




1968

Psychiatrist in Workmen's Compensation Field

Donald W. Loria

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Law and Psychology Commons](#), and the [Workers' Compensation Law Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Donald W. Loria, Psychiatrist in Workmen's Compensation Field, 17 Clev.-Marshall L. Rev. 19 (1968)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Psychiatrist in Workmen's Compensation Field

Donald W. Loria*

I. Prelude

AT ONE TIME, if a physician could find no objective evidence of disability, an employee usually lost his workmen's compensation case. If the x-ray and the electroencephalogram were negative, if no muscle spasm were present, if the diminished sensation to pinprick followed no anatomical pattern—if the doctors could find nothing in the examination to substantiate the employee's complaints of pain—the decision invariably found the employee was malingering. Compensation was denied.

Toward the middle of this century, psychiatry began to offer some explanations.

After the fracture had mended, the arm was still useless because an hysterical paralysis had set in. The employee's anger at his boss was too dangerous for him to express directly, too upsetting for him to acknowledge even to himself. He turned his anger inward and unconsciously paralyzed his own arm so he wouldn't have to strike his boss.

After the strained back muscles had healed, the employee still could not lift. Excruciating pain followed each attempt to pick up the stock. Psychiatry suggested that it had always been very difficult for this worker to be the mature, independent breadwinner of his family. With his wife, his children, his debts already "on his back," he unconsciously accepted the added physical insult to his spine as a reason for abdicating his male function. He could regress to a more comfortable role as a passive, dependent child. He could be taken care of by his family, his employer and society within a somewhat acceptable framework.

The theories of the psychiatrist met with a great deal of opposition. The adjudicator of the facts wanted some degree of objective verification of disability. "After all," he would project, "if we give money to someone who only *says* he can't work, we will be taken advantage of. People don't like to work anyway, and this kind of claim would be altogether too easy a way for the lazy to avoid the drudgery we all must endure." Frequently, moreover, this adjudicator would dimly recognize the problems of the worker—as explained by the psychiatrist—to be somewhat related to his own conflicts. Thus threatened, he could slough off the psychiatric theory as an annoying and useless deuce of clubs.

In time, resistance to psychiatric viewpoints lessened. The principles of dynamic psychology began to exert a powerful influence upon the court.

* Of the Michigan Bar; partner in the law firm of Kelman, Loria, Downing and Craig (Detroit, Michigan).

Analogy was used: Remember the time when the ruptured intervertebral disc was unknown? Then we classified all those complainers of back pain as malingerers. If we had known then what we know now, how much injustice could have been avoided! So don't sell psychiatry short.

Familiarity bred erosion: The most suspicious referee, the most hardened attorney began to observe that claimants with emotional problems frequently had a number of common characteristics. They didn't react reasonably to advice. They wouldn't take "No" or even "Yes" for an answer. They used up valuable time, annoyed persistently, and couldn't be swept beneath the carpet.

And the public relations media completed the transition. Psychiatrists were less and less the butt of jokes and more and more the heroes of movies and of television shows. Advertising repeated and repeated that we must "fight mental illness. After all, it's no different from physical illness." Republicans and Democrats sponsored platform planks that endorsed expansion of mental health programs. To be against "mental health" was to be against progress.

Psychiatry, on many levels still suspect, has nevertheless now acquired a secure foothold within the existing societal structure.

II. Dr. Szasz

Dr. Thomas S. Szasz is Professor of Psychiatry at State University of New York, Upstate Medical Center, Syracuse, N. Y. He is also a practicing psychoanalyst who subscribes to the basic premises and principles of psychoanalytic theory. He has stirred the violent antagonism of both psychiatrists and lawyers by questioning the wisdom of the psychiatrist's involvement with the law. His writings have produced such a torrent of criticism¹—both in quantity and in intensity—that they deserve more of a dialogue than is presently the case. He has two primary premises.

A. A cardinal tenet of democracy is the *Rule of Law*: "individual conduct is regulated by abstract rules applicable equally to all."² In a country where the government is arbitrary (as contrasted with free) the principle known as the *Rule of Men* prevails. Individual conduct is regulated by the will of another person.

