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Some reflections on liberty: Bruce Winick's '*Civil Commitment: A Therapeutic Jurisprudence Model*'

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Mini Biography: James Gray joined Northumbria University Law School in Newcastle-upon-Tyne in 1999. His first degree was in Philosophy at the University of Liverpool, the origin of his interest in jurisprudence, which led later to a law degree at the University of Kent and to his becoming a barrister in 1997. Pupillage at the Chambers of Antony Shaw QC was followed by a year working at the Tax Law Rewrite Project. Now a Principal Lecturer at Northumbria, James teaches jurisprudence and a number of subjects on the Bar Vocational Course. His particular interest in legal theory is in its development as part of the history of ideas. His research interests are in law and literature, the political aspects of legal theory and the jurisprudential possibilities of subjects normally seen as marginal such as anarchism and love.

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Abstract:

In the United States, involuntary hospitalisation of the mentally ill through the civil commitment process results in a curtailment of the fundamental liberty interest of freedom from external restraint; part of the constitutional guarantee. Apart from the loss of freedom through physical confinement, the labelling that inevitably accompanies commitment can give rise to significant social stigma and restricted life chances. In the last fifty-years, the power of doctors to commit on a best interests basis has been replaced by a legal process in which the grounds for involuntary hospitalisation have been restricted and the rights of patients prioritised. The problems inherent to both models have led to the development of therapeutic jurisprudence in which the therapeutic possibilities of law and the legal process are studied with the aim of optimising the therapeutic outcomes of commitment. Any model of involuntary hospitalisation necessarily gives rise to basic philosophical and political questions about the nature of individual liberty, of freedom and of the relationship between the individual and the state. As historically contingent concepts, what meaning can be attached to them and the goal of striving for a better balance in the context of the mentally ill between freedom and coercion?

Some reflections on liberty: Bruce Winick's '*Civil Commitment: A Therapeutic Jurisprudence Model*'

In Alan Bennett's play *The History Boys*, Irwin, a sixth-form history tutor destined for a media career (based, it is rumoured, on that specialist in historical controversy Niall Ferguson) sets out his views on how a difficult change in the law that will affect individual rights should be dealt with. The tactic Irwin advocates is for the Government to insist that the new Bill, rather than reducing the liberty of the subject "amplifies it." The use of paradox, notes Irwin, "works well ... the loss of liberty is the price we pay for freedom type thing." (Bennett 2004, 3).

Thus, in a few sentences, Bennett encapsulates one of the greatest, or, at least, what we in the West have come to think of as one of the greatest, of political questions of this or of any time; the contest between liberty and restraint, between force and freedom – how best to govern so as to maximise (individual) liberty? What is memorable about the passage is that Bennett achieves this in terms at once familiar and, importantly, mystifying. Note that the sentence works as sophistry only because the word "freedom" is substituted for that of "liberty", as if the two were conceptually separable. Indeed, there is paradox in the simple sense of contradiction only if the terms share a common meaning. At the same time, our sense of the ambiguity of the terms allows for an alternate, more complex sense of paradox, of that which appears to be nonsensical but which is actually possible or true. This causes us to hesitate. If the terms really do express different concepts, *could* one increase freedom by reducing liberty? Isn't there, anyway, a part of us that intuits that freedom must somehow be a limited thing, that freedom cannot be absolute for, if it were, what meaning would it have? If limited, what are its limits and what is the nature of any

constraints? Then again, if the terms cannot be differentiated, is there a single definition that we could agree on? If so, might this not then be subject to multiple interpretations – interpretations as to how freedom is to be realised – each dependent on differing sets of values, values that might also change over time? Moreover, even if we were to agree on a meaning, is freedom necessarily a good thing as seems usually to be assumed? Come to think of it, didn't someone once write a book telling us that, having abandoned God, we are naturally afraid of freedom and try to escape it?

