William & Mary Journal of Race, Gender, and Social Justice

Volume *20 (2013-2014)*
Issue 1 *William & Mary Journal of Women and the Law: 2013 Special Issue: Reproductive Justice*

Article 9

December 2013

Strong Voices for a Vulnerable Group

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STRONG VOICES FOR A VULNERABLE GROUP

INTRODUCTION

Our society is increasingly becoming more dependent on medication.[1] This is an issue that concerns all members of our society from people older than sixty using cholesterol-lowering drugs, to people in between twenty and fifty-nine using an antidepressant, to younger people prescribed attention deficit hyperactivity disorder medication.[2] Although this is an important social and legal issue concerning all demographic groups, this Note will focus on foster children and the effects of overprescription of psychotropic drugs.

Overprescribing psychotropic drugs to foster children is a significant problem. This type of medication is prescribed to foster children at high rates relative to the rest of the population.[3] There are some statistics that suggest fifty percent of children in foster care could be "prescribed one *or more* psychotropic medications."[4]

There are two main reasons that the overprescription of psychotropic drugs should aggrieve society's morals and sensibilities. First,

1. Nicholas Bakalar, *Prescription Drug Use Soared in Past Decade*, N.Y. TIMES (Oct. 18, 2010), http://www.nytimes.com/2010/10/19/health/research/19stats.html?_r=0.

2. *Id.*

3. A. Rachel Camp, *A Mistreated Epidemic: State and Federal Failure to Adequately Regulate Psychotropic Medications Prescribed to Children in Foster Care*, 83 TEMP. L. REV. 369, 373 (2011).

4. *Id.*

foster children are some of the most vulnerable members of our society. These children do not have a stable home life, and in many cases they are shuffled around to different foster homes.[5] This can create a situation where these children do not have a benefactor invested in their future.[6]

Second, the very nature of psychotropic drugs can create a noxious effect on children. These drugs change the brain chemistry and thus alter cognition.[7] Our cognition and mental faculties are what make us who we are; when people think about an individual, usually his or her personality is the first thing that comes to mind.[8] By prescribing these types of drugs to a child, his or her very essence is being altered, and the freedom of his or her individuality and creative thinking is being stifled.[9] Many of these children do not have strong parental advice or oversight to make a decision on whether to medicate.[10] Also, the children do not have the capacity to make this important and life-altering decision.[11]

These two reasons, the vulnerability of foster children and the nature of psychotropic drugs, will provide the foundation for the policy argument below that the federal and state governments should reform the system concerning prescribing these types of drugs to foster children.

The federal government has passed statutes mandating states to create oversight committees and mechanism for medical care, and psychotropic drugs for foster children specifically.[12] However, as stated above, this does not go far enough. This Note proposes that the federal government and the individual states should enact statutes tightening the requirements that must be met before a foster child can be prescribed psychotropic drugs, and allowing the courts (as opposed to government agencies) oversight concerning the final decision to medicate.

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5. Jessenia Arias, *Love Should Not Be Unaffordable*, N.Y. TIMES (Oct. 29, 2012), http://www.nytimes.com/roomfordebate/2012/10/29/should-the-adoption-tax-credit-be-renewed/love-should-not-be-unaffordable.

6. *Id.*

7. Kendra Cherry, *Psychoactive Drugs*, ABOUT.COM, http://psychology.about.com/od/psychoactivedrugs/tp/psychoactive-drugs.htm (last visited Nov. 3, 2013).

8. DANIEL NETTLE, PERSONALITY: WHAT MAKES YOU THE WAY YOU ARE 8 (Oxford Univ. Press, 2007).

9. United States v. Charters, 829 F.2d 479, 489 (4th Cir. 1987).

10. Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 70 (2008).

11. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 317 (2006).

12. Eva J. Klain, *Improving Oversight of Psychotropic Medication Use with Children in Foster Care*, 31 CHILD L. PRAC. 109 (2012).

Once these requirements are met, the court should appoint an independent attorney to zealously represent the interests of a foster child at the hearing that decides whether to place the foster child on a psychotropic drug regime.

I. PSYCHOTROPIC DRUGS AND FOSTER CHILDREN

It is necessary to define and examine the nature of psychotropic drugs before discussing the legal policies. Psychotropic drugs are substances that change the brain chemistry which in turn changes mood and behavior.[13] These substances do this by passing through the blood-brain barrier which "is composed of . . . specialized cells."[14] The cells of the blood-brain barrier act as a selective barrier which only allows certain chemicals and molecules to pass through and reach the brain.[15] This selective barrier protects the brain chemistry and cognition by blocking many chemicals and medicines that could effect the physical structure of the brain, brain chemistry, and as a result protects cognition.[16] Any molecule, or medicine that can cross the blood-brain barrier can effect the chemistry of the brain which can cause psychotropic ("mind altering") side-effects.[17] Some of the more serious effects mind altering substances can have on the mind include: "[d]elirium, mood changes, and psychotic symptoms."[18] Psychotropic drugs can pass the blood-brain barrier which allows these substances to affect the brain.[19] In consequence, these substances can cause changes in behavior, mood, consciousness, and overall cognition.[20]

Psychotropic substances have been used throughout history.[21] For example, people have in the ancient world, and up to present day,

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13. Enjoli Francis, *Psychotropic Drugs: What Are They?*, ABC NEWS BLOG, (Dec. 2, 2011, 5:04 PM), http://abcnews.go.com/blogs/health/2011/12/02/what-you-need-to-know-about-psychotropic-drugs/.

14. Abhilash K. Desai, *Psychotropic Side Effects of Commonly Prescribed Medications in the Elderly*, PSYCHIATRY WKLY., http://www.psychweekly.com/aspx/article/ArticleDetail.aspx?articleid=56 (last visited Nov. 3, 2013); Krishna Ramanujan, *Breaching the Blood-Brain Barrier: Finding May Permit Drug Delivery to the Brain for Alzheimer's, Multiple Sclerosis and Brain Cancers*, SCIENCE DAILY (Sept. 14, 2011), http://www.sciencedaily.com/releases/2011/09/110913172631.htm.