¹ Davidson, *The New War on Psychiatry*, 121 *Am. J. Psychiat.* 528 (1964); Turkel, *What Psychiatry Can Do*, 28 *Harper's* 96 (1964); Guttmacher, *Critique of Views of Thomas Szasz on Legal Psychiatry*, 10 *Arch. Gen. Psychiat.* 238 (1964); Slovenko, *The Psychiatric Patient, Liberty and the Law*, 121 *Am. J. Psychiat.* 534 (1964); Masserman, *Is Mental Illness a Medico-Social "Myth"?*, 9 *Arch. Gen. Psychiat.* 175 (1963); Lowinger, *Psychiatrists Against Psychiatry*, 123 *Am. J. Psychiat.* 490 (1966).

² Szasz, *Psychoanalysis and the Rule of Law*. Presented in the panel on Psychoanalysis and Jurisprudence at the Annual Meeting of the American Psychoanalytic Association, Detroit, May, 1967.

If the individual cannot predict with certainty what conduct will be tolerated by government, he is not free to pursue fully his life. He must constantly worry lest the government decide *ad hominem* contrary to the pre-established rules. He has freedom to live unfettered only if the rules are set beforehand and scrupulously followed without deviation.

A measurement of democracy, then, is the extent to which the *Rule of Law* is observed. Certainly our legal system gives lip service, at least, to this principle. Justice is not the fiat of the individual judge following his own philosophy. It is, in a legal sense, that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts.³ A judge is not free to act in accordance with his personal wishes, desires or predilections. The reason: judicial action must be controlled by a consideration of the law only as applied to the facts of the particular case.⁴

"Courts administer justice by fixed rules which experience and wisdom have demonstrated as necessary in the investigation of truth, even though cases of individual hardship may result from the application of these rules to the various affairs of life."⁵

Although law is usually a mirror of the moral standards of the community, the judge should not wink at and ignore the rule if it does not conform to his own moral standard. Justice Cardozo has written:

The tendency of principle and rule to conform to moral standards, which is a true avenue of growth for law, is not to be confounded with the suspension of all principle and rule and the substitution of sentiment or unregulated benevolence, which, pushed to an extreme, is the negation of all law. Every system of law has within it artificial devices which are deemed in the main and on the average to promote convenience or security or other forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigant affected, there would be no sense in making them.⁶

Thus, Dr. Szasz' first premise is fundamental to our law: That system of justice which follows the *Rule of Law* promotes democratic values. Conversely, that system of justice which follows the *Rule of Men* promotes non-democratic, or totalitarian values.

B. The foundations of psychiatry are *moral* rather than *scientific*. Psychiatric testimony is based not upon scientific facts, but, rather, on the individual moral precepts of the testifier.

³ *McManus v. Fulton*, 85 Mont. 170, 278 P. 126 (1929).

⁴ *State v. Schumaker et al.*, 200 Ind. 623, 157 N.E. 769 (1927).

⁵ 14 Am. Jur., Courts, § 53 (1941).

⁶ Cardozo, *The Paradoxes of Legal Science* 68 (1928).

Perhaps some concrete examples will clarify Dr. Szasz' premise.

1. *Commitment Proceedings.*

Frequently, an individual is failing to perform certain necessary social functions within his family unit. A wife may be seriously depressed. A husband may be alcoholic. A grandparent may be senile. The family then "accuses" the offending member of being afflicted with "mental illness": the breadwinner will be fired from his job, or put in jail. He causes grief and dismay. The family seeks commitment as the only solution to an intolerable problem.

Dr. Szasz, however, suggests alternatives.⁷ The family members can request the offender to alter his behavior. They can ask, plead, or indeed threaten. They can demand that the offender seek voluntary hospitalization. They can, finally, leave and sever the relationship. Divorce is a common solution.

The psychiatrist, then, who testifies at the hearing on commitment, is faced with a moral conflict. If he values the integrity of the family unit more than he values the autonomy of the individual, he will favor commitment. If he more deeply values autonomy, equality and liberty—as Dr. Szasz does—he will oppose commitment. Thus, the psychiatrist will testify not to scientific facts about the individual. Undoubtedly, if he has decided to favor commitment, he will describe the problems of the "patient" in "scientific" language calculated to secure that end. E.g.: "Mr. Jones is a paranoid schizophrenic and a danger to himself and the community."

