

Games Psychiatrists Play: Circumventing Constitutional Protections Using “Mental Illness” as Legal Fiction

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(Handout notes)

Most people recognize that literal treatment for literal disease is a choice, subject to consent. People have the right to refuse treatment when they have lung cancer, or are otherwise very sick, despite the fact that doing so may mean certain death. When you elect to undergo major surgery, you must sign a consent form. Even when you request a vaccination for influenza, you still must sign a consent form.

There are three relatively uncontroversial situations in which treatment proceeds legally without consent: The first is the medical treatment of children. The second is the treatment of people when they are literally unconscious. And the third is the treatment of persons with contagious disease.

Children may be treated, or poked with a hypodermic syringe to vaccinate, or to collect blood without their consent, mainly because the children are in a custodial or guardian relationship with their parent(s), and their freedom, like their responsibility, is limited. We accept that when a person is a child he or she may not fully comprehend the consequences of refusing treatment. Obviously, the distinction between adult and child is somewhat arbitrary. There are many people who are over twenty-one years of age who still act in immature ways. There are many people who are under twenty-one years of age who act in mature ways. It seems odd that courts will allow fourteen-year-old children to be tried as adults for particularly heinous criminal acts. However, fourteen-year-old children are not granted the freedoms and privileges of adulthood for demonstrating virtuous behaviors and for demonstrating a clear comprehension of the relationship between specific behaviors and their consequences. Most people recognize and accept that children can and should be coerced into receiving medical treatment

when their parent(s) deem it necessary to do so. (Obviously, it is preferable to gently explain why the prick of a needle is necessary, however, children vary by age in terms of their understanding and willingness to submit to pain, regardless of why and who says doing so is necessary.)

The second situation when medical treatment occurs without consent is when a person is literally unconscious. Consider a pedestrian crossing a street at a marked crosswalk during rush-hour traffic. Our imaginary pedestrian is hit by a car, and as he falls to the street he hits his head on the pavement and is knocked unconscious. Someone calls an ambulance, the ambulance arrives, and emergency medical technicians immediately begin to assess the person's condition, treat him as necessary at the scene of the accident, then in the ambulance on the way to the hospital, and then by doctors and medical staff at the hospital. No one waits for our pedestrian-now-patient to regain consciousness so that doctors and other medical personnel can ask him if he *wants* to be treated, that is, if he consents to treatment. He might die if they wait. Our pedestrian-now-patient doesn't have the conscious capacity to say yes or no, give or refuse consent to treatment, so we err in the direction of helping the person. Again, most people accept this second form of treatment without consent, as necessary.

Our third and final situation involves a person who has contracted a contagious disease. Imagine an adult university student who becomes infected with a highly contagious form of viral meningitis. Once university and district medical personnel are alerted to the fact that this student is dangerously ill with a contagious form of meningitis, she is immediately quarantined and treated whether she gives consent or not. Why? Because others at the university can be infected or catch the disease simply by being in the same vicinity as our student sick with meningitis. Anyone in a classroom with her can catch the disease.

In order to protect *others* from her disease, she must be removed, quarantined and treated for her disease, whether she gives consent or refuses to give consent for medical treatment. Remember, she is being sequestered and treated to protect others, as well as herself.

When I use the word contagious here I am referring to a disease that others can contract simply by breathing the same air, dipping into the same food and drinking out of the same cup of water our sick student is using. That kind of contagious disease is a true public health matter. Syphilis and herpes are private health matters, the result of taking a

behavioral risk with others. Getting AIDS from contaminated blood is a public health matter. Getting AIDS by practicing unsafe sex is a private health problem. I'm referring to the public health form of contagious disease. **Most people accept these three situations or conditions as legal and ethically sound.**

Treatment providers forcibly "treat" people they and others consider "dangerous to self and others," justifying what they do in the name of compassion and care. They take each of the three conditions I've just described – youth, unconsciousness, and danger to others – and blur the distinction between metaphor and literal disease and treatment.

