AUTONOMY, PERSONHOOD, AND THE RIGHT TO PSYCHIATRIC TREATMENT

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by
Richard T. Hull, Ph.D.
Departments of Philosophy and Social and Preventive Medicine
State University of New York at Buffalo

Case Review

In the May, 1960, issue of the *American Bar Association Journal* (vol. 499), Morton Birnbaum, a lawyer and physician, argued for a legal right to psychiatric treatment of the involuntarily committed mentally ill person. In the 18 years since his article appeared,, there have been several key court cases in which this concept of a right to psychiatric treatment has figured prominently and decisively. It is important to note that the language of the decisions have had at least an indirect effect in the recently enacted mental Hygiene Law of the State of New York. While I shall not seek to establish the historical thesis that Birnbaum's article has been efficacious in bringing about both these court decisions and changes in statutory laws, I do want to examine Birnbaum's article and some of the opinions for three cases: *Wyatt v. Stickney* (1972), *Wyatt v. Aderholt* (1974), and *O'Connor v. Donaldson* (422 US 563, 1975), in an effort to understand both the significance of these changes in our laws and the underlying philosophical and ethical notions of which they are an expression.

Birnbaum observed that the notable feature of the legal situation at the time was that there had not been recognized a constitutional requirement that one who had been institutionalized for mental illness according to due process must receive treatment. Birnbaum argued that the effects of an omission of such a requirement to treat were that mental institutions typically offered only custodial care, that patients who were held only under custodial care typically did not improve, and that the result was that involuntary incarceration in a mental institution was, at least from the point of view of the patient, functionally no different than would be imprisonment for an unspecified period of time.

Birnbaum argued for a recognition and enforcement in the courts of the right to treatment "...as a necessary and overdue development of our present concept of due process of law," i.e., as required by the 14th Amendment to the U.S. Constitution: "No State . . . shall deprive any person of life, liberty or property, without due process of law . . . ."

Birnbaum's reasoning appears to be that (I) since the power to commit someone involuntarily is not tied in the law to the right to treatment, an involuntarily committed patient is liable to be deprived of his freedom without being provided the opportunity to regain it through treatment to improve his incapacitating condition; (ii) legislatures are not, and are not likely in the foreseeable future, inclined voluntarily to provide the funds necessary to provide treatment for mental patients in state hospitals; (iii) thus, remedy for the situation will require action in the courts. Birnbaum was moved to maintain that there was violation of the due process requirement involved when "an inmate is being kept in a mental institution against his will, (and not being) given proper medical treatment..."; "the courts must be prepared to hold that . . . he must be given proper medical treatment or else the inmate can obtain his release at will in spite of the existence or severity of his mental illness." Birnbaum recognized that "To release a mentally ill person who requires further institutionalization, solely because he is not being given proper care and treatment, may endanger the health and welfare of many members of the community as well as the health and welfare of the sick person; however, it should always be remembered that the entire danger to, and from, the mentally ill that may occur by releasing them while they still require further institutionalization can be removed simply by our society treating these sick people properly. . . . For if repeated court decisions constantly remind the public that medical care in public mental institutions is inadequate, not only will the mentally ill be released from their mental prisons but, it is believed that public opinion will react to force the legislatures to increase appropriations sufficiently to make it possible to provide adequate care and treatment so that the mentally ill will be treated in mental hospitals."

That same month of May, 1960, an article appeared in the *New York Times* discussing Birnbaum's espousal of the right to treatment. Kenneth Donaldson, an inmate of Florida State Hospital at Chatahoochee since 1956, read the article and contacted Birnbaum, asking him to represent him in his efforts to obtain a release based on inadequate treatment. The release was finally secured in 1975, as a result of the landmark decision in *O'Connor v. Donaldson* (442 US 563, 95 S. Ct. 2486, 45 L. Ed.2d 396 (1975)). In this decision the supreme Court found that "a finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." (Ibid., p. 133) In addition the Court found that a State cannot confine a person to an institution solely to provide him with a standard of living higher than that he would have enjoyed outside of the institution. "In short, a State cannot constitutionally confine . . . a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." (Ibid.) The respondent had been confined for 19 years against his will, had asked to be released on numerous occasions (all denied by the hospital's superintendent), and there had also been undertakings by responsible persons to care for the petitioner outside the hospital (also denied by the superintendent). At trial it was found that the petitioner was dangerous neither to himself nor to others. The program at the hospital was found to be designed not to cure the patient but to keep him in a 'simple regimen of enforced custodial care . . . .'' (p. 132, Lockhart Supp.) Donaldson's release was ordered.