15. Ramanujan, *supra* note 14.

16. *Id.*

17. Desai, *supra* note 14.

18. *Id.*

19. *Id.*

20. Cherry, *supra* note 7.

21. Jonathan Wynne-Jones, *Stone Age Man Took Drugs, Say Scientists*, TELEGRAPH (Oct. 19, 2008), http://www.telegraph.co.uk/news/newstopics/howaboutthat/3225729/Stone-Age-man-took-drugs-say-scientists.html.

partaken in alcohol, a psychotropic drug.[22] These substances can occur in nature and can be isolated, which allows for greater potency by increasing the concentration of the active psychotropic chemical, or they can be synthesized in a laboratory.[23] There are different types of psychotropic drugs, including depressants, stimulants, and hallucinogens.[24] These drugs can be used to treat a variety of different mental and personality disorders and are widely used as medicine.[25] Psychotropic drugs also have physical effects.[26] Their very nature changes the chemistry of the brain, which is a physical effect. These substances can also affect other parts of the body.[27] Some of these substances are extremely powerful and cause complex biochemical reactions in the body.[28] These biochemical reactions are not isolated to the brain; they also occur in other areas of the body.[29] One reason that dosage must be taken into account is due to these physical effects.[30] A person can die or have a serious physical injury if an incorrect dosage is given to them.[31] Dosage requirements change when there is a change in body weight or mass.[32] For example, if you have five milligrams of a substance and this dosage is given to a 200 pound person and a 120 pound person, the substances will be more diluted in the former and cause less of an effect than in the latter.[33] Thus, the dosage required for an adult will be greater than the dosage required for a child.[34]

A. Effect of Psychotropic Drugs on the Mind of a Child

The effects of psychotropic drugs on the mind of a child are not known. Currently, the research on psychotropic medicine lacks the ability to inform doctors on the safe and suitable use of these drugs

22. David J. Hanson, *History of Alcohol and Drinking around the World*, ALCOHOL: PROBLEMS AND SOLUTIONS, http://www2.potsdam.edu/hansondj/Controversies/1114796842.html (last visited Nov. 3, 2013); Cherry, *supra* note 7.

23. *See Coca & Poppy: Nature's Addictive Plants*, DEA MUSEUM, http://www.deamuseum.org/ccp/coca/production-distribution.html (last visited Nov. 3, 2013).

24. Cherry, *supra* note 7.

25. *Psychoactive Drugs*, THE BODY, http://www.thebody.com/content/art4989.html (last visited Nov. 3, 2013).

26. Francis, *supra* note 13.

27. *Id.*

28. *Id.*

29. *Id.*

30. Timothy S. Lesar, *Prescribing Errors Involving Medication Dosage Forms*, 7 J. GEN. INTERN. MED. 579, 581 (2002).

31. *Id.*

32. *Id.* at 579.

33. *Id.*

34. *Id.*

for pediatric patients.[35] Alarmingly, there is very little evidence concerning whether "pharmacologic interventions for the treatment of trauma-related symptoms in children" is or is not effective.[36] Without suitable research, doctors and medical personnel do not currently have accurate information concerning the short- and long-term effects of psychotropic medicine on the minds and bodies of children, or on child development.[37] Although all of the short- and long-term effects are not known, many children use psychoactive substances to control symptoms of ADHD, ADD, autism, bipolar disorder, and other disorders.[38] For example, Methylphenidate (Ritalin) in particular is used to treat autism and ADHD.[39] Children may experience nervousness, palpitations, increased heart rate, and psychosis due to taking Ritalin.[40] The Food and Drug Administration has linked certain psychotropic drugs (antidepressants) to suicidal thoughts and behaviors in children.[41]

The case of Christopher Pittman is a powerful example of the sometimes unusual and unpredictable effects psychotropic drugs can have on young minds.[42] In this case a psychiatrist testified in court that he believed the psychotropic drug Zoloft could have led young Pittman (twelve at the time) to kill both of his grandparents.[43] Pittman was a troubled child: he had a strained relationship with his father, tried to run away from home and threatened to hurt himself with a knife.[44] After this incident he was prescribed the antidepressant Paxil, and he went to live with his grandparents.[45]

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35. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEPT. HEALTH & HUMAN SERVS., INFORMATION MEMORANDUM: PROMOTING THE SAFE, APPROPRIATE, AND EFFECTIVE USE OF PSYCHOTROPIC MEDICATION FOR CHILDREN IN FOSTER CARE 7 (2012), (citing Peter S. Jensen, et al., 38 *Psychoactive Medication Prescribing Practices for U.S. Children: Gaps Between Research and Clinical Practice*, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, 557 (1999)), *available at* http://www.acf.hhs.gov/sites/default/files/cb/im1203.pdf.

36. *Id.* (citing Holly R. Wethington, et al., *The Effectiveness of Interventions to Reduce Psychological Harm from Traumatic Events Among Children and Adolescents: A Systematic Review*, 35 AM. J. PREVENTATIVE MED., 287 (2008)).

37. *Id.* at 7–8.

38. M. Lynn Crismon & Tami Argo, *The Use of Psychotropic Medication for Children in Foster Care*, 88 CHILD WELFARE 72 (2009).

39. Norra MacReady, *Methylphenidate May Reduce ADHD Symptoms in Autism*, MEDSCAPE (May 24, 2011), http://www.medscape.com/viewarticle/743287.

40. Eni Williams, *Ritalin Side Effects Center*, RXLIST, http://www.rxlist.com/ritalin-side-effects-drug-center.htm (last visited Nov. 3, 2013).

41. Laurel K. Leslie et al., *The Food and Drug Administration's Deliberations on Antidepressant Use in Pediatric Patients*, 116 PEDIATRICS 195 (2005); Tori DeAngelis, *Should Our Children Be Taking Psychotropics?*, 35 AM. PSYCHOLOGICAL ASSOC. 42, *available at* http://www.apa.org/monitor/dec04/psychotropics.aspx.

42. Jim Polk, *Defense Doctor: Zoloft Could Have Led Youth to Kill*, CNN (Feb. 4, 2005), http://www.cnn.com/2005/LAW/02/04/zoloft.trial/.

