor examining employee pursuant to employer's workers' compensation carrier's request not liable for negligent diagnosis of recovery because no physician-patient relationship existed).

115. *See* Moses v. McWilliams, 549 A.2d 950, 956-57 (Pa. Super. Ct. 1988) (holding that doctor's pretrial statements to attorney were absolutely immunized by judicial privilege because they were made in reasonable connection with judicial proceeding); Clodgo v. Bowman, 601 A.2d 342, 345-46 (Pa. Super. Ct. 1992) (dismissing medical malpractice lawsuit against court-appointed doctor who misread paternity test because his testimony was protected by the doctrine of judicial privilege).

D. Guardian or State Treating Minor Without Statutory Exception

In 1922, the Pennsylvania Supreme Court offhandedly approved a statutory scheme that could jail parents who refused to obtain vaccinations for their school-aged children.[116] Guardians were required to send their children to school, and all children sent to school were required to have proper vaccinations.[117] Therefore, guardians were required to obtain vaccinations for their children.[118] Children are legally incompetent to approve or reject most medical treatments, so their guardians—typically their parents—are primarily responsible for their well-being via a duty imposed by the state under the state's *parens patriae* power.[119] Thus, when the guardian violates his or her duty, the state may directly intervene to care for the incompetent minor.[120] In the harshest compulsory vaccination cases, children are removed from their parents' custody, forcibly vaccinated by the state, and sent to a public school under the supervision of various child welfare departments.[121]

Although children may sue their parents in Pennsylvania, an exhaustive search found no record of a case where a child sued a parent to block a medical treatment that the parent wished to force upon the child.[122] A child would arguably have standing to sue when a guardian interfered with his or her statutorily-created rights to seek or refuse certain treatments, such as substance abuse counseling or medication for a venereal disease.[123] Despite the lack of precedent showing that a guardian can typically force treatment upon a child via a delegated *parens patriae* power, that inference is abundantly clear from the line of cases that permit the Commonwealth to bypass parents and forcibly treat a child under the same legal theory of *parens patriae*. Furthermore, Pennsylvania law expressly authorizes a doctor's use of force in treating a minor patient with a guardian's consent.[124]

This brief history introduces a recent case dealing with many of these issues. In *Commonwealth v. Nixon*,[125] the Pennsylvania Supreme Court affirmed

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116. *See* Commonwealth *ex rel.* Schaffer v. Wilkins, 115 A. 887, 887-88 (Pa. 1922); *accord In re* Marsh, 14 A.2d 368, 369, 370 (Pa. Super. Ct. 1940).

117. *In re* Marsh, 14 A.2d at 369-70.

118. *Id.* at 371. Pennsylvania courts have recognized the possibilities of exceptions to this scheme, such as in cases where a child's body could not handle the vaccination process or where a child was home-schooled. Stull v. Reber, 64 A. 419, 421 (Pa. 1906); *Cf. In re* Marsh, 14 A.2d at 371. However, this paper addresses compulsory vaccinations of schoolchildren as one example of a broader ability of the state to forcibly treat minors when the parents fail to do so. Thus, the specifics of the compulsory vaccination laws will not be explored.

119. Commonwealth v. Nixon, 761 A.2d 1151, 1153 (Pa. 2000).

120. *See id.* (citing Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)).

121. *See, e.g.*, *In re* Marsh, 14 A.2d at 369, 371.

122. *See* DiGirolamo v. Apanavage, 312 A.2d 382, 387 n.10. (Pa. 1973) ("The doctrine that a child may not sue his parent in tort was abolished . . . ." (citing Falco v. Pados, 282 A.2d 351 (1971)).

123. 71 PA. STAT. ANN. § 1690.112 (West 2011) (allowing minors to independently consent to substance abuse treatment); 35 PA. STAT. ANN. § 521.14a (West 2011) (permitting minors to independently consent to treatments for sexually transmitted diseases).

124. 18 PA. CONS. STAT. ANN. § 509(4)(ii) (West 1998).

