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DR. JEKYLL'S WAIVER OF MR. HYDE'S RIGHT TO REFUSE MEDICAL TREATMENT: WASHINGTON'S NEW LAW AUTHORIZING MENTAL HEALTH CARE ADVANCE DIRECTIVES NEEDS ADDITIONAL PROTECTIONS

Nick Anderson

Abstract: Mental health care advance directives are gaining popularity nationwide. Following a growing trend, the Washington State Legislature has recently passed a law allowing patients to draft mental health care advance directives that could be irrevocable. Patients who sign an irrevocable directive essentially waive their fundamental right to refuse treatment in the future. The United States Supreme Court has held that waivers of fundamental rights must be made knowingly, voluntarily, and intelligently. However, as passed, Washington's new law contains insufficient safeguards to guarantee such a waiver. This Comment proposes that the Washington State Legislature amend this law to require two additional protections: a "rights advocate" to explain the potential waiver of rights, and a written warning in the advance directive form. These safeguards will help ensure that patients make knowing and intelligent waivers of their fundamental right to refuse treatment.

Dr. Jekyll,¹ a respected physician, lives in Seattle with his wife. Dr. Jekyll has dissociative identity disorder.² About once a year his other personality, Mr. Hyde, takes over, rendering him unable to perform as a physician. Mr. Hyde always refuses to take the psychotropic medication that could control the symptoms and speed up Dr. Jekyll's recovery. Yet, because Mr. Hyde never poses a danger to himself or to others, the State of Washington will not commit him to a mental hospital against his will or force him to take medication. Nevertheless, Dr. Jekyll and his wife agree that taking medication is important. Dr. Jekyll's wife persuades him to sign an "advance directive," a document authorizing her to commit him to a mental health facility where he can receive treatment and medication when he slips into the role of Mr. Hyde. This document sounds like a good idea to Dr. Jekyll; it will allow him to receive the treatment he needs so he can recover and return to work. However, when Dr. Jekyll signs the document, he does not realize he is effectively waiving his fundamental right to refuse medical treatment later on. Once

1. Character names are the invention of Robert Louis Stevenson. ROBERT LOUIS STEVENSON, *THE STRANGE CASE OF DR. JEKYLL AND MR. HYDE* (1886).

2. Hypothetical created by the author for illustrative purposes.

the document is signed, Mr. Hyde no longer has the right to refuse medication, no matter how strongly he protests.

This scenario could soon take place in Washington. The Washington State Legislature has passed a new law, Mental Health—Advance Directives for Health Care, which allows a competent individual to sign a binding, and in some cases irrevocable, mental health advance directive.³ This directive is a document in which a patient gives advance consent for mental health care treatments.⁴ A competent Dr. Jekyll could therefore instruct health care providers how to treat him when he becomes incompetent and slips into the role of Mr. Hyde. While little dispute exists over whether there is a constitutional right to refuse medical treatment in advance,⁵ questions remain about a person's right to irrevocably consent to such treatments in advance.⁶ Washington's new law could allow the state to force an unwilling, mentally ill patient to take medication if the patient previously gave irrevocable consent to such treatment.⁷ The patient's present unwillingness would conflict with the previously given consent, and this conflict raises a serious concern about whether irrevocable advance directives might unconstitutionally infringe upon a patient's right to refuse medical treatment.

The United States Supreme Court has recognized that a patient's ability to refuse medical treatment is a fundamental right.⁸ State legislation cannot permit a person to waive a fundamental right in advance unless the waiver meets the constitutionally-required "knowing, voluntary, and intelligent" test.⁹ This Comment argues that Washington's new law fails to ensure that patients make such a waiver. Specifically, the law does not guarantee that patients' waivers of their fundamental right to refuse treatment are made knowingly and intelligently.

3. Mental Health—Advance Directives for Health Care, 2003 Wash. Legis. Serv. 283 (West, WESTLAW through 2003 Sess.) [hereinafter Mental Health Advance Directives].

4. *Id.* § 5.

5. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); see also *infra* note 123 and accompanying text.

6. See Rebecca S. Dresser, *Ulysses and the Psychiatrists: A Legal and Policy Analysis of the Voluntary Commitment Contract*, 16 HARV. C.R.-C.L. L. REV. 777, 819 (1982).

7. See Mental Health Advance Directives, *supra* note 3, § 5.

8. *Cruzan*, 497 U.S. at 278.

9. *Chang v. United States*, 250 F.3d 79, 83 (2d Cir. 2001); see also *Brady v. United States*, 397 U.S. 742, 748 (1970) (establishing the knowing, voluntary, and intelligent waiver test).

Part I of this Comment describes advance directives and Washington's new law. Part II examines a patient's right to refuse medical treatment and the three requirements for valid waivers of that right. Part III explores how existing statutes, rules of procedure, and court-mandated processes provide protections to guarantee that waivers of fundamental rights are made knowingly, voluntarily, and intelligently. Finally, Part IV argues that the Washington State Legislature should amend the mental health advance directive law to include similar protections. These protections are necessary to ensure that patients make knowing and intelligent waivers, and to prevent the new law from being struck down as unconstitutional.

I. FOLLOWING A GROWING TREND, THE WASHINGTON STATE LEGISLATURE HAS PASSED A LAW AUTHORIZING MENTAL HEALTH ADVANCE DIRECTIVES

Advance directives allow patients to give informed consent for certain treatments in advance.¹⁰ Such directives were first used for end of life situations, but many patients in the State of Washington have pressed for statutory authorization to draft advance directives for mental health care.¹¹ In response, Washington legislators have passed a law that will allow patients to create mental health advance directives.¹²

A. *Advance Directives Allow Patients to Make Decisions About Their Future Health Care*

An advance directive is a legal document that declares a patient's wishes about medical treatment to be provided should the patient become incompetent or unable to communicate.¹³ Patients sign advance directives while they are competent, and the documents remain in effect even if the patients later become incompetent.¹⁴ There are two different

10. Bruce J. Winick, *Advance Directive Instruments for Those with Mental Illness*, 51 U. MIAMI L. REV. 57, 70 (1996).

11. See *infra* note 37 and accompanying text.

12. Mental Health Advance Directives, *supra* note 3, § 5.

13. BLACK'S LAW DICTIONARY 53 (7th ed. 1999).

14. Robert D. Fleischner, *Advance Directives for Mental Health Care: An Analysis of State Statutes*, 4 PSYCHOL. PUB. POL'Y & L. 788, 791 (1998).

types of advance medical directives that allow patients to control their future health care: proxy directives and instructional directives.¹⁵

A proxy directive simply allows a patient to authorize someone else to make decisions on that patient's behalf.¹⁶ The principal—the patient who signs the directive—allows the proxy—an agent or personal representative—to make decisions on the principal's behalf if and when the principal becomes incompetent.¹⁷ Such directives are similar to a durable power of attorney.¹⁸ The agency relationship is “durable” because it lasts even when the principal becomes incompetent.¹⁹ The benefit of this arrangement is that it enables the agent to respond flexibly to changing circumstances when the patient's current wishes are unknown.²⁰

In contrast, an instructional directive is a legal document in which a person defines what kinds of treatment may be performed in the future if he or she becomes incompetent and cannot make decisions.²¹ One popular type of instructional advance directive is called a living will.²² A living will specifies a person's desire to be taken off life support when there is little chance of recovery by stating that the signer's life shall not be artificially prolonged when an extreme physical or mental disability makes it highly unlikely that the signer will recover.²³ Many states have statutes authorizing living wills.²⁴ In Washington, the Natural Death Act recognizes “the right of an adult person to make a written directive” to explain when the person would like life-sustaining treatment removed.²⁵

The legal basis for advance directives is rooted in the tort theory of informed consent. Advance directives attempt to allow the competent

15. Elizabeth M. Gallagher, *Advance Directives for Psychiatric Care: A Theoretical and Practical Overview for Legal Professionals*, 4 PSYCHOL. PUB. POL'Y & L. 746, 749 (1998).

16. *Id.* at 751.

17. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 404 (6th ed. 2000).

18. *Id.*

19. *See id.* (describing durable powers of attorney and the UNIFORM HEALTH-CARE DECISIONS ACT, 9 U.L.A. 144 (1999)); *see also* UNIF. PROBATE CODE §§ 5-501 to -505, 8 U.L.A. 210 (1998).

20. DUKEMINIER & JOHANSON, *supra* note 17, at 404.

21. Karen L. Schultz & Timothy D. Schultz, *Advance Directives: A Primer*, 63 TEX. BAR J. 1034, 1036 (Dec. 2000).

22. DUKEMINIER & JOHANSON, *supra* note 17, at 403–04.

23. *Id.*

24. *See, e.g.*, FLA. STAT. ch. 765.309(1) (1995); MO. REV. STAT. § 459.055 (1986); TENN. CODE ANN. § 32-11-110 (2003).