Dr. Szasz challenges the validity of the psychiatric jargon.⁸ He suggests that the term "schizophrenia," for example, may be a panchreston—a word that explains all and therefore explains nothing. Originally, schizophrenia was a useful term. Now it may have outlived its usefulness. Currently, however, it is a term accepted by psychiatry and the courts. So a man may be committed if the label is attached to him.

Another psychiatrist may examine the same man and feel he does not merit this tag. His opinion also may be morally rather than scientifically based. He may feel that the complaining family has alternatives other than commitment and will testify, accordingly, that the patient is *not* a danger.

2. *Criminal Responsibility.*

Dr. Szasz suggests that there is a task prior to considering the "modernization" of the *M'Naghten Rule* (the ability to distinguish right from wrong). Many believe that persons labeled "mentally ill" can still distinguish between right and wrong. Since they are ill, they should not,

⁷ Szasz, *Civil Liberties and the Mentally Ill*, 9 *Clev-Mar. L. Rev.* 399, 413-415 (1960).

⁸ Szasz, *The Classification of Mental Illness*, 33 *Psychiat. Quart.* 77 (1959).

therefore, be punished for a violation of the criminal law. The *Durham Rule* (which requires only that the criminal act be a product of an abnormal mental condition) has been constructed, humanistically, to meet this gap.

The argument rages over what kind of psychiatric condition will excuse a particular piece of criminal behavior. But, should a psychiatrist, Dr. Szasz asks, get into this act at all? Explore, first, this question: Can any human being, no matter what his problems, control his behavior? If all actions are determined, if human behavior is regarded as an attempt at preserving self-equilibrium, no man can be blamed more for his conduct than any other man. Each human being is equally accountable or non-accountable. A psychiatrist, therefore, who testifies that an accused criminal is (or is not) responsible is expressing a moral and non-scientific opinion.

Dr. Szasz wrote to the New York Herald Tribune about three young men accused of treason because they had allegedly formed a neo-Nazi group. The District Attorney had suggested that the youths be sent to a hospital for mental examination.

Will the two defendants be examined by Jewish, anti-Semitic or 'neutral' psychiatrists? *Should* they be examined by (devoutly) Jewish psychiatrists, or, perchance, by hypothetical refugee German psychiatrists who had been members of the Nazi Party? Will the District Attorney and the court *want to know* the examining psychiatrists' beliefs concerning Jews and Nazis, or will they be satisfied that the examiners are *bona fide* experts because of their medical and psychiatric qualifications?⁹

C. If we accept the two premises—(1) the *Rule of Law* is preferable to the *Rule of Men* and (2) psychiatric testimony is morally and not scientifically based—we are drawn to an abrupt conclusion. When psychiatric testimony is used to influence judicial determinations, society abandons its rules. Psychiatric testimony, therefore, promotes totalitarian rather than democratic values.

The use of psychological explanations for aberrant behavior may be motivated by a desire to treat some "sick" people more humanely. But "Exceptions to the Rule of Law on the grounds of mental illness are exceptions just as surely as if they favored (or penalized) a racial or religious group."¹⁰

Dr. Szasz points out that we should treat the guilty with decency. We can find alternative methods of handling the problems of those people we classify as "mentally ill" without infringing on their rights, their liberty, and, finally, on our democratic system of justice.

⁹ The New York Herald Tribune, Letters to the Editor, Feb. 5, 1960.

¹⁰ Szasz, *Politics and Mental Health*, 115 *Am. J. Psychiat.* 508 (1958).

III. Psychiatry and Workmen's Compensation

I have presented, in brief and over-simplified strokes, certain insights of Thomas Szasz. He questions the role of the psychiatrist as a scientific expert and would exclude him from the medical witness category. His writings have dealt with criminal and probate proceedings in the main. I will attempt to explore the applicability of these constructs to the field of workmen's compensation laws. This inquiry has broad implications, since, in my opinion, psychiatric testimony is employed more in workmen's compensation litigation than in any other field of law.

IV. Functions of Psychiatric Testimony in Workmen's Compensation Cases

A. *Evaluation of Disability.*

The psychiatrist is frequently called upon to testify whether the workman is telling the truth about his pain or whether he is malingering. The psychiatrist testifying for the worker may say that the pain is actually felt and is as real as if the fracture had not, in fact, mended. The psychiatrist for the defense may say that the worker is perfectly healthy, experiences no distress, and is merely pretending to experience pain so he may reap the "green" reward.