Amused by the satire, we are left uneasy by the thought that perhaps, in the mouths of politicians, the terms have been rendered meaningless: the political gold of the post-Enlightenment Klondike long since beaten to transparency by the claims of countless, frequently contradictory interests. Perhaps. But liberty and freedom, whatever the terms may mean, remain at the centre of Western political philosophy and of liberal law – most obviously so American law. Undeniably essential elements of the “grand narrative” of our system of democracy, fundamental components of Western dreamtime, *the* central tenets of our creation myth and, despite the odds, rather like a certain much overused four-letter Anglo-Saxon expletive, terms that remain imbued with extraordinary power, with emotional resonance, perhaps most strongly so – another paradox – when we genuinely don't know what they mean.

But let's clarify for a moment and take philosophical stock (except grammatically in the sense of permission) the terms are not distinguishable, formal definition is possible (although how many types of liberty is still debated) – rather, it is the differing means of achieving liberty that give rise to confusion and argument (contrast for a moment laissez-faire libertarian individualism, in which liberty is essentially an expression of economic choice and private ownership, and Marxism

where liberty is a function of consciousness raising: we become free by understanding that we are determined. “He has most toys wins” versus the inevitability of historical materialism

). This is a problem. Indeed, because liberty remains *the* concept of our times it is arguably also *the* problem of our times. One man’s freedom fighter is another man’s terrorist type thing ...

It is arguable that of all areas of black letter law, that governing mental illness forces us to consider problems of liberty in the most searching of ways. It is the area most obviously concerned with both the outward and inward, what are sometimes called the interpersonal and intrapersonal, senses of liberty and their loss.ⁱ For example, mental illness that renders one incapable of making decisions or of self-mastery as compared to physical restraint, incarceration and enforced treatment decisions. But there are other reasons too. Whatever the truth of such perceptions or our devotion to rational and dispassionate assessment, there is no escaping the fact that mental health law has baggage: the mistakes of the past, an abiding sense that much mental illness is not well understood, the horror of labelling and dread of losing one’s identity. Overlaying these is the fact that apart from crime, mental health is the one aspect of behaviour that can lead to incarceration (and much else) most often through no fault of the individual. Arguably, it is the involuntary aspect of interaction between the individual and the state – coercion absent fault – with all its implications for the preservation of *liberty* that gives most alarm; the double sense in which my being free necessitates being myself.

In his examination of involuntary commitment in the United States, Bruce Winick offers an eloquent challenge to the currently dominant legal model by arguing the cause of therapeutic jurisprudence. For those unfamiliar with the term, therapeutic

jurisprudence is a multi-disciplinary approach (involving psychology and the social sciences) that seeks to reveal both the anti-therapeutic and therapeutic effects of law, its institutions and legal actors with a view to law reform. Thus, in Winick's text, jurisprudence is applied both in its empirical sociological sense and as conceptual analysis and clarification. In respect of commitment, the aim of therapeutic jurisprudence is to promote a more balanced approach than that achieved either by the medical model that dominated prior to the 1960's or the legal model that followed it. As what he terms a "scholarly approach", Winick is at pains to stress that the goal is to facilitate, where suitable, greater harmony between medical and legal considerations so that therapeutic outcomes are improved (Winick 2005, 7). To move away, in other words, from a situation in which a presumption is made that either medical or legal considerations must necessarily be privileged. The greater part of the book is thus dedicated to detailed and extensive consideration of the law and practices relevant to civil commitment and the ways in which therapeutic jurisprudence might helpfully be brought to bear upon them. Much of this discussion is quite dense and is obviously informed by an expert understanding of three key aspects: the law, practice and the professional literature. For example, Chapter 4, dealing with incompetency and how it should be defined and determined, is an impressive treatment of all three aspects and ends by arguing for the adoption of a presumption of competence in line with present American trends and the precepts of therapeutic jurisprudence. What is welcome, particularly in an American text, is Winick's application of his subject to a consideration of international human rights and their implications for involuntary treatment.

Throughout, the footnoting demonstrates not only Winick's wide research base but also his substantial contributions to the area of mental health law. Indeed,

some might buy the book for the footnoting resource alone. It must be said too that, despite the density of information, Winick's writing style is very easy. It is a function of his understanding of the issues that Winick is able to present them so clearly and palatably. Moreover, despite its scholarship, this is a book suitable to a wide range of professionals; on the whole, no one need fear that a lack of particular expertise will confound their understanding – nearly everything that requires explanation receives it. The only caveat for a non-American readership is that although Winick's discussion of case and statute law is admirably clear, some procedural knowledge of the American legal system might prove helpful.

