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Points of View

1. Psychiatric Justice*

THOMAS SZASZ

It is now widely accepted, especially in the United States, that confining lawbreakers in mental hospitals as insane, without the benefit of a real trial, rather in prisons as criminals, after a proper trial, is a recent, enlightened Western practice. Nothing could be further from the truth. The practice is not recent, enlightened, or typically Western – resembling the Oriental despotic arbitrariness towards troublesome persons much more closely than the Occidental legal respect towards persons accused of crimes. Many 19th-century cases illustrate the procedure and support my foregoing interpretation of it. The following is a typical example.

In the years before World War I, Grigorii Rasputin, whom history knows as the 'mad monk', although he was neither mad nor a monk, was, after Nicholas and Alexandra, the most powerful person in Russia. As the Empress's most trusted friend and 'therapist', he exercised enormous influence over her; and she, in turn, had virtually complete control over the weak and ineffectual Tsar. Not surprisingly, Rasputin was widely hated and feared, and was eventually assassinated in 1916. However, there was a previous, failed attempt to kill him: in 1914, a woman named Chionya Gusyeva, dressed as a beggar, approached Rasputin in his home town of Pokrovskoe and, when Rasputin reached for his money, stabbed him in the lower abdomen. Rasputin survived. As for Gusyeva, she was treated much like countless Americans have been and continue to be:

> "Gusyeva was arrested. . . . She announced that she had tried to kill Rasputin for abusing his so-called sainthood, for his heresies, and for raping a nun. The authorities felt it would be a mistake to put her on trial. After a short imprisonment she was conveniently declared insane and put in an asylum in Tomsk. Her relatives made repeated attempts to get her out, on the grounds that she had 'got better', but the doctor in charge insisted that she continued to display symptoms of 'psychological disturbance and exalted religiosity'. She did not get out until after the February Revolution. . . ." (de Jonge, 1982, p. 238)

This procedure has all the earmarks of traditional oriental despotism: it is arbitrary; it is unilateral, the defendant's 'betters' deciding how best to deal with her; it is devoid of any mechanism for appealing the punishment; and, while defined as compassionate and humane (even medical and therapeutic), the charade simply serves the convenience of the defendant's adversaries (see, for example, Wittfogel (1957) and Szamuely (1974)). Long ago, this paternalistic procedure for dealing with persons who disrupt the social order was grafted to the tree of the American legal system. By pushing unwanted persons out on this limb, we ensure that they fall to their psychiatric deaths, while we bask in the glory of our therapeutic rationalisations (see Szasz (1987), especially chapters 9–11).

I regard the setting aside of a criminal trial and its replacement with psychiatric methods of punishing persons accused of crimes as one of psychiatry's most characteristic and most important social practices. Why? Because I value individual liberty and believe that a fair trial, conducted in public, is one of our most powerful safeguards against political tyranny, regardless of the tyrant's motives – to enslave and exploit his victims, or to protect and treat them.

There are, of course, many methods for determining guilt and punishing lawbreaking other than the criminal trial as practised in contemporary English and American courts. Indeed, figuratively speaking, the phenomenon of rule following/rule breaking begins at the simplest, impersonal, organismic level – namely, the transgression of biological rules and its consequences: to survive as an *organism*, man must eat and drink what is nutritious or at least safe, and avoid eating and drinking what is non-nutritious or poisonous. On a higher, interpersonal level, we observe or violate social rules: to survive as a *person*, man must obey certain rules or be punished for disobeying them. The important difference between these two phenomena is that the deleterious consequences of violating biological rules are automatic, that is, do not require the intervention of human agents, whereas the deleterious consequences of violating social rules are not automatic, but require the intervention of human agents. Furthermore, because

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the crux of social life is obeying and disobeying rules, all of us, at all times, are both potential rule followers and rule breakers. As modern sociologists have noted, in an important sense it is only the violation of rules and their punishment that define what the rules *really* are. This raises two simple but all-important questions: how do we know or ascertain that a rule has been broken, and, having ascertained it, by whom and by what means is the rule breaker punished? A brief glance at history gives us all the answers we need for our present purposes.

In the Judaeo-Christian world view, history begins with a crime and a punishment: the Fall was the crime, and our life and death its punishment. To be sure, Adam and Eve never received a trial – much less a fair one. There was no need for it: God, the Perfect Autocrat, knew when they were good and when they were bad. Accordingly, God needed no one else and nothing else to mete out justice: His perception, judgement, and punishment – all of which were just, by definition – were enough. When monarchs ruled by divine decree, emperors, kings, and tsars decided, in a similarly autocratic/despotic style, who was to be punished and how – and the punishment was always, by definition, just.