125. 761 A.2d 1151 (Pa. 2000).

the involuntary manslaughter convictions of parents Dennis and Lorie Nixon when they refused to obtain medical treatment for their daughter's diabetic condition.[126] The court rejected a proposed affirmative defense from the Nixons, dubbed the "mature minor doctrine."[127] Recognizing that minors are generally incompetent to refuse medical treatment deemed necessary by their guardians, the court refused to permit case-by-case findings of "mature minors" who could make treatment decisions on their own.[128] Thus, the Nixons' sixteen-year-old daughter had no right to legally refuse medical treatment absent an explicit statutory provision, and the parents were criminally responsible for failing to force lifesaving treatment upon her using their *parens patriae*-derived power.[129]

Although the typical child "refusing" medical treatment may be a crying toddler afraid of a vaccination needle, the state legislature recognizes that certain medical situations require a delicate balancing of risks and rewards that may only be performed by the child. The general rule that a person has the right to refuse medical treatment is reversed for children; minors do not have a right to refuse medical treatment unless they can find a specific exception in a statute.[130] The first exception is emancipation. When a minor is emancipated, he or she earns full rights to control his or her medical treatments, subject to the compelling interests of the state.[131] In Pennsylvania, emancipation irreversibly occurs at the earliest of any of the following acts by a minor: (1) reaching age eighteen, (2) graduating from high school, (3) marrying, or (4) becoming pregnant.[132]

By statute, a minor also has the independent power to consent to treatments addressing the following areas: (1) substance abuse,[133] (2) venereal diseases,[134] (3) psychological problems,[135] (4) volunteer blood donations,[136] and

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126. *Nixon*, 761 A.2d at 1152. The Nixons, wishing to abide by the Faith Tabernacle Church's tenet where spiritual rather than medical treatment is used to address illness, used prayer and "anointments" to help their daughter, Shannon. *Id.* at 1152 & n.1. The freedom of religion issues raised by this case will not be further addressed, as the court gave no added weight to the religious motivations, holding that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter ill health or death." *Id.* at 1153 (quoting Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)). Thus, the Court weighed the state's interests against the typical right of privacy interests discussed at length earlier in this paper.

127. *Nixon*, 761 A.2d at 1153, 1155.

128. *Id.* at 1155.

129. *Id.* at 1155-56.

130. *Cf. Nixon*, 761 A.2d at 1155 (identifying situations where a minor may consent, by statute, to medical treatment).

131. *Id.* at 1153-54.

132. 35 PA. CONS. STAT. ANN. § 10101 (West 2011).

133. 71 PA. CONS. STAT. ANN. § 1690.112 (West 2011).

134. 35 PA. CONS. STAT. ANN. § 521.14a (West 2011). *See also* 35 PA. CONS. STAT. ANN. § 10103.

135. 35 PA. CONS. STAT. ANN. §§ 10101.1(a)(1), (3), (b)(2), (4)-(5) (Supp. 2011). The minor must also be at least fourteen years old. *Id. §* 10101.1(b)(5).

136. 35 PA. CONS. STAT. § 10002 (West 2011). The minor must be at least seventeen years old. *Id.*

(5) court-supervised abortions.[137] However, some of these same statutes also strip the minor of the right to *refuse* treatment. A minor's guardian may consent to mental health treatment on behalf of the minor over the minor's express objections.[138] A guardian can petition the court to force a minor into substance abuse treatment when the minor refuses such treatment despite the minor's clear addiction and need for treatment.[139]

Having listed the narrow areas where a minor may refuse treatment and noting that the Pennsylvania Supreme Court declined to allow a case-by-case expansion of these areas, it stands to reason that all medical treatments falling outside the scope of these narrow exceptions may be forced upon a minor by his or her guardian. Where a guardian is also the minor's parent, the privacy rights of the family prevent the state from excessively interfering with the parent's treatment choices, despite the fact that the parent's power to treat the minor derives from the state's sovereign power.[140] However, where the Commonwealth has a compelling interest, that state interest trumps all privacy rights.[141] In those situations, such as where the minor's life is in jeopardy, the state may retake its *parens patriae* power and compel treatment. Thus, minors in Pennsylvania are often subjected to involuntary medical care, typically at the hands of their guardians but occasionally by the will of the state.

E. Emergencies Where a Patient's Refusal is Not Fully Conscious

Although no Pennsylvania case directly addresses the ability of a doctor to force treatment upon a resistant person in an emergency, case law clearly indicates that the interest in preserving a patient's life and health is paramount in an urgent situation. The Pennsylvania Supreme Court held that "where there is an emergency calling for an immediate decision, nothing less than a fully conscious contemporaneous decision by the patient will be sufficient to override evidence of medical necessity."[142] This quote comes from the previously discussed case of Jehovah's Witness Darrell Dorone, where a

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137. 18 PA. CONS. STAT. ANN. § 3206(c) (West 2000 & Supp. 2011). A court may allow a pregnant minor to abort her fetus without parental consent if the court believes she is "mature and capable of giving informed consent." *Id.* Although this statute supposedly does not apply to emancipated individuals, its purpose clearly contradicts the ability of a pregnant minor to have full control over treatment decisions. *See id.* at § 3206(a); 35 PA. CONS. STAT. ANN. § 10101 (West 2011). The most reasonable interpretation, although not addressed by Pennsylvania courts, would be that a pregnant minor must get either parental or court approval to have an abortion, but a minor who has (1) turned eighteen, (2) graduated from high school, or (3) married, may independently obtain an abortion. A pregnant minor may make all other treatment decisions outside of abortion on her own.