The success of the book's construction and execution is marred only by some unevenness. In seeking comprehensiveness in his treatment of the subject and to apply therapeutic jurisprudence to all key areas of civil commitment, an essentially scholarly approach might be expected to fit a little awkwardly with the more practical aspects of the legal process. An example is a section discussing the role of counsel in Chapter 6 that deals with the application of civil commitment criteria. Although espousing much good sense, one cannot escape the thought that some of what Winick says here should (one hopes, *would*) occur to any sensitive and dedicated practitioner working in the field, even in other fields. The tone in places appears slightly unfortunate; that the patient should not be treated as invisible, that language should avoid professional jargon, that a sense of optimism should be conveyed and that the judge should convey the *impression* that what the patient has said is important, may be observations of best practice but carry overtones of the paternalistic, even of mild condescension, that one imagines the therapeutic approach should strive to avoid. However, an alternative reading would be to take these recommendations at face value. It is clear from many of Winick's observations that the standard of mental

health advocacy and procedure in the United States is sometimes very questionable: the level of detailed commentary in Winick's account suggests just *how* questionable.

Those familiar with American legal theory will know that the attempt to understand law through consideration of legal practice, clinical legal education and the beginnings of sociological jurisprudence are all traceable to American legal realism. Not for nothing that the phrase, "we are all realists now" is repeated still in the law schools of American universities. It is not too fanciful to say that elements of therapeutic jurisprudence might have very distant connections with such works as Jerome Frank's *Law and the Modern Mind*, a realist work born from Frank's long period of psychoanalysis (Frank, 1930). However, rather than merely drawing disputable equivalences, the more serious point, one that takes us back to the discussion of liberty, is to recognise that legal theory can be viewed as part of the history of ideas, ideas not necessarily limited to those subjects most directly connected with law. The realists recognised that the modern university law school offered opportunities to draw on established academic disciplines like history and philosophy as well as new disciplines such as anthropology and psychology in the analysis and teaching of law and by so doing invented the multi-disciplinary approach to legal education. The inheritors of that tradition in the United States, the critical legal scholars of the 1980's, were able to draw more widely and in a more sophisticated way on other disciplines to support one of their central contentions: that law is a disguised expression of power. Much of the analysis of CLS scholars fed on the idea that the Western legal tradition was riven by a series of contradictions. The best known of these, the so-called fundamental contradiction, was framed by Duncan Kennedy, "most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the

communal coercive action that is necessary to achieve it.” (Kennedy 1979, 211) Although overtaken by later postmodernist argument and abandoned by Kennedy himself, the idea, of conflict between liberty and its preservatory mechanisms and of law’s function as mediator of that conflict – as “smoother-over” of cracks in the fabric of society – remains relevant. At the very least it reminds us of the need, in the context of liberal legal theory, of a developed understanding of the concept of liberty, of its history and relationship with other ideas as well as of its philosophical basis.

Winick begins his book by stressing the importance at least, of one conception of liberty, “Civil commitment imposes on those subjected to it a deprivation of the fundamental liberty interest in being free of external restraint.” (Winick 2005, 1) Elsewhere, Winick refers both to liberty and self-determination. Throughout the book, there is considerable and helpful reference to the constitutional framework for liberty, a concept which, as part of the Declaration of Independence of the United States, had its origins in natural rights theory. Unsurprisingly, Winick is not insensible to the need to examine the philosophical component in more detail. In Chapter 2, we find a footnote referencing an article by Winick, *On Autonomy: Legal and Psychological Perspectives* written in 1992 (Winick, 1992). The first part of the article, *Autonomy in Legal and Political Theory*, deals in part with philosophical foundations before resolving into a discussion of how the principle of autonomy was incorporated into legal doctrine through the constitutional principle of due process. The philosophical section initially describes a familiar descriptive arc: discussion of Lockean natural rights and their use by Jefferson, the creation of the Constitution and the Bill of Rights is followed by consideration of consequentialism (Mill, Bentham) and deontological theory (Kant). The only link offered by Winick between discussions of constitutionalism and the later philosophical commentary is that the