But unlike gods, men are not omniscient. Accordingly, it long ago occurred to them that a person might be accused falsely and punished unjustly. To determine whether or not rule violation has, in fact, occurred, more than accusation is needed; the accusation must be true. To punish justly, more than superior power is needed: the punishment must be fair and fitting. Out of such sentiments arose various mechanisms for adjudicating offences, among them our Anglo-American concept of due process.

In one form or another, trial is an ancient and virtually universal institution. Let us remember in this connection that Socrates and Jesus, Servetus and Galileo, witches and heretics, even Stalin's alleged enemies were all tried. To be sure, by our standards, these trials were not fair. But they were, morally and politically, better than no trial at all – better than people being massacred in the middle of the night by unknown executioners; better than people disappearing, without a trace, into concentration camps or the Gulag; better than people being dispatched, with a mockery of due process, to prisons called mental hospitals.

To appreciate what is bad, from a libertarian point of view, about despotic law enforcement, whether of the Oriental or psychiatric kind, we must be clear about what is good about the modern Anglo-American idea of a fair trial. As I see it, nearly all that is bad about the former and good about the latter can be put in one word for each – namely, *unilateral* and *adversary*. When God punishes the Israelites in the Bible, He weighs the evidence, He decides, He metes out the penalty – and that's that. And so it has been through the ages. Against this religious/despotic/paternalistic/therapeutic model of administering justice, there stands – often assailed, frequently feeble, but always beloved by the accused and all who treasure personal liberty and responsibility – the adversarial model. Although not as old as the despotic method, the adversarial procedure is also of ancient origin.

However, the history of social controls does not concern us here. What does concern us is that the modern Anglo-American concept of a fair trial can be reduced to three basic elements, namely: prosecution, defence, and judge/jury. In effect, the trial is a contest: the contestants – prosecutor and defence attorneys – engage in an argument or debate whose outcome they themselves cannot decide; the decision maker or umpire (judge/jury) himself cannot join the contest but must, instead, conduct it according to certain rules, and must decide who wins and who loses (or whether the contest is a draw).

As a people, we could decide that we do not like this system of adjudicating criminal responsibility, that we no longer believe that some persons charged with crimes are guilty and others innocent, and that those not proved guilty are entitled to remain free and unmolested by the government. But we cannot, it seems to me, continue to regard more and more lawbreakers as not-bad-but-mad and hope to preserve our hard-won political liberties.

In the East, where the right to property was never a fundamental value, the right to personal liberty never developed. In the West, where the two rights developed in tandem, both rights remain fragile and endangered – by communist subversion and aggression from without and, perhaps more importantly, by psychiatric/therapeutic erosion from within. This erosion, beginning at about the time of the French Revolution, gathered momentum all through the 20th century, reaching a critical level today. Now, in our typical psychiatrised non-trial, the prosecution does not prosecute, the defence does not defend, and the judge does not preside over a trial; instead, all three parties join in pretending to protect the defendant while, in fact, they are destroying him. The result is a regression to an ancient, religio-despotic criminal procedure where the guilt of the defendant was assumed from the outset and the 'trial' was merely the ceremonial purging of evil from the community. This turning away from the heavy existential demands of the

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adversarial criminal trial was already evident in many 19th-century insanity trials, including the classic so-called trial of Daniel McNaughton. I say so-called because, as I intend to show, McNaughton was never *really* tried: his trial was a charade, a mere formality.

The facts of the case are briefly as follow. On 20 January 1843, Daniel McNaughton shot and killed Edward Drummond, Sir Robert Peel's private secretary. Believing himself victimised by the Tories, McNaughton wanted to shoot Peel, but mistook Drummond for the Home Secretary. For reasons that need not concern us here – but principally because of the mounting aversion to the death penalty in Victorian England – counsel for both defence and prosecution, as well as the judges, all agreed that McNaughton was insane and should not be found guilty (see West & Walk, 1977).