Malingering, as a term, is impregnated with moral condemnation of the behavior examined. The person who calls another a malingerer is really saying that the "malingerer" is trying to get away with something, is trying to shirk some necessary duty which the observer considers "oppressive, unpleasant, or dangerous."¹¹ For example, if a psychiatrist says that an employee really can work, but only says he can't, the psychiatrist must implicitly assume that *work* itself is unpleasant. In the nineteenth century, the hysteric was regarded as a malingerer—she was evading certain adult responsibilities such as having children. The worker who won't work and the woman who won't bear children incur the moral reproach of the observer.

Deviant behavior then calls forth the diagnosis of malingering. "Aches and pains not clearly attributable to somatic . . . lesions . . . are among the most disreputable symptoms which one can have today."¹² When a psychiatrist says a person is malingering, he is saying that the person should be morally condemned. "It thus tells us more about the observer, the physician or psychiatrist than it does about the observed, the patient."¹³ In a workmen's compensation case, then, the psychiatrist plays the role of moral umpire. Dr. Szasz believes that a psychiatrist

¹¹ Szasz, *What is Malingering?* 5 *Med. Trial Tech. Quart.* 29 (1959).

¹² *Id.* at 36.

¹³ *Id.* at 39.

cannot perform this function truly impartially—he must favor, morally, either the patient or the employer.

He further points out that the concept of pain itself needs re-examination. When a person complains of pain, he is attempting to communicate something.¹⁴ The “painful person” has the pain because he wishes to create some “meaning for his life and power to control his human environment.”¹⁵

He may not be interested in giving up his suffering, since, without suffering, his life may be meaningless. The psychiatrist will often observe that “the patient denies his mental illness.” Of course, the patient does not want to be morally condemned for having a “mental illness.” He insists on his right to suffer and will not allow another person to say that his complaints are imaginary.

Pain, therefore, bears a multitude of meanings not generally recognized by physicians and psychiatrists. A physician who says that a person does not have pain is testifying to the impossible. A scientific investigation of the existence of pain will fail as miserably as a scientific investigation of the existence of beauty.

The Michigan Supreme Court has, on several occasions,¹⁶ determined that an expert medical witness is precluded from offering his opinion as to whether the plaintiff was or was not malingering. The trier of the facts, rather than an expert witness, is the judge of veracity. Although these decisions were rendered long before psychiatry had reached its modern position of influence, we believe the rationale to be pertinent at present. The court’s conclusions, for whatever reasons, have adumbrated the thinking of Dr. Szasz.

B. *Explanation of Etiology.*

Psychiatric testimony is also commonly used to explain the etiology of a disability, to answer such a question as: Why does this person have the pain in his arm after the injured bone and muscle have healed? The psychiatrist may testify¹⁷ that the plaintiff has had certain pre-existing unconscious conflicts. He had been using a large proportion of his available energy to work on his problems. After the injury, which is the subject of the litigation, additional energy is needed to assimilate the trauma. But the reserves have been depleted and no energy is available to deal with the trauma. The pre-existing unconscious conflicts, heretofore un-

¹⁴ Szasz, *Pain and Pleasure* (1957).

¹⁵ Szasz, *The Psychology of Persistent Pain*. Presented in part at the International Symposium on Pain, Faculté des Sciences de Paris, Laboratoire de Psychophysiologie, Paris, April 11-13, 1967.

¹⁶ *McCormick v. Detroit Ry. Co.*, 141 Mich. 17, 104 N.W. 390 (1905); *Cole v. Lakeshore & M.S. Ry. Co.*, 95 Mich. 77, 54 N.W. 638 (1893); *Comstock v. Georgetown Tp.*, 137 Mich. 541, 100 N.W. 788 (1904).

¹⁷ Loria, *Ego, Injury and Claim*, 1 *Medicolegal Digest* 15 (1960).

der tenuous control, erupt in the form of neurotic symptoms. There is consequently pain and disability in the arm which has organically healed. Dynamically, the psychiatrist testifies, the conflicts have been converted and expressed in terms of physical distress.

Dr. Szasz, however, would say that the psychiatrist is not a scientific expert and that his moral values dictate his conclusions. The psychiatrist who is paid by the employer is an agent of the employer and cannot be impartial.