Treatment without consent for "mental illness" is justified by saying the person is *like* a child. Since we base the distinction between adult and child on chronological age, a person is either an adult or a child. If he's twenty-one, he's an adult. If he's twenty, he's a child. Psychiatrists and mental health professionals empowered by the state to commit someone involuntarily to a psychiatric "hospital" argue that a twenty-five year old person who refuses to bathe and take care of himself is really a child. He does not, in their opinion, exercise responsibility for himself because he cannot do so. He is a threat to himself. He may verbally or nonverbally abdicate all responsibility for himself and ask to be taken care of by others, for fear that he might hurt himself. (Again, I am most concerned with those who do *not* want help, who *reject* "help," and who are coerced into "treatment" when *they don't want it*.)

It doesn't matter to me whether they express a "thank you clause" after they are released from a hospital, or after they are thoroughly drugged with major tranquilizers. In my opinion, when an adult refuses treatment his refusal must be respected. Otherwise, coercion occurs in the name of helping him. The intentions of psychiatrists and this man's friends and family are irrelevant. They may certainly try to persuade, encourage, even beg him to go into a "treatment" facility. In the end, the man called a child has a right to refuse treatment and that refusal must be respected in the sense that psychiatrists keep their hands off him.

Institutional psychiatrists are agents of the state. They are not agents of the designated patient. The state has no business inside a patient's metaphorical head.

According to psychiatrists who coerce this person into a psychiatric facility, the coercion must occur in order to protect him from himself. He "needs" to be deprived of his liberty, otherwise, "he will die with his

'rights' on," as one staunch defender of involuntary commitment procedures responded to those concerned about violating people's constitutional rights in the name of treating their mental illness. The more a person objects to being coerced into "treatment," the more likely he is to be diagnosed with serious mental illness. He is labeled a child with mental illness, yet he is not literally a child. He is a metaphorical child, and he does not have a literal illness. He "has" a metaphorical illness. He has committed no crime.

While mental health professionals may consider this to be the same as treating a literal child with a literal disease, the differences are clear; this is one way a person can be committed against his will to a psychiatric facility for "treatment." Others consider this to be assault and battery committed by psychiatrists and the state, which has empowered them to do this to people. As Murray Rothbard once wrote at a symposium honoring Thomas Szasz, "diagnosis is a weapon."

Here is another example of distorted thinking on the part of someone who believes strongly in the existence of mental illness. Years ago I had an exchange with someone who was very angry about my views on mental illness. He calls himself a "libertarian." He said, "I know mental illness is real, it almost killed me." I wrote back to him explaining that in my opinion, "he" was "it." There is no "it" separate from himself that almost killed him. *He*, apparently, almost killed himself. He did not want to take responsibility for himself, I informed him.

In the unconsciousness situation, treatment without consent for "mental illness" is justified by saying the person "lacks insight" into his disease. When a person diagnosed as mentally ill rejects the diagnosis, this rejection is "diagnosed" as a sign of his mental illness. All mental illnesses are based on *symptoms* alone. There are no *signs* of mental illness. Hijacking the term "anosognosia," psychiatrists assert that disagreeing with them is a manifestation of the patient's mental illness, a kind of "heads I win, tails you lose" interaction. The doctor is always right, especially when he's wrong.

A person is either conscious or unconscious, especially when they angrily try to reject and resist attempts at coercion in the form of involuntary commitment to a mental hospital. The more a patient resists and fights, the deeper his "lack of insight." This is an attempt on the part of psychiatrists to justify coercion. Obviously a person *is* conscious when he resists treatment, and obviously he has a right to resist treatment. This is very different from being unconscious after falling and hitting one's head on the pavement. Nevertheless, mental

health professionals assert that disagreeing with them is just another form of unconsciousness, and therefore coercion is justified.

In the third condition, the metaphor of contagion, treatment without consent is justified on the assertion that the person is dangerous to others. A person with a literally contagious disease can unintentionally harm others. Likewise, a person with a metaphorically contagious disease can also allegedly and unintentionally harm others. He can commit acts of violence toward others and must be sequestered or put into a form of quarantine in order to protect the public from him, and he from himself. A literal situation with real contagion is twisted into a metaphorical situation in order to justify coercion in the name of compassion, care, and really, medicine.