The *Donaldson* decision had two important components which need to be discussed separately. First, in it the U.S. Court of Appeals for the Fifth Circuit had held that a State may confine a person against his will in order to treat his mental illness under either of two justifications: "We reasoned that the only permissible justifications for civil commitment, and for the massive abridgments of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or to others, or the individual's need for treatment and care. We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided . . . ." (*Wyatt v. Aderholt*, 1312, reviewing the *Donaldson* decision) But this first justification, involuntary commitment in order to provide needed treatment, has been rejected generally by the Supreme Court of West Virginia in the matter of *Hawks v. Lazaro* (1974), which "held involuntary confinement in the patient's own 'best interest' unconstitutional" (Lawrence Tribe, *American Constitutional Law* (1978), p. 982, n. 11), and specifically by Chief Justice Warren Burger, in his concurring opinion in the *Donaldson* case. Burger held that the right to treatment for mental illness cannot be equated with a denial of due process for those who do not voluntarily submit to such treatment. While a mentally ill individual has the due process right to treatment for his illness, the State cannot involuntarily incarcerate that individual in order to provide treatment unless the patient is clearly a danger to himself and/or others.

The part of the Circuit Court's decision in Donaldson which stood was that ". . . where the justification (for involuntary commitment) was the danger to self or others, then treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of individuals' liberty" (*Wyatt v. Aderholt*, p. 1312). This extraordinarily piece of reasoning figured centrally in another pair of landmark decisions: *Wyatt v. Stickney* (344 F. Supp. 373 (1972)), and *Wyatt v. Aderholt* (503 F. 2d 1305 (1974)), a decision on an appeal of *Wyatt v. Stickney*).

The *Wyatt* decisions were the result of a class action suit brought on behalf of patients involuntarily confined for mental treatment purposes in Alabama mental institutions. "The case began . . . when a cut in the Alabama cigarette tax forced the state to fire 99 professional, subprofessional, and intern employees, at the Bryce Hospital, a state-run institution for the mentally ill . . . . The complaint alleged that the defendants had effected the staff reductions purely for budgetary reasons; that the discharges . . . had been accomplished without notice . . . ; and that as a result of the discharges the patients at Bryce would not receive adequate treatment." (*Wyatt v. Aderholt*, 1307) The complaint was later amended to question "the overall adequacy of the treatment afforded at the Alabama state mental hospitals." The plaintiffs requested that the court require that Bryce be operated “in a manner that . . . conform(s) to constitutional standards of delivering adequate mental treatment to its patients”; that the court order the preparation of a “comprehensive constitutionally acceptable plan to provide adequate treatment in any state mental health facility”; and that the court affirm that “patients confined to a state mental health facility are entitled to ‘adequate, competent treatment’.” The defendants alleged that there was no constitutionally guaranteed right to treatment and that the U.S. District Court therefore lacked jurisdiction in the case. The Court struck down this argument and followed Donaldson in affirming that a right to treatment for mental illness is found to be within the purview of the 14^{th} amendment: “patients ‘involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings’ are ‘committed for treatment purposes’ and so ‘unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition’.” (*Wyatt v. Aderholt*, 1308) The Court also held that the patients in Alabama mental hospitals were being denied their right to treatment, and it laid down detailed and complex standards for adequate care and treatment, ordering the state to provide (1) a humane physical and psych9logical environment; (2) qualified staff in numbers sufficient to administer adequate treatment, and (3) individualized treatment plans.

On appeal, Governor George Wallace argued that “the principal justification for commitment lies in the inability of the mentally ill and mentally retarded to care for themselves. The essence of this argument is that the primary function of civil commitment is to relieve the burden imposed upon the families and friends of the mentally disabled,” and inferred from this that the need for care, together with the burden that such placed upon families and friends, justified involuntary commitment for the purpose of custodial care. As Governor Wallace put it, “The families and friends of the disabled are the ‘true clients’ of the institutionalization system.”