43. *Id.*

44. State v. Pittman, 647 S.E.2d 144, 152 (2007).

45. *Id.*

While Pittman was living with his grandparents, his new doctor did not have Paxil, so he abruptly changed the prescription to Zoloft.[46] The family stated that after the change in medication Pittman began to experience negative side effects and act out of character; his sister stated that "he just acted like a crazy man."[47] Zoloft can have serious side effects and can cause changes in behavior.[48] After Pittman was prescribed a high dosage of Zoloft he got into trouble at school and church.[49] His grandfather punished him and after his punishment, Christopher Pittman shot both of his grandparents with a shotgun and set the home on fire.[50] Pittman's father stated that he believed Zoloft was the cause of the murders.[51] Pittman's defense attorney opined that the drug turned off Pittman's inhibitions, and allowed him to act violently.[52]

Because the effects of psychotropic drugs on the minds of children are not known, they should be prescribed with caution. Overprescribing psychotropic drugs to foster children is a significant problem because currently the effects of these drugs on the minds of young children is unknown.[53] We do not know what effects these drugs will have on these children as they grow and develop. The adult mind is different than the child's mind because the adult mind has already developed.[54] The child's mind, in contrast, is developing complex neural pathways and thus has different needs than the adult mind.[55] Given the differences between child and adult minds, we do not know whether these psychotropic drugs could adversely affect the continuing development of a child's brain. These potential adverse effects should push us to closely scrutinize the prescription of drugs to foster children, for their safety and healthy mental development.

B. Foster Children as a Vulnerable Group

Foster children are a vulnerable group in our society.[56] These children have been neglected by the people who were supposed to love

46. *Id.*
47. Rebecca Leung, *Prescription For Murder?*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/8301-18559_162-687855.html.
48. *Zoloft*, PFIZER, http://www.zoloft.com/ (last visited Nov. 3, 2013).
49. Pittman, 647 S.E.2d at 152.
50. *Id.*
51. Leung, *supra* note 47.
52. *Id.*
53. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 7–8.
54. Nicole Giese, *Adult and Child Brains Perform Tasks Differently*, WASH. UNIV. (May 11, 2005), http://news.wustl.edu/news/Pages/5295.aspx.
55. *Id.*
56. Bruskas, *supra* note 10.

them the most, their parents, and some have been physically abused.[57] This puts these children at an increased vulnerability to mental health risks.[58] Many children in foster care also have "poor developmental, mental, and educational outcomes."[59] Many of these children will have difficulties transitioning from "foster care to young adulthood," and some "will succumb to poor choices that will prevent them from obtaining" their greatest potential in life.[60] The child welfare system and society marginalizes and creates in foster children a feeling of powerlessness.[61] By not having a sense of control in which home they are placed in, foster children are instilled with feelings of powerlessness.[62] These psychological issues cause increased mental and emotional vulnerability in foster children.[63]

Also, the unstable environment caused by constant moving from different foster homes causes there to be an absence of a strong adult voice in the lives of foster children.[64] The vulnerability makes the overprescription of psychotropic drugs all the more troubling and problematic. These children are very vulnerable, they already have a propensity to have emotional difficulties, and often do not have a strong adult that is looking out for their interests.[65]

C. Overprescription of Psychotropic Drugs for Foster Children

Foster children on average are prescribed more psychotropic medications than other children. There are studies which consistently show higher rates of psychotropic drug use and prescription in foster children than in the general population; the range of "usage rates between [thirteen] and [fifty-two] percent."[66] This is a troubling development

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. Bruskas, *supra* note 10, at 74.
62. *Id.*
63. *Id.* at 72.
64. *Id.* at 70.
65. *Id.*
66. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 2, 3 (citing S. dosReis et al., *Mental Health Services for Foster Care and Disabled Youth*, 91 AM. J. PUB. HEALTH 1094 (2001)); JC McMillen et al., *A Crisis of Credibility: Professionals' Concerns about the Psychiatric Care Provided to Clients of the Child Welfare System*, 34 ADMIN. & POL'Y IN MENTAL HEALTH & MENTAL HEALTH SERV. RES. 203 (2007); OFFICE OF THE TEX. COMPTROLLER, TEXAS HEALTH CARE CLAIMS STUDY: SPECIAL REPORT ON FOSTER CHILDREN (2007); M. Olfson et al., *National Trends in the Use of Psychotropic Medications by Children*, 41 J. AM. CHILD AND ADOLESCENT PSYCHIATRY 514 (2002); LK Leslie et al., *Rates of Psychotropic Medication Use over Time Among Youth in Child Welfare/Child Protective Services*, 20 J. OF CHILD & ADOLESCENT PSYCHOPHARMACOLOGY 135 (2010); B. T. Zima et al., *Quality of*

for foster children. Psychotropic medication may be necessary for foster children due to their maltreatment and higher rates of abuse and neglect. However, "current use of psychotropic medications among children in foster care . . . may exceed practice standards that are supported by empirical research."[67]

Foster children are more likely to be prescribed psychotropic drugs, and are also more likely to be prescribed multiple psychotropic drugs at "doses that exceed the maximum FDA approved levels."[68] One child, Ke'onte Cook, stated that during his tenure in foster care he was prescribed and taking five drugs at a time.[69] He stated that the drugs made him feel irritable and exhausted, and lose his appetite.[70] Since being adopted (and thus out of the foster care system) he is no longer on any of those medications.[71] Reflecting on his situation, Cook states that he was "upset about [his] situation, not bipolar or ADHD," and that, "putting [him] on all of these stupid meds was the most idiotic thing [he] experienced in foster care, and the worst thing someone could do to foster kids."[72]

As explained above, psychotropic drugs have unclear short- and long-term effects on children.[73] Also, as explained in a previous section, foster children are a vulnerable group, with no strong parental or guardian voice to completely look after their interests.[74] These three factors combined: 1) the unclear effects of psychotropic drugs on the mind of a child, 2) the vulnerability of foster children, and 3) the overprescription of psychotropic drugs in foster children, support the idea that heightened laws, regulations, and standards are needed regarding the prescription of psychotropic drugs to foster children.

Publicly-Funded Outpatient Specialty Mental Health Care for Common Childhood Psychiatric Disorders in California, 44 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 130 (2005); D.G. Ferguson et al., *Psychotropic Drug Use with European American and American Indian Children in Foster Care*, 16 J. OF CHILD & ADOLESCENT PSYCHOPHARMACOLOGY, 474 (2006).

67. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 11.

68. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-270T, FOSTER CHILDREN HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTIONS (2011) (finding "the rate of children prescribed five or more psychotropic drugs concomitantly ranged from 0.11 to 1.33 percent among foster children compared with 0.01 to 0.07 percent rate among non-foster children."), *available at* http://www.gao.gov/new.items/d12270t.pdf; Jenny Gold, *Foster Kids Given Psychiatric Drugs at Higher Rates*, NPR (Dec. 1, 2011, 5:00 PM), http://www.npr.org/blogs/health/2011/12/01/143017520/foster-kids-even-infants-more-likely-to-be-given-psychotropic-drugs.

