

Key ethical concepts in the justification of compulsory detention and treatment

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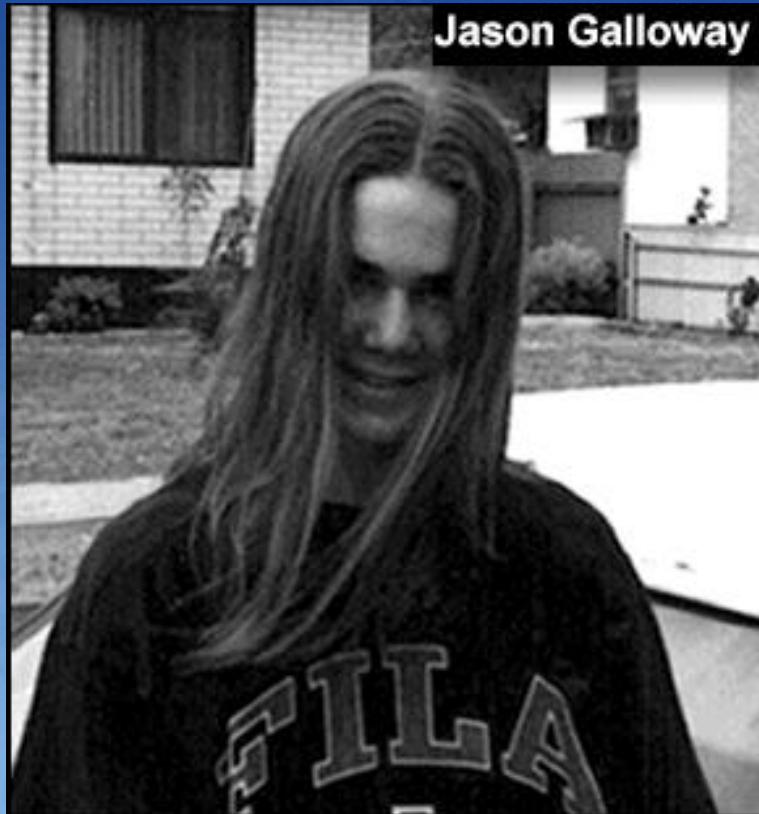
DIVISION OF HEALTH SCIENCES



Key concepts

- Maximise liberty
- First of all, do no harm
- Nurture autonomy and recovery
- Prevent harm to self
- Prevent harm to others
- Consistency and fairness

Liberty



- Fears the local bikie gang
- Tapping his phone, listening devices
- Hearing voices, telling him to self-harm
- 'Detained' for assessment and then treatment
- Coerced into going to the hospital
- Clearly his liberty has been constrained
- This appears justified, which concepts are in play?

Liberty: minimise deprivations

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action

MCA 2005 1/6

(b) mental health services should be provided on a voluntary basis as far as possible, and otherwise in the least restrictive way and in the least restrictive environment that is consistent with their efficacy and public safety, and at places as near as practicable to where the patients, or their families or other carers of supporters, reside;

South Australia Mental Health Act 7/1 (b)

First of all, do no harm

- Jason?
- Harms of coerced and compelled treatment (Szmukler 2015)(Szmukler and Appelbaum 2008) (Nyttingnes, Ruud et al. 2016)(Geller, Fisher et al. 2006)
- Mental Capacity Act 2005, Deprivation of Liberty Safeguards

Nurture autonomy and recovery

(a) mental health services should be designed to bring about the best therapeutic outcomes for patients, and, as far as possible, their recovery and participation in community life;

South Australia Mental Health Act 7/1 (a)

Autonomy as a therapeutic end in mental health,
an aim for Jason

Harm to self and harm to others

36. Detention of certified patients

(1) If-

- (a) a patient liable to be detained in a mental hospital (otherwise than under this section) or in the Correctional Services Department Psychiatric Centre; or
- (b) a voluntary patient in a mental hospital, has been examined by 2 registered medical practitioners either separately or together and the 2 registered medical practitioners are of the opinion that -
 - (i) the patient is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in hospital; and (Amended 81 of 1997 s.28)
 - (ii) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section.

