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Law & Psychiatry at BIDMC

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Force & the Therapeutic Alliance

> "The psychodynamics of a patient's refusal of treatment are as legitimate a topic of therapeutic investigation as the matters that brought the patient to the hospital. . . . At times, the legal atmosphere surrounding the right to refuse treatment can obscure the fact that refusal is, at base, far more nearly a psychological problem than a legal one; the clinician must attend to the issue in treatment. In particular, clinicians must actively resist the temptation to shift immediately into an adversarial role and to invoke too readily the legal mechanisms for processing treatment refusal cases before careful clinical exploration has taken place."[1]

Compare with:

> Q Okay, thank you. Now, in your affidavit, you say involuntary treatment should be difficult to implement and used only in the direst of circumstances. Could you explain why you have that opinion?
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> A Well, it's just, you know, the degree to which you have to force people to do anything is the degree to which it's going to be very difficult to forge a good therapeutic relationship. And in the field of psychiatry, it is the therapeutic relationship which is the single most important thing. And if you have been a cop, you know, that is, some kind of a social controller and using force, then it becomes nearly impossible to change roles into the role -- the traditional role of the physician as healer advocate for his or her patient. And so I think that that -- we should stay out of the job of being police. That's why we have police. So they can do that job, and it's not our job. Now, if because of some altered state of consciousness, somebody is about to do themselves grievous harm or someone else grievous harm, well then, I would stop them in whatever way I needed to. I would probably prefer to do it with the police, but if it came to it, I guess I would do it. In my career I have never committed anyone.. . . I make it my business to form the kind of relationship that . . . we can establish an ongoing treatment plan that is acceptable to both of us. And that may you avoid getting into the fight around whatever. And, you know, our job is to be healers, not fighters.
>
> Q Now, you say you've never committed anybody. . . . [H]ave you had a lot of experience with people with schizophrenia?
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> A Oh, dear. I probably am the person on the planet who has seen more acutely psychotic people off of medication, without any medications, than anyone else on the face of the planet today. . . . Because of the Soteria Project that we did for 12 years where I would sit with people who were not on medications for hours on end. And I've seen them in my private practice, and I see them to this day in

[1] P. 97 *Clinical Handbook of Psychiatry & the Law*, P. Appelbaum & T. Gutheil (Lippincott 2007)

my now, very small, private practice. . . . I find that people who are psychotic and not medicated are among the most interesting of all the customers one finds.[2]

Standard of Care Does Not Equal Right to Force

"But the issue is not one of medical competence or expertise. As we have already seen, the right at stake here-the right to choose or reject medical treatment-finds its source in the fundamental constitutional guarantees of liberty and privacy. The constitution itself requires courts, not physicians, to protect and enforce these guarantees. Ultimately, then, whether Myers's best interests will be served by allowing the state to make a vital choice that is properly hers presents a constitutional question; and though the answer certainly must be fully informed by medical advice received with appropriate deference, in the final analysis the answer must take the form of a legal judgment that hinges not on medical expertise but on constitutional principles aimed at protecting individual choice."[3]

Involuntary Commitment

Constitutional only if:

1. Confinement takes place pursuant to proper procedures and evidentiary standards,
2. Finding of "dangerousness either to one's self or to others,"
   - Incapable of surviving safely in freedom,[(4)] and
3. Proof of dangerousness is "coupled ... with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'[5]

Forced Drugging (Best Interests/*Parens Patriae*)

Constitutional only if Court concludes:

1. Important governmental interests are at stake,
2. Will significantly further those state interests - substantially unlikely to have side effects that will interfere significantly (with achieving state interest),
3. Necessary to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results, and
4. Medically appropriate, i.e., in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.[6]

What if the Protesting Patients are Right?

- Drugs don't work (for them) and harmful.
- No brain defect.

Are Psychiatrists Providing Accurate Enough Information to Obtain Informed Consent?

- Drug Companies Have Been Providing Cover?
- About to Change?[7]

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[2] Loren R. Mosher, MD's testimony in *Myers v. Alaska Psychiatric Institute*, emphasis added

[3] *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 250 (Alaska 2006)

[4] *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 1383 (1996)

[5] *Kansas v. Crane*, 534 U.S. 407, 409-10, 122 S.Ct. 867, 869 (2002).

[6] *Sell v. United States*, 539 U.S. 166, 177-8, 123 S.Ct. 2174, 2183 (2003) (competence to stand trial case).

[7] *See*, Psychiatrists' Failure to Inform: Is There Substantial Financial Exposure?, by James B. Gottstein, Esq., *Ethical Human Psychology and Psychiatry*, Vol 9, No. 2, 117-125 (2007).