69. Gold, *supra* note 68.

70. *Id.*

71. *Id.*

72. *Id.*

73. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 7–8.

74. Bruskas, *supra* note 10, at 70.

II. CURRENT FEDERAL REGULATIONS AND STATUTES

Recent federal statutes require states that administer child protective services funded by the Social Security Act to address some of the issues dealing with psychotropic drugs and the overprescription of these drugs to foster children.[75] The Fostering Connections to Success and Increasing Adoptions Act of 2008 requires state child protective services to create plans for the oversight of foster children's health care services, including mental heath care.[76]

States with foster care programs must coordinate with health care personnel for the health (including mental health) care needs of foster children.[77] The relevant clause of the Social Security Act, 42 U.S.C.A. § 622, states that the state must develop a plan to provide "the oversight of prescription medicines, including protocols for the appropriate use and monitoring of psychotropic medications" for children in the state's foster care program.[78] In order for states to receive funding from the federal government for running child protective service programs, the states must create these plans to oversee psychotropic medications and consult with physicians concerning children's mental health.[79] This gives states considerable discretion to formulate their own strategies and policies to effectively oversee and regulate the prescription of psychotropic medications to foster children.

Some practice guidelines that the U.S. Department of Health and Human Services have given are policies that allow for screening, assessment, and treatment planning mechanisms to help the mental health of foster children.[80] The federal government has given the individual states the ability to come up with their own plans concerning the assessment and treatment of the mental health of foster children.[81] Also, guidelines suggest that information concerning the treatment of the child's mental health should be given to all of the "key stakeholders" in the child's life.[82] The agency also suggests that mental health expertise is available "regarding both consent and monitoring issues" during the child's treatment.[83] All of these suggestions are merely guidelines.[84] The federal government says that there must be

75. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 1–2.
76. *Id.* at 1–2; Camp, *supra* note 3, at 374.
77. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 1–2; Camp, *supra* note 3, at 374.
78. 42 U.S.C.A. § 622 (West 2011).
79. *Id.*
80. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 12.
81. *Id.* at 1.
82. *Id.* at 12.
83. *Id.* at 13.
84. *Id.* at 11–13.

oversight and protocols relating to psychotropic drugs, but leaves it up to individual states to decide how their system will work.[85]

Due to the vast discretion and ability of states to create and tailor their own programs, it is necessary to examine the measures states are taking in this regard before we can discuss policy reforms and changes.

A. Illustrative Examples of the Importance of State Regulations and Statutes Regarding Psychotropic Drugs

Two New York cases illustrate the need for effective state regulations regarding the prescription of psychotropic drugs. In the case *In re Lyle A.*, Lyle was neglected by his mother, and as a result he (along with his siblings) went into foster care.[86] Lyle had been sexually and physically abused by adults responsible for his care.[87] When he entered foster care he was emotionally unstable, "suffered from ringworm, an infected ingrown toenail, and anemia."[88] The child "had been observed drinking out of [a] toilet, eating paper, and digging in the garbage."[89] He was subsequently sexually abused while in foster care.[90] Lyle then began to act out.[91] He was moved around to a number of different foster homes, thus creating an unstable living environment.[92] Due to his emotional downward spiral, the caseworker thought that the situation was life-threatening, and she put Lyle (a four-and-a-half-year-old boy), on Depakote sprinkles.[93]

In another case involving Depakote sprinkles, *In re Martin F.*, Desiree, a two-year-old child, and her brother were placed into foster care.[94] Desiree entered into foster care as a mentally and emotionally healthy child, but began a downward spiral after entering into the foster care program.[95] Desiree was moved from four different foster care homes within a five-month time frame.[96] Desiree was physically abused in her third foster home and allegedly in a prior foster home.[97] Desiree's behavior continued to get progressively worse.[98] The foster mother and the government caseworker decided it would be a good

85. *Id.* at 2.
86. *In re* Lyle A., 830 N.Y.S.2d 486, 487 (N.Y. Fam. Ct. 2006).
87. *Id.* at 487.
88. *Id.*
89. *Id.*
90. *Id.* at 488.
91. *Id.*
92. *In re* Lyle A., 830 N.Y.S.2d at 488–89.
93. *Id.* at 489.
94. *In re* Martin F., 820 N.Y.S.2d 759, 764 (N.Y. Fam. Ct. 2006).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 765.

idea (over the objections of the mother) to put the then three-year-old child on Depakote sprinkles.[99]

Depakote is a power psychotropic drug used to treat seizure disorders, mental disorders, emotional disorders, and migraines.[100] Side effects include diarrhea, dizziness, drowsiness, hair loss, vision damage, ringing in the ears, shakiness, unsteadiness, weight changes, depression, suicidal thoughts, and in some rare cases a severe and sometimes fatal brain disorder, serious (sometimes fatal) liver problems, pancreas problems, and birth defects.[101] Children that are two years old and younger "are more likely to develop severe liver problems" when taking Depakote sprinkles.[102] Due to the plethora of potential serious side effects, this type of drug clearly should only be used when a child absolutely needs it. The children in the two prior cases did not need this type of powerful, and sometimes fatal, drug.[103] These children needed what every child needs: love, tenderness, stability, and no physical abuse. The fact that the state decided that these children needed this powerful psychotropic drug that can cause a host of physical and mental issues shows that the standards for prescribing these drugs are not nearly high enough.

Lyle and Desiree were both taken off of the psychotropic drug regimen. However, not every child is so fortunate; these drugs are fatal in some cases.[104] Rebecca Riley was a four-year-old girl who was diagnosed with ADHD and bipolar disorder.[105] Once diagnosed, she was given "Clonidine, a blood pressure medication . . . prescribed for ADHD; Depakote, an antiseizure and mood-stabilizing drug prescribed for the little girl's bipolar disorder; a cough suppressant; and an antihistamine."[106] This drug cocktail proved fatal, and Rebecca died.[107]

As stated in previous sections, and illustrated in the two cases above, contributing causes of this problem include the following: the vulnerability of foster children, and their lack of a strong parental, guardian, or frankly any voice to completely look after their interests.[108]

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99. *Id.* at 766–67.

100. *Drugs & Medications—Depakote Sprinkles Oral*, WEBMD, http://www.webmd.com/drugs/drug-9118-Depakote+Sprinkles+Oral.aspx?drugid=9118&drugname=Depakote+Sprinkles+Oral (last visited Nov. 3, 2013).

