

On Making a Travesty of Triability

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Psychiatry and law seem to make no sense in the case of Russell Weston, the paranoid schizophrenic who killed two U.S. Capitol Police officers in July 1998 in a bloody shootout in the corridors of the Capitol. Since then, his lawyers have prevented his being treated by antipsychotic medication though he is delusional. They argue that medicating him so that he can be competent to stand trial (known as "triability") would send him to the execution chamber. After much deliberation, Judge Emmet Sullivan in the District of Columbia recently ruled that Weston could be medicated forcibly to treat his mental illness. Litigation in other cases has raised the question whether an accused can be under medication throughout the trial, whether the defense is "not guilty" or "not guilty by reason of insanity."

Then too, some psychiatrists argue that it violates their code of ethics to participate in the death penalty process. Yet one may wonder whether a physician's decision to treat a sick individual should depend on the future of the individual, whether he will become a musician, serve in the military, or whatever. The physician's task is to treat the suffering irrespective of what the future may hold. In the words of an old song, "Whatever will be, will be."

Since the mid-17th century, the common law rule has been that one cannot be required to plead to an indictment, stand trial, or be executed when one is so disordered as to be incapable of understanding what is transpiring. Presence of mind is required as well as presence of body. For triability, the accused must have the ability to cooperate with counsel in his defense (a communicative ability) and the ability to

understand the proceedings against him (a cognitive ability).

The rule is an aspect of the general prohibition against trials *in absentia*. The individual who fails to meet the test on triability may be present physically in the courtroom, but in the vernacular, is out of it mentally.

In the past, serious difficulties arose when, on arraignment, the accused did not plead at all or in the ancient legal phrase, "remained mute." Because joinder of issue (*litis contestatio*) was essential, it made possible a legal maneuver by which the defendant would attempt to block the proceeding by not pleading. Before the 19th century this difficulty was harder to overcome, because at that time the accused was not entitled to legal representation if the charge was treason or felony. Then, there was no one to act on his behalf, and the court had no method of proceeding. When the court concluded that the accused remained obstinately mute or "mute of malice," he was subjected to a form of judicial torture to compel him to plead. Increasingly heavier weights were placed on his or her chest—the accused was literally "pressed for his answer."

What happens now when one accused in a criminal case cannot or will not speak to the charges against him? In the case of the apparently competent defendant, a plea of not guilty is entered automatically at arraignment, and at trial, like most defendants, he may rest mute on the basis of the privilege against self-incrimination. What about the incompetent defendant?

Modern advances in medication might be expected to affect the status of persons otherwise deemed incompetent. Studies indicate that a majority of mentally disordered defendants who are unfit can, with active treatment, attain fitness within a

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relatively short period of time, often less than 90 days.

Be that as it may, the issue of triability has a checkered history. It has been used for legal maneuvering by both the prosecution and the defense. The prosecution may use it to preclude any pretrial release of the accused or to obtain long-term detention that otherwise might not be available under the criminal law process. Poet Ezra Pound, who spent World War II broadcasting for Mussolini, was found mentally unfit to face treason charges, and he was held for 13 years in the criminal ward of St. Elizabeth's Hospital in Washington, D.C.

Sometimes at the urging of the prosecution, trial court judges would not put to trial an individual who was rendered competent by medication. The accused had to be competent "*au naturel*." The concern was that if put to trial the accused might be found not guilty or not guilty by reason of insanity and when released he may be dangerous. Who would see to it that he would take medication? An individual who was not competent even to stand trial without medication poses a serious risk.

On the other hand, the defense would raise the triability issue so as to delay the trial, hoping that witnesses would forget or disappear. The best defense, so to speak, is continuance of a case. Continue it long enough and it is forgotten.

Then too, defense counsel would argue against medication, claiming that it would make the defendant appear drugged, and that would prejudice him in the eyes of the jury. In effect, that argument would result in trial immunity. In the lead case on this issue, *State v. Jojola*, the New Mexico Supreme Court allowed the trial of the accused who was rendered "chemically competent," finding no evidence that antipsychotic medication negatively affects an individual's thought processes or appearance.

Incredibly, in cases in which the defense pleads insanity rather than not guilty, defense counsel argues for termination of medication so that the accused can show to the jury his "true mental state" at the time of the crime. B.J. George, a prominent law professor and one-time Wayne State University Law School dean, argued that in these cases medication should be barred as a matter of procedural due process. He wrote, "Due process can be denied by producing such a calming effect on a defendant that he or she cannot through conduct or mode of testifying

demonstrate to a jury the irrationality or lack of control under pressure important to establish the insanity defense."

In a recent case involving the shooting death of Dr. John Kemink, an otolaryngologist at the University of Michigan, there was no dispute that Chester Lee Posby, the defendant, shot and killed the doctor. The sole issue was the defendant's sanity at the time of the shooting. At the time of trial, the defendant was on antipsychotic medication. Defense counsel requested discontinuance of the medication so that the jury could observe the defendant "as he was during the time of the shooting, in an unmedicated state." The Michigan Court of Appeals said that the request to be taken off antipsychotic medication involves the defendant's right to present a defense. Taken off medication for a few days, the defendant could testify in an unmedicated state, and that, the court found, did not implicate the question of competency during trial. The defendant had already assisted in his defense.

In 1992, in a case that reached the U.S. Supreme Court, *Riggins v. Nevada*, the Court ruled that as a condition for forced medication, the state must show both an overriding justification and medical appropriateness. In this case, the Court said, the state failed to justify the "need" for the medication. Arguably, the need for medication to treat an illness is coextensive with the need for medication to achieve triability.

Would the defendant's demeanor on the witness stand while in an unmedicated state have approximated his mental state at the time of the offense? The passage of time and circumstances and the treatment received in the intervening time would attenuate its probative value. Moreover, taking the individual off medication is antitherapeutic—one does not go in and out of psychosis without brain damage. In addition, what would be the likely outcome at trial? Juries rarely return a verdict of not guilty by reason of insanity, and the odds of it are even less when the defendant at trial appears crazy. They do not want him out on the streets, an outcome generally believed to follow an insanity verdict.

Common sense would dictate that an accused who is psychotic ought to be medically treated just like any individual who is psychotic, and then let the chips fall as they may. To do otherwise makes a travesty of triability.