138. 35 PA. CONS. STAT. ANN. §§ 10101.1(a)(2)-(3), (b)(1), (4), (6).

139. 71 PA. STAT. ANN. § 1690.112a (Supp. 2011).

140. Commonwealth v. Nixon, 761 A.2d 1151, 1156 (Pa. 2000).

141. *Id.*

142. *In re* Estate of Dorone, 534 A.2d 452, 455 (Pa. 1987) (emphasis omitted). In context, the court emphasized "by the patient" to show that even the strongest religious conviction may waver when faced with imminent death, so a third party may not use the patient's religious beliefs to block medically necessary treatment. *Id.*

hospital administrator bypassed the unconscious Dorone's prior decision to reject blood products despite parental attempts to enforce Dorone's wishes.[143]

The court's rule can faithfully be rephrased as a general statement that all medically necessary treatment must be administered in an emergency unless the fully conscious patient contemporaneously refuses such treatment.[144] For the purposes of this study, which focuses on when a doctor may force treatment despite a patient's explicit refusal, the exception's requirements of a contemporaneous action by the patient will always be satisfied. Furthermore, where patients are unconscious, questions of implied consent—beyond the scope of this analysis—arise. Clearly, the exception allows a fully conscious patient to reject treatment. However, the narrow situation of a semiconscious patient presently refusing treatment must be considered.

While no case law addresses this situation, Pennsylvania statutory law immunizes emergency health care personnel from civil liability arising from a claim that they rendered emergency treatment upon a person who was unable to legally consent to or refuse medical assistance.[145] In light of the leeway both the legislature and the courts give doctors, the fairly certain conclusion is that a doctor has the authority to forcibly administer treatment to a semiconscious patient who is expressly refusing treatment, but whose ability to make reasoned decisions may be affected by an ailment.[146] In the event a person is disoriented, suffering from a mental illness, in shock, or otherwise unable to make a *fully* conscious refusal of treatment, doctors could, should, and would likely force treatment when they believe the "refusal" is caused by the trauma rather than the patient's willful thought process.

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143. *In re Estate of Dorone*, 534 A.2d at 454-55.

144. *See id.* at 455.

145. 35 PA. CONS. STAT. ANN. § 8151 (Supp. 2011) (amending 35 PA. CONS. STAT. ANN. § 6933 (West 2003)). The scope of the statute has not yet been tested in a Pennsylvania court, so the point on the treatment continuum at which the immunity terminates is not clear. The statute addresses:

> (1) [t]he medical care, including medical assessment, monitoring, treatment, transportation and observation, which may be provided to a person in responding to an actual or reported emergency to: (i) prevent or protect against loss of life or a deterioration in physiological or psychological condition; or (ii) address pain or morbidity associated with the person's condition [and] (2) [t]he transportation of an individual with medical assessment, monitoring, treatment or observation of the individual who, due to the individual's condition, requires medical assessment, monitoring, treatment or observation during the transport.

§ 8103 (Supp. 2011) (amending 35 PA. CONS. STAT. ANN. § 6923 (West 2003)).

146. *Cf.* Commonwealth, Dep't of Transp. v. Dauer, 416 A.2d 113, 115 (Pa. Commw. Ct. 1980) (suggesting that a severe blow to the head may render a person temporarily incompetent for purposes of accepting or rejecting medical treatment); Fensterer v. Fensterer, 13 Phila. Co. Rptr. 51, 56 (Pa. Ct. Com. Pl. 1985) (recognizing that a refusal of medical treatment may in fact be induced by the mental problem that needs treatment).