(Mental Health Ordinance, HK)

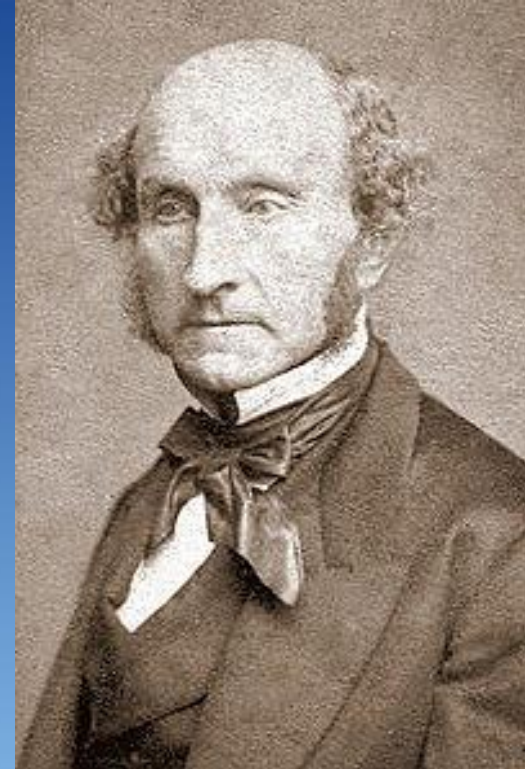
Harm to self: SA MHA 2009

21.1 —Level 1 detention and treatment orders

- (a) the person has a mental illness; and
- (b) because of the mental illness, **the person requires treatment for the person's own protection from harm (including harm involved in the continuation or deterioration of the person's condition)** or for the protection of others from harm; and
- (c) there is no less restrictive means than a detention and treatment order of ensuring appropriate treatment of the person's illness.

Harm to self: the harm principle

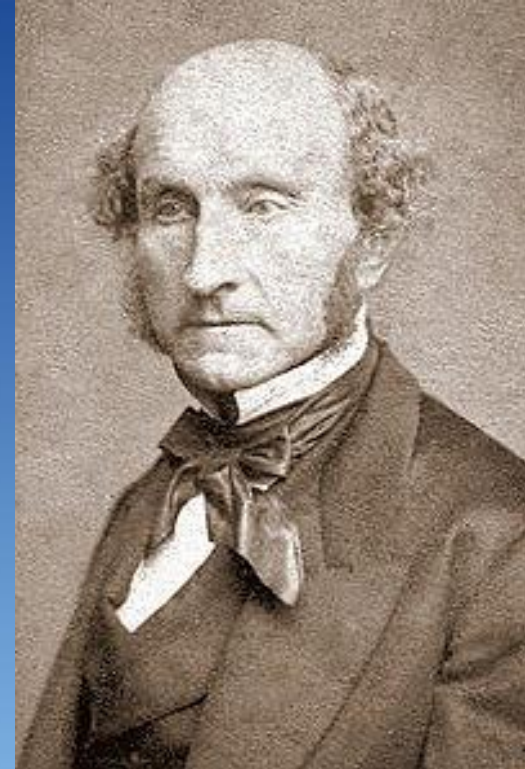
“...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. That the only purposes for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. **His own good, either physical or moral, is not a sufficient warrant...**



John Stuart Mill *On Liberty*

Harm to self: maturity of the faculties

“It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. **Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury...** as soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion ... compulsion...is no longer admissible as a means to their own good, and justifiable only for the security of others.



John Stuart Mill *On Liberty*

Harm to self and justifying compulsion or coercion

Compulsory mental health treatment for that person's good requires that there is an appropriate balance between:

- involuntariness or the degree of nonvoluntariness, and
- the probability of improving that patient's autonomy and wellbeing, once the harms of coercion and compulsion are factored in.

Harm to self: NZ MHA 1992, S2

mental disorder, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, **of such a degree that it** –

- (a) poses a serious danger to the health or safety of that person or of others; or
- (b) seriously diminishes the capacity of that person to take care of himself or herself.

Harm to others

36. Detention of certified patients

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(Mental Health Ordinance, HK)

Michael Stone (UK)

- Murdered Lin and Megan Russell in 1996
- Daughter Josie survived the attack
- Anti-social personality disorder
- Had been turned away from services because he was 'untreatable'
- The catalyst for law reform and new institutions in the UK.



<http://www.michaelstone.co.uk/>



Stewart Murray Wilson, aka “The beast of Blenheim” (NZ)

- Probably psychopathic
- Convictions for child sexual abuse, robbery, bestiality
- Most of his life in jail, claimed he had been given no therapy
- Poster boy for the NZ Public Safety (Public Protection Orders Bill) 2014

Releasing the Beast of Blenheim

Last updated 06:42 08/04/2012



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FAIRFAX NZ

PUSHING FOR CHANGE: With Stewart Murray Wilson, left, facing release from prison in five months, Justice Minister Judith Collins is scrambling to change the law.

Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand

November 2014

Associate Professor Colin Gavaghan

Dr Jeanne Snelling

Professor John McMillan



PCL-R

F1 interpersonal and affective

Interpersonal

1. Glibness/superficial charm
2. Grandiose sense of self-worth
4. Pathological lying
5. Conning/manipulative

Affective

6. Lack of remorse or guilt
7. Shallow affect
8. Callous/Lack of empathy
16. Failure to accept responsibility

F2 socially deviant lifestyle

Lifestyle

3. Need for stimulation
9. Parasitic lifestyle
13. Lack of realistic, long-term goals
14. Impulsivity
15. Irresponsibility

Antisocial

10. Poor behavioral controls
12. Early behavioral problems
18. Juvenile delinquency
19. Revocation of conditional release
20. Criminal versatility

Public Safety (Public Protection Orders Bill)

13(2) The court may not make a finding of the kind described in subsection (1)(b) unless satisfied that the respondent exhibits a severe disturbance in behavioural functioning established by evidence of the following characteristics to a high level:

- (a) an intense drive or urge to commit a particular form of offending:
- (b) Limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties:
- (c) Absence of understanding or concern for the impact of offending on actual or potential victims:
- (d) Poor interpersonal relationships or social isolation or both

Harm to others

- How much harm? Analogy with public health?
- Harm to others justification doesn't require that there be any degree of nonvoluntariness.
- In a MH context, nonvoluntariness probably is weighed as a factor
- Requires that there is an appropriate balance between:
 - the probability and severity of the risk, whether the patient's autonomy and wellbeing will be improved, once the harms (length!) of coercion and compulsion are factored in.
 - Personality disorders?

Consistency and fairness: the scope of treatment

Treatment for mental illness

- Limits scope of incursion upon liberty
- Strengthens link between the kind of illness and the kind of treatment
- Implies mental illness is different from other causes of diminished responsibility

NZ MHA 1992, UK MHA 1983

Medical treatment

- Implications for role of psychiatry
- Quicker way of legally justifying treatment when responsibility is diminished
- Broader scope increases potential for misuse

South Australia MHA 2009,
Mental Health Ordinance HK?

Consistency and fairness: Re C[1994] (UK)

- 68 y.o. man
- Grossly infected leg with a necrotic ulcer covering the whole of the dorsum.
- In-patient for 30 years, last 6 in an open ward of the parole house
- Chronic paranoid schizophrenia. Grandiose and persecutory delusions, incongruity of affect.
- Delusions did not include the belief that his present condition was caused by his carers.
- Believed that he was world famous surgeon.
- Complete confidence in his ability to survive with the aid of God
- Knew that he would die but thought that this would not be caused by his foot.
- A surgeon advised amputation below the knee and assessed the chance of survival with conservative management as 15%
- C wanted an injunction against the hospital to prevent them removing his leg without his consent

Consistency and fairness: Re C[1994] (UK)

- Should MHAs include a capacity test?
- Once we have capacity legislation, why make mental illness a special case?

Consistency and fairness: how illness is defined

Victoria MHA 2014

“...***mental illness*** is a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.”

NZ MHA 1992

“**mental disorder**, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition,...”

Consistency and fairness: how illness is defined

UK MHA 1983

...“mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorders and any other disorder or disability of mind and “mentally disordered” shall be construed accordingly;”

SA MHA 2009

“mental illness means any illness or disorder of mind...”

Mental Health Ordinance

““mental disorder” means –

- (a) mental illness;
- (b) A state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;
- (c) psychopathic disorder; or
- (d) Any other disorder or disability of mind which does not amount to mental handicap,

Consistency and fairness: Objective verses subjective criteria

NZ MHA 1992

mental disorder, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it –

- (a) poses a serious danger to the health or safety of that person or of others; or
- (b) seriously diminishes the capacity of that person to take care of himself or herself.

MCA 2005

(1) If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if –

- (a) Before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
- (b) When doing the act, D reasonably believes –
 - (i) That P lacks capacity in relation to the matter, and
 - (ii) That it will be in P’s best interests for the act to be done.

References

Mental Health Ordinance Hong Kong

England and Wales (1983) Mental Health Act

England and Wales (2005) Mental Capacity Act

New Zealand (1992) Mental Health (Compulsory Assessment and Treatment) Act

State of South Australian (2009) Mental Health Act

State of Victoria (2014) Mental Health Act

Geller, J., et al. (2006). "Involuntary outpatient treatment as 'deinstitutionalized coercion': The net widening concerns." International journal of law and psychiatry **29**: 551-562.

McMillan, J. (2013). Psychiatric Ethics. International encyclopedia of ethics. H. LaFollette. Malden, MA, Wiley-Blackwell: 4186-4195.

Mill, J. S. (2003). Utilitarianism and On Liberty: including Mill's essay on Bentham. Malden, MA, Blackwell Publishing.

Nytingnes, O., et al. (2016). "'It's unbelievably humiliating" Patient's expressions of negative effects of coercion in mental health care." International journal of law and psychiatry **49**: 147-153.

Szmukler, G. (2015). "Compulsion and "coercion" in mental health care." World Psychiatry **14**(3): 259-261.

Szmukler, G. and P. Appelbaum (2008). "treatment pressures, leverage, coercion, and compulsion in mental health care." Journal of Mental Health **17**: 233-244.