101. *Id.*

102. *Id.*

103. Camp, *supra* note 3, at 376.

104. *Id.*

105. *Girl's Death Stirs Debate over Psychiatric Meds*, NBC NEWS (Mar. 23, 2007, 4:11 PM), http://www.msnbc.msn.com/id/17758170/ns/health-childrens_health/t/girls-death-stirs-debate-over-psychiatric-meds/#.UPcyC6W5fzI.

106. *Id.*

107. *Id.*

108. Bruskas, *supra* note 10, at 70.

B. Current State Regulations and Statutes

Many states have ignored the current issue of overprescription of psychotropic drugs to foster children.[109] States that continue to ignore this issue do so at the peril of the children under their care.[110] Foster children deserve more from the state and our society than complacency and neglect.[111] Some states, however, have begun to address this issue. Some states use consent procedures for prescribing psychotropic medicine to children in their foster care program.[112]

In New York, the court stated in *Martin* that a natural parent has the right to make decisions concerning the medication of their child in foster care.[113] The parent can refuse psychotropic medication on behalf of the foster child.[114] Consent obtained must be informed, thus the doctor must speak to the foster child's parent personally.[115] However, "if a physician believes that a parent's decision is not what a child/patient if competent would have decided, and could not reasonably be judged to be within the child/patient's best interests, then a court order to administer medication should be requested."[116]

Therefore, it is possible under the New York law that a court may issue an order authorizing a child to be prescribed psychotropic drugs without the parent's informed consent.[117] In the state of New York, informed consent includes information about potential side-effects and the danger of the drug.[118] It also includes the potential benefits of the drug and how likely it is that it will work.[119] A few other states (including Florida, California, Illinois, Oregon, Connecticut, and Tennessee) use consent procedures for prescribing psychotropic medicine to children in their foster care programs similar to the New York consent process.[120]

The consent process is a good starting point for protecting the child, but there is still work to be done.[121] In New York, both *Lyle* and *Martin* were decided while New York had the consent process.[122] In

109. Camp, *supra* note 3, at 373.
110. *Id.* at 369.
111. *Id.* at 404.
112. *Id.* at 397.
113. *In re* Lyle A., 830 N.Y.S.2d 486, 492 (N.Y. Fam. Ct. 2006).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *In re* Lyle A., 830 N.Y.S.2d at 492.
120. Camp, *supra* note 3, at 397.
121. *Id.* at 399–400.
122. *In re* Lyle A., 830 N.Y.S.2d at 492; *In re* Martin F., 820 N.Y.S.2d 759, 768–69 (N.Y. Fam. Ct. 2006).

both cases, the natural parents had to go to court to end treatment of their children; the state-run child foster agency did not respect their interests.[123]

Likewise, in Florida, "a 2006 internal study . . . found that, despite the foregoing safeguards, approximately one in six children receiving psychotropic medications received their prescriptions without the legally required consent."[124] This shows that although these policies are a good start, they are missing key components.

One of the main problems with the consent standards states have enacted is that the natural parents of foster children are either vulnerable people themselves, neglectful, or abusive.[125] It is difficult to understand how a natural parent's consent will help a foster child when that same parent cannot or will not care for the child due to issues outside of his or her concern. Some authors have argued for, and some states have made reforms which necessitate, a natural parent's consent before the state prescribes psychotropic drugs. This reform is meant to give foster children extra protection.[126] Some of these states (Florida and Tennessee) include the natural parent in the consent process.[127] While the motive behind this policy is well-intentioned, it does not appear that this is an effective policy.

Natural parents of children with foster care are either vulnerable people themselves (very poor, or people with addiction or other problems), neglectful, or abusive.[128] These people are usually not the best people to be their child's advocate. Some natural parents do not fully understand the effects of this medication on their children.[129] Also, because these parents are either in a vulnerable position themselves, or abusive,[130] more educated government officials could have a greater influence on the decision to medicate the foster child.

As noted above, it is unclear how obtaining these people's consent will help protect the child's *legal rights*. The reason the child is in foster care (and many times the reason the child has emotional problems) is attributable to the actions by their natural parents—the very people from whom the states are seeking consent.[131] Also, the state doctors and officials usually know much more about the issues than these

123. *In re* Lyle A., 830 N.Y.S.2d at 493; *In re* Martin F., 820 N.Y.S.2d at 760–61.
124. Camp, *supra* note 3, at 400.
125. *See supra* notes 58–61 and accompanying text.
126. Camp, *supra* note 3, at 392.
127. *Id.* at 397–99.
128. Sandra Bass et al., *Children, Families, and Foster Care: Analysis and Recommendations*, 14 THE FUTURE OF CHILDREN 6, 4 (2004).
129. *See, e.g.*, *In re* Lyle A., 830 N.Y.S.2d 486, 498–91 (N.Y. Fam. Ct. 2006).
130. *See* Camp, *supra* note 3, at 390.
131. *See supra* notes 56–58 and accompanying text.

parents, which can create an unequal balance of power.[132] Even though the parents must be fully informed under New York law, they still may feel intimidated and defer to the state officials and thus not protect their natural child's *legal rights*.[133] The consent process may protect the *parental rights* of the natural parent, but due to the above reasons, will likely not protect the child's rights and best interest.

In most cases, including a foster child's natural parent in the proceeding will not create an independent voice that is purely for the child's best interest. The vulnerability of foster children and their natural parents calls the current standards that are being used into question and pushes us to heighten the current standards.

In the following sections, this Note will discuss ways to remedy the issues discussed above, and to give foster children more protection regarding psychotropic drugs.

C. Constitutional Issues with the Prescription of Psychotropic Drugs

One of the issues created by state agencies determining whether children can be medicated is the constitutional right of freedom of thought.[134] If a person that is in the state's care or custody has the competency required to consent to or refuse medical care, his constitutional interests in making such a choice must be taken into account.[135] If a person has the capacity to consent, his interest in freedom of thought outweighs the government's interests.[136] A patient is presumed competent unless a court finds otherwise. However, children who have not yet reached the age of capacity do not have the required capacity or competency needed to make medical decisions.[137] A patient's lack of capacity does not extinguish the patient's constitutional rights.[138] If a person lacks capacity then the custodians must obtain a court order before a psychotropic medication regimen can begin.[139] Under circumstances of inadequate capacity, the court must

132. Camp, *supra* note 3, at 390.

133. *See, e.g.*, *In re* Lyle A., 830 N.Y.S.2d at 489–90.