F. Mentally Ill Person Poses Clear and Present Danger to Self or Others

Sections 7301 through 7305 of Pennsylvania's Mental Health Procedures Act[147] list the various scenarios under which a doctor may forcibly examine or institutionalize a person for mental illness.[148] Involuntary treatment of the mentally ill may only occur when patients need immediate treatments to address *any* medical conditions and pose a clear and present danger to themselves or others because of their mental illnesses.[149] Forcible examination is permissible only upon introducing evidence of both *past* and *continuing* danger.[150] Ordinary criminality does not alone permit forcible medical treatment. However, when a fact-finder deems a defendant incompetent to stand trial or not guilty due to insanity on charges relating to the infliction of bodily harm, an interested party can file for involuntary examination of the defendant within thirty days of such verdict.[151] Absent such a judicial proceeding, a person posing a danger to others must have exhibited dangerous behavior within thirty days of the forcible examination.[152]

In addition to those who exhibit violence towards others, persons who (1) were unable to significantly care for themselves, (2) attempted suicide, or (3) attempted to substantially mutilate themselves in the thirty days prior to examination may be forcibly treated as long as a reasonable probability of behavioral repetition exists.[153] Any doctor (1) at a treatment facility or (2) personally observing troubling conduct can mandate an involuntary emergency examination lasting up to 120 hours.[154] Additional procedures allow others to apply for a warrant to mandate such compulsory diagnosis.[155] A party seeking to compel examination must allege facts demonstrating a person's (1) mental illness and (2) need for immediate treatment using one of the clear and present danger tests outlined above.[156]

After the initial compulsory examination, forcible treatment may be administered where a doctor deems such treatment necessary.[157] When the need for treatment is likely to extend beyond 120 hours, the institution may request court permission to extend forcible treatment for up to twenty days.[158] After a semiformal hearing, the court may grant such a request.[159] If further treatment is needed or if extended treatment is foreseeable at the outset of these procedures, a court may conduct a formal hearing; such a hearing may

147. 50 PA. STAT. ANN. §§ 7101-503 (West 2001).
148. *Id.* §§ 7301-05.
149. *Id.* § 7301(a).
150. *Id.* § 7301(b)(1).
151. *Id.*
152. *Id.* § 7301(b)(1).
153. 50 PA. STAT. ANN. § 7301(b)(2).
154. *Id.* § 7302(a), (d).
155. *Id.* § 7302(a)(1).
156. *Id.*
157. *Id.* § 7302(b).
158. *Id.* § 7303(a), (f).
159. 50 PA. STAT. ANN. § 7303(b), (c)(1).

result in the issuance of an order compelling treatment for an initial or additional ninety days.[160]

When these preliminary periods expire and involuntary treatment is still necessary, a court can certify 180 days of treatment at a time, reconfirming that the patient remains ill and dangerous at each renewal hearing.[161] Where the patient was deemed criminally insane or committed acts that could have been charged as a major enumerated crime, the court may certify a year's worth of treatment at a time, instead of 180-day intervals.[162] These procedures apply to all persons within the Commonwealth, but children under the age of fourteen must have their guardians represent their interests.[163] Pennsylvania also has an additional statute that permits the involuntary treatment of a juvenile delinquent who has difficulty controlling sexually violent behaviors, thus relaxing the "clear and present danger" requirement of the main law.[164]

Pennsylvania courts have given civil authorities broad latitude under these statutes to forcibly treat persons suspected of having a mental illness. The "reasonable grounds" required to initiate involuntary evaluation are less stringent than the criminal "probable cause" standard.[165] The Pennsylvania Supreme Court's most recent case addressing the merits of an involuntary commitment held that the forcible removal of a woman from her own home was permissible when a mental health specialist possessed the following information about that woman: (1) she made repeated calls to government agencies, (2) family members were concerned for her mental health, (3) she possessed a gun, (4) she was disheveled, (5) she was defensive when approached by the specialist at her home, refusing to admit him into the residence, (6) she refused to explain a facial bruise observed by the specialist, and (7) she claimed to be in a federal witness protection program.[166]

Based upon the preceding example, doctors clearly possess a great deal of discretion in forcibly evaluating the mentally ill. Once designated mentally ill and forcibly committed, lesser acts of violence or self-abuse allow the treatment to be forcibly continued.[167] Denise Romett was initially evaluated and committed for assaulting various family members.[168] At one of her numerous commitment recertification hearings, she alleged that the doctors had insufficient evidence to prove that she posed a clear and present danger of

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160. 50 PA. STAT. ANN. § 7304.

161. *Id.* § 7305.

162. *Id.* § 7304(g)(2). The enumerated crimes subjecting a patient to the lengthier treatment period are murder, voluntary manslaughter, kidnapping, rape, involuntary deviate sexual intercourse, aggravated assault, and arson. *Id.*

163. *In re* McMullins, 462 A.2d 718, 722 (Pa. Super. Ct. 1983).

164. *See* 42 PA. CONS. STAT. ANN. § 6403 (West 2000).

