The State's Insatiable Need to Incarcerate Those Who Frighten It

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It is wonderful to be back in Syracuse where I did my early teaching and where I met some wonderful people. Quite a few of them are here tonight. In many ways the most extraordinary person I met then was Thomas Szasz. One of the most intriguing aspects of knowing Tom is the contradiction in the manner in which he is treated by his critics. When I first knew him, he was that unnamed lunatic fringe (I always thought the pun was intended). Now, he is greeted as a respected patriarch. Obviously, his concepts have won approval partially by most and totally by many. Why, then, has so little changed?

I suggest that the largest force maintaining the Therapeutic State was always the State's anxiety, not real concern for the medical condition of its citizens. The Anxious State has not changed. It has merely transformed itself by other forms of repression. Once, involuntary commitment was the easy way of removing threatening people from the streets. In the State's most effective days, almost three times as many persons were committed as criminally incarcerated.(1) It was easy to commit. Two physicians could accomplish the result with a signature.(2) Now, after a due process revolution, commitment is harder and is shorter in duration (although often repetitive.(3) Have you noticed that it is easier to imprison people now because constitutional barriers have been lowered? I suggest that these are related phenomena.

The Anxious Society has not needed illness as a concept in dealing with threatening folk. The prior state took care of witches and heretics by the malignancy of their souls. (4) It has killed or removed many in a variety of non-medical ways.

More recently, mental illness was, however, a preferred method of dealing with the threatening for several reasons. Since treatment for illness could be viewed as beneficial, the internal constitutional barriers against adverse treatment were lowered or dispensed with. Since the concept of mental illnesses is hopelessly vague, the characteristics of people who engender fear could be identified as reasons for the treatment. One is called sick because what they do is sickening to others. Treatment appeals to the empathetic as superior to punishment.

The Myth of Mental Illness(5) provoked re-examination. People began to notice that the involuntary commitment tended to be long-term. They also noticed that predictions of dangerous to self or others on which many commitments are based were essentially unreliable.(6) The civil rights movement eventually got around to the mental health process and provided more hearings.(7) A general swing to fiscal conservatism reduced mental health resources. Time for the Anxious State to reinvent the Therapeutic State.

Which of course it has.

A totalitarian government has a lot less difficulty in simply institutionalizing those who might present a threat to the government. The history of repression in the USSR demonstrates how effectively mental institutions can be used in that manner.(8) They not only incapacitated but also stigmatized their inmates while devaluing their ideas. Fortunately, it is more difficult to do the same in a constitutional democracy. The United States, for example, has long rejected preventive detention of those who might harm.(9) In its place, we have generally required probable cause to arrest, speedy trial and conviction by a beyond a reasonable doubt standard as minimal conditions for long-term confinement.(10) Of course, there has been the parallel mental health system with none of those safeguards constitutionally enshrined.(11) For the Anxious State, an amalgamation of the procedural laxity of the mental health system and the security of the criminal system seemed a perfect solution.

The United States Supreme Court has now provided a curious decision indicating that sometimes mental health law can be an effective adjunct to criminal law. While it was clear that convicted criminals were entitled to release from prison at the end of their sentence and that those involuntarily hospitalized during a criminal sentence were equally entitled to be returned to civil status then(12) --- Faith Seidenberg and I established that mental patients who had been convicted of crime before commitment were even entitled to probation hearings in the meantime(13) --- a different future lay in-store for those acquitted by reason of insanity. In Jones v. United States, the Supreme Court approved the permissibility of finding that n.g.i. acquittal indicates dangerousness which allows the state to impose involuntary confinement until the danger is removed, even if that is longer than the criminal sentence will run.(14)

That decision must have inspired others to think of a new category of involuntary incarceration: post incarceration incarceration. Unfortunately for them, mental illness diagnosis was seen to be a stumbling block, but not for long.

