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Law and Psychiatry in the Canadian Context

Cases, Notes and Materials

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To my brother Eli,
analyst and humanist.

Introduction

What do law and psychiatry have in common, either in theory or practice? A lay person with only passing familiarity with the subjects would assume that they are very different professions, with the jurisdiction of law being punishment and regulation, and the primary responsibility of psychiatry being treatment. Law would be regarded as an age-old institution and psychiatry as an embryonic science, albeit associated with the long-standing profession of medicine. While the average person in our culture is intrigued by the esoteric nature of psychiatry, and is even increasingly dependent on its treatments, there is widespread suspicion and fear of its capacity to affect the direction of one's private life and significant social relations. Even to the uninitiated, psychiatry is approached with ambivalence. Similarly, people have mixed reactions to law, which, as a social institution, affects almost every aspect of our lives.

Careful scrutiny of the theoretical content, professional ideologies, and practices of law and psychiatry, exposes some strong affinities between the two. They both involve very wide discretion in fashioning their discourses, and in the exercise of that discretion, in their respective rules and categories, lack certainty when compared with scientific knowledge found in the hard sciences. Perhaps most important, they directly confront and are central to those values in our society that deal with the control of deviancy. They are each value-laden systems of social control and therefore have discreet relationships with the conservative authoritative structures of power and influence in contemporary civilization. While at one level of analysis one might distinguish rational law from the core of psychiatry, which presumably deals with the irrational, it should not be forgotten that psychiatry purports to have a rational theory about the irrational, and in so doing has something in common with the theoretical framework of legal discourse. Although psychiatry is arguably as uncertain in its predictions and diagnoses as law is in its interpretation of jurisprudence and prediction of legal outcomes, in producing theoretical justifications of their projects, both of these groups attempt to model themselves after scientific paradigms of discovery and application. Without this, they could hardly hope to accrue the prestige associated with their professionalism.

Although the earlier relationships between law and psychiatry were apparently harmonious in the sense that law relied on psychiatry for its humanistic contributions to treatment, much needed in the period of legal

reformation and rehabilitation, latterly psychiatry has come under severe attack from many quarters for perceived abuses of power. Historians, populists and consumers, sociologists, theologians, and government planners have joined ranks in listing the defects of psychiatric knowledge and in particular the shortcomings of its encroachment on the territory of law. The movement of antipsychiatry broadly includes such figures as Thomas Szasz in the United States and Michel Foucault in France; the former insists that the concept of mental illness is a myth in its entirety, and the latter identifies the trend toward rehabilitative psychiatry as serving the needs of industrialization, with the consequent undermining of the real person or self. In the context of Western Europe, the critique of psychiatry has reached political proportions, resulting in momentous social upheavals, such as the new Mental Health Legislation of 1978 in Italy, which summarily closed the mental hospitals (asylums), and has prevented the reopening of psychiatric wards within the general hospital system.

It is understandable that controversies have begun to rage about the parameters of psychiatry and the legitimacy of its claims to having a role with respect to rehabilitation, and within the legal system itself. Particularly in Europe, Marxist thinkers have entered the fray, suggesting that some of the premises of psychiatry, specifically found within the tradition of Freudianism, can be linked to the needs and wants of the bourgeois controlling classes. It is their perspective that, unless subdued, psychiatry can only continue to play a pernicious part in subjugating socially ineffective individuals who are made blameworthy on an individual basis for matters that have their cause in the contradictions of late capitalism.

Curiously enough, an unholy alliance has occurred between the right and the left; the right, perturbed about the actual cost of maintaining psychiatric institutions and extended psychiatric social services, and the left, which defines its interest as the liberation of psychiatric patients from their overseers. Theologians are distressed about the incursions of psychiatry into their well-guarded belief systems of morality and faith. Ex-mental patients, encouraged by the politicizing of psychiatric institutionalization, and the discussion of alternative beliefs and values to those of psychiatry, have developed organized responses to psychiatric management. These interventions have rapidly found the backing of lawyers who have begun to specialize in the field, and who have launched manifold claims with regard to the criteria for involuntary incarceration, the rights and obligations flowing from the confidentiality of treatment, the conditions of informed consent, the limitations to be placed on expert testimony, the standards of malpractice, and the procedures for psychiatric

research and experimentation. Particularly in the United States, there has been a substantial investment, on the part of lawyers, to ensure that psychiatry be brought more and more under judicial control.