25. WASH. REV. CODE § 70.122.010 (2003).

“present self” to give informed consent on behalf of the “future self” who may become incapacitated.²⁶ All patients must give informed consent before medical treatment can be administered.²⁷ As a general rule, a patient’s consent should be based on adequate information about the benefits of medical treatment, the available alternatives, and the risks involved.²⁸ When treatment is unauthorized or performed without any consent at all, the health care provider administering the treatment may be liable for having committed a battery.²⁹

The rationale behind allowing advance directives is that a person is in a better position to give true informed consent to mental health care treatments when he or she is competent than when incompetent.³⁰ Typically, a competent person can carefully weigh the benefits, alternatives, and risks of treatment and make an informed decision.³¹ By comparison, an incompetent person’s ability to evaluate information is impaired to such an extent that the person lacks the capacity to make treatment decisions.³² Consent is essential to the provision of medical treatment, and advance directives allow informed consent to be given ahead of time.³³

B. Many Washington Patients Wanted Statutory Authorization to Write Mental Health Advance Directives

In recent years there has been a groundswell of support for advance directives by mental health consumers, providers, and advocacy

26. See Dresser, *supra* note 6, at 814 n.134.

27. See, e.g., Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 269 (1990) (noting that “informed consent is generally required for medical treatment” and stating that the “informed consent doctrine has become firmly entrenched in American tort law”); see also Scott v. Bradford, 606 P.2d 554, 558 (Okla. 1979) (noting an exception to informed consent for emergency circumstances); Alan Meisel & Lisa D. Kabnick, *Informed Consent to Medical Treatment: An Analysis of Recent Legislation*, 41 U. PITT. L. REV. 407, 409–10 (1980) (noting that “[b]y the end of the 1960’s a fairly well-established and well-developed body of common law . . . had emerged” regarding informed consent, and twenty four states enacted legislation between 1975 and 1977).

28. Scott, 606 P.2d at 556–57.

29. *Id.* at 557.

30. See Dresser, *supra* note 6, at 785 n.31.

31. See Mental Health Advance Directives, *supra* note 3, § 2(8).

32. See OR. REV. STAT. § 127.700(5) (2003).

33. See Winick, *supra* note 10, at 70–71 (arguing that advance directives refusing treatment are more likely to be valid than those requesting treatment, but that the latter does constitute a measure of proof of informed consent).

groups.³⁴ Mental health patients—especially those who alternate between competence and incompetence—have pushed for legislation allowing mental health advance directives.³⁵ Sixteen states have responded by enacting statutes specifically authorizing mental health advance directives.³⁶ Many mental health care patients in Washington state pressured the Washington State Legislature to pass a similar law.³⁷

One of the major reasons some families of patients wanted statutory authorization to execute mental health advance directives was to clarify uncertainty about Washington law.³⁸ Mental health treatment can always be obtained voluntarily if patients are willing to check themselves into a treatment facility.³⁹ However, patients who suffer from mental illness are often “treatment resistant” and either refuse treatment or do not realize they need it.⁴⁰ Even those who do take medication often stop taking it prematurely as they begin to feel better.⁴¹ When a mentally ill person refuses treatment, friends and family must go through a complex public legal process to have their family member committed involuntarily.⁴² Moreover, under Washington State’s Involuntary Treatment Act, courts only authorize involuntary commitment when patients are “gravely disabled” or pose a risk of serious harm to themselves or to others.⁴³

Because of the difficult legal standard that existed under Washington law, families felt frustrated by their inability to help mentally ill

34. See Gallagher, *supra* note 15, at 748.

35. Email from Erin Speck, Legislative Assistant to Washington State Senator Karen Keiser, to author (Jan. 27, 2003) (on file with author) [hereinafter Speck Email].

36. DEBRA SREBNIK & LISA BRODOFF, IMPLEMENTING PSYCHIATRIC ADVANCE DIRECTIVES: SERVICE PROVIDER ISSUES AND ANSWERS 28 (Working Paper, 2003); see, e.g., ALASKA STAT. §§ 47.30.950–980 (Michie 2002); HAW. REV. STAT. ANN. § 327F (Michie 2002); IDAHO CODE §§ 66-601 to -613 (Michie 2002); 755 ILL. COMP. STAT. 43/1-115 (2002); MINN. STAT. ANN. § 253B.03(6)(d) (West 2002); N.C. GEN. STAT. §§ 122C-71 to -77 (2002); OKLA. STAT. ANN. tit. 43A, §§ 11-101 to -113 (West 2002); OR. REV. STAT. §§ 127.700–737 (2002); TEX. CIV. PRAC. & REM. CODE ANN. §§ 137.001–011 (Vernon 2002); UTAH CODE ANN. §§ 62A-15-1001 to -1004 (2002).

37. See REPORT FROM THE SENATE COMMITTEE ON CHILDREN & FAMILY SERVICES ON S.B. 5223, 58th Sess., at 3 (Wash. 2003).

38. Speck Email, *supra* note 35.

39. WASH. REV. CODE § 71.05.050 (2003).

40. See Gallagher, *supra* note 15, at 747.

41. Michelle Roberts, *County Watches Woman Starve Herself to Death; State Leaves Supervisor’s Missteps Unpunished*, THE OREGONIAN, Dec. 29, 2002, at A1.

42. WASH. REV. CODE § 71.05.370.

43. *Id.* § 71.05.030; see also *In re Anderson*, 17 Wash. App. 690, 692, 564 P.2d 1190, 1192 (1977).

relatives.⁴⁴ A family's hands were effectively tied—it could not send a mentally ill family member to a treatment facility if the person did not meet the strict definition of “gravely disabled,” even if the person could benefit from treatment.⁴⁵ In the vast majority of involuntary and voluntary commitment cases, it is the family that seeks commitment or treatment.⁴⁶ A legislative assistant paraphrased one patient's passionate testimony regarding this problem to the Washington State Legislature: “[w]hen someone is allowed to ‘decompose’ so severely before they can get help under the Involuntary Treatment Act, they never come back quite the same.”⁴⁷ Many families believe that a mental health advance directive would allow patients to get the treatment they need before the patients' mental health deteriorates to the point where it fits the definition of “gravely disabled.”⁴⁸

Further, proponents of the new law argued that advance directive legislation would help cure another inadequacy in Washington law: situations where incompetent patients cannot communicate the treatment they want. When incompetent patients are unable to let others know what type of treatment they prefer, Washington law allows courts to “make a substituted judgment for the patient as if he or she were competent to make such a determination.”⁴⁹ In *In re Ingram*,⁵⁰ the Washington State Supreme Court held that when a court is asked to make a substituted medical decision for an incompetent person, the court must attempt to decide as the individual would if he or she were competent.⁵¹ An advance directive allows patients to describe recurring mental health issues treatments that have worked in the past.⁵²

44. Michelle Roberts, *Free To Die: Oregon's Civil Commitment Standard Makes it Hard to Help Those Most in Need*, THE OREGONIAN, Dec. 30, 2002, at A1 (discussing similar problems in Oregon).

45. *Id.*

46. SAMUEL JAN BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 32 (3d ed. 1985).

47. Speck Email, *supra* note 35.

48. *Id.*; Interview with Lisa Brodoff, Professor, Seattle University School of Law, in Seattle, Wash. (Nov. 14, 2002); see also *Post 2002 Leg. Sess.*, 33D LEGIS. DIST. NEWSLETTER (Sen. Karen Keiser, Olympia, Wash.), May 2002, at 4 (on file with author).

49. WASH. REV. CODE § 71.05.370(7)(b) (2003).

50. 102 Wash. 2d 827, 689 P.2d 1363 (1984).

51. *Id.* at 838, 1369.

52. Vonne Worth, *Harborview Treats Epilepsy on Involuntary Psych Ward*, 12 DIFFERENT TIMES (Seattle, Wash.), at <http://www.psychiatricrights.org/stories/Vworth.htm> (last visited June 26, 2003).

Therefore, a mental health advance directive could be strong evidence of a patient's wishes on which a court could rely when making such a substituted judgment.⁵³

Another reason that some Washington citizens wanted statutory authorization to execute mental health advance directives is that mental health care providers and patients had concerns about the legal validity of advance directives based on existing state law.⁵⁴ Prior to the bill's passage, it was unclear whether patients who wanted to execute irrevocable advance directives could do so.⁵⁵ Therefore, patients and attorneys believed that legislation explicitly authorizing mental health advance directives would be more useful than the general common law and vaguely analogous laws allowing advance directives for end of life situations.⁵⁶

Attorneys in Washington had attempted to apply general principles of state law on living wills and powers of attorney to the unique circumstances of mental health care.⁵⁷ Although these laws did not prohibit mental health care advance directives, the actual enforceability of mental health directives drafted according to such laws was somewhat uncertain.⁵⁸ Mental health care providers were unsure about how to deal with mental health advance directives in the absence of express statutory authorization, and were concerned about potential liability for following, or refusing to follow, mental health care advance directives.⁵⁹ Finally, many attorneys prefer to rely on a specific grant of statutory authority when representing a client who wants to draft a mental health advance directive.⁶⁰

C. *A New Washington Statute Specifically Authorizes Patients to Write Mental Health Advance Directives*

The Washington State Legislature recently passed a law that specifically authorizes patients to write mental health advance