134. United States v. Charters, 829 F.2d 479, 489–90 (4th Cir. 1987), *aff'd on reh'g*, 863 F.2d 302 (4th Cir. 1988).

135. *Id.* at 484.

136. *Id.*

137. *Id.*; Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 317, 324 (2006) (stating minors are "categorically incapable of giving informed consent for most medical procedures" subject to the mature minor doctrine. In some states a court will allow a minor to make decisions concerning medical procedures if the court determines that the child can comprehend the nature of the treatment. Many states also require the minor to be close to the age of majority in order to apply this exception.).

138. *Charters*, 829 F.2d at 484.

139. *Id.*

determine what treatment the person would select for himself and whether the person would select the treatment if the person were competent and could choose his own medication or choose not to medicate.[140]

Under circumstances of inadequate capacity, the court must also take into consideration the physical and mental effects these drugs may have.[141] The Supreme Court has found that psychotropic drugs "may well cause serious and irreversible injury in a significant percentage of cases."[142] Psychotropic medications may not only cause serious injury to a person, but could also infringe on the person's constitutional right to freedom of thought.[143] In the eyes of the Fourth Circuit there is no difference between "the chemical invasion of drug therapy and the mechanical invasion of surgery" in determining whether there was a freedom of thought violation.[144] Psychotropic drugs can affect mood, thought processes, and personality which are the core of what makes an individual an individual.[145]

With these constitutional issues in mind, there are some instances where the needs of the community outweigh the needs of the individual.[146] In cases where a court determines that physical harm or violence could result from a lack of medication, or if deterioration of the patient's health could result from the lack of medication, the interests of the community may override the interests of the patient.[147] However, with small children it is hard to imagine a situation where a child would be so violent to the community that this would come into play; their physical size is such that it is unlikely that they could cause much damage to the community. Psychotropic medications can be used effectively as treatment, but one of the reasons they are used is to control behavior, to discipline, and as a result they have occasionally been misused.[148] People should be informed of their potential side effects and potential adverse effects of the psychotropic medication that the state is attempting to prescribe them.[149]

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140. *Id.*
141. *Id.* at 489.
142. *Id.* (citing Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984)); *Rennie v. Klein*, 720 F.2d 266, 276 (3d Cir. 1983); *Matter of Guardianship of Roe*, 421 N.E.2d 40, 52 (Mass. 1981).
143. *Charters*, 829 F.2d at 489–90.
144. *Id.* at 489.
145. *Id.*
146. *Id.* at 493–94.
147. *Id.*
148. *Matter of Guardianship of Roe*, 421 N.E.2d 40, 53 (Mass. 1981).
149. *Id.* (quoting Robert Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461, 466–74 (1977)).

Modern science tells us that the brain is plastic and is shaped by our experiences.[150] Modern science also tells us that experiences, ideas, and our personalities are stored by the neural pathways that our experience and thoughts create and build throughout our lives.[151] The long- and short-term effects of psychotropic medication on the minds of children are presently unknown. However, there is a fear that psychotropic medication could be disruptive to the development of neural pathways.[152] Such a scenario would cause the person to not be able to fully exercise the freedom of thought, individuality, and the right to have an individual personality.[153]

With the constitutional right of freedom of thought at stake, it is important for foster children to have heightened protection against psychotropic drug regimens, especially since the child could have his or her constitutional right to freedom of thought curtailed by the adverse effects of psychotropic medication.

III. PROPOSED HEIGHTENED STANDARD

As shown above, the overprescription of psychotropic drugs is a big problem for foster children.[154] The federal government and the states have (as shown in the previous section) heightened standards in recent years.[155] These heightened standards are not enough.[156]

A. Independent Counsel

Some states have listened to the federal government's recommendations and have heightened standards that have a parental consent requirement concerning the prescription of psychotropic drugs.[157] However, it is difficult to understand how a parent's consent will help a foster child when that same parent cannot or will not care for the child (due to issues under their control or issues out of their control).[158] The federal government should recommend, and individual states should

150. Sharon Begley, *The Brain: How the Brain Rewires Itself*, TIME (Jan. 19, 2007), http://www.time.com/time/magazine/article/0,9171,1580438-1,00.html.

151. *Id.*

152. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35, at 7–8; James Morris & George Stone, *Children & Psychotropic Medication: A Cautionary Note*, 37 J. MARITAL & FAMILY THERAPY 299, 302 (2011).

153. United States v. Charters, 829 F.2d 479, 489, 492 (4th Cir. 1987).

154. Camp, *supra* note 3, at 373.

155. *Id.* at 374.

156. *Id.* at 374–75.

157. *Id.* at 374; *see also In re* Lyle A., 830 N.Y.S.2d 486, 494–96 (N.Y. Fam. Ct. 2006).

158. Bruskas, *supra* note 10, at 70.

enact, statutes requiring that an independent advocate be appointed to zealously represent the interests of a foster child.

Foster children are some of the most vulnerable groups in our society and they need an advocate to look after their interests.[159] An independent advocate for the foster child would be a powerful voice for the interest of the child. This advocate would be available to consult with the foster child's natural parent, help make sure the natural parent's constitutional and statutory parental rights were protected, and make sure the child's constitutional and statutory rights were protected. The advocate would have the power to review the child's medical files, call independent medical experts, review the files of the caseworkers, and be familiar with the child's overall history. This would give the advocate insight into the world of the foster child and help the advocate represent the child and petition the court for the best options for the child.

The court-appointed independent advocate would protect foster children's freedom of thought. The advocate would completely represent foster children in cases where they do not have the capacity to be adequately informed of the potential adverse effects of the medication and do not have the capacity to consent. This would further protect the children's rights to freedom of thought. When the court is petitioned to begin psychotropic medication, the independent advocate would be there to represent the child's rights in court.