A proponent of psychiatry as a science could argue that psychiatric research has established certain scientifically validated data. Anna Freud, e.g., during World War II in England, proved that children who experience an unbroken continuity in their human relationships fare better than children who do not have on-going social relationships.¹⁸ Such research, then, can aid the courts in determining the proper assignment of children in custody cases.

But, Dr. Szasz might reply, if the moral values of the psychiatrist were within a particular religious framework, where the life hereafter is more important than life on earth, an entirely different conclusion would be in order. The ultimate best interests of the child would not be served by keeping the child with non-blood related parent figures who had raised the child for the first seven years of its life. It would be far better for the child to be wrenched from these relationships and be placed with a natural parent, even though a stranger. The natural parent would raise the child in the true religion which would allow eventual salvation. Jehovah's Witnesses, e.g., believe that happiness on earth is a value secondary to God's law.

There are lawmakers and medical men who recognize that the Christian should have the right to obey God's law even when it conflicts with man's law. Indeed, one doctor, writing in *Clinical Pediatrics* of December 1966 stated the following:

"Most people in the Western World profess to be Christians. They respect other Christians and almost deify the early martyrs who were fed to the lions in ancient Rome rather than renounce their faith. Almost deify them! Yet those early martyrs joyously allowed their own children to die in lions' jaws. . . . Why for religious reasons can the involuntary, artificial (and much more grotesque) death of children then be almost divine, and the involuntary but entirely natural death of the same kind of children for the same reasons *now* be almost criminal? After all, in both instances minority beliefs were and are involved. What's the difference?"

"Lack of reason and common sense, and emotionalism, and hypocrisy—these make the difference."

This doctor notes the conflict at times between man's law and God's law. Of this he says:

¹⁸ Freud and Burlingham; *War and Children* (1943).

"Which is the highest ideal and the greatest Good, religion or secular law? If one answers law, then for him the problem doesn't even exist. . . . This is . . . basically irreligious or atheistic. If one answers that both are equally Good, the conflict becomes insoluble. . . .

"Now, if religion or any sort of faith in the supernatural is higher than law, then, the problem is again easily resolved. Where the two conflict, religious tenets will prevail. . . .

"The dilemma boils down to a vital philosophical argument: in questions involving personal highest principles of parents versus law or society, which should hold sway? If the latter, as is now the case, then pure socialism is the greatest Good . . . and one could never know (or care) which principles might be foisted on whose children. Organized religion would be no more than a meaningless farce and a mockery; the state supreme."

However, this doctor next notes a most important part of the issue, the part that explains why the early Christians could allow themselves and their children to die in the arena. It explains why Christians today would rather die than break God's laws.

"Perhaps the most fundamental question is what is the value of terrestrial life, anyway? Is it to be valued above all else? If so, then society's present outlook is correct. Save the life of the child *at all costs!* Spend all the money; use all the material; smash all doctrines! . . .

"If not, if there is some principle higher than life, then the 'good guys' are wrong. *The life of the child becomes less important than the integrity of the religious principles to which the parents adhere and according to which they wish to raise him.*"

Jehovah's Witnesses have faith in the God of the Bible. They believe his promises of everlasting life on a paradise earth under God's righteous rule. As the early Christians, they know that nothing, not even a few more years of life in this system of things, is worth compromising their integrity to God.¹⁹

Thus, the seeming scientific conclusions of the psychiatrist are no more than the dictates of his individual morality. An atheistic psychiatrist would not be concerned with a life after death. A religious psychiatrist might be.

Similarly, the psychiatrist who offers opinions on issues such as abortion, the death penalty, homosexual acts, marijuana, and alcoholism,²⁰ or diagnoses on persons such as General Walker,²¹ former Senator Goldwater²² and Ezra Pound,²³ is really offering a moral opinion. Dr. Szasz would separate such opinions from a category of scientific conclu-

¹⁹ Awake 15 (May 22, 1967).

²⁰ Szasz, *Alcoholism: A Socio-Ethical Perspective*. Presented at the Symposium on Alcoholism in Industry, sponsored by Western Medicine Medical Journal, Beverly Hills, Calif., Sept. 29-30, 1966.

²¹ Szasz, *Psychiatric Justice* 178-225 (1965).