53. See Gallagher, *supra* note 15, at 770–71.

54. See REPORT FROM THE SENATE COMMITTEE ON CHILDREN & FAMILY SERVICES ON S.B. 5223, 58th Sess., at 3 (Wash. 2003).

55. See Speck Email, *supra* note 35.

56. See Gallagher, *supra* note 15, at 763.

57. See *id.* (specifically considering Washington State).

58. See *id.* at 772.

59. See generally SREBNIK & BRODOFF, *supra* note 36, at 11.

60. Gallagher, *supra* note 15, at 771.

directives.⁶¹ The law is called “Mental Health—Advance Directives For Health Care.”⁶² In December of 2002, Representative Patricia Lantz and Senator Karen Keiser proposed House Bill 1041⁶³ and Senate Bill 5223,⁶⁴ respectively, to the Washington State Legislature. On February 25, 2003, the Judiciary Committee combined the House and Senate bills into a Substitute Bill that passed both houses.⁶⁵ On May 14, 2003, Governor Gary Locke signed the bill into law.⁶⁶ The law became effective on July 27, 2003.⁶⁷ This law is the result of a two-year collaborative drafting process that involved patients, mental health care providers, attorneys, and legislators.⁶⁸

Senator Keiser first sponsored this bill when a family with a schizophrenic son asked her to propose advance directive legislation.⁶⁹ Their son was able to function when he was taking his medication, but periodically he would stop taking it.⁷⁰ When this happened, he often ended up on the streets of downtown Seattle in a state of confusion, where he would threaten passers-by.⁷¹ Sometimes the young man would find himself in jail or in the emergency room.⁷² He and his family wished there were some way to break this cycle and get him help earlier when he first presented symptoms.⁷³ The family wanted to be able to

61. Mental Health Advance Directives, *supra* note 3, § 5.

62. *Id.*

63. H.B. 1041, 58th Leg., Reg. Sess. (Wash. 2003), available at <http://www.leg.wa.gov/wsladm/billinfo/dspBillSummary> (Feb. 12, 2003).

64. S.B. 5223, 58th Leg., Reg. Sess. (Wash. 2003), available at <http://www.leg.wa.gov/wsladm/billinfo/dspBillSummary> (Feb. 12, 2003).

65. Substitute H.B. 1041, 58th Leg., Reg. Sess. (Wash. 2003), available at <http://www.leg.wa.gov/wsladm/billinfo/dspBillSummary> (Apr. 6, 2003).

66. See Mental Health Advance Directives, *supra* note 3.

67. *Id.*

68. Telephone Interview with Debra Srebnik, Professor, University of Washington Department of Psychiatry and Behavioral Sciences (Oct. 15, 2002) (Professor Srebnik was a frequent participant in advance directive stakeholder meetings).

69. *Post 2002 Leg. Sess.*, 33D LEGIS. DIST. NEWSLETTER (Sen. Karen Keiser, Olympia, Wash.), May 2002, at 4 (on file with author).

70. Speck Email, *supra* note 35.

71. *Id.*

72. *Id.*

73. *Id.*

secure the treatment their son needed earlier, and they felt that this legislation would allow them to do so.⁷⁴

The new law gives patients a statutory right to execute mental health care advance directives that will be valid if certain formalities are met.⁷⁵

The pertinent section of the law provides:

A directive shall:

- (a) Be in writing;
- (b) Contain language that clearly indicates that the principal intends to create a directive;
- (c) Be dated and signed by the principal or at the principal's direction in the principal's presence if the principal is unable to sign;
- (d) Designate whether the principal wishes to be able to revoke the directive during any period of incapacity or wishes to be unable to revoke the directive during any period of incapacity; and
- (e) Be witnessed in writing by at least two adults, each of whom shall declare that he or she personally knows the principal, was present when the principal dated and signed the directive, and that the principal did not appear to be incapacitated or acting under fraud, undue influence, or duress.⁷⁶

This new Washington law allows principals to make many decisions for themselves. For example, the law permits patients to choose when their directive will become effective.⁷⁷ It also includes a sample form that patients can use to create their own directives.⁷⁸ This form includes a place for patients to indicate, at the time the directive is executed, whether the directive will be revocable or irrevocable during subsequent incapacity.⁷⁹

Patients or their families can challenge the creation of a mental health care advance directive in court.⁸⁰ The legislation specifically authorizes

74. *Id.*

75. Mental Health Advance Directives, *supra* note 3, § 5(2).

76. *Id.* § 6.

77. *Id.* § 6(3).

78. *Id.* § 26.

79. *Id.* § 26 (Part IV).

80. *Id.* § 20 (stating that “[a]ny person with reasonable cause to believe that a directive has been created or revoked under circumstances amounting to fraud, duress, or undue influence may petition the court for appointment of a guardian for the person or to review the actions of the agent or person alleged to be involved in improper conduct under RCW 11.94.090 or 74.34.110”).

a principal—the person who signs an advance directive—to bring an action to contest the validity of his or her directive.⁸¹ For example, patients could argue that their advance directives are not valid because they were signed under duress, fraud, or undue influence.⁸² Patients could also argue that they were not competent at the time they signed the directive.⁸³ Further, families could potentially challenge the directive's validity by arguing that it was signed unknowingly or unintelligently.⁸⁴

An irrevocable mental health advance directive signed under the new Washington law is, in effect, a waiver of the patient's right to make future health care decisions because it involves more than merely giving advance consent for certain medical treatments.⁸⁵ There is a distinction between giving consent for treatment and giving up the right to refuse treatment.⁸⁶ With a traditional consent form, a patient can revoke consent at any time.⁸⁷ However, with an irrevocable advance directive, the patient gives up his or her future right to withdraw consent, effectively waiving the future right to refuse medical treatment during subsequent incapacity.⁸⁸ At the time the directive is signed, the “present self” waives a right that the “future self” would otherwise possess—the right to refuse treatment.⁸⁹

In sum, in response to public demand, the Washington State Legislature has passed a new law to ensure that mental health advance directives are enforceable and to clarify the requirements for executing such a directive.⁹⁰ The law permits patients to execute mental health advance directives consenting to certain treatments in advance.⁹¹ Patients have the right to challenge their advance directives in court on the

81. *Id.* § 12.

82. *See id.* § 20.

83. *See id.* § 12.

84. *Id.* § 20.

85. Dresser, *supra* note 6, at 819 (arguing that signing a voluntary commitment contract involves a waiver of rights).

86. *See* Winick, *supra* note 10, at 70–71.

87. *See, e.g.*, Washington's Natural Death Act, WASH. REV. CODE § 70.122.040 (2003) (allowing consent to be withdrawn “at any time”).

88. *See* Mental Health Advance Directives, *supra* note 3, § 6.

89. Dresser, *supra* note 6, at 819.

90. Mental Health Advance Directives, *supra* note 3, § 5.

91. *Id.*

grounds that they were improperly executed.⁹² Yet, an irrevocable advance directive—in addition to giving the patient’s consent for future treatment—could waive the patient’s right to refuse future treatment.⁹³

II. PATIENTS HAVE A FUNDAMENTAL RIGHT TO REFUSE MEDICAL TREATMENT THAT CAN ONLY BE WAIVED VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY

Fundamental rights are rights that are constitutionally protected because they are vital to a democratic society.⁹⁴ One of the rights the U.S. Supreme Court has deemed fundamental is the right to refuse medical treatment.⁹⁵ Fundamental rights cannot be waived unless a person’s waiver is voluntary, knowing, and intelligent.⁹⁶ Therefore, patients can only waive the fundamental right to refuse medical treatment if the waiver is made knowingly, voluntarily, and intelligently.⁹⁷

A. *Fundamental Rights Are Protected by the Constitution*

The U.S. Supreme Court considers some rights to be fundamental. As Justice Cardozo explained, a fundamental right represents the “very essence of a scheme of ordered liberty . . . a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁹⁸ Some fundamental rights are expressly stated in the Bill of Rights,⁹⁹ while others have been held to originate in the concept

92. *Id.* §§ 12, 20.

93. *See Dresser, supra* note 6, at 819.

94. *See Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *rev’d on other grounds*, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *see also* MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 9 (2001).

95. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

96. *See Brady v. United States*, 397 U.S. 742, 748 (1970).

97. *See Rogers v. Okin*, 478 F. Supp. 1342, 1368 (D. Mass. 1979), *aff’d in part and rev’d in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984) (involving a pre-admission agreement requiring the patient to waive the right to refuse treatment).

98. *Palko*, 302 U.S. at 325–26 (alteration in original); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (characterizing fundamental rights as those liberties that are “deeply rooted in this Nation’s history and tradition”).