Long-term health and wellness is what is at stake in these cases, and therefore children who do not have capacity and do not have a strong parental voice in their life should have an independent counsel to protect their rights and advocate on their behalf. In cases where a child may be prescribed psychotropic drugs, the child's freedom of thought, and potentially freedom of individuality, hangs in the balance.[160]

One state is already appointing independent advocates to represent children in court: Oregon.[161] Oregon law requires that a court must inform the child's special advocate of the psychotropic drug medication.[162] The special advocate may petition the court to discontinue the medication if the advocate objects to the medication.[163] The special advocate in Oregon is a member of the CASA Volunteer Program.[164] These volunteers are court appointed, and they advocate

159. *Id.*
160. United States v. Charters, 829 F.2d 479, 490 (4th Cir. 1987).
161. OR. REV. STAT. § 418.517 (West 2012).
162. *Id.*
163. *Id.*
164. OR. REV. STAT. § 419A.004 (West 2012).

for Oregon's foster children.[165] These volunteers give children a voice that keeps them from getting "lost in the overburdened legal and social service system."[166] The same court-appointed volunteers stay with each child throughout the foster care process until "the child is placed in a safe, permanent home."[167] This court-appointed volunteer is a constant adult presence, which is important because this is lacking in so many foster children's lives.[168] Research demonstrates that children fare better with these independent advocates than without them.[169]

The experience with independent advocates shows that they help children in the foster child system.[170] Use of these advocates is the right step forward in protecting children's rights and protecting them from the inappropriate prescription of psychotropic drugs.

B. Heightened Judicial Standard

The second prong to the proposed new standard is a heightened judicial standard in putting children on a psychotropic medication regime. In many cases, the FDA has not adequately tested psychotropic drugs regarding children, and has not determined the long and short term effects on the minds and mental development of children.[171] This is due to the ethical difficulties in acquiring and using children as medical test subjects for psychotropic drugs and other drugs.[172]

Physicians prescribe psychotropic drugs to children, but due to the lack of FDA approval, physicians must prescribe these drugs "off-label" in instances where there is not adequate testing or data on the effects of the drug, and the child needs the medication.[173] Many of the newer psychotropic medications are prescribed to children off-label because there has not been adequate testing in children regarding the safety and the efficiency of these newer psychotropic drugs in children, and there is little knowledge on the long- and short-term effects on children.[174] Off-label usage of many medications in children is necessary because of the lack of FDA testing, and the use of such is common.[175] This is because most drugs have not, and are not, able to be studied adequately in children as stated above.[176]

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165. *About Us*, CASA FOR CHILDREN, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm (last visited Nov. 3, 2013).
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. Morris & Stone, *supra* note 152, at 302.
172. Camp, *supra* note 3, at 379 n.82.
173. *Id.* at 379.
174. *Id.* at 379; Leslie et al., *supra* note 41, at 196.
175. Leslie et al., *supra* note 41, at 196.
176. Morris & Stone, *supra* note 152, at 301–02.

Because the FDA has not adequately tested certain psychotropic drugs, the court or legislature should create a new judicial standard of review where psychotropic drugs are only given to foster children when necessary for the well-being of the child. Policy reasons for this include the protection of vulnerable foster children.[177]

The knowledge that foster children are vulnerable, and are disproportionately given psychotropic drugs compared to the rest of the population[178] speaks to the need of greater judicial scrutiny. Granted, the average foster child has had a more difficult life than an average child not in the foster program, and thus it is more likely that foster children are more susceptible to mental illness.[179]

This point aside, it is important for our society that foster children learn to become productive citizens. It is more difficult for someone to become a productive citizen if they are medicated for their entire childhood and their development is interfered with by psychotropic drugs. These drugs most likely negatively impact development.[180]

Courts have held that without consent, the court must conduct a best interest inquiry when doctors wish to administer these types of drugs to non-consenting mentally ill patients.[181] Some of the same policy reasons that apply to foster children also apply to the mentally ill: they are vulnerable, and unable to give consent.[182] Like mentally ill people, foster children also need judicial protection. The similar vulnerabilities and inability to consent should prompt state legislatures and courts to heighten the standards relating to the prescription of these psychotropic medication to foster children.

Due to these reasons, a strict judicial test should be enacted stating that unless psychotropic drug use is necessary for the well-being of the child, the drugs should not be administered. The reason for a judicial test and proceeding is that it is more fair to the constitutional and statutory rights of the child and the child's due process to establish a judicial proceeding as opposed to an administrative board.[183]

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177. Camp, *supra* note 3, at 373. For a discussion on the vulnerability of foster children, *see* Bruskas, *supra* note 10.

178. *Id.*; Bruskas, *supra* note 10, at 70.

179. Bruskas, *supra* note 10, at 70–71.

180. Morris & Stone, *supra* note 152, at 302.

181. Myers v. Alaska Psychiatric Inst., 138 P.3d 238, 250 (Alaska 2006); *see also* Jarvis v. Levine, 418 N.W.2d 139, 147 (Minn. 1988); Steele v. Hamilton Cty. Cmty. Mental Health Bd., 736 N.E.2d 10, 21 (Ohio 2000).

182. *The Vulnerability of Patients Suffering from Mental Illness as Research Subjects*, ONLINE ETHICS CENTER FOR ENG'R. (Sept. 11, 2006), http://www.onlineethics.org/Resources/TeachingTools/Modules/19237/resethpages/vuln.aspx.

183. *See Myers*, 138 P.3d at 254 (holding that the Alaska constitution's guarantees of liberty and privacy make it necessary for a court to use a best interest test in ordering a psychotropic drug regime if a patient cannot consent to the procedure).

A child and the child's advocate would be able to appear in court and in an adversarial proceeding be able to fully enforce the rights of the child.[184] A judge, independent of the agency, would be available to oversee the medication when needed, or deny the medication when deemed to be not necessary for the child.[185] The judge would be able to listen to the concerns raised by the independent counsel who could fully inform the child's natural relatives of their rights, and thus be able to fully communicate and give voice to the desires of the natural family when present, and the child.[186] The judge would consider the views of the child, and then listen to the views of the agency and of the independent doctors and then make his or her decision.

By basing the standard on whether the medication is necessary, the judge will be protecting the issues stated above that are causes for concern. The judge will protect the child from potential adverse effects of the medication unless it is *necessary* for the child to be medicated.[187] This high standard is needed because so much is at stake: the child's mental, physical, and emotional health are on the line.

C. Accountability to the Public

Another reason for the judicial standard and for the guardian ad litem is more accountability to the public. In some cases the government officials administering the foster program have allowed children as young as three years old to be given powerful psychotropic drugs.[188] These administrative proceedings are often not as accountable to the public because they are done by administrative and bureaucratic boards.[189]

The courts on the other hand are more accountable to the public, and thus provide a check on the bureaucracy.[190] Although many juvenile court cases are closed to the public, judges in many parts of the country are visible figures in their communities as compared to bureaucrats.

