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Does Competency Matter after Charters?

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Does competency matter after *Charters*?

by Michael L. Perlin

The en banc *review*

While *Charters I* was *like* contemporary state cases involving civilly committed patients (such as the New York Court of Appeals's *Rivers v. Katz* decision), it was clearly a far cry from most of the decisions that dealt with individuals committed pursuant to the filing of criminal charges. Had the panel decision stood, there is no question that it would have altered significantly the body of law applying to this universe of patients. Thus, when the fourth circuit granted *en banc* review, it was reasonable to draw the inference that it was not simply to affirm—*in toto*—the panel's truly groundbreaking decision.

It did just the opposite: it vacated the panel decision and remanded the case to the district court for further proceedings in accordance with its opinion, holding that the district court had correctly determined that Charters's interests were adequately protected by the exercise of the professional judgment of Butner's medical staff at the time of the decision to medicate, leaving virtually nothing of the panel's original reasoning or holding. I will briefly set out the reasoning that the majority employed in coming to its decision and attempt to unearth some of the "hidden agendas" that I think I can discern in it.

Basically, the *en banc* opinion in *Charters II* suggests that the panel was wrong about almost everything. While it agreed that Charters did possess a constitutionally-retained interest in freedom from bodily restraint (and that this interest was implicated by the forcible administration of psychotropic drugs), and that this interest is protected "against arbitrary and capricious actions by government officials," it recast the issue in dispute:

> [W]hat procedural protection is constitutionally required to protect the interest in freedom from bodily intrusion that is retained by an involuntarily-committed individual after a prior due process proceeding that significantly curtails his basic liberty interest[?]

It rationalized the shift in focus this way: since Charters came "legally into the custody of the United States," the current limitations on his liberty interest were constitutionally acceptable, and his retained freedom-from-bodily-intrusion interest must thus "yield to the legitimate incidents of his institutionalization."

Before it embarked upon its own analysis, the *en banc* court stopped to critique the language of the panel that had cited the potentially "mind-altering" quality of drug treatment, noting that this phrase was rife with "all the images that evoke the use by totalitarian states of 'mind-controlling' psychiatric techniques specifically to curtail individual liberty." In a footnote it pointed out that tardive dyskinesia is the principal side-effect that "may" be threatened and that its pathology, its probability, its susceptability to treatment and its durability "probably cannot be more pessimistically and vividly described than [by] the selected items from the legal and psychiatric literature" in the panel's initial opinion, and that "a much less drastic appraisal of the risk-potential is made "by the responsible elements in the relevant scientific communities."

With this commentary about the relevancy of social science research under its belt, the court proceeded to analyze the case before it. Employing a strict *Mathews v. Eldridge* balancing test, it relied

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Michael L. Perlin, J.D., is Associate Professor of Law at New York Law School and Director of the Federal Litigation Clinic. Mr. Perlin participated in the Twelfth Annual Symposium on Mental Health and the Law in March, 1989. What follows is an excerpt of Mr. Perlin's longer presentation [on the impact of the Fourth Circuit Court of Appeals decision in *U.S. v. Charters*, 863 F.2d 302 (4th Cir. 1988) (*en banc*) (*Charters II*), vacating 829 F.2d 479 (4th Cir. 1987)]. *Charters I* was discussed in 8 *Developments in Mental Health Law* 1. The footnotes have been omitted to save space but are available upon request.

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on the Supreme Court's decisions in *Youngberg v. Romeo* and *Parham v. J.R.* to reach the conclusion that committing "the base-line governmental decision to medicate [to] the appropriate medical personnel of the custodial institution"—subject to judicial review for "arbitrariness"—comported fully with due process, even where the exercise of professional judgment "necessarily involves some interpretation of the disputable 'meaning' of clinical 'facts.' "

While conceding that both *Parham* and *Youngberg* involved "somewhat different types of medical decisions," the court concluded that "their general approval of the basic regime proposed by the government here is plain." It drew particular support from the Court's analysis in *Parham* that, "while medical and psychiatric diagnosis obviously was fallible, there was no reason to suppose that it was more so than would be the comparable diagnosis of a judge or hearing officer," in concluding that such a regime may comport with procedural due process requirements "notwithstanding the absence of any adversarial adjudicative element."

On the other hand, the court rejected Charters's proposal for several reasons. First, that proposed regime would bring with it "all the cumbersomeness, expense and delay incident to judicial proceedings." Under such a scheme the role of institutional medical personnel would be transformed into that of "expert witnesses defending their opinions in judicial proceedings rather than that of base-line decision makers [at which, p]resumably, their opinions. . .would be entitled to no greater deference than the conflicting opinions of the outside expert witnesses *whose testimony surely can be anticipated.*"

By way of support for this proposition the court recounted several unreported cases in which Butner inmates, in the wake of the initial panel decision in *Charters*, withdrew earlier consent to medication (a withdrawal supported by outside expert testimony); in each of these, "[c]onfronted with directly conflicting opinion by two professionally qualified experts," the district court found the inmates competent to refuse medication, thus "according less rather than more deference to the decisions of institutional professionals than to the conflicting opinions of outside expert witnesses." On this point the *en banc* court sympathetically recounted Dr. Johnson's testimony questioning the validity of "any factual inquiry into the competency of schizophrenic patients to make such decisions at particular points in time." [Dr. Johnson, Director of Forensic Services and Clinical Research at Butner, was the only expert witness in the case.]