The proceedings against McNaughton began on 2 February 1843, when he was asked to plead: "How say you, prisoner, are you guilty or not guilty?" After a pause, McNaughton answered: "I am guilty of firing". Lord Abinger (Lord Chief Justice of England) then asked: "By that, do you mean to say you are not guilty of the remainder of the charge; that is, of intending to murder Mr. Drummond?" "Yes," replied McNaughton. Lord Abinger did not ask whether McNaughton intended to murder Sir Robert Peel; instead, a plea of 'not guilty' was entered on his behalf. A fairly lengthy trial ensued at which much lay testimony was given in support of the interpretation that McNaughton knew perfectly well what he was doing, that he intended to kill Peel, but merely shot the wrong man. For example, Benjamin Weston, an "office porter" who happened to be on the scene, testified that "The prisoner drew the pistol very deliberately, but at the same time very quickly. As far as I can judge, it was a very cool, deliberate act." Others, among them a surgeon named James Douglas, testified similarly:

> "I am a surgeon, residing at Glasgow. I am in the habit of giving lectures on anatomy. I recognise the prisoner as having been a student of mine last summer. I had the opportunities of speaking to him almost every day; I merely spoke to him on the subject of anatomy. He seemed to understand it. . . . I never observed anything to lead me to suppose his mind was disordered." (See West & Walk, 1977, pp. 12–73)

Nine "medical gentlemen", led by Dr E. T. Monro, one of the most prominent alienists of the day, then testified,

> "all emphasizing that his delusions of persecution meant that 'his moral liberty was destroyed'. The Crown presented no medical evidence to rebut this, even though McNaughton had obtained firearms, had watched his victim for several days, and had waited till his victim's back was turned." (Smith, 1981, p. 103)

At that conclusion of all the testimony, the chief prosecutor addressed the jury and asked it to find the defendant not guilty by reason of insanity:

> "Solicitor General: Gentlemen of the jury, after the intimation I have received from the Bench I feel that I should not be properly discharging my duties to the Crown and to the public if I asked you to give your verdict in this case *against* the prisoner. . . . This unfortunate man, at the time he committed the act was labouring under insanity; and, of course, if he were so, he would be entitled to his acquittal." (West & Walk, 1977, p. 72, emphasis added)

I emphasise the word *against* to indicate that the prosecutor considered the decision to execute McNaughton as being against him, and the decision to imprison him for life as being *not against* him. But McNaughton never asked for this. Clearly, it was the lawyers and judges, not McNaughton, who were disturbed by the prospect of his being put to death. And so, in the end, Tindal, the chief judge, instructed the jury to bring in a verdict of not guilty by reason of insanity, leading to this colloquy:

> "Tindal, C. J.: . . . If you think you ought to hear the evidence more fully, in that case I will state it to you, and leave the case in your hands. Probably, however, sufficient has now been laid before you, and you will say whether you want further information.
> Foreman of the Jury: We require no more, my Lord.
> Tindal, C. J.: If you find the prisoner not guilty, say on the ground of insanity, in which case proper care will be taken of him.
> Foreman: We find the prisoner not guilty, on the grounds of insanity." (West & Walk, 1977, p. 73)

It is a shameful travesty of justice that, ever since 1843, historians and scholars, psychiatrists and lawyers, have spoken and written about the 'McNaughton trial', inasmuch as there never was a McNaughton *trial*. Calling what happened in court to McNaughton a criminal trial, formally designating it as "The Queen Against Daniel McNaughton", is an Orwellian untruth: the Queen did not proceed *against* McNaughton, she proceeded *for* him, so that, as the judge himself phrased it, "proper care will be taken of him".

Actually, English and American law is familiar with circumstances where judicial authorities do not seek to prosecute and punish a person but, on the contrary, endeavor to protect him (from himself and those who might take advantage of his helplessness). Called an *ex parte* proceeding, such an action is defined as follows:

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"On one side only; . . . done for, in behalf of, on the application of, one party only. . . . A judicial proceeding, order, injunction, etc. is said to be *ex parte* when it is taken for granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." (Black, 1968)

This is exactly how McNaughton as treated: the judicial authorities did not solicit his consent for treating him as a madman who, like a helpless child, cannot care for himself. Instead, assuming the duties of *parens patriae*, counsel for both the prosecution and the defence as well as the judges all relinquished their customary roles, and assumed instead the duties of guardianship. The legal proceeding responsible for McNaughton's fate after 1843 should have been called "*Ex parte* the Queen, in the matter of the mad Daniel McNaughton". Ironically, Queen Victoria, like Daniel McNaughton, was a party to this proceeding in name only. Actually, she was very angry with the conduct of the trial, maintaining that it is absurd to suggest that a British subject who deliberately sets out to assassinate one of her ministers is not guilty of a crime. Her displeasure with the (non)trial generated the historic hearing before the House of Lords that led to the adoption of what we now call the McNaughton rules.