165. *In re* J.M., 726 A.2d 1041, 1047 & n.8 (Pa. 1999).

166. *In re J.M.*, 726 A.2d at 1050. No separate attempt was made to validate any of the received information, such as the woman's actual ownership or possession of a gun or the woman's possible but highly unlikely status as a protected witness. *Id.* at 1048. The Court did not believe such verification was necessary due to the emergency situations under which mental health providers must act. *Id.*

167. Commonwealth v. Romett, 538 A.2d 1339, 1342 (Pa. Super. Ct. 1988).

168. *Id.* at 1340.

serious bodily harm.[169] However, no overt acts of violence are required to continue the forcible treatment of a patient once committed; a doctor's opinion that such serious violence is imminent absent treatment will suffice.[170] Essentially, a court evaluates the patient's *condition*—not the patient's *recent conduct*—to determine whether continued involuntary treatment is permissible.[171]

In addition to the courts' heavy deference to medical experts in permitting this type of forced treatment, doctors have another advantage when practicing in this area. The Mental Health Procedures Act contains an immunity provision for doctors participating in the involuntary treatment of a patient under this Act, which bars both civil and criminal suits arising from such participation in the absence of willful misconduct or gross negligence.[172] The Pennsylvania Supreme Court held that "gross negligence" in the context of the Mental Health Procedures Act requires flagrant behavior in gross deviance of the standard of ordinary medical care.[173]

Involuntary commitment and mental health treatment laws can vary greatly between states—unlike some of the more mundane exceptions discussed earlier. For that reason, a limited comparative analysis of these laws follows.

IV. SURVEYING INVOLUNTARY COMMITMENT LAW IN FIVE POPULOUS STATES

The remainder of this article surveys involuntary-commitment law in five of America's most populous states: California, Texas, New York, Florida, and Pennsylvania.[174] This portion of the article offers a brief assessment of each state's commitment procedures. An analysis of relevant trends within those states will follow, as common added protections for prospective patients will be noted.

A. California: Many Additional Procedural and Substantive Rights

California grants numerous additional procedural protections to prospective patients. A person subject to a commitment hearing has the right to demand a jury trial.[175] California recognizes this right as a legislative creation because "the United States Supreme Court has never held that due process requires . . . a jury trial . . . in the analogous context of the civil commitment of a mentally ill or sexually dangerous person."[176] When interpreting this statutory right,

169. *Romett*, 538 A.2d at 1341.
170. *Id.* at 1341-42.
171. *Id.* at 1342.
172. 50 PA. STAT. ANN. § 7114(a) (West 2001).
173. Albright v. Abington Mem'l Hosp., 696 A.2d 1159, 1164 (Pa. 1997).
174. *See* U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT 19 tbl. 14 (2011), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0014.pdf.
175. CAL. WELF. & INST. CODE § 5350(d) (West 2010).
176. Levin v. Adalberto M., 67 Cal. Rptr. 3d 277, 283 (Cal. Ct. App. 2007).

California's highest court held that the jury must be both (1) persuaded beyond a reasonable doubt and (2) able to reach a unanimous verdict before a conservator may forcibly commit a mentally ill person.[177]

The Lanterman-Petris-Short Act[178] ("LPS Act") offers many other statutory protections beyond the right to a jury trial. Although a patient may be forcibly treated for up to seventy-two hours without a hearing, a designated mental health professional must affirm the need for emergency involuntary treatment immediately upon the patient's arrival at the treating facility.[179] After the initial treatment period has passed, a patient must receive a hearing and, if requested, an attorney, before an additional fourteen days of forced treatment may be provided.[180] A patient has additional rights to hearings when medical professionals order further treatment, and the timeframe between hearings is largely governed by the patient's own behavior and participation in the process.[181]

In addition to the procedural due process rights noted above, an involuntarily committed patient has numerous substantive rights granted by statute.[182] Involuntarily committed patients may not be sent to a jail for holding merely because an appropriate mental health facility lacks space.[183] Among other more notable rights are the patients' rights to (1) wear their own personal clothes, (2) see visitors daily, and (3) refuse convulsive treatment or psychosurgery.[184] The statutory list of substantive rights is not exclusive and has been liberally expanded in case law.[185]

B. Texas: Adds Some Procedural Rights but Few Substantive Rights

Texas offers a few additional procedural protections to prospective patients. Texas provides the right to a jury at a commitment proceeding.[186] However, the jury's verdict need not be unanimous.[187] By Texas statute, the standard of proof for forcibly committing someone is the federal minimum of "clear and

177. Heap v. Roulet, 590 P.2d 1, 11 (Cal. 1979).

178. WELF. & INST. CODE §§ 5000-5550.

179. *Id.* § 5151. The seventy-two hour period in which emergency involuntary treatment is permissible does not include Saturdays, Sundays, or holidays. *Id.* Thus, the initial treatment period could technically last much longer before a hearing is required.