Such a scheme—apparently reflective of a "greater confidence in the ability of judges and adversarial adjudicative processes than in the capacity of medical professionals subject to judicial review"—flew "directly in the face" of Supreme Court teachings, the court concluded, noting that decisions of this type by institutional personnel should be treated by courts as "presumptively valid," and quoting extensively from former Chief Justice Burger's well-traveled language in *Parham*:

> Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real.

Therefore, to require a preliminary factual determination of a patient's competency as to medical decision making would pose "an unavoidable risk of completely anomalous, perhaps flatly inconsistent, determinations of mental competence by different judicial tribunals." Stressing that Charters had already been declared incompetent to proceed to trial—a "solemn judicial adjudication [that] still stands"—and conceding

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that "there may be a difference" between competency to stand trial and competency to engage in medical decision making, such a distinction, the court concluded "must certainly be one of such subtlety and complexity as to tax perception by the most skilled medical or psychiatric professionals."

On the specific issue of side-effects, while the court acknowledged that they "introduce[d] an element in the risk of error that require[d] special concern," it chose to recast the question in terms of whether this risk was "so unique" that it required "skewing the basically approved regime for insuring due process in making medical decisions," and concluded that it did not.

Side-effects were simply "one element" in the "best interests" calculus, and the fact that responsible professionals expressed "wide disagreement. . . as to the degree of their severity, their susceptibility to treatment, their duration, and. . . their probability over the run of cases"—a disagreement reflected in this case through the dramatically-contrasting *amicus* briefs of the American Psychiatric Association and the American Psychological Association—emphasized to the court that the side-effects question was "simply and unavoidably" an element of the "best interests" decision. Stressing that "no scientific opinion is advanced that these side-effects are so highly probable, so severe, and so unmanageable that the antipsychotic medication simply should never be administered. . . even with patient consent," the court concluded that the side-effects threat "can better be assessed and reviewed within the government's proposed regime than by an adversarial adjudicative process."

Similarly the court dismissed Charters's claim that his competency must be determined by a neutral fact-finder, as it was not convinced that giving this determination to "non-specialist judges. . . offers a better protection against error than would leaving it to responsible medical professionals." The patient's competence to make an informed judgment—like the potential for side-effects—was "simply another factor in the ultimate medical decision."

Turning to the government's stake, the court stressed that its role "here is not that of punitive custodian of a fully competent inmate, but *benign custodian of one legally committed to it for medical care and treatment*." [emphasis added] To accept Charters's proposed regime "would effectively stymie the government's ability to proceed with the treatment—certainly for an interval that might make it no longer efficacious, and probably indefinitely."

Having concluded that the government's planned regime was constitutionally adequate, the court then moved to the issue of how it should be administered. Relying once again on the *Parham* case for the proposition that an "internal adversarial hearing" was similarly not required, it held that "an acceptable professional decision" may be based upon "accepted medical practices in diagnosis, treatment and prognosis, with the aid of such technical tools and consultative techniques as are appropriate in the profession," including, *inter alia*, "the patient's general history and present condition, the specific need for medication, its possible side-effects, any previous reaction to the same or comparable medication, the prognosis, the duration of any previous medication, etc.," all of which must be supported by "adequate documentation."

Side-effects were simply "one element" in the "best interests" calculus.

The "professional judgment standard," the court underscored, was not whether the treatment decision was "the medically correct or most appropriate one," but "only whether the decision was made by an appropriate professional." Under this test, there will be a denial of due process only—quoting *Youngberg* again—where the decision is such a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Thus, there will be *only one question* to be asked of experts in any proceeding stemming from a medication question decision: "*was this decision reached by a process so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one.*" [emphasis added] Such a standard, the court concluded, "appropriately defers to the necessarily subjective aspects of the decisional process of institutional medical professionals," according them "the presumption of validity due them."

In looking at the facts of the case before it, the *en banc* court found that the district court conducted its "careful inquiry" properly, noting:

> Significantly, no evidence was offered that the decision lay completely beyond the bounds of tolerable professional judgment. This undoubtedly reflects the fact that no such evidence was available.

On this point, the court cited two recent scholarly medical articles [including Baldessari and Lipton, *Risks of antipsychotic drugs overemphasized.* 305 NEJM 588 (1982)] that had concluded that antipsychotic drugs were the "cornerstone" and the "primary modality" in the management of acute mental illnesses. Finally, in setting out the limits of its ordered remand, the court concluded by "assuming that medical professionals, *now aware of the standard* to which they are held, may be as willing to proceed without prior judicial approval as are other governmental officials such as those on

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