99. U.S. CONST. amends. I–X. For example, the Court has held that the right to free speech and the right to free exercise of religion are fundamental rights stemming from the Bill of Rights. *See O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

of “liberty” under the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ Certain fundamental rights protect individuals from overreaching by the government, like the right to be free from government intrusion¹⁰¹ or to have assistance of counsel at a criminal trial.¹⁰² Other rights protect people’s bodily integrity, such as the rights to have children, to marital privacy, to use contraception, and to terminate one’s pregnancy.¹⁰³

The U.S. Supreme Court has held that fundamental rights and liberties deserve more protection and require a greater degree of vigilance than do other rights.¹⁰⁴ The Due Process Clause of the Fourteenth Amendment provides “heightened protection against government interference with certain fundamental rights and liberty interests.”¹⁰⁵ When a state statute implicating a fundamental right is challenged, the Court applies the “strict scrutiny” standard of review.¹⁰⁶ Under this standard, the Court will strike down the law infringing on the fundamental right unless the state can demonstrate that the law is justified by a compelling state interest¹⁰⁷ and is narrowly tailored.¹⁰⁸

B. The Right to Refuse Medical Treatment Is a Fundamental Right

The U.S. Supreme Court has recognized that the fundamental liberty interest under the Due Process Clause includes the right to refuse unwanted medical treatment.¹⁰⁹ As early as 1891, the Court noted that

100. See *Palko*, 302 U.S. at 325; see also *Charfauros v. Bd. of Elections*, 249 F.3d 941, 951 (9th Cir. 2001) (stating that the Due Process Clause is the basis for the fundamental rights to get married and to vote); KONVITZ, *supra* note 94, at 13.

101. See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990) (sustaining right to refuse medical treatment); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating ban on interracial marriage).

102. *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

103. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (listing fundamental rights).

104. KONVITZ, *supra* note 94, at 2.

105. *Glucksberg*, 521 U.S. at 720.

106. See *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (invalidating an Oklahoma statute requiring sterilization of habitual criminals and applying strict scrutiny because the statute dealt with the fundamental rights of marriage and procreation).

107. See *Goosby v. Osser*, 409 U.S. 512, 519 (1973).

108. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

109. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990); *Mills v. Rogers*, 457 U.S. 291, 300 (1982).

“no right is held more sacred” than the right of every individual to the possession and control of his or her own person.¹¹⁰ This “sacred” right includes the right to refuse medical treatment.¹¹¹

The U.S. Supreme Court first recognized the right to refuse medical treatment in *Cruzan v. Director, Missouri Department of Health*.¹¹² In *Cruzan*, a young woman was in a terrible car accident that left her on permanent life support.¹¹³ The young woman’s parents wanted to remove her from the artificial life support, arguing that she had virtually no chance of recovering her cognitive faculties.¹¹⁴ The State of Missouri refused to allow her family to take her off life support.¹¹⁵ The State wanted to require extra evidence beyond the family’s testimony to ensure that the patient herself, if competent, would have wanted to be removed from life support.¹¹⁶ The Court agreed and concluded that a state could require more evidence of a patient’s desire to be removed from life support than her parents’ belief.¹¹⁷

In *Cruzan*, the Court suggested that the right to refuse treatment is closely related to the requirement of informed consent.¹¹⁸ Patients must give informed consent before receiving medical treatment, because the forcible treatment of a non-consenting person represents a “substantial interference with that person’s liberty.”¹¹⁹ As the Court reasoned, if patients must give informed consent, then, by a “logical corollary,” a patient necessarily has the right to refuse to give consent.¹²⁰

Recognizing the young woman’s right to refuse treatment, the *Cruzan* Court noted that even prisoners possess a significant liberty interest in avoiding unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.¹²¹ Justice O’Connor,

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

111. *Cruzan*, 497 U.S. at 278. See generally Kristine Cordier Karnezis, *Patient’s Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R.3D 67 (1979) (collecting cases).

112. 497 U.S. 261 (1990).

113. *Id.* at 265.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 280.

118. *Id.* at 269 (reasoning that informed consent is needed to protect the liberty interests inherent in the Fourteenth Amendment).

119. *Washington v. Harper*, 494 U.S. 210, 229 (1990); see also *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (recognizing the “common-law rule that forced medication was a battery”).

120. *Cruzan*, 497 U.S. at 270.

121. *Harper*, 494 U.S. at 221–22.

concurring in the judgment, reasoned that the liberty guaranteed by the Due Process Clause must protect an individual's deeply personal decision to reject medical treatment.¹²² The Court recognized the "principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."¹²³ Applying this principle to the case at hand, the Court held that Missouri could require stronger evidence of what the patient would have wanted, other than her parents' belief, had she been competent.¹²⁴

Individual states have also statutorily recognized the fundamental right to refuse treatment.¹²⁵ For example, the Washington State Legislature recognized the fundamental right to refuse treatment in the Natural Death Act, which states: "[t]he Legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own health care."¹²⁶

People with mental illnesses have a limited right to refuse medical treatment, although the actual scope of an incompetent person's right to refuse treatment is unclear.¹²⁷ Still, the U.S. Supreme Court has recognized that, at a minimum, incompetent persons retain a basic right to refuse treatment.¹²⁸ Some lower courts have held that incompetent persons have the right to refuse medical treatment absent an emergency situation¹²⁹—such as when they pose a danger to themselves or others.¹³⁰

122. *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring).

123. *Id.* at 278.

124. *Id.* at 280.

125. *See, e.g.*, WASH. REV. CODE § 70.122.010 (2003) (recognizing the right to refuse treatment in Washington State).

126. *Id.*

127. *See* Fleischner, *supra* note 14, at 790.

128. The U.S. Supreme Court has focused on the right of an incompetent person to refuse treatment in the criminal context. *See, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (stating that forced medication of a pretrial detainee during trial deprived him of a fair trial); *Washington v. Harper*, 494 U.S. 210, 229 (1990) (noting that an incompetent prisoner had a significant constitutional due process interest in avoiding unwanted administration of mental drugs).

129. *See* *Rogers v. Okin*, 634 F.2d 650, 653 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984); *see also* *Guardianship of Roe*, 421 N.E.2d 40, 42 (Mass. 1981) (holding that an incompetent mentally ill patient may have a right to refuse medication based on the constitutional right to privacy and on the common law).

130. *See* Elizabeth Ann Rosenfeld, *Mental Health Advance Directives: A False Sense of Autonomy for the Nation's Aging Population*, 9 *ELDER L.J.* 53, 57–58 (2001).

If patients are incompetent and cannot make any treatment decision, the patients' guardians can still refuse treatment on their behalf.¹³¹

Washington courts also adhere to this principle.¹³² The Washington State Supreme Court has recognized that an "incompetent's right to refuse treatment should be equal to a competent's right to do so."¹³³ As noted previously, in Washington a person retains the right to refuse treatment until he or she meets the strict definition of "gravely disabled."¹³⁴ In addition, the Washington State Supreme Court has held that an incompetent person's expressed wish to refuse treatment must be given substantial weight, even if made while the person is incompetent.¹³⁵

C. *Fundamental Rights Cannot Be Waived Unless the Waiver Is Voluntary, Knowing, and Intelligent*

The U.S. Supreme Court has been reluctant to recognize waivers of fundamental rights.¹³⁶ The Court has instructed lower courts to indulge all reasonable presumptions against the waiver of fundamental constitutional rights.¹³⁷ The United States Court of Appeals for the Ninth Circuit has held that the waiver of a constitutional right is "not to be implied and is not lightly to be found."¹³⁸ Therefore, courts will presume that a person has not waived a fundamental right absent clear evidence of the person's intent, and courts are extremely hesitant to recognize an implied or inferred waiver.¹³⁹

The U.S. Supreme Court applies a three-part test to determine whether a person has made a valid waiver of a fundamental right: a

131. *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984) (involving a pre-admission agreement requiring the patient to waive the right to refuse treatment).

132. See *Guardianship of Ingram*, 102 Wash. 2d 827, 836, 689 P.2d 1363, 1368 (1984) (noting that "a judicial finding of incompetence does not deprive [a person of the] right to refuse treatment").

133. *In re Grant*, 109 Wash. 2d 545, 553, 747 P.2d 445, 449 (1987).

134. *In re Anderson*, 17 Wash. App. 690, 692, 564 P.2d 1190, 1192 (1977).

135. *Guardianship of Ingram*, 102 Wash. 2d at 840, 689 P.2d at 1370.

136. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

137. *Johnson*, 304 U.S. at 464.

138. *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987) (quoting *United States v. Provencio*, 554 F.2d 361, 363 (9th Cir. 1977)).

139. See *Estelle v. Williams*, 425 U.S. 501, 515 (1976) (Powell, J., concurring).

waiver is only valid if it was made voluntarily, knowingly, and intelligently.¹⁴⁰ This three-part test has developed gradually over time. In 1938, the Court established the “knowing” requirement in *Johnson v. Zerbst*.¹⁴¹ The Court later required valid waivers to be made knowingly and voluntarily in *Brady v. United States*.¹⁴² Finally, the Court added the “intelligent” requirement in both *Brady*¹⁴³ and *Miranda v. Arizona*.¹⁴⁴ This three-part test for waiver of fundamental constitutional rights applies equally to criminal and civil cases.¹⁴⁵

The U.S. Supreme Court began developing the three-part waiver test in *Johnson*, where the Court held that criminal defendants must make knowing waivers of their fundamental rights to counsel.¹⁴⁶ In *Johnson*, two U.S. Marines were convicted of passing counterfeit twenty-dollar bills.¹⁴⁷ The soldiers, who were not represented by counsel during their trial, argued on appeal that they were not even aware they had a right to counsel.¹⁴⁸ Therefore, they claimed their Sixth Amendment rights were violated.¹⁴⁹ The government argued that the two soldiers waived their constitutional right to counsel by not asking the trial judge to appoint lawyers for them.¹⁵⁰

Ruling in favor of the soldiers, the *Johnson* Court noted that the trial judge has a responsibility to determine on the record whether a defendant has made a competent waiver of the right to counsel.¹⁵¹ The Court stated that that waiver of a fundamental constitutional right should

140. See *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Brookhardt v. Janis*, 384 U.S. 1, 4 (1966); *Patton v. United States*, 281 U.S. 276, 312 (1930); see also *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000); *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997); *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991).