From the psychiatric standpoint it is asserted that the adversarial nature of law has frustrated the humanistic endeavours of psychiatric practice, and moreover has frustrated the constructive contributions of psychiatry to the legal process. Psychiatrists argue that the terms and references of law demand too heavy a price in the courtroom; psychiatrists are pressed to give simplistic answers to complex psychological problems, and when unable to respond conclusively, are made the subject of ridicule. Many psychiatrists have become distrustful of the law and resist what they see as courtroom conspiracies. Despite this, there has been an increased reliance on psychiatric testimony in almost every legal jurisdiction in the Western world.

Forensic specialists have emerged who, at least in some instances, have produced a new set of recognizable problems. Those psychiatrists who have learnt to be adept at dealing with the legal system have been identified, by lawyers and psychiatrists alike, as having lost their professional independence and as having evolved a collusion with the legal system in working out preset scenarios in both the civil and criminal sectors.

It must be readily admitted that psychiatry is not a monolithic theoretical discourse, nor are the actors within the profession of a single persona. The private psychiatric practitioner may never see a courtroom and may only have a few discreet experiences with the law in the course of his practice. He may specialize in soft treatments and benign discomforts, and rarely find himself in the middle of public commentary about the impact of his treatments on his patients, the scope of his research plans, or the consequences of his social decision making, such as occur in involuntary commitment. He might never be required to take a stand on issues such as psychopathy in an insanity defence.

At the opposite end of the spectrum is the range of psychiatrists who have ongoing and direct involvements with the legal system. Within this group are found various levels of identification with state or legal authority. There are the psychiatric reformers who, in the interest of either science or politics, are committed to changing the existing power structure. These individuals may hold different political commitments and can be located anywhere along the path of extreme right and left political views. It is usually the case that the psychiatrist who is dedicated to scientific rehabilitation will justify the right of the state to maximize a citizen's

productivity and integration. A natural consequence of this position is often a reduction of patients' liberties, regardless of the economic model in question, be it laissez-faire or socialist. In the former instance, the reformer rationalizes his research on the basis of a utilitarian calculation that there is no reason for individuals or groups to have their life enjoyment compromised because of the infirmity of another, given that there is a scientific avenue by which to rectify the imbalance. In more controlled economic and political settings the psychiatric researcher sees a consistency between science and social evolution, all the while conceiving the state's interest as paramount and believing that this is the best guarantee of the long-term protection of the collective. Wherever psychiatric scientific reformers are politically sensitive to the greater design of political and social values of the state, there will be a meeting ground between the political left and the political right.

Within institutional psychiatry there is a small but distinctive community who define themselves as agents of social control. Their perception is that their primary responsibility is to service the authoritative hierarchy. Some of this group will believe that their appraisal of the pragmatics of power is realistic and not inconsistent with a moral-social duty, provided that one is not seriously opposed to the political or legal fabric of the community at large. The more controlled the society, the greater the likelihood that this group will predominate. These psychiatrists find little difficulty in making connections between their professional stance and their ideological responsibility; when called upon to make a choice betwen the patient's professed right to liberty and the state's claim to social rehabilitation, they will opt for state authority.

The direction of institutionalized legal psychiatry is as unclear as our ability to understand the areas in which privatized psychiatry will find itself, over time, intertwined with the law. What we must accept is that psychiatry has evolved into a social instrument which is attached to the exercise of discretionary judgments with real individual and social outcomes. We must explore the qualitative differences in the holding of this power, between law and psychiatry, and investigate the historical groundwork that has given rise to our predicament. It does not seem credible that history happened as baldly as some authors are wont to say. The justice system turned to psychiatry to engage it in looking after a host of unmanageable social inflictions. The vulnerability of psychiatry appears to have lain in the fact that psychiatry has held out neither the overt moral values of religion, nor the professional solidarity and air of certainty presented by law.

At this point in history psychiatry has become sufficiently infused into our culture that it seems to have more than a moderate attachment to the fashioning of our social norms and the manner in which we justify them. Whereas religion and law have learned over the centuries to disguise their absolutes and punishments, unfortunately for psychiatry, history has transferred, at least in the eyes of many observers, absolutism and punitiveness to it, leaving psychiatry more exposed to criticism than law. Whereas law gains its respect through establishing a powerful professional structure which is wedded to a discipline like the system of precedent, psychiatry, until now, has not summoned its forces in the interest of defending its concepts and professional authority. The challenge before psychiatry is whether it will strengthen itself as an institution and as a theoretical discipline, thereby articulating its theory of social values, and thus legitimating its claims in the territorial dispute between itself and law.