So, we see here how the three legal and ethical situations or conditions in which a person can be treated medically without consent, are twisted to serve the best interests of mental health professionals. Again, mental health professionals include psychiatrists, psychologists, social workers, and various categories of professional counselors.

In each of these conditions the idea of mental illness plays a key role in forcing people into a mental hospital. People are deprived of liberty because others think they are a threat to others and themselves. Leaving aside the fact that a person's body is his or her own property, and suicide is a right, not a crime, and the fact that the U.S. Supreme Court has upheld the constitutionality of involuntary treatment for mental illness, it seems to me that a profound injustice is occurring to persons labeled as mentally ill. This is social control masquerading as the literal and ethical practice of medicine. Literal treatment becomes metaphorical treatment, and metaphorical treatment for a metaphorical disease. *Similia similibus curentur*, as the homeopathic school often says – like cures like.

It is important to note that while social "scientists" have been striving for years to accurately predict who is likely to commit acts of violence and who is not likely to do so, we cannot predict who is going to be violent with an accuracy greater than that predicted by chance. In other words, guessing who is going to be violent is as accurate as taking into consideration hundreds if not thousands of personality and demographic characteristics comparing violent to nonviolent people. So while many people clamor for more involuntary commitment to mental hospitals, along with gun control, in order to prevent mass murders like the one just committed in Aurora, Colorado, we cannot predict who is going to do it and who is not. That is a fact, not fiction.

There is one final detail that we need to address. Even if we could predict who is going to commit a crime or act of violence and who is not with perfect accuracy, as shown in the movie *Minority Report* (2002), people are still being deprived of liberty when they have committed no crime. They are being deprived of their right to due process of law.

Legal Fiction

Involuntary treatment for mental illness and the insanity defense are two sides of the same coin. Both practices rest on the idea of mental illness. Both practices occur via the power of the state. In the involuntary treatment scenario, a person is treated as if he was a criminal and deprived of liberty when he has committed no crime. In the insanity defense, a person is treated as if he was *not* a criminal, and exculpated of criminal responsibility, even when he has committed a crime. If involuntary treatment is abolished as unconstitutional, then it would seem the insanity defense would be abolished as well, and vice versa. Since the idea of mental illness is the key to both, it seems as though it would be easy to get rid of both practices by showing a court that mental illness is a myth, as professor of psychiatry emeritus Thomas Szasz has written about for the past sixty years.

Mental illness will continue to play a role in depriving people of liberty and justice as long as it is considered an apposite legal fiction. As Szasz has pointed out in his book entitled *Insanity: The Idea and Its Consequences* (1987), the greatest racial legal fiction before the Civil War was that negro slaves were three-fifths persons. The greatest medical legal fiction since the Civil War is mental illness, the idea that persons labeled as mentally ill are not full persons, full citizens, entitled to their full constitutional rights. It is as if the Bill of Rights had a postscript at the bottom reading "For mentally healthy people only."

A legal fiction is something that is false, asserted as true, and something that a court will not allow to be disproved. The late legal scholar Lon Fuller stated that in order to understand something as a legal fiction, one has to first identify the premise upon which the fiction rests, and then identify what purpose is being served by the fictional assertion. Szasz explained how mental illness is legal fiction in light of this point by Fuller in his book *Insanity*. The premise upon which mental illness as legal fiction rests is that the mind can be diseased just as the brain can be diseased. The purpose mental illness as legal fiction serves is to deprive of liberty persons labeled as mentally ill without letting them have due process of law. In other words, the

purpose of the greatest medical legal fiction since the Civil War, mental illness, is to deprive people of their right to due process of law without violating their constitutional rights.

Involuntary commitment rests primarily on asserting that a person's mental illness causes them to be a danger to themselves and others. Variations on the insanity defense, for example, from the [M'Naghten rules](#) ^[3] or the [irresistible impulse doctrine](#) ^[4], or Durham's "product," all attempt to claim that a person cannot form the necessary intent or *mens rea* to be responsible for a crime. There are some legitimate ways in which a person's responsibility for criminal acts is diminished or absent.