The state of Washington came up with the idea. When someone was acquitted by reason of insanity, they were routinely hospitalized involuntarily until the acquitee "recovered." Jones had indicated that indefinite incarceration would be all right for people who were ill and dangerous.(15) Why not hold the dangerous among them even after they were cured of illness? They passed a law which provided that on recovery from mental illness, the patient would have a hearing on future dangerousness. If patients were potentially dangerous, albeit not ill, they would be incarcerated until cured of their dangerousness. Several members of the United States Supreme Court thought that would be fine. Justice Thomas in Foucha v. Louisiana indicated that a mental patient should not be released based on psychiatric evidence that he is not mentally ill because such opinion is not sufficiently precise --- because psychiatry is not an exact science and psychiatrists widely disagree on what constitutes mental illness.(16) Anyway, the majority in the Foucha case held that the law was unconstitutional.(17) No illness, no commitment. Back to the drawing board.

Five years later the Supreme Court had a new law before it in Kansas v. Hendricks.(18) Kansas has passed the Sexually Violent Predator Act only two years after the Foucha decision.(19) It provided that sexually violent predators would have a post sentence hearing to determine whether they were mentally ill and dangerous as future sexual predators.(20) The legislature defined the requisite mental illness as involving "any person who has been convicted of or were charged with a sexually violent defense and who suffers from a mental abnormality or personality disorder which makes a person likely to engage in the predatory acts of sexual violence."(21) The legislature then defined mental abnormality as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such a person a menace to the health and safety of others."(22)

That combination worked fine.

In a debate that Thomas Szasz, Jeff Schaeler and I had with, among others, the State's Attorney General on DebatesDebates, the Attorney General insisted that sexual predation was not a forerunner of other "diseases" warranting general post incarceration incarceration. She assured us it was unique. Of course, she was quickly proved wrong.

There were, to be sure, several truly unique features of this new form of mental illness. First, it was legislatively created, not created by any professional group. Secondly, it seemed so broad in its definitions as to make it a one size fits all law. One should also notice that the Attorney General claimed success in aiding this condition which psychiatry had classed as largely incurable.

According to the Supreme Court, the critical question was whether the law was designed for treatment of the condition or toward punishment of the predator.(23) If the latter, it of course had several serious constitutional problems. As a criminal law, the dissent pointed out, it was likely both ex post facto and a violation of the double jeopardy provision. The court majority thought that Kansas was merely self protective, not punitive.(24) That made it all right.

The distinction seems curious. From the prisoner's standpoint, being locked up after he completed his sentence must appear fairly punitive. For all we know, the good people of Kansas are never punitive even when they convict a person of a crime. It seems likely that their principal concern is self protection and many might support rehabilitation in preference to retribution. We will need to hear more about the punitive/nonpunitive distinction and are likely to find out something soon as the Supreme Court has accepted a case from Washington in which the lower court found a similar law to be punitive.(25)

There has been a shift. Garden variety mental illness no longer serves the Anxious State sufficiently. The Kansas type of law provided promise for the moment. It still involves a form of reference to mental illness but, in this round, its mythical quality is far

more transparent.

The argument I am sketching suggests that the Anxious State will not be denied. People who frighten other people can still expect to be institutionalized regularly. So what has the Myth of Mental Illness brought us? In the end, its contribution will not have been to free the prisoner of mass anxiety---a task still worth working on. It will have ripped the mask off the notion of benevolence and clarified the balance the state is trying to strike between individual autonomy and public safety and will have made us much more careful about applications of mental health theory to others. Where mental illness becomes an issue in interpersonal disputes, such as in the case of guardianship, and the myriad legal issues which involve the state less directly, some changes occurred and more may be hoped for.(26) In any event, we have been made to focus more clearly on the issues which the mental health metaphor has obscured. It is a grand and singular contribution to have made.

REFERENCES

1. In 1963, 678,000 persons were confined in mental institutions in the Unitted States; only 250.000 persons were incarcerated in all the prisons administered by the states and federal government. Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 TEXAS L. REV. 424. 432,433 (1966). See generally, Robert D. Miller, The Continuum of Coercion: Constitutional and Clinical Considerations in The Treatment of Mentally Disordered Persons, 74 Denv. U. L. Rev. 1169, 1183 nn.74-75 (1997).