²² *Id.* at 224-225.

²³ Szasz, *op. cit.* *supra* note 10.

sions. The psychiatrist is entitled to offer his opinions on such issues or people but he should clearly differentiate that the opinion is that of a citizen and not of a psychiatrist-scientist.

To say that human behavior is complexly motivated is to utter a truism. Yet psychiatrists will venture opinions as to the cause of an individual's problem after minimal (measured in hours) contact with a person. It is difficult to accept the proposition that a psychiatrist who examines a plaintiff on behalf of the employer can ever obtain meaningful data. Communication between one human being and another is perhaps one of the most difficult problems of life. The literature of the ages is significantly concerned with such failures. Consider the plaintiff in the psychiatric interview under the usual conditions. He has been seen by medical doctors who have found him organically intact and have therefore looked quizzically at him when he persists on insisting he is in pain. The employer has tabbed him as an undeserving person. His enemy, the employer, then sends him to its agent. It is inconceivable that, under these circumstances, any rapport could be established. Even a well-intentioned psychiatrist (and there are many who are not) would find it impossible to know meaningfully the person examined.

The psychiatrist selected by the plaintiff's attorney has merely a slightly better opportunity. Trust is an essential element of the psychiatric relationship. There cannot be trust if the suffering person knows that his confidences will be revealed. Since the purpose of the interview is to provide testimony in open court—and the employee knows this—the essence of the psychiatric relationship cannot be attained in the processes of litigation.

I have applied these insights to the cross-examination of psychiatrists. Although my observations are empirical, I have found that, when I extricate, for example, the moral assumption from the psychiatric conclusion, the witness becomes conciliatory, hostile, or utterly confused. Certainly, the prior specious objectivity of the testimony is dissipated.

We do not have to settle in this paper the problem of whether human behavior is subject to scientific inquiry. If it is not, then, of course, the psychiatrist has no business posing as a scientific expert. If human behavior can be scientifically analyzed, the problems inherent in the psychiatric interview during litigation effectively preclude a valuable contribution.

V. Proper Role of Psychiatrist

I should emphasize that Dr. Szasz believes the psychiatrist does have a valuable contribution to make—but not in the courtroom. Dr. Szasz urges that the psychiatrist should play the unique role for which his training prepares him.²⁴ Over a long period of time, within the four walls

²⁴ Szasz, *The Ethics of Psychoanalysis* 13, 24, 32, 51 (1965).

of his office, he can offer to a troubled human being an equalitarian human relationship. Nurtured by this, the client may try out less destructive ways of dealing with life. The psychiatrist, through his method of relating to his client, encourages him to become more autonomous.²⁵ Autonomy, or individual human freedom, is the core of any real democracy.

VI. Summary

I have attempted to sketch the gradually expanding use of psychiatric testimony in litigation of various kinds. I have briefly described the contention of Dr. Szasz that psychiatric testimony is morally and not scientifically based; that testimony based on individual moral premises will tend to promote the *RULE OF MEN* rather than the *RULE OF LAW*. Totalitarian rather than democratic goals would, consequently, be furthered. Conclusion: the psychiatrist should not have a place in the courtroom.

I then attempted to relate these general principles, applicable to criminal and commitment procedures, to the field of workmen's compensation law where the use of psychiatric testimony is, at least quantitatively, more significant than in any other field of law.

In evaluating the existence or absence of disability the psychiatrist should have no place in such determinations. Pain is a complicated phenomenon about which the psychiatrist has no more relevant comment than any other equally intelligent layman.

As to the etiology of an individual's problems in living, the moral values of the psychiatrist are important in the assessment of his conclusions. Since the value of the psychiatrist is the help he can offer to a person in a one-to-one relationship, strong doubt exists as to the scientific aid a psychiatrist can furnish to the field of workmen's compensation.