Judges are usually attuned to public feelings, and in some states judges are elected.[191] This greater judicial accountability to the public,

184. CASA FOR CHILDREN, *supra* note 165.

185. *See Myers*, 138 P.3d at 250.

186. *Id.*; CASA FOR CHILDREN, *supra* note 165.

187. *Myers*, 138 P.3d at 250 ("[B]efore a state may administer psychotropic drugs to a non-consenting mentally ill patient in a non-emergency setting, an independent judicial best interests determination is constitutionally necessary to ensure that the proposed treatment is actually the least intrusive means of protecting the patient.").

188. *See, e.g.*, *In re* Martin F., 820 N.Y.S.2d 759, 767 (N.Y. Fam. Ct. 2006).

189. Thomas E. Patterson, *The American Democracy*, MCGRAW-HILL, *available at* http://highered.mcgraw-hill.com/sites/0072481218/student_view0/chapter13/.

190. *Id.*

191. *See, e.g.*, N.C. GEN. STAT. ANN. § 416 (West 2013).

especially in states where judges are elected, makes judges much more thoughtful in their decisions than the more anonymous bureaucrat. This thoughtfulness will more adequately protect the rights of children and their well-being.

Greater judicial accountability should incentivize judges to not make decisions to medicate children unless such medication is necessary. In many states, bureaucrats and administrative boards are much less accountable and much less public than the courts.[192]

An increase in accountability to the public, judges' desire to have a positive legacy, and judges' awareness of public standards are all reasons why the judiciary is better fitted to determine whether foster children will be medicated than bureaucrats.

CONCLUSION

The current epidemic of overprescription of psychotropic medication in foster children is an issue that states and the federal government need to address.[193] Foster children are a vulnerable group that can be easily overlooked by our society and fall through the cracks.[194] Foster children are a group in our society that lack parental guidance and protection.[195] In some cases these children have been neglected and abused.[196] Many of these children have increased vulnerability to health and mental risks, and many have developmental issues.[197] These children do not have a stable family life or a strong adult presence looking after their interests.[198]

Foster children are overprescribed psychotropic drugs, and these drugs likely have negative long-term effects on these children.[199] The effects of psychotropic medication also call into question the constitutional freedom of thought.[200] Prescribing psychotropic medication to people can affect their ability to freely think by altering brain chemistry and affecting the neural pathways which is just as intrusive as "mechanical surgery."[201]

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192. Patterson, *supra* note 189.
193. Camp, *supra* note 3, at 401.
194. *See* discussion *infra* Part I.B.
195. *Id.*; Bruskas, *supra* note 10, at 70.
196. Bruskas, *supra* note 10, at 70.
197. *Id.*
198. *Id.*
199. *See* discussion *infra* Part I.C; Camp, *supra* note 3, at 373; Morris & Stone, *supra* note 152, at 302.
200. *See* discussion *infra* Part II.C; United States v. Charters, 829 F.2d 479, 489 (4th Cir. 1987).
201. *Charters*, 829 F.2d at 489.

One of the purposes of childhood is to learn to control one's emotions and learn to effectively work with others.[202] If one is overmedicated, one has a warped sense of reality and cannot effectively learn to live with oneself, one's emotions, and the effect others have on one's emotions.[203] Therefore, it is a great disservice to put children on psychotropic drugs when it is unnecessary due to the interference with emotional and mental development.[204]

Not only is it a disservice due to the mental and emotional issues as stated above, it is also a disservice due to the physical effects and dependency that can arise as a result from psychotropic drug use.[205] Many psychotropic drugs are very powerful and some have many adverse physical and psychological effects.[206]

Due to the effects of psychotropic drugs on children physically and emotionally, the constitutional question, and the vulnerability of the foster children group as a whole, the federal government enacted new laws and provided standards to protect foster children from psychotropic drugs.[207] Federal agencies have given the states the ability to come up with their own plans concerning the assessment and treatment of the mental health of foster children.[208]

Some states have ignored this issue, and some have opted for an informed consent policy.[209] The problems with ignoring this epidemic are evident, and ignoring this issue will not solve anything. One of the main problems with the informed consent standards that states have enacted is that the natural parents of foster children are either vulnerable people themselves, neglectful, or abusive.[210] Therefore, the informed consent standard, and the new federal mandate is not enough.

In order to adequately protect foster children from being overprescribed psychotropic drugs when they are not needed there should be a two pronged approach.

First, states should draft legislation to ensure its courts appoint an independent advocate to represent the foster child's interests.[211]

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202. Robin Stern, *Social and Emotional Learning: What Is It? How Can We Use It to Help Our Children?*, NYU CHILD STUDY CTR., http://www.aboutourkids.org/articles/social_emotional_learning_what_it_how_can_we_use_it_help_our_children (last visited Nov. 3, 2013).

203. *Charters*, 829 F.2d at 479 (recognizing that psychotropic drugs impede freedom of thought).

204. *Id.*

205. Francis, *supra* note 13.

206. Morris & Stone, *supra* note 152, at 302.

207. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 35.

208. *Id.*

209. *See* discussion *infra* Part II.B.

210. *See supra* notes 58–61 and accompanying text.

211. *See* discussion *infra* Part III.A.

This will ensure that the rights of the child and the child's well-being are being protected.[212] Oregon has recently passed a law to follow this approach.[213] The independent advocate would be able to look at the child's records, could inform the child's natural family of their rights and remedies, and be a strong voice completely looking after the child's best interest.[214] The independent advocate would be a strong and consistent adult presence in the life of the foster child.[215] This is important, as the presence of this advocate has been shown to help children's ability to navigate and eventually leave the foster system.[216]

The next prong is to make it necessary for a court to order the medication only if necessary for the child's health and well-being.[217] These prongs will protect the child from psychotropic drugs unless they are absolutely necessary.[218]

The overprescription of psychotropic drugs is a significant problem for foster children.[219] As seen in some of the illustrative examples and the science above, psychotropic drugs can harm and sometimes prove fatal to children taking these prescriptions.[220]

The above steps will be a good start for states to begin to protect the rights of foster children, and to help ensure that their voices will be heard. These children need strong voices to protect them, stand up for them and to ensure foster children have a voice in our society.

In other words, if the state follows these steps and passes laws and regulations to protect the interest of foster children, the state, the court, and the independent advocate will all be strong voices for a vulnerable group.

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212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *See* discussion *infra* Part III.B.
218. *Id.*
219. *See* discussion *infra* Part I.C.
220. *See* discussion *infra* Part II.A.

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