141. 304 U.S. 458 (1938).

142. 397 U.S. 742, 748 (1970).

143. *Id.*

144. 384 U.S. 436, 444 (1966).

145. See *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972).

146. *Johnson*, 304 U.S. at 464.

147. *Id.* at 460.

148. *Id.* at 467.

149. *Id.* at 467–68.

150. See *id.* at 460, 464.

151. *Id.* at 465.

be “an intentional relinquishment or abandonment of a known right.”¹⁵² Therefore, if the soldiers did not even know they had a right to request counsel, they could not have validly waived that right.¹⁵³

The Court added another requirement to ensure valid waivers in *Brady* by holding that waivers of fundamental rights must also be made voluntarily.¹⁵⁴ Brady, fearing that a co-defendant who had already plead guilty would testify against him, plead guilty to kidnapping, thus avoiding the death penalty.¹⁵⁵ On appeal, Brady argued that his right to plead “not guilty” was waived involuntarily because he was coerced under the pressure of the possible application of the death penalty.¹⁵⁶ The Court rejected this argument, relying on the fact that Brady was twice questioned by the trial court judge as to the voluntariness of his plea,¹⁵⁷ as well as the fact that he was represented by competent counsel.¹⁵⁸

Therefore, a person’s waiver of a fundamental right is not valid if it is coerced under force or threat of force.¹⁵⁹ For example, waivers of fundamental rights cannot be obtained by the threat of continued incarceration.¹⁶⁰ The Court has noted several factors that may indicate when a waiver of a fundamental right is not voluntary, including “coercion, terror, inducements, [and] subtle or blatant threats.”¹⁶¹

The *Brady* Court also reaffirmed that waivers of fundamental rights must be made intelligently,¹⁶² and held that “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts.”¹⁶³ The Court relied on *Miranda* in requiring intelligent waivers.¹⁶⁴

152. *Id.* at 464.

153. *See id.* at 464–65.

154. *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (noting that “[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily”).

155. *Brady*, 397 U.S. at 743.

156. *Id.* at 744.

157. *Id.* at 743.

158. *Id.* at 749.

159. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

160. *Hall v. Ochs*, 817 F.2d 920, 923 (1st Cir. 1987).

161. *Boykin*, 395 U.S. at 243; *see also* DANIEL PENOFSKY, GUIDELINES FOR INTERROGATIONS: WAIVER OF RIGHTS UNDER MIRANDA 92, 114 (1967) (noting that other factors indicative of an involuntary waiver include physical abuse, psychological coercion, trickery, or cajolery).

162. *See Brady*, 397 U.S. at 748.

163. *Id.* at 748.

164. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

An intelligent waiver of rights requires that the party waiving the right understands the consequences of the waiver.¹⁶⁵ Factors that courts consider when deciding if a waiver is intelligently made include the age, educational background, and mental state of the person waiving the right.¹⁶⁶ Depression, for example, may be enough to make a waiver unintelligent because “[d]epression can impair a patient’s ability to understand information, to weigh alternatives, and to make a judgment that is stable.”¹⁶⁷

D. One Federal Court Has Applied the Knowing, Voluntary, and Intelligent Test to Waivers of the Fundamental Right to Refuse Medical Treatment

Although one federal court has applied the three-part waiver test to a waiver of the right to refuse medical treatment,¹⁶⁸ no other federal courts have specifically addressed the issue. In *Rogers v. Okin*,¹⁶⁹ a federal district court for the District of Massachusetts held that a patient’s signature on a form, by itself, was not sufficient to meet the knowing, voluntary, and intelligent waiver test.¹⁷⁰ In *Rogers*, all patients were required to sign a form before being admitted to a mental hospital in Massachusetts,¹⁷¹ which stated: “I understand that during my hospitalization and after any care, I will be given care and treatment which may include the injection of medicines.”¹⁷² Patients who had

165. See *Hardling v. Lewis*, 834 F.2d 853, 857 (9th Cir. 1987).

166. PENOFKY, *supra* note 161, at 115.

167. Edward Grant & Paul Linton, *Relief or Reproach?: Euthanasia Rights in the Wake of Measure 16*, 74 OR. L. REV. 449, 532 (1995).

168. *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979), *aff’d in part and rev’d in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984) (involving a pre-admission agreement requiring the patient to waive the right to refuse treatment).

169. 478 F. Supp. 1342 (D. Mass. 1979), *aff’d in part and rev’d in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

170. *Id.* at 1368. Although other parts of the district court’s opinion were overturned on appeal, on subsequent remand neither the U.S. Court of Appeals for the First Circuit nor the U.S. Supreme Court disturbed the district court’s holding that there was not a valid waiver of the right to refuse medical treatment under the facts of the case. See *Rogers*, 634 F.2d 650; *Mills v. Rogers*, 457 U.S. 291 (1982).

171. *Rogers*, 478 F. Supp. at 1367.

172. *Id.* at 1367.

signed this form argued that the form's language was so vague that it could not constitute a "knowing[,] voluntary waiver of a constitutional right to refuse treatment."¹⁷³

The district court agreed that merely signing this form did not constitute a knowing waiver by the patients, and held that "[i]n order for a court to find a waiver of a right to refuse [treatment], the evidence must be clear that the patient understood such a right existed and then elected knowingly and voluntarily to waive such a right."¹⁷⁴ The court concluded that the patients had no real choice about whether to sign the consent form—it was similar to a "take it or leave it" adhesion contract—and that the written warning the patients signed was inadequate to notify them that they were waiving fundamental rights.¹⁷⁵ Under these facts, the court held the waiver was invalid because the knowing and voluntary prongs of the waiver test were not met.¹⁷⁶ The opinion in *Rogers* did not specifically address the intelligent prong.¹⁷⁷

Thus, the U.S. Supreme Court has adopted a three-part waiver test in order to protect fundamental constitutional rights. For a person to validly waive a fundamental right, the waiver must be made knowingly, voluntarily, and intelligently. Consequently, it is likely that such a waiver is required for a person to give up the fundamental right to refuse medical treatment.

III. RULES, COURT-MANDATED PROCESSES, AND STATUTES PROVIDE SAFEGUARDS TO GUARANTEE VOLUNTARY, KNOWING, AND INTELLIGENT WAIVERS OF FUNDAMENTAL RIGHTS

There are many contexts in which special procedural safeguards are in place to ensure that knowing, voluntary, and intelligent waivers are made. For example, the Federal Rules of Criminal Procedure allow defendants to waive the fundamental rights that accompany a criminal trial, but include a process to ensure that such waivers meet the "knowing, voluntary, and intelligent" test.¹⁷⁸ Similarly, the U.S. Supreme Court requires police officers to warn arrestees of their

173. *Id.* at 1368.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. FED. R. CRIM. P. 11(b)(2).

fundamental rights to assistance of counsel and to remain silent before they can validly waive any of those rights.¹⁷⁹ Finally, statutes like Oregon’s Death with Dignity Act, which allow a person to waive the fundamental right to life, contain procedural safeguards in order to ensure knowing, voluntary, and intelligent waivers of that right.¹⁸⁰

A. The Federal Rules of Criminal Procedure Ensure That a Defendant’s Waiver of Fundamental Trial Rights Is Made Knowingly, Voluntarily, and Intelligently

An accused individual has a fundamental right to a trial by jury, a privilege against compulsory self-incrimination, and a right to confront his or her accusers.¹⁸¹ Entering a plea of guilty or *nolo contendere* is, in effect, a waiver of all of these rights that accompany a trial.¹⁸² Therefore, a defendant’s unknowing and involuntary guilty plea will be void.¹⁸³ Thus, the Federal Rules of Criminal Procedure require federal courts to ensure that defendants’ waivers of trial rights are made knowingly, voluntarily, and intelligently.¹⁸⁴

First, Federal Rule of Criminal Procedure 11 requires procedural safeguards to ensure that federal defendants make knowing waivers of their rights.¹⁸⁵ The judge must address the defendant in open court and explain specific facts concerning the charge to which the defendant has pleaded guilty and the rights he or she has waived.¹⁸⁶ This requirement guarantees that defendants know precisely what rights are at stake.¹⁸⁷

179. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

180. See OR. REV. STAT. § 127.815 (2003).

181. U.S. CONST. amend. VI (guaranteeing defendants the right to trial by an impartial jury and to be confronted with witnesses against them); see also *City of Mobile v. Bolden*, 446 U.S. 55, 77 n.24 (1980) (concluding that defendant in a criminal case has the “fundamental” right to trial by a jury of his peers).