The extent to which psychiatry can delineate its future agenda with respect to social values and its participation in legal decision making cannot be separated out from the future of law. The legal precedent system is under pressure in any number of areas in our complex industrial economy, which is affected by rapidly changing social and individual values. Because psychiatry and law are both produced and reflected in particlar cultural social systems, neither institution can separate itself out from the dialectical patterns of involvement with economies and politics and, indeed, can no longer neatly separate themselves out from each other. Each needs the other in effect to survive, to respond meaningfully to scientific advances in knowledge, and to take responsibility where science can give no answers. Whatever the outcome, it is only through a painstaking analysis of all those areas in law where psychiatry has given its testimonies and taken a measure of responsibility that we, as lawyers, psychiatrists, and citizens can cope with the broader issues of the politicization and legal regulation of psychiatry.

In Canada, where until recently forensic psychiatry was looked upon as a highly specialized area of theory and practice, the issues of legal psychiatry have come under the direct scrutiny of government, the legal profession, and the public at large. This has occurred because the definition of mental illness and the consequences that flow from it are seen to have far-reaching social effects, which in turn may be related to the very basic values that constitute a liberal democracy. The denial of the mental patient's liberty, whether in the civil or criminal process, has raised serious legal issues which are presently finding resolution and clarification in judicial decisions, legislative reform projects, and academic writings.

The communication lines between lawyers and mental health professionals have been far from satisfactory. As a group, lawyers are identified with the demand for more stringent regulation of the mental health profession, both in the context of therapeutic treatment and scientific research. This trend has raised questions as to who should have the authority to formulate guidelines and sanctions, under what circumstances such authority should be allocated, and through what means or institutions they should be imposed. From the point of view of mental health professionals, there is a paucity of established jurisprudence and legislative criteria to inform them meaningfully about social and legal expectations. Judges and legislators are as confused as mental health professionals by the diversity and complexity of the value claims placed before them; this is aggravated by misunderstandings about the nature of the responsibilities and practical experiences in each other's profession.

This casebook, in the interest of improved dialogue among the professions, is organized around the major themes that present themselves in the forensic system, ranging from the civil tests of competency to the various stages of adjudication and disposition of the mentally ill criminal offender. There are also sections that deal with the historical evolution of concepts of illness and normalcy, and current methodologies being utilized for purposes of diagnosis, assessment, and treatment. There is a review of the scope of patients' rights, and the judicial and alternative remedies available for the redress of wrongs. Finally, there is a separate chapter that examines the liabilities which may be incurred by mental health professionals through civil actions pertaining to informed consent, malpractice, and breach of confidentiality.

Forensic psychiatry cannot be neatly separated out from the fields of constitutional, family, tort, and criminal law, and therefore the treatment to be found here cannot be exhaustive. This casebook is intended as an introduction to the broad areas of interaction between law and psychiatry. It emphasizes the specific role of the psychiatrist as opposed to other mental health professionals, although it will appear in many instances that the legal issues attach themselves similarly to other professionals working in the field. Certain timely topics such as the dangerous sex offender, the juvenile, and the addict have only been treated peripherally in order to accommodate the demands for a workable structure for reviewing the major parameters of Law and Psychiatry. It is to be expected that more specialized texts and academic articles will emerge over the next few years.

The casebook itself has benefited greatly from the work of Canadian forensic pioneers. Within the Clarke Institute of Psychiatry, for example, a fine tradition of scholarship was developed in the post-war years under the tutelage of the late Kenneth Gray, Hans Mohr, R. E. Turner, and Don Atcheson. This has also been true in many of the other provinces, and in the work of the federal government of Canada. Under the direction of the Federal Law Reform Commission in Ottawa, numerous background papers and reports have been written to respond to perceived needs in the criminal arena. The controversies are far from over and this too is encouraging. One of the main benefits of stimulating research and critical analysis has been the bringing together in public forums of people of divergent perspectives and commitments. The result of this will be greater attention to the moral and legal issues in law and psychiatry, with little likelihood of effective, simple or short term resolutions for the outstanding and contentious issues. It is most important, however, through the educational experience, to produce occasions for persons training in forensic psychiatry and law to inform themselves about contemporary Canadian realities.

For some, it will be assumed that the litigation which has taken place in America is alien to the common law institutions which are an essential part of the Canadian cultural fabric, while for others a comparative review of materials will recommend possibilities for fresh and challenging adjudicative reflections. I have attempted in this work to avoid structuring the issues in a way that would recommend a particular avenue. Rather, these materials were assembled to allow discussion to take place from opposing points of view. The tone of a casebook can never remain completely neutral and thus I ask the forgiveness of my colleagues in all the relevant professions for the shortcomings of my judgment. Given the sudden upsurge of excellent writings and research findings, we all realize in any event that much of what has found its way into this volume will either be shortly outdated or at least be redefined according to new learning. Practitioners should use the casebook with appropriate caution since courts are constantly reviewing their own decisions and are apt to reformulate policy.

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Table of Cases