notion of individual autonomy “is at the core of two major ethical traditions in modern Western philosophy” (Winick 1992, 1712). This historical overview thus offers us two conceptions of liberty. Mill’s self-determination (autonomy) and the idea of the core of privacy into which the state cannot intrude, and Kant’s principle of individuals as ends in themselves. The latter is a Pandora’s box raising a number of difficulties, not least the fact that the fragmentary Kantian conception of personhood sits rather uncomfortably with the stable liberal individual of modernism. More than this, part of what we derive from Kant takes us back to the kinds of problem with which we began: how to be free when we are not free? In the conclusion to the article Winick reflects on the limitations of our idealised model of individual autonomy as “inconsistent with psychological realities and largely artificial” (Winick 1992, 1769). More than this, Winick explicitly acknowledges many of the ways in which the liberal circle must somehow be squared: the conflict between individualism and interdependence, the difficulty of drawing a boundary between individual choice in the pursuit of happiness and the role of the state. About all of this Winick takes a pragmatic view, the political conception of the rational individual as decision maker is “a useful foundation upon which to base a legal system” (Winick 1992, 1769). The paradox here of course is that whilst liberalism insists on us being free, distinct individuals, liberal law, through the concept of formal equality, aims to treat us as all the same.

American history provides us with a wealth of examples of the ways in which conceptions of liberty and the value and possibilities of self-determination shift in response to economic, political and sociological factors, a phenomenon to which psychiatry has, arguably, also contributed. Consider for a moment the complex interplay, argued for in a recent documentary, between the work of R D Laing and D

L Rosenhan in discrediting conventional psychiatry, the influence of the Austrian School of Economics through the work of Frederick von Hayek, Robert Nozick's libertarianism, game theory, the development of public choice theory and the challenge to state institutions and the notion of the public good, all of which helped bring about a new emphasis on individuals conceived as rational and self-interested consumers in which the market, once again, became pre-eminent: more, some felt, a tumbling backwards into the 18th century than a leap forward into the 21st (Curtis, 2007).

The purpose of these reflections is to help, in a very limited sense, not to answer but to throw light on the question posed at the start – how best to govern so as to maximise liberty? A question that at one level, trusting Winick will forgive this rather crude act of reductionism, is that at which his work is aimed. The central difficulty in addressing it is that liberalism is an ideology of extraordinary complexity – for one thing, its capacity for containment of dramatically contradictory positions defies attempts to delineate it satisfactorily. Consider for a moment that the work of Nozick in *Anarchy State and Utopia* is celebrated by right-wing liberal adherents to an extreme form economic individualism which perceived taxation as a form of slavery and is intolerant of anything more than the night-watchman state (psychologically potent for country which perceives a strong divide between the public and private law), whilst at the same time it is decried by left-wing liberals who believe in establishing state mechanisms for the achievement of social justice and substantive equality. A commitment simply to liberty can only serve to raise a whole series of associated questions. At best we may say that, “the metaphysical and ontological core of liberalism is individualism”, and thus a point of agreed value amongst liberals (Arblaster 1984, 66). To this we must add respect for freedom. As

suggested above, one facet of the genius of liberalism has been to accommodate wildly different conceptions of how freedom is to be achieved and to find the means to mediate between them. What it really means to be self-determining or free from external restraint in our society is open to debate.

To return to Irwin's quip that the loss of liberty is the price we pay for freedom, we might, with due caution, now attempt a different reading: that in seeking to remove freedom we must act so as to maximise the chances of preserving it. That this is *not* a paradox is something we can valuably learn from Bruce Winick's powerful exposition of therapeutic jurisprudence, that we can accept the use of the term "freedom" as meaningful is something we must attribute to the genius of liberalism.

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ⁱ For a helpful treatment of different conceptualisations of freedom see: Gray, T., *Freedom*, 1991, Humanities Press International. Gray's argument is that there is, contra Isaiah Berlin who, in particular, made famous the idea of positive and negative liberty, only one definition of liberty (a value free definition) but many different (value laden) conceptions.