The U.S. Court of Appeals for the Fifth Circuit decided this appeal in *Wyatt v. Aderholt*. The decision was, in essence, that (I) even in those cases where custodial care was all that could be provided the patient, due to the hopelessness of the patient’s condition, certain standards of custodial care had to be adhered to, and that those standards required that “where rehabilitation is impossible, minimally adequate habilitation and care . . . (be) beyond the subsistence level custodial care that would be provided in a penitentiary”; and that (ii) the “*quid pro quo*” argument in Donaldson applied to all cases where treatment was possible.

> . . . [W]e find it impossible to accept the Governor’s underlying premise that the ‘need to care’ for the mentally ill—and to relieve their families, friends, or guardians of the burdens of doing so—can supply a

> constitutional justification for civil commitment. At stake in the civil commitment context . . . are 'Massive curtailments' of individual liberty. Against the sweeping personal interests involved, Governor Wallace would have us weigh the state's interest, and the interests of the friends and families of the mentally handicapped in having private parties relieved of the 'burden' of caring for the mentally ill. The state interest thus asserted may be, strictly speaking, a 'rational' state interest. But we find it so trivial beside the major personal interests against which it is to be weighed that we cannot possibly accept it as a justification for the deprivations of liberty involved. (*Wyatt v. Aderholt*, p. 1313)
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> . . . [I]t is the essence of our holding, here and in Donaldson, that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone. (*Ibid.*)

Thus, as I understand this series of cases, including the Supreme Court's review of *Donaldson* and its implications for *Wyatt*, it is now the Curt's view that the 14th Amendment's due process clause requires that a person in need of treatment for mental disorder has a constitutional right to that treatment; but that right does not justify the state in incarcerating him for any reason against his will, including relief of the burden of care, except for the reason of protection of self or others from a clear danger posed by that individual; that right positively requires that one who is committed involuntarily because of the danger posed to self or others be provided treatment for that mental disorder which offers the chance for eventual restoration of liberty; only if the disorder is such (as in severe mental retardation for which neither education nor training can be efficacious) that treatment is inappropriate can mere custodial care be provided, and that only if certain standards for that care are met.

Case Analysis

As a philosopher and ethicist, I attempt to understand patterns of reasoning as expressions of broad, widely shared systems of concepts and beliefs. That a particular right claim is justified as issuing from the 14th amendment, or any other Constitutional element, is not of particular interest philosophically, unless that element in turn can be seen to be part of a broader scheme or view which has withstood the tests of our best reflections on moral philosophy. That is, it is of more than passing interest to me to see whether the claim of a right to psychiatric treatment can be justified s a moral right; if so, we will have a compelling reason not to consider the possibility of altering the Constitution so that such no longer stands as a constitutional right, even if the recognition and implementation of that right becomes burdensome upon us as taxpayers and as potential or actual members of families or circles of friends of mentally disabled persons.

I would like to begin this section of my remarks with a review of three ethical traditions that are implicit in the reasoning offered in this set of cases. The first tradition, or pattern of decision-making, that is involved is that of Utilitarianism. The Principle of Utility has a variety of formulations, but perhaps the most common one is this: We are obligated to make choices and act so as to maximize the welfare or happiness of the greatest number of individual persons. Under the utilitarian's patterns of reasoning, it is justifiable to limit individual freedom, and perhaps even to contribute to a particular individual's unhappiness, if doing so will produce the greatest increase in over-all happiness (or the least decrease in over-all unhappiness) of any alternative choice or way of acting.

It seems to me that this is the tradition which best captures the rationale behind Governor Wallace's argument. The mentally ill are unable to care for themselves; caring for a mentally ill person often taxes greatly the patience, lifestyle, resources, and happiness of families and friends; institutionalizing the mentally ill and providing for them by professional employees both relieves families and friends of the burdens of daily care and makes for a more manageable and safer environment for the mentally ill. The good of the greatest number, understood in terms of the over-all happiness that results, is better served by institutionalizing than by leaving individuals in private situations. On the other hand, for the state to provide more than custodial care is not an obligation, fur such is costly and thereby involves a commitment of personal resources, through increased taxation, that the general public may not be willing to make. Provided that the institutionalized can be cared for in a fashion that does not involve an increase in their suffering, and can be pacified and tranquilized and thereby kept reasonably content, the state is fulfilling its obligations as specifiable under a utilitarian pattern of reasoning.