Did McNaughton's self-appointed guardians help their ward? Yes, if we equate helping McNaughton with saving him from the gallows, whether or not he wanted to be saved. No, if we believe there are fates worse than death. *De jure*, McNaughton was treated as if he had been insane when he shot Drummond. *De facto*, he was treated as if he had been, was, and would always remain insane. McNaughton was confined as a madman for the remaining 21 years of his life, dying in Broadmoor in 1864.

By the time McNaughton came to trial, this method of disposing of capital cases was not at all unusual. "In practice," comments Roger Smith (1981, p. 23) in his definitive study of Victorian insanity trials, "a warrant of removal to a criminal asylum usually meant a permanent removal. It was extremely difficult to attribute 'recovery' to someone who had shown potential for violence." It was, indeed, because there was no desire ever to set such malefactors free. Everyone, including the alienists, knew perfectly well that imprisonment for life in an insane asylum without the possibility of parole was a terrible punishment. For example, Dr Forbes Winslow, a leading Victorian alienist and the proprietor of two private insane asylums, actually promoted the insanity defence by touting the terrors of psychiatric confinement:

"To talk of a person escaping the extreme penalty of the law on the plea of Insanity, as one being subjected to no kind or degree of *punishment*, is a perfect mockery of truth and perversion of language. Suffer no punishment! He is exposed to the severest pain and torture of body and mind that can be inflicted upon a human creature short of being publicly strangled upon the gallows. If the fact be doubted, let a visit be paid to that dreadful *den* at Bethlehem Hospital . . . where the criminal portion of the establishment are confined like wild beasts in an iron cage!" (Smith, 1981, p. 31)

Thus, already by 1858, psychiatrists had hit upon this clever formula for advertising the asylum: for the non-criminal, the insane asylum is a *hospital*, the ideal place for treating mental illness; for the criminal ("where the criminal portion of the establishment are confined"), the asylum is a *prison*, the ideal place for storing "wild beasts", secure equally from escape by the hard-hearted criminal and release by the soft-hearted judge. Psychiatrists still use the same tactic to promote and justify involuntary mental hospital admission.

Surveying the fate of insanity acquittees serving life sentences in insane asylums, Smith (1981, p. 23) wryly observes that "Medical superintendents accepted their custodial role". That, I think, is putting it mildly. Actually, 'medical men' in Victorian England vied for the privilege of being the executioners of such brutal punishments – and ever since psychiatrists throughout the world have eagerly emulated them. These sobering facts alone should suffice to lay to rest, once and for all, the absurd canard that pyschiatric institutions are hospitals, not prisons; that institutional psychiatrists dispense treatments, not tortures; and that the inmates of mental institutions are patients, not prisoners.

Let us now return to the slightly different subject of unfitness to stand trial because of mental illness. From the legal point of view, insanity at the time of the crime is not the same as insanity at the time of trial: the former renders the accused not guilty by reason of insanity; the latter renders him (temporarily, in theory) unfit to stand trial. In either case, the result is about the same – the authorities denying an accused person a trial, or at least a speedy trial, without the participation or agreement of the defendant, and incarcerating him, as insane, in a psychiatric institution.

What has happened with respect to the particular procedure – the pre-trial psychiatric diagnosis and disposition of defendants – described in *Psychiatric Justice* since its first edition was published in 1965? *De jure*, a good deal; *de facto*, very little. This is not the place for a review of the

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voluminous legal and psychiatric literature on incompetence to stand trial. A brief summary of one landmark case, and a few additional remarks, should suffice.

In May 1968, Theon Jackson, a 27-year-old mentally defective deaf mute, was arrested for snatching the handbags of two women. The total value of his loot was $9. Brought before an Indiana court, the judge ordered Jackson to submit to a pretrial psychiatric examination. Jackson was examined by two state-appointed psychiatrists, who diagnosed him as mentally unfit to stand trial. The trial court thereupon committed Jackson to the care of the Indiana Department of Mental Health until such time as he could be certified as fit to stand trial. The facility in which Jackson was confined had no member of staff who knew sign language, and there was not even so much as a bureaucratic pretence at 'treating' him or doing anything else to render him mentally competent to stand trial. Jackson's lawyer filed a motion for a new trial, which was denied. The State Supreme Court affirmed the denial, whereupon the case was appealed to the US Supreme Court, which agreed to hear the case and rendered a decision on 7 June 1972.