One example is when a person harms another in a situation involving self-defense. An auto accident suffered due to a heart attack or an epileptic seizure may be another. Two persons may get into a physical altercation and while neither party intends to kill the other, one person may still be killed, even without any intent.

John Hinckley stalked and shot President Ronald Reagan. It appeared that he had the necessary intent or *mens rea* to be found guilty within the context of criminal law. However, he successfully pled not guilty by reason of insanity. There was no criminal responsibility. He was not punished as he might otherwise have been, and he was sent instead to St. Elizabeth's Hospital in Washington, D.C. for treatment of his "insanity."

Theodore John "Ted" Kaczynski, the "Unabomber," was charged with a crime for which he wanted to stand trial. He objected to his defense counsel's attempts to have him examined by a psychiatrist for "schizophrenia." Kaczynski did not want his political motives for mailing letter bombs to be undermined by a diagnosis of schizophrenia. He clearly understood that both the defense and prosecutors were attempting to do this. It is interesting to note that not once have people arrested for Islamic terrorist activities either requested or been coerced into pleading not guilty by reason of insanity.

Conclusion

In sum, two scenarios operate under the name of mental illness, and both lead to state-sponsored psychiatric coercion and injustice. The idea of mental illness is used to assign responsibility where it does not belong and to involuntarily commit people to mental hospitals. The idea of mental illness is also used to remove responsibility where it

does belong, in the varieties of the insanity defense that I have briefly described. When liberty is deprived in the name of mental illness, responsibility for behavior is necessarily diminished. Thus involuntary treatment procedures are intimately connected to variations on the insanity defense.

A positive correlation exists between liberty and responsibility. When we increase one, we necessarily increase the other. When we decrease one, we necessarily decrease the other. The myth is that a negative correlation exists between the two. We cannot increase liberty by adopting policies that ultimately diminish personal responsibility.

My colleague and our good friend, Thomas Szasz, agreed with me on many issues, and disagreed on many issues as well. In terms of abolishing the use of the idea of mental illness as the greatest medical-legal fiction since the Civil War, his belief, as expressed to me in personal communication, is that this can only be done by prohibiting a psychiatrist from being in a court room, testifying as an expert on behavior in a trial. I believe it can only be done by exposing mental illness as a metaphorical disease, and by showing judges and legislators that mental illness is the greatest medical-legal fiction since the Civil War, in the way that Lon Fuller has brilliantly described legal fiction.

What is left for institutional psychiatrists to do once involuntary commitment and the insanity defense are outlawed? Consensual or contractual psychiatry.

I believe that one of the greatest threats to liberty and responsibility we have known since the Spanish Inquisition can be found in institutional psychiatry, the confusing of public health with private health, and the growth of the therapeutic state, that union of medicine and state that has come to replace the theocratic state in so many of its former functions.

Thank you.

Note

[1] See Jeffrey A. Schaler and Richard E. Vatz, "[Mental health Trojan horse](#) ^[5]," *Washington Times*, December 31, 2009; see also "[Mental Health Parity Legislation Should Be Reversed Or Modified Because Questions About Mental Illness, Addiction Remain, Opinion Piece Says](#)"

[6],” Medical Digest.com.

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URL to article: <http://www.cato-unbound.org/2012/08/06/jeffrey-a-schaler/strategies-of-psychiatric-coercion/>

URLs in this post:

[1] the mental health “parity” controversy:

<http://www.samhsa.gov/healthreform/parity/>

[2] Impaired or lack awareness of illness – a neurological syndrome called anosognosia:

<http://www.treatmentadvocacycenter.org/problem/anosognosia>

[3] M’Naghten rules:

http://www.law.cornell.edu/wex/insanity_defense

[4] irresistible impulse doctrine:

<http://www.enotes.com/criminal-law-reference/insanity-defense>

[5] Mental health Trojan horse:

<http://www.washingtontimes.com/news/2009/dec/31/mental-health-trojan-horse/>

[6] Mental Health Parity Legislation Should Be Reversed Or Modified Because Questions About Mental Illness, Addiction Remain, Opinion Piece Says: <http://www.medical-digest.com/news/mental-health-parity-legislation-should-/>

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