182. See *Dresser*, *supra* note 6, at 816 (arguing that entering a plea of guilty under FED. R. CRIM. P. 11(c)(4) before trial is “a waiver of all the safeguards that accompany a trial”).

183. *McCarthy v. United States*, 394 U.S. 459, 464–65 (1969).

184. *Id.* at 466.

185. See FED. R. CRIM. P. 11(b)(1)(H)–(I) (requiring a judge to tell the defendant the maximum and minimum penalties the defendant will be subject to should the defendant choose to plead guilty).

186. FED. R. CRIM. P. 11(b)(1)(A)–(F).

187. See FED. R. CRIM. P. 11(b)(1)(B)–(E) (requiring judges to tell defendants what rights are at stake).

Second, in addition to informing the defendant of his or her rights, courts also must ensure that a defendant's waiver is made voluntarily.¹⁸⁸ Under Rule 11, the court must determine whether a defendant's guilty plea is "voluntary and did not result from force, threats or promises" other than a plea agreement.¹⁸⁹ Courts may only admit a defendant's confession into evidence when they are satisfied that the confession was made voluntarily.¹⁹⁰ Many states require that the judge's determination of whether there has been an "effective waiver of the right to plead not guilty" be made on the record.¹⁹¹

Finally, Rule 11 includes requirements to ensure intelligent waivers. When a defendant has chosen to plead guilty as part of a plea bargain agreement reached with the prosecution, the judge must "advise the defendant that the defendant has no right to withdraw the plea if the court does not follow [the prosecution's] recommendation or request."¹⁹² This procedural safeguard helps to ensure that the defendant waives the right to trial only after being fully informed of the consequences and risks of the waiver. The scope of Rule 11 was considerably expanded in 1973 to reflect the intent of the original rule which stated simply that a court "shall not accept . . . [a plea of guilty] without first addressing the defendant personally and determining that the plea is made . . . with understanding of the nature of the charge and the consequences of the plea."¹⁹³ Therefore, Federal Rule of Criminal Procedure 11 ensures that a defendant's waiver of the fundamental right to trial is made knowingly, voluntarily, and intelligently.

B. The Miranda Warnings in Criminal Interrogations Assure That a Defendant's Waiver of Fundamental Civil Rights Is Made Knowingly, Voluntarily, and Intelligently

The U.S. Supreme Court adopted "prophylactic" rules in *Miranda v. Arizona* that protect suspects from invalidly waiving fundamental rights.¹⁹⁴ Under the Sixth Amendment, criminal suspects have the

188. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

189. FED. R. CRIM. P. 11(b)(2).

190. *See Boykin*, 395 U.S. at 242 (citing *Jackson v. Denno*, 378 U.S. 368, 387 (1964)).

191. *Id.* at 244 n.6; *Woods v. Rhay*, 68 Wash. 2d 601, 605, 414 P.2d 601, 605 (1966).

192. FED. R. CRIM. P. 11(c)(3)(B).

193. *Goodwin v. United States*, 687 F.2d 585, 586 n.1 (2d Cir. 1982).

194. *See Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (interpreting *Miranda*).

fundamental right to assistance of counsel,¹⁹⁵ and under the Fifth Amendment, suspects have the right to remain silent.¹⁹⁶ When a criminal suspect is taken into custody, police officers must give five warnings before interrogating the suspect.¹⁹⁷ At trial, the prosecution bears the burden of proving that a defendant's waivers were valid.¹⁹⁸

Miranda warnings protect criminal suspects from unknowingly waiving fundamental rights.¹⁹⁹ Police officers must tell suspects specifically what their rights are.²⁰⁰ The *Miranda* warnings require officers to tell suspects “[y]ou . . . have the right to remain silent” and “[y]ou are entitled to consult with an attorney before interrogation.”²⁰¹ Courts will not presume that criminal defendants knew that they had a right to remain silent in the absence of a *Miranda* warning.²⁰² These warnings ensure that suspects and defendants are waiving known rights.²⁰³

In addition, *Miranda* warnings protect criminal suspects from involuntarily waiving fundamental rights.²⁰⁴ Once a suspect is prosecuted, courts will examine whether a suspect's decision to waive a right was voluntary in light of the totality of the circumstances.²⁰⁵ *Miranda* warnings are one factor that courts will take into consideration because “[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities.”²⁰⁶

195. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

196. See U.S. CONST. amend. V.

197. *PENOFKY*, *supra* note 161, at 14 (noting that the five required warnings are: (1) that the accused has the right to remain silent; (2) that any statement made can be used against the accused; (3) that the accused has the right to consult with an attorney; (4) that the accused has the right to have an attorney present during any interrogation; and (5) if the accused cannot afford an attorney, one will be appointed for him).

198. See *id.* at 7.

199. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

200. See *id.*

201. THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS* 11 (1981) (noting that actual wording of warnings often varies from state to state).

202. See *Miranda*, 384 U.S. at 468 (explaining that “the Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights [to remain silent] without a warning being given”).

203. See *PENOFKY*, *supra* note 161, at 15.

204. *Miranda*, 384 U.S. at 475.

205. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1976).

206. *Oregon v. Elstad*, 470 U.S. 298, 308 (1985).

Miranda warnings were designed to protect fundamental rights from government “compulsion, subtle or otherwise” that “operates on the individual to overcome free choice in producing a statement.”²⁰⁷ Later judicial review ensures that a suspect’s waivers were made voluntarily.²⁰⁸

Finally, *Miranda* warnings protect criminal suspects from unintelligently waiving fundamental rights.²⁰⁹ Police officers inform suspects of the potential consequences of a decision to waive the right to silence when they state that “[a]nything you say can and will be used against you in a court of law.”²¹⁰ Thus, the *Miranda* warnings protect criminal suspects from invalidly waiving their fundamental rights to assistance of counsel and to remain silent.²¹¹

C. *Oregon’s “Death with Dignity” Statute Ensures That a Patient’s Waiver of the Fundamental Right to Life Is Made Knowingly, Voluntarily, and Intelligently*

Statutes allowing citizens to waive fundamental rights can include procedural protections to guarantee that a waiver is knowingly, voluntarily, and intelligently made.²¹² For example, Oregon’s Death with Dignity Act allows patients with terminal conditions to waive their right to life by taking prescribed medication that will cause their own death.²¹³ The right to life is a fundamental right.²¹⁴ Therefore, Oregon has included special protections in its Death with Dignity Act to ensure that any waiver of the fundamental right to life meets the U.S. Supreme Court’s three-part waiver test.²¹⁵

Oregon’s legislation—originally an initiative that voters passed—includes safeguards to protect vulnerable individuals.²¹⁶ Similar ballot

207. *Miranda*, 384 U.S. at 474.

208. *Schneckloth*, 412 U.S. at 227.

209. *Miranda*, 384 U.S. at 475.

210. GRISSE, *supra* note 201, at 11.

211. *Miranda*, 384 U.S. at 475.

212. *See, e.g.*, OR. REV. STAT. § 127.815(1)(c) (2003) (requiring physicians to make sure patient is “making an informed decision” before physician can prescribe life-ending medication to that patient).

213. *Id.*

214. *See Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

215. *See* OR. REV. STAT. § 127.815.

216. Cheryl K. Smith, *Oregon’s Measure 16: Once More to the Ballot Box*, available at <http://www.ncf.carleton.ca/ip/social.services/rt-die/journal/oregon> (last visited July 10, 2003).

measures failed in California and Washington because opponents successfully convinced voters that the bills did not contain adequate safeguards.²¹⁷ The drafters of the subsequent Oregon measure took this into consideration.²¹⁸ They knew that Oregon voters would be more likely to support the bill if it contained protections to ensure that people would seriously consider their decision to end their own lives, and to guarantee that this decision would be made in light of all the relevant information.²¹⁹

As a result, Oregon's Death with Dignity Act provides in relevant part that before a physician can prescribe life-ending medication:

(1) The attending physician shall:

(a) Make the initial determination of whether a patient has a terminal disease, is capable, and has made the request voluntarily;

. . . .

(c) To ensure that the patient is making an informed decision, inform the patient of:

(A) His or her medical diagnosis;

(B) His or her prognosis;

(C) The potential risks associated with taking the medication to be prescribed;

(D) The probable result of taking the medication to be prescribed; and

(E) The feasible alternatives, including, but not limited to, comfort care, hospice care and pain control;

(d) Refer the patient to a consulting physician for medical confirmation of the diagnosis, and for a determination that the patient is capable and acting voluntarily;

(e) Refer the patient for counseling if appropriate . . . ;

. . . .

(h) Inform the patient that he or she has an opportunity to rescind the request at any time and in any manner.²²⁰

217. *Id.*

218. *Id.*

219. *Id.*

220. OR. REV. STAT. § 127.815.

Although the Oregon statute specifically addresses the voluntary and intelligent prongs, it does not contain provisions specifically aimed at ensuring “knowing” waivers, such as a provision requiring physicians to tell patients that they have a fundamental right to life.²²¹ Perhaps the drafters assumed that it is common knowledge that the right to continue living is fundamental.²²²

Oregon’s Death with Dignity Act does include protections to guarantee that waivers of the fundamental right to life are made voluntarily.²²³ The physician must make a good faith effort to determine whether the patient is voluntarily asking to give up his or her right to life.²²⁴ Moreover, Oregon’s statute addresses the intelligent waiver prong.²²⁵ Oregon requires health care providers to sit down with a patient who is considering physician-assisted suicide and explain the potential risks of the decision.²²⁶ When patients choose to be removed from life support or to take a prescribed medication to end their own lives, a physician is required to explain the options, alternatives, and risks.²²⁷ These requirements ensure that any waiver is made intelligently.