180. *Id.* §§ 5256.4(a)(1), 5257(b). While an indigent patient is entitled to funding to retain an expert witness, California does not give all prospective patients the right to an expert in a civil commitment proceeding. People v. Hardacre, 109 Cal. Rptr. 2d 667, 673 (Cal. Ct. App. 2001).

181. *See, e.g.*, WELF. & INST. CODE §§ 5260, 5270.15, 5270.35, 5270.55, 5300-5304, 5350-5372.

182. *Id.* § 5325.

183. *Id.* § 5150.1.

184. *Id.* §§ 5325(a), (c), (f), (g).

185. *See, e.g.*, Riese v. St. Mary's Hosp. & Med. Ctr., 271 Cal. Rptr. 199, 208, 210 (Cal. Ct. App. 1987) (granting a committed patient the right to refuse antipsychotic drugs).

186. TEX. HEALTH & SAFETY CODE ANN. § 574.032 (West 2003).

187. *See In re* G.B.R., 953 S.W.2d 391, 395 (Tex. App. 1997) (explaining that a six-person jury can render a valid verdict if five jurors agree, and a twelve-person jury can render a valid verdict if ten jurors agree).

convincing evidence."[188] While Texas also requires that a hearing and an attorney be provided within seventy-two hours of forcible emergency treatment, later hearings are much less frequent.[189] The court must follow one of three options: (1) release the patient, (2) authorize ninety days of commitment, or (3) authorize 365 days of commitment.[190]

Texas offers a few additional substantive rights to the mentally ill when compared to the federal minimum—but not as many as California. Texas will generally respect a patient's rights and preferences, but the patient's choice can occasionally be bypassed in an emergency or with court authorization.[191] The applicable statute listing the patient's rights merely offers the federal minimum, plus the right to a court-appointed attorney and an independent expert at a commitment proceeding.[192] Furthermore, Texas courts have not been receptive to various state constitutional arguments seeking rights beyond those enumerated in the statute.[193]

C. New York: A Right to an Attorney, a Jury Appeal, but Nothing More

New York has a different method of handling its commitments. Two doctors and a hospital psychiatrist must separately[194] certify a patient for involuntary commitment, and that commitment is legally valid for up to sixty days.[195] However, the patient or anyone acting on his behalf may request a hearing on the commitment question.[196] The patient must receive the hearing

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188. *In re* M.M., 184 S.W.3d 416, 417-18 (Tex. App. 2006). *See also* HEALTH & SAFETY §§ 574.031(g), 574.034(a), 574.035(a).

189. *See* HEALTH & SAFETY §§ 574.025(b) (requiring a hearing within seventy-two hours of emergency detention, excluding weekends and holidays), 574.034(g) (requiring temporary treatment orders to last exactly ninety days), 574.035(h) (requiring extended treatment orders to last exactly twelve months).

190. *Id.* §§ 574.025(b), .034(g), .035(h).

191. *See, e.g.*, *id.* §§ 574.083(f) (non-criminally insane patient may be held in jail during "extreme emergency"), 574.104(a) (physician can seek court authorization to administer antipsychotic medications).

192. *Id.* § 574.105.

193. *See, e.g.*, Greene v. State, 537 S.W.2d 100, 102-03 (Tex. Civ. App. 1976) (permitting patient to waive right to personally appear at commitment proceeding, refusing to require proof beyond a reasonable doubt, and ignoring various evidentiary objections by strictly applying normal court rules to commitment proceedings).

194. "Separately" here simply means on different sheets of paper. *See, e.g.*, N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2011). All three professionals could sit in the same examination or each could conduct separate examinations. *Id.*

195. *Id.* §§ 9.27(a), (e), 9.31(a). There are numerous ways for others, such as police officers, to become involved in the process, but, ultimately, the opinions of two doctors and a hospital psychiatrist will be needed in all but the rarest circumstances. *See, e.g.*, *id.* § 9.41 (allowing a police officer to take a patient into custody and transfer him or her to a proper facility). *But see id.* § 9.37(c) (allowing a psychologist or social worker in a small county to commit a patient, subject to the concurrence of two on-site doctors and the local hospital director). However, the court retains the unilateral power to issue a warrant for commitment by directly exercising the State's *parens patriae* and police powers. *See id.* § 9.43(a).