2. See generally Donald H. J. Hermann, Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Civil Commitment, 39 Vand. L. Rev. 83 (1986).

3. See, e.g., Douglas S. Stranvisky, Civil Commitment And The Right to Refuse Treatment: Resolving Disputes From A Due Process Perspective, 50 U. Miami. L. Rev. 413, 415-23 (1996); Mary L. Durham, The Empirical Consequences and Policy Implications of Broadening The Statutory Criteria for Civil Commitments, 3 Yale L. & Pol'y Rev. 395, 398 (1984).

4. See, e.g., THOMAS SZASZ, THE MANUFACTURE OF MADNESS 111 (1970); MORTON HUNT, THE STORY OF PSYCHOLOGY 2 (1993).

5. THOMAS SZASZ, MYTH OF MENTAL ILLNESS (1961).

6. Here lawyers hoisted the profession on its own pitard. If professionals could predict dangerousness, lawyers argued, they must surely be responsible to warn those endangered. The Tarasoff case brought a chastened profession to the bar to plead they

really couldn't predict. Tarasoff v. Regents of University of California, 17 Cal. 3d 425 (1976).

7. See generally Michael L. Perlin, Therapeutic Jurisprudence and The Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?, 1 Psychol. Pub. Pol'y & L. 80, 86 (1995).

8. See. S. BLOCK AND P. REDDAWAY, SOVIET PSYCHIATRIC ABUSE: THE SHADOW OVER WORLD PSYCHIATRY (1984).

9. Although even here there has been a shift. In the Salerno case, the Supreme Court approved short term pretrial confinement of some people accused of dangerous conduct. United States v. Salerno, 481 U.S. 739 (1987).

10. U.S. CONST. amend. IV; U.S. CONST. amend. VI; Brinegar v. United States, 338 U.S. 160, 174 (1949) ("...guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property").

11. See generally David B. Wexler, Putting Mental Health into Health Law: Therapeutic Jurisprudence, 16 Law and Hum. Behav. 27, 28 n.4 (1992); Addington v. Texas, 441 U. S. 418 (1979) (clear and convincing evidence standard in commitment hearings as opposed to preponderance of the evidence standard of the ordinary civil cases and less than proof beyond a reasonable doubt of criminal cases).

12. Baxtrom v.Herold, 383 U.S. 107 (1969).

13. United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2d Cir.) cert. denied, 396 U.S. 847 (1969).

14. Jones v. United States, 463 U.S. 354 (1983).

15. Id. at 364.

16. Foucha v. Louisiana, 504 U.S. 71, 109 (1992). He may not have read Roe v. Wade, 410 U.S. 959 (1973), before he joined the Court but he appears to have read Myth of Mental Illness. One has to wonder how he can vote in commitment on the same kind of evidence.

17. Foucha, 504 U.S. 71.

18. Kansas v. Hendricks, 521 U.S. 346 (1997).

19. The Kansas Sexually Violent Predator Act was enacted in 1994; Foucha was decided in 1992.

20. Kan. Stat. Ann §59-29a01 (1994).

21. Kan. Stat. Ann §59-29a02(a) (1994).

22. Kan. Stat. Ann §59-29a02(b) (1994).

23. Hendricks, 521 at 356, 361.

24. Id. at 362.

25. Young v. Weston, 192 F. 3d 870 (9th Cir. 1999) (Wash.), cert. granted sub nom, Seling v. Young, 120 S. Ct. 1416 (mem.) (U.S. Mar. 20, 2000) (No. 99-1185).

26. See generally Raol Jean Isaac, Subverting Good Intentions: A Brief History of Mental Health Law "Reform," 2 Cornell J. L. & Pub. Pol'y 89, 116 n.92 (1992).

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