Oregon requires a face-to-face verbal warning from the doctor before patients are allowed to waive their rights.²²⁸ By requiring the attending physician to have this conversation with a person who is considering waiving his or her right to life, Oregon’s Death with Dignity Act protects its citizens from unknowingly, involuntarily, or unintelligently waiving their rights.

Thus, Federal Rule of Criminal Procedure 11, *Miranda* warnings, and Oregon’s Death with Dignity Act all include provisions to ensure knowing, voluntary, and intelligent waivers of fundamental rights. Under Rule 11, a federal judge must tell criminal defendants what rights they forfeit by pleading guilty.²²⁹ Likewise, *Miranda* warnings require

221. *Id.* § 127.815(1)(a)–(c).

222. *See Woods v. Niertheimer*, 328 U.S. 211, 216 (1946) (noting that the “fundamental rights to life and liberty are guaranteed by the United States Constitution”).

223. OR. REV. STAT. § 127.815(1)(a).

224. *See Grant & Linton, supra* note 167, at 528.

225. OR. REV. STAT. § 127.815(1)(c)(A)–(E).

226. *See id.* § 127.815(1)(c)(C).

227. *See id.* § 127.815(1)(a)–(c).

228. *See id.* While the Oregon statute does not explicitly require that the communication be *face-to-face*, it is reasonable to assume that most doctors talk with their patients in person before prescribing medication to the patient allowing the patient to end his or her own life.

229. FED. R. CRIM. P. 11(a)(1)(B)–(E).

police officers to tell suspects what their rights are and explain the consequences of waiving those rights.²³⁰ Finally, Oregon's Death with Dignity Act requires physicians to meet with patients to discuss the risks and alternatives before the physician can prescribe lethal medication for patients wanting to waive their right to life.²³¹ These procedures help ensure that waivers of fundamental rights meet the U.S. Supreme Court's three-part test.

IV. WASHINGTON'S ADVANCE DIRECTIVE LAW SHOULD BE AMENDED TO INCLUDE PROTECTIONS AT THE EXECUTION STAGE THAT WILL GUARANTEE KNOWING AND INTELLIGENT WAIVERS

Although Washington's new law authorizing mental health advance directives provides many benefits,²³² it may be unconstitutional as passed because it does not ensure that waivers of the fundamental right to refuse treatment will be made knowingly and intelligently. With minor changes to the new law, the Washington Legislature could fix this shortcoming and guarantee that patients' waivers of fundamental rights will meet the U.S. Supreme Court's three-part test.

A. *Washington's Mental Health Advance Directive Law Contains Insufficient Safeguards in the Execution Stage to Meet the "Knowing, Voluntary, and Intelligent" Test*

Washington's mental health advance directive law fails to guarantee that patients will make knowing and intelligent waivers of their fundamental right to refuse medical treatment. Under the law, patients could sign an irrevocable advance directive that effectively constitutes a waiver of their right to refuse treatment in the future. Although the Washington law includes sufficient safeguards to ensure that such a waiver is voluntary, it fails to guarantee that a waiver is made knowingly

230. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

231. OR. REV. STAT. § 127.815(1)(a)-(c).

232. Interview with Lisa Brodoff, Professor, Seattle University School of Law, in Seattle, Wash. (Nov. 14, 2002) (explaining that the drafters of the proposed legislation tried to ensure a great deal of choice to the mentally ill); see, e.g., Mental Health Advance Directives, *supra* note 3, § 6(3), (allowing patients the freedom to choose the point in time when their directive will become effective).

and intelligently in accordance with the *Johnson* test.²³³ In fact, the bill provides even less protection against unknowing waivers than the protections held insufficient in *Rogers*.²³⁴

Signing an irrevocable advance directive constitutes a waiver of a patient's fundamental rights.²³⁵ Even incompetent persons retain the fundamental right to refuse treatment.²³⁶ In Washington, a patient retains the right to refuse treatment until the person meets the strict definition of "gravely disabled."²³⁷ Signing an irrevocable advance directive can cause a patient to effectively give up his or her right to refuse treatment in the future.²³⁸ Therefore, signing an irrevocable mental health advance directive constitutes a waiver of a fundamental right. Because Washington's mental health advance directive law allows patients to waive their future right to refuse treatment, it must include safeguards to ensure that such waivers meet the knowing, voluntary, and intelligent test.²³⁹

The drafters of Washington's mental health advance directive law adequately addressed one part of the U.S. Supreme Court's three-part "knowing, voluntary, and intelligent" test.²⁴⁰ The law ensures that patients will make voluntary waivers by requiring two adult witnesses to attest to the fact that the patient signed voluntarily at the time the advance directive was executed.²⁴¹ The witnesses must certify that the

233. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

234. *See Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

235. *See supra* note 89 and accompanying text.

236. *See, e.g., Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (stating that forced medication of a pretrial detainee during trial deprived him of a fair trial); *Washington v. Harper*, 494 U.S. 210, 229 (1990) (noting that an incompetent prisoner had a significant constitutional due process interest in avoiding unwanted administration of mental drugs).

237. WASH. REV. CODE § 71.05.030 (2003); *see also In re Anderson*, 17 Wash. App. 690, 692, 564 P.2d 1190, 1192 (1977).

238. *Dresser, supra* note 6, at 819 (arguing that signing a voluntary commitment contract, which is similar to an irrevocable advance directive, involves a waiver of rights).

239. *See Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Brookhardt v. Janis*, 384 U.S. 1, 4 (1966); *Patton v. United States*, 281 U.S. 276, 312 (1930); *see also D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000); *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997); *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991).

240. *Mental Health Advance Directives, supra* note 3, § 6(1)(e).

241. *Id.*

patient did not appear incapacitated at the time of signing.²⁴² Although the legislation protects against involuntary waivers, no provisions are included to guarantee that waivers of the right to refuse treatment are made knowingly or intelligently.²⁴³ As a result, Washington's law contains insufficient safeguards to ensure that the advance directives will withstand constitutional scrutiny.

The Washington statute fails to meet the *Johnson* test that requires waivers to be made *knowingly*.²⁴⁴ Much like the two Marines in *Johnson* who did not know they had a fundamental right to counsel,²⁴⁵ some patients who execute mental health advance directives may not know they have a fundamental right to refuse treatment. Moreover, the new Washington law includes no requirement that those executing an advance directive be informed that they are giving up a fundamental right to refuse treatment.²⁴⁶ This is in striking contrast to *Johnson* where the U.S. Supreme Court required trial judges to inform defendants of their right to request counsel.²⁴⁷

Further, the Washington law provides even less protection against an unknowing waiver of the fundamental right to refuse treatment than the mental hospital did in *Rogers v. Okin*.²⁴⁸ In *Rogers*, patients had to sign a form acknowledging that they would be given treatment once they entered the hospital.²⁴⁹ Yet, the court held that this form was not enough to constitute a knowing waiver of the right to refuse treatment.²⁵⁰ Thus, a court may require more than a mere written acknowledgment of rights to ensure that patients are knowingly waiving a right.²⁵¹ The form included in the Washington law refers to potential treatment or medication in terms of "preferences,"²⁵² but never mentions the waiver of a right to refuse treatment. The Washington law thus provides even less protection

242. *Id.* (requiring witnesses to certify that the person signing an advance directive does not appear to be acting under fraud, undue influence, or duress).

243. *See id.*

244. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

245. *Id.* at 467.

246. *See* Mental Health Advance Directives, *supra* note 3.

247. *Johnson*, 304 U.S. at 465.

248. 478 F. Supp. 1342 (1979).

249. *Id.* at 1367.

250. *Id.*

251. *See id.*

252. Mental Health Advance Directives, *supra* note 3, § 26 (Part V).

against an unknowing waiver than the protection that the court held insufficient in *Rogers*.²⁵³ Therefore, the Washington law does not meet the knowing requirement set forth by the U.S. Supreme Court.

Additionally, Washington's statute does not guarantee that patients will make *intelligent* waivers of their fundamental rights, because it does not ensure that patients will know the consequences, risks, and alternatives to signing an irrevocable advance directive. In contrast to Federal Rule of Criminal Procedure 11, which requires judges to warn defendants of the possible consequences of waiving the right to a trial,²⁵⁴ the Washington statute does not require someone to explain to patients the consequences of signing an irrevocable advance directive. Also, unlike Oregon's Death with Dignity Act, which requires a physician to explain alternatives to a patient,²⁵⁵ Washington's statute does not require anyone to explain to patients the alternatives to signing irrevocable advance directives. Therefore, the Washington law does not ensure that patients will intelligently waive the fundamental right to refuse treatment.