196. *Id.* § 9.31(a).

within five days of the request.[197] In any event, a court must approve any involuntary treatments lasting longer than sixty days.[198]

A patient has no right to a jury in the initial hearing, regardless of when it occurs, but that decision may be appealed to another local judge, who must seat a jury to decide the question.[199] That jury may commit the patient if at least five-sixths of at least six deliberating jurors find the required elements for commitment.[200] The standard of proof in a New York commitment proceeding is the federal minimum of "clear and convincing evidence."[201] However, New York case law recognizes a prospective patient's right to an attorney.[202] A look at the state's "patient's bill of rights" offers no meaningful procedural or substantive rights beyond the federal minimums.[203]

D. Florida: Adds Few Procedural Rights but Many Substantive Rights

The Baker Act[204] largely governs involuntary civil commitments in Florida. A patient involuntarily treated in an emergency must receive an examination by the receiving facility within seventy-two hours, and any petition for involuntary placement must be filed within the same period.[205] The patient must also receive an attorney within one court working day of the petition filing and must receive a court hearing within five days.[206] However, the court need only find that commitment is needed by "clear and convincing evidence."[207] In the event of commitment, "the patient has a right to a periodic review of his or her mental condition [before an administrative judge], and the burden remains on the State to show that there is a continued need for involuntary placement."[208] While the patient is entitled to an expert witness free of charge, the patient is not entitled to a jury trial.[209]

The Baker Act has a section dedicated to defining a mental patient's substantive rights.[210] A patient who is mentally ill but not charged with a

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197. N.Y. MENTAL HYG. LAW § 9.31(c).

198. *Id.* § 9.33.

199. *Id.* § 9.35. The right to a jury trial is waivable, however, which would give the new presiding judge the power to end the commitment. *Id.*

200. *See* Sharrow v. Dick Corp., 653 N.E.2d 1150, 1152 (N.Y. 1995).

201. *In re* Judge, 745 N.Y.S.2d 885, 887 (N.Y. Sup. Ct. 2002).

202. Ughetto v. Acrish, 494 N.Y.S.2d 943, 947 (N.Y. Sup. Ct. 1985).

203. *See* N.Y. PUB. HEALTH LAW § 2803-c (McKinney 2007). A patient is specifically entitled to kosher or halal food, but that right is of little consolation after seeing the vague minimums throughout the rest of the statute. *Id.*

204. FLA. STAT. ANN. §§ 394.451-394.4789 (West 2011).

205. *Id.* § 394.467(2).

206. *Id.* §§ 394.463(2)(g), (i), 394.467(4), (6)(a)(1).

207. *Id.* § 394.467(1). Typically, two mental health experts are needed to provide this evidence, but in small counties, an experienced physician or psychiatric nurse may provide the second opinion. *Id.* § 394.467(2).

208. Handley v. Dennis, 642 So.2d 115, 116 (Fla. Dist. Ct. App. 1994) (*per curiam*).

209. FLA. STAT. ANN. § 394.467(6)(a)(2) (providing that "[t]he court may appoint a general or special magistrate to preside at the hearing.").

210. *Id.* § 394.459.

crime may not be held in jail.[211] Mental patients are also expressly entitled to free treatment in the least restrictive alternative.[212] Involuntarily committed patients still have the right to send and receive confidential communications and speak privately with outside visitors except for compelling documented reasons.[213] However, an incompetent patient does not have a unilateral right to decline anesthesia or electroconvulsive therapy.[214] Florida courts have refused to judicially create rights of the patient in light of the "comprehensive catalog of rights" listed in the Baker Act.[215]

E. Pennsylvania: Some Added Procedural and Substantive Rights

In Pennsylvania, any doctor may authorize emergency treatment lasting up to 120 hours when (1) observing abnormal conduct or (2) working at a mental health treatment facility.[216] Others may move a court to order an initial involuntary evaluation with the proper evidence of a dangerous mental defect.[217] After 120 hours, a semiformal hearing must be held to approve up to twenty additional days of forcible treatment.[218] After that time, the prospective patient is entitled to an attorney and expert assistance free of charge at a formal hearing where the standard of proof is "clear and convincing evidence."[219] Prospective patients have no right to a jury trial during the commitment process.[220]

Substantively speaking, Pennsylvania provides a committed patient with a right to the "least restrictive treatment" alternative.[221] Patients also have the right to private visitation and communication.[222] Most other rights enumerated in Pennsylvania statutes are either basic constitutional rights (e.g., freedom of religion) or subject to the discretion of a treatment facility director (e.g., the right to cultivate a small plot of land).[223]

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211. FLA. STAT. ANN. § 394.459(1).