The District Court of the 5th Circuit, however, seems to have been moved by some qualifying concerns. There is an element of the utilitarian's reasoning in their position that it is justifiable to institutionalize a person for his own good, in that this is an action seen to be justifiable under the duty to seek to maximize the good of the greatest number. However, the District Court held that depriving an individual of his freedom for his own good was permissible only if done for the purpose of restoring or developing in that individual the ability to live freely and autonomously. In the District Court's reasoning, it is permissible to serve the utilitarian maxim only if doing so is done in a just manner; where serving that maxim requires institutionalizing someone against his will, this is done justly only when that individual is provided with the opportunity to regain his freedom. Thus, the requirements of justice serve as limiting factors on what may be done in an individual's interests and in the general interest; but provided that the requirements of justice are served, it is permissible to institutionalize a person against his will, even if the only justification for doing so is that he needs treatment.

Such a position is called by ethicists a mixed deontological one; *deontological* because it places certain limits on what counts as a morally permissible action, which limits do not turn upon calculations of what is the best outcome but rather upon the manner and motive behind the actions; and *mixed* because within those limits, utilitarian reasoning is the determinant of what is morally permissible.

The Supreme Court has rejected both Governor Wallace's position and the position of the District Court, upholding in their stead a much more strongly deontological position. As I understand the Court's position, it is that a person may not be deprived of liberty involuntarily except when found guilt of a crime for which imprisonment is required as a penalty, or when that person is a danger to himself or to others due to impaired mental functioning. Furthermore, such incarceration is permissible in the case of the mentally ill (where no punishment is involved) only if treatment is provided the person while institutionalized that affords him the possibility of such improvement as will warrant restoration of liberty.

Perhaps the best encapsulated statement of the principle that underlies the Supreme Court's rulings in these cases was given by the German philosopher Immanuel Kant: The central maxim of morality, Kant maintained, was this: "Act so that you treat humanity (meaning all rational beings), whether in your own person or in that of another, always as an end and never as a means only." Kant thought autonomy, or rational self-control, was the defining characteristic of personhood so that his maxim may be seen as commanding always to respect the autonomy of persons. Since limiting a person's freedom by institutionalization against his will is a paradigm of infringement upon personal liberty and self-control, we may see the court of appeals and the Supreme Court as reasoning in the Kantian deontological manner in holding that one cannot be institutionalized against his will, except when to do so is the only way of preventing that individual from harming himself or others—that is from damaging his own autonomy or that of others. And it is justifiable to do so only if we are prepared to pay the *quid pro quo* price for such protection of providing these individuals the opportunity for restoration of autonomy afforded by state-of-the-art psychiatric treatment.

There are, of course, a number of questions that can be raised about this pattern of reasoning. I want, however, to turn to a passing remark made in the text of the Court's opinion in *Wyatt v. Aderholt*, for that remark may indicate both something further about the nature of this conception of a person with which the Courts are working, and something about how the Courts might rule in the case of a special class of institutionalized humans, those for whom there is no hope of the restoration or development of autonomy.

Recall that the Court of Appeals write: "Our express holding in *Donaldson* and here rests on the *quid pro quo* concept of 'rehabilitative treatment, or, *where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary*'" (my emphasis). How can we understand this excusing of the States from providing treatment "where rehabilitation is impossible," if the right to treatment is every person's right?

I suggest that the Court may have had in mind a conception of personhood under which to be a person means to be an individual with the capacity for autonomy, understood as either the ability to engage in rational self-control or at least the potential to develop that ability as the result of some treatment or process. This broad, partially dispositional conception of personhood is necessary, of course, to capture our intuitions that an unconscious person is still a person, that it is as wrong to kill a sleeping person as an awake one, that persons can suffer harms without being aware of them, that children are persons even though they so far lack rational capacities, and so forth. While a mentally ill person may well not be able to exercise rational self-control (indeed, such disability may be central to being mentally ill and in need of treatment), he is still accorded the status of a person because (we believe) he has the potential for rehabilitation—for restoration of that ability. And to the extent that a retarded individual has the ability to develop some degree of rational self-control, a retarded individual is accorded the status of a person. To be a person means, in part, to be accorded the right to self-determination; that right, the Court holds, may be infringed against one's will only to the extent that to do so is necessary to prevent one's exercise of self-control from either being self-destructive or harmful to others.