Because the court ruled against Indiana's indefinite quasicriminal commitment statute, *Jackson* v. *Indiana* is, in legal circles, considered to be a very important case. In fact, however, the petition on behalf of Jackson, as well as the court's ruling, were based on extremely narrow criteria. Concerning the former, the record states:

> "Petitioner's counsel . . . contend[ed] that his commitment was tantamount to a 'life sentence' without his having been convicted of a crime . . . absent the criminal charges against him, the State would have had to proceed under other statutory procedures for the feeble-minded or those for the mentally ill. . . . (Jackson v. Indiana, 406 US 715 (1972), p. 715)

In summary, the court decided that Indiana's indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violated due process. Such a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. If it is determined that he will not, the state must either institute civil proceedings applicable to indefinite commitment of those not charged with crime, or release the defendant. In effect, the court ruled that persons accused of crimes deemed unfit to stand trial ought to be committed "civilly" rather than "criminally". In practice, the decision has meant that defendants who, before *Jackson*, might have been confined indefinitely as mentally unfit to stand trial, would, after *Jackson*, be confined indefinitely following 'acquittal' by reason of insanity. Ezra Pound was incarcerated in St Elizabeth's Hospital, Washington, DC, as psychiatrically unfit to stand trial (see Szasz, 1963, pp. 199–211, 1984, pp. 158–165); John W. Hinckley, Jr, who shot and wounded President Reagan, is incarcerated in the same psychiatric prison after having been acquitted as not guilty by reason of insanity (see Szasz, 1984, pp. 147–156, 1987, pp. 255–271).)

Writing for a unanimous court in *Jackson* v. *Indiana*, Justice Blackmun offered a revealing comment on the broader issue of involuntary mental hospital admission: "The States have traditionally exercised broad power to commit persons found to be mentally ill. Considering the number of cases affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." (Jackson v. Indiana, p. 737).

And, in a footnote to this passage, he added:

> "In 1961, it was estimated that 90% of the approximately 800,000 patients in mental hospitals in this country had been involuntarily committed. . . . Although later U.S. Census Bureau data for 1969 shows a resident patient population almost 50% lower, other data from the U.S. Department of Health, Education, and Welfare estimate annual admissions to institutions to be almost equal to the patient population at any one time, about 380,000 persons per annum." (Jackson v. Indiana p. 737)

As I write this, the total number of patients in mental hospitals is somewhat smaller still, but the significance of psychiatric power to commit is not a whit less. Moreover, popular opinion – that is, the sentiment prevailing among lawyers, psychiatrists, journalists, and the general public – is swinging back towards re-embracing prolonged, even permanent, involuntary psychiatric incarceration as the proper remedy for social ills – especially homelessness and crime (See, for example, Fuller Torrey, 1988).

The criminals 'saved' by psychiatry in the 19th century stayed incarcerated until they died, sometimes for as long as 43 years. John W. Hinckley, Jr, currently the most famous American insanity acquittee, has already spent more than seven years in confinement – and his 'cure' does not seem imminent. Compare this with what happens to *convicted criminals*: "Those released from prison [in the 1980s] for murder and nonnegligent manslaughter served a median of 78 months in confinement . . ." (Minor-Harper & Innes, 1987). Thus, with capital punishment virtually abolished and prison time served for murder shorter than ever,

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'psychiatric justice' is now even more punitive and more unjust than it was in the 19th century.

Clearly, this particular psychiatric practice – namely, the pre-trial psychiatric examination of defendants, the legal/medical judgement that they are mentally unfit to stand trial, and their subsequent psychiatric incarceration – hinges on, and is an integral part of, the psychiatrist's power to 'hospitalise' persons against their will. Psychiatrists have always had, and continue to have, a veritable love affair with practising coercion, which they equate with and then peddle as compassion; reciprocally, legislators, lawyers, and lay persons have had a love affair with submission to psychiatric coercion, which they equate with and then peddle as care. So long as this mutuality prevails, so long as virtually everyone believes that psychiatrists are entitled to exercise power over persons labelled 'mental patients', psychiatrists will gladly exercise such power and people will gullibly submit to it. Accordingly, it is both naive and foolish, albeit no doubt self-satisfying, for politicians, physicians, and the press to indulge in periodic outbursts of indignation at psychiatric 'abuses' (see, for example, *Lancet*, 1988). It is the very legitimacy of the psychiatrist's power – his moral and legal right to intimidate, much less coerce or imprison – that requires our scrutiny. And, in my opinion, our condemnation and rejection.

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Thomas Szasz, *Professor of Psychiatry, SUNY Health Science Center, Syracuse, NY 13210, USA*

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