VII. Prospectus

At the beginning of the twentieth century in the United States, workmen's compensation, as a device for aiding employees with work-caused disability, was an important and necessary step forward. As we enter the final third of the century, we find numerous programs to compensate workers—programs which frequently overlap and conflict. Group health insurance, Social Security, pension plans, unemployment compensation, supplemental unemployment compensation, guaranteed annual wage, and general welfare programs are some examples. It may be totally illogical today to provide a special category of benefits for the

²⁵ "Autonomy is a positive concept. It is freedom to develop one's self—to increase one's knowledge, improve one's skills, and achieve responsibility for one's conduct. And, it is freedom to lead one's own life, to choose among alternative courses of action so long as no injury to others results." *Id.* at 22.

man injured at work as contrasted with the man injured at home. Undoubtedly, workmen's compensation will eventually become an anachronism. This problem, however, is not the subject of my paper. So long as the system is with us, we should explore avenues to make it work better.

Perhaps it is time to re-evaluate some basic premises in workmen's compensation litigation, about dealing with people who claim to be disabled. A usual assumption is that work is unpleasant and will be avoided if possible. The conclusion that follows is that a person must *prove* his disability in order to merit help. An alternative assumption is that people, for many basic reasons, *need* and, therefore, *desire* to work. The conclusion that follows this assumption is that a person should not have to prove his disability because he would work if he could.

Justice McAllister discussed these assumptions and chose the latter:²⁶

The argument, too, is addressed to us that the applicant for disability benefits in this case is a comparatively young man, and that he could perform, at least, light work of a substantial gainful nature, if he wanted to. This argument implies that in this case, and in many other like cases, applicants for disability benefits who are able to work belong to the class that does not want to work, or refuses to work.

Some people have always blamed the poor for being poor, and the unemployed for being unemployed, as is especially remembered from the early days of the Works Progress Administration more than thirty years ago. However, in the intervening years, much investigative work has been carried on by federal, state, county, and city governments, and by civic, philanthropic, and labor organizations, as well as in studies and findings of government legislative committees, the Department of Labor, and other groups, directed to the study of unemployment, its causes, and remedies. Now, it is generally accepted that, of those able to perform labor and accept employment, only a small fraction of unemployed persons, perhaps 2% at most, refuse to work and prefer a small relief payment to wages; and, even in such cases, while a laziness may appear to be the outward sign, nevertheless, behind this is found a psychopathic condition, a deep character defect, emotional instability, or, at times, mental illness. Anyone who has read the literature on the subject during the past thirty years knows this. While we are not here concerned with determining the exact percentage of unemployed who refuse work or ask a small dole in preference to employment, we allude to the foregoing in emphasizing that it is a matter of common knowledge that the overwhelming number of men who became unemployed, seek re-employment, or a new employment, rather than government relief.

In the instant case, applicant, at the time he filed for disability benefits, as has been stated, was fifty-two years old; he had started working in the coal mines when he was sixteen years old; and he

²⁶ *Masey v. Celebrezze*, 345 F. 2d. 146 (6th Cir. 1965).

worked for thirty-five years until his disability. At that time, his annual earnings were \$6,619.60.

There is an unconscious implication in the government's argument that this particular applicant, who worked in the coal mines all his life and was then disabled for further work as a miner, would prefer to do nothing and receive, in disability benefits, a fraction of what he could earn in substantial gainful employment. With such a work record behind applicant, and such an earning power, it is impossible to classify applicant in that minuscule number of the unemployed who refuse to do any work available to them, even if it results in substantial gainful employment.

It would be worth trying a system whereby help would be provided on the claimant's mere statement of disability. No expert would be needed to buttress the claim. Society would not only save the costs attributable to the litigation process but would, more importantly, foster democracy by adhering to Rules of Law rather than of Men.

If this plan would cause some small increase in disability claims, we can easily tolerate the additional cost.

If this plan were to fail because large masses of people stopped working, we would learn much about what is wrong with our society. Such knowledge would prove invaluable. Since we already know a great deal about the dilemma created by ever-increasing leisure time, a conclusion that people do not need to work would be unjustified. We might conclude that the nature of work in our society must be radically altered if life is to have meaning.

Although the suggested alternative might well be worth investigating, I do not believe there is any hope for changing the rules of our legal game in the foreseeable future. This suggestion will, for obvious reasons, be opposed by employers, insurance carriers and the legal profession. There will be resistance also from psychiatrists because we are questioning whether the psychiatrist really has the knowledge he professes. If the psychiatrist does not have this special knowledge, he loses power and status.

As lawyers, we must represent our clients to the best of our ability within the present rules. The thinking of Dr. Szasz can provide new vistas for all those concerned with securing justice in a democratic society.