212. *Id.* § 394.459(2)(b).

213. *Id.* § 394.459(5).

214. *Id.* § 394.459(3)(b).

215. *In re* Holland, 356 So.2d 1311, 1312 (Fla. Dist. Ct. App. 1978) (refusing to recognize a patient's right to bail while awaiting a commitment hearing).

216. 50 PA. STAT. ANN. § 7302(a), (d) (West 2001).

217. *Id.* § 7302(a)(1).

218. *Id.* § 7303.

219. *Id. §* 7304(f). If extended treatment is foreseeable at the outset, the formal hearing can be held immediately. *Id.* Also, periodic review will take place to certify up to six months of treatment at a time. *Id.* § 7305(a).

220. I*n re* J.M., 726 A.2d 1041, 1047 n.8 (Pa. 1999).

221. *Id.*

222. 50 PA. STAT. ANN. § 4423(1) (West 2001).

223. *Id.* § 4423(2), (4).

F. Notable Differences Between the Key States

To summarize the more important elements discussed above, the following table has been created:

STATE / *Right*	California	Texas	New York	Florida	Pennsylvania
Attorney	X	X	X	X	X
Expert		X		X	X
Jury Trial	X	X	X		
Unanimous	X				
Beyond Doubt	X				
No Jail Cell	X			X	
Private Letters	X			X	X
Private Visits	X			X	X
Refuse Surgery	X				
Least Restricted				X	X

As one can see, the only non-federally-required right recognized by all five of these populous states is the right to an attorney during the commitment process. Noting that the top five rights on the chart are procedural and the bottom five rights are substantive, there is a slim thirteen-to-eleven split in favor of more procedural rights being offered by the states. Given the fact that the only unanimous right is the right to counsel, the states may be more attuned to procedural due process because of a higher likelihood of reversal upon a federal habeas appeal.

California appears to be the most liberal state in terms of providing additional rights to its mentally ill population, followed by Florida, which is in turn followed closely by Pennsylvania. After a significant gap, Texas and New York bring up the rear in this measurement, as those two states offer an average of only twenty-five percent of the protections available to the mentally ill.

V. CONCLUSION

Pennsylvania statutes and case law vary in many ways with respect to other states. Pennsylvania takes a harder stance against religiously-motivated refusals of treatment, treating such refusals no differently when balancing the patient's privacy rights against the state's interests.[224] In contrast, state law does not permit court-ordered outpatient therapy for the mentally ill—unlike many

224. *See generally* Commonwealth v. Nixon, 761 A.2d 1151 (Pa. 2000); Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J. L. & MED. 269, 297 (2003).

other states.[225] Furthermore, absent other exceptions, the only "treatment" that doctors can force upon a patient infected with a contagious disease is quarantine.[226] The Pennsylvania legislature partially rests its policy decision on these issues on the knowledge that the Pennsylvania Constitution is typically interpreted by the Pennsylvania courts to protect more civil liberties than the United States Constitution.[227]

Knowing that the Pennsylvania courts remain free to interpret how far liberty and privacy rights extend, health care lawyers and doctors wishing to treat patients against their wishes must have a thorough knowledge of the case law in this area. This article seeks to provide that knowledge.

225. Pennsylvania Senate Bill No. 226 of the 2007 Session would authorize a court to mandate "assisted outpatient treatment" for certain patients who do not necessarily pose a "clear and present danger" but nonetheless are "unlikely to survive safely in the community without supervision." PA. S. B. NO. 226 § 305-A(b)(3),(6) (Pa. 2007). As of February 19, 2012, this bill remained tabled as "referred to Public Health and Welfare" for further study. *Bill Information: Senate Bill 226*, PA. GEN. ASSEMB., http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2007&sind=0&body=S&type=B&BN=0226 (last visited February 19, 2012).

226. Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 115 & n.232. (1999).

227. *See, e.g.*, Commonwealth v. Jackson, 698 A.2d 571, 573 (Pa. 1997) (observing that Pennsylvania constitutional protection against unreasonable search and seizure is broader than federal constitutional protection); Commonwealth v. Hockenbury, 701 A.2d 1334, 1339 (Pa. 1997) (observing that the Pennsylvania Constitution arguably provides broader protection against double jeopardy than the U.S. Constitution).