But is the implication for those who cannot be rehabilitated? Being so classified implies a judgment that one is not possessed of the capacity or potential to become autonomous. But one who lacks the potential to become autonomous falls into a different category than that of persons—in other words, is not a person. Not being a person, such an individual is not accorded those rights that are peculiarly reserved to persons, but presumably is accorded those rights that are his generally as a sentient being. I understand this portion of the Court's opinion as holding that such non-persons are entitled, not to treatment of a psychiatric nature (we ought to treat only those who can benefit from treatment), but is rather entitled to a level of care that is not punitive, not painful, and does not make for a life of suffering. This is the same duty that we have to non-human animals, be they pets, laboratory rats, cattle, rodeo beasts, or animals in the wild; it is the duty to be humane.

To summarize, then, I understand the courts as holding implicitly that we have a Constitutional and moral duty to provide psychiatric treatment aiming at rehabilitation whenever we involuntarily commit a mental or retarded patient, to the extent that rehabilitation is possible. Where rehabilitation is not possible, that is, where it is not possible to restore or develop in an individual the ability for rational self-control, such an individual falls out of the class of persons so entitled and into another class of beings entitled only to humane treatment.

Prognosis

I believe that this interpretation of the reasoning of the Courts is plausible, and that if correct, points the direction to important developments and refinements in the law of one of the most central concepts we have—that of the person. Whether the Courts will follow in the direction indicated is, of course, another question. But I should like to indicate some of the important implications that I find in this interpretation.

1) Along with the right to treatment, one of the rights most hotly debated in philosophical, jurisprudential and legislative circles in recent years is the right of persons not to be subjected to experimentation that is non-therapeutic, without first obtaining their informed consent. Such a right has not been generally recognized as holding for non-human animals. Does the reclassification of some humans out of the class of persons and into the class of beings entitled only to humane care make of them permissible subjects for non-therapeutic experimentation, at least with the consent of guardians?

2) The laws in New York State that apply to institutions for the retarded, particularly for retarded children, require that education be provided for each and every such patient. Given that such patients include among them those which under the Court's understanding of the term are not persons, what is the rationale of such a law? Even if the law operates under a general maxim such as "education to each according to his need," the maxim is intended to apply to persons. Is it a consistent policy to require education for the ineducable and not require treatment for the untreatable? If the constitutional ground (perhaps under the equal protection clause of the 14th Amendment) for education of the severely retarded non-person were undermined, would such state laws requiring such educational efforts survive the pressures of competition for tax dollars?

3) Perhaps the most sobering associated issue is that of the question of whether the non-person human has a serious right to life. We are all aware of the early practices in Nazi Germany of wholesale killing of the insane and retarded. Given that we may well differ over the question of where the line is to be drawn between the person and the non-person, once the line has been drawn, is the practice of providing a quick and painless death for humans who are not and can not become persons, morally indefensible, particularly when the costs of even custodial care are extremely high and the numbers of such individuals are increasing as a result of our ability to preserve and prolong lives that would formerly have been rather short?

Such disturbing questions must be squarely faced if we are to develop and apply the concept of a person—a potentially or actually autonomous individual in whom we collectively recognize a set of rights extending beyond those of other beings—differentially among members of our species (and perhaps other species as well). The courts have taken a large first step in such differential applications of the concept; it remains to be seen whether history records it as a step forward or not.

(The following letter was received by the author a few weeks after the talk.)

July 21, 1978
(address withheld)

Dear Dr. Hull,

Thank you for sending me a copy of your talk given at B. P. H. I have read and re-read it with interest.

It has particular relevance for us at the West Seneca Developmental Center right now, for we are faced with "Criteria C" of the Intermediate Care Facilities (ICF) Medicaid Guidelines.

We are being told that those residents who are unrehabilitatable are inappropriate for continued stay here. If we cannot prove progress within the past year, they belong in a Skilled Nursing Facility (SNF). This approach seems to be a step backward to a pure custodial placement for those who are hopeless, even though it is premised on more effective use of staff, availability of treatment, etc.

The Psychologists on the staff here are asked: 1. To set up and document the programs, 2. Indicate progress or lack of it, and 3. Play a major role in deciding those "persons" ineligible for continued stay. We're on the firing line of your Kantian maxim—and find it most uncomfortable.

So the distress caused by your inevitable conclusion is exacerbated by the realization that it is occurring in actuality and to us. And this social reality is in full conflict with our moral and ethical sense.

No one who has read your paper likes your conclusion—but they have to admit that it is happening in reality. The question I get is: "Can't he find a different model so that the results won't be so terrible?"

Thanks again for sending me a copy of your paper.

Sincerely yours,

(Name withheld)