Thus, Washington's mental health advance directive law fails to ensure that patients will make knowing and intelligent waivers of their fundamental right to refuse medical treatment. Under the new law, it would be possible for a fully competent person to sign an irrevocable advance directive without realizing that the document waived his or her fundamental right to refuse medical treatment at a later time. Under such circumstances, the directive would be open to legal challenges. For example, imagine that two witnesses certify that a patient is "competent" to sign a directive, but that patient is clinically depressed. It is certainly possible for two witnesses to be unaware of a patient's clinical depression. Though the patient signs the directive voluntarily, the depression may be enough to make the waiver unknowing or unintelligent because "depression can impair a patient's ability to understand information, to weigh alternatives, and to make a judgment that is stable."²⁵⁶ Without more, Washington's statute permits such a patient to waive the fundamental right to refuse medical treatment without even realizing it. This unfortunate possibility stands in stark

253. *See id.*

254. *See* FED. R. CRIM. P. 11(b)(1)(A)-(F).

255. OR. REV. STAT. § 127.815 (2003).

256. Grand & Linton, *supra* note 167, at 532 n.352.

contrast to the expressed desires of those citizens who initially advocated for mental health advance directives in Washington.²⁵⁷

B. A “Rights Advocate” and a Written Warning Would Provide the Necessary Protections Against Unknowing Waiver

With two minor changes, the Washington State Legislature could guarantee that the advance directive law would ensure knowing and intelligent waivers. First, the statute should be amended to require a “rights advocate” to explain to the patient that an irrevocable directive is a waiver of the fundamental right to refuse treatment, and discuss the possible risks of and alternatives to using an advance directive. Second, the advance directive form should include a written warning that signing an irrevocable advance directive could constitute a waiver of the fundamental right to refuse treatment.

The Washington State Legislature should require a “rights advocate” to explain that the patient is waiving a fundamental right, and to discuss the potential consequences of that waiver before the patient signs an irrevocable advance directive. This rights advocate should be a disinterested person with no other relation to the principal who has a basic understanding of Washington law and of the fundamental right to refuse treatment. The rights advocate could be an attorney, a social worker, or a health care professional. Similar to *Miranda* warnings²⁵⁸ and Oregon’s Death with Dignity Act,²⁵⁹ this requirement should be mandatory when the patient selects an irrevocable advance directive in Washington.²⁶⁰ If the patient retains the right to revoke the directive at any time,²⁶¹ the fundamental right to refuse medical treatment is not waived and a “rights advocate” is not needed. However, when a patient decides that the directive should be irrevocable during subsequent incapacity,²⁶² a “rights advocate” can ensure that the patient understands that doing so waives the fundamental right to refuse medical treatment.

257. SREBNIK & BRODOFF, *supra* note 36, at 10 (noting that “a prominent concern of [potential advance directive users in Washington] was whether [they] would have sufficient information and competency to execute” advance directives).

258. See *Miranda v. Arizona*, 384 U.S 436, 475 (1966); see also *supra* note 197.

259. See OR. REV. STAT. § 127.815.

260. Mental Health Advance Directives, *supra* note 3, § 6(1)(d).

261. *Id.*

262. *Id.*

Essentially, the rights advocate should act like the physician in Oregon's Death with Dignity Act, explaining the risks, consequences, and alternatives to signing an irrevocable advance directive.²⁶³ Thus, a rights advocate would bring an advance directive in line with the theory of informed consent. This will help guarantee that the patient's waiver is intelligent and made in light of all the relevant information.

Once the rights advocate has informed the patient, the advocate should sign a certification stating that the patient has been advised of his or her rights. A court could refer to the certification if the directive is subsequently challenged.²⁶⁴ To accomplish this, the Washington Legislature should amend its mental health advance directive law to include the following:

If the principal has elected to be unable to revoke the directive during any period of incapacity, the directive shall include a certification by a rights advocate that states in substance as follows: "I am a disinterested attorney, social worker, or health care professional. I certify that I am familiar with the provisions of the Involuntary Treatment Act, the mental health advance directive authorized under this statute and the constitutionally protected fundamental right to refuse medical treatment. I met with the principal prior to the execution of this directive and advised him/her concerning his/her rights. In connection with this directive, I advised him/her about the risks involved, the possible legal and medical consequences of signing or not signing this directive, and available alternatives to signing the directive. In particular, I advised the principal that by signing this directive he/she was effectively waiving the fundamental right to refuse treatment in the future."²⁶⁵

This language will ensure that the patient is advised—by an impartial rights advocate—of the legal consequences of signing the directive, including the fact that it constitutes a waiver of a fundamental right.

A second change to the advance directive statute, adding a warning in the advance directive form, would also help prevent patients from signing advance directives without knowing they are waiving fundamental rights. The new statute includes a sample form directive

263. See OR. REV. STAT. § 127.815.

264. See Mental Health Advance Directives, *supra* note 3, §§ 12, 20.

265. Similar language was first proposed by Karen Boxx, Professor, University of Washington School of Law, at a Mental Health Advance Directives for Health Care stakeholders meeting in Olympia, Washington on December 3, 2002.

that patients can use.²⁶⁶ This form should be amended to include a warning that signing an irrevocable directive may constitute a waiver of a fundamental right. At present, the form requires those who want an irrevocable directive to sign under a statement that says: “I . . . understand that if I choose this option and become incapacitated while this directive is in effect, I may receive treatment that I specify in this directive, even if I object at the time.”²⁶⁷ This statement should be expanded and clarified to include a second sentence that reads: “I further understand that I have a fundamental constitutional right to refuse medical treatment. I understand that by choosing to execute an irrevocable directive I may be waiving my fundamental right to refuse medical treatment.” Much like the explanations provided by rights advocate, such a written warning would ensure that patients make knowing waivers of the fundamental right to refuse treatment. Although the rights advocate may be a more personal and effective means of guaranteeing a knowing waiver, requiring both oral and written warnings would create two levels of procedural protection.

C. By Making These Changes, the Washington State Legislature Can Ensure That Mental Health Advance Directives Will Be Constitutional and Enforceable

If the Washington advance directive statute is amended to include these two changes, courts will most likely uphold irrevocable advance directives as knowing, voluntary, and intelligent waivers of the fundamental right to refuse treatment. As passed, the law satisfies the voluntary requirement,²⁶⁸ but fails to meet the knowing and intelligent requirements. The proposed changes will rectify this failure in multiple ways.

First, the amended statute would ensure knowing waivers if it requires a rights advocate to explain that patients are giving up a fundamental right when they sign an irrevocable directive. This explanation of rights is similar to police officers telling suspects that they “have the right to remain silent” as part of a *Miranda* warning.²⁶⁹ It is also akin to a judge

266. Mental Health Advance Directives, *supra* note 3, § 26.

267. *Id.* § 26 (Part IV).

268. *Id.* § 6(1)(e); *see also supra* note 241 and accompanying text.

269. *See Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *see also supra* note 197.

informing defendants that they have the right to a trial and do not have to plead guilty.²⁷⁰ The rights advocate would be able to guarantee that the patient knows about his or her rights. Thus, requiring a rights advocate would ensure that the Washington statute meets the *Johnson* test.²⁷¹ Further, if the advance directive form states that the person is waiving a fundamental right, it will be more clear and specific than the form used in *Rogers*.²⁷² Therefore, with these two changes, the law would ensure that patients make knowing waivers of their fundamental right to refuse treatment.

Additionally, the amended statute would ensure intelligent waivers if it requires a rights advocate to tell a patient about the risks, consequences, and alternatives of signing an irrevocable directive. Such information is analogous to the explanations that must be given by a physician under Oregon's Death with Dignity Act,²⁷³ and by a judge acting under Rule 11.²⁷⁴ Adding a requirement for a rights advocate would allow patients to make an informed decision before signing an irrevocable directive. Therefore, the rights advocate would ensure that the patient intelligently waives his or her fundamental right to refuse treatment, as required by both *Brady* and *Miranda*.²⁷⁵

Finally, these protections would make irrevocable directives more enforceable. If a patient becomes incompetent and subsequently tries to challenge his or her directive in court,²⁷⁶ the person's signature on the form and the certification of the rights advocate would provide the court with evidence that the patient validly waived his or her right to refuse treatment.

V. CONCLUSION

The new Washington statute authorizing mental health advance directives stems from good intentions. However, there is a risk that the

270. See FED. R. CRIM. P. 11(b)(1)(A)–(F).

271. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1968).

272. See *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

273. See OR. REV. STAT. § 127.815 (2003).

274. See FED. R. CRIM. P. 11(b)(1)(A)–(F).

275. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); see also *supra* note 162 and accompanying text.

276. Mental Health Advance Directives, *supra* note 3, §§ 12, 20.

statute could be successfully challenged as a violation of the U.S. Supreme Court's requirement that fundamental rights can only be waived knowingly, voluntarily, and intelligently. By adding the simple procedural safeguards of a "rights advocate" at the signing stage, and a clear warning in the form, an amended version of the advance directive law should withstand a constitutional challenge. Consequently, Dr. Jekyll would be protected from inadvertently waiving Mr. Hyde's fundamental right to refuse treatment.

