Law and Psychiatry: The Conjuncture of Two Disciplines

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This brief note addresses the changing relationships amongst law and all those related fields that have in the United States come together in the legal academy under the rubric-law and psychiatry. Law curricula in the United States have had courses in law and psychiatry over the last forty years if not longer. Psychiatry attached to law for legal analysis was paradigmatic of the Law@movement. Social science and humanistic disciplines were coupled with law to entertain the ways in which such disciplines could aid legal analysis in the project of more effective social engineering that had become the trajectory of liberal jurisprudence in the United States with the hegemony of American Legal Realism as a school of jurisprudence or as Neil Duxbury in his excellent study of American legal thought, Patterns of American Legal Thought, a mood of legal thought.

Michel Foucault, for one, in the West brought psychiatric thinking to the center of analysis social thought as an exemplary case of the changing nature of policing populations of mass states under the sign of the psychiatric gaze. With psychiatry we have a disciplinary marker for all the disciplines that relate human psychology to law's social control and justice needs. Such disciplines include but are not restricted to anthropology, biology, economics, history, linguistics, literary analysis, political philosophy, political science and psychology.

The first courses in law and psychiatry in the United States were more constrained in the number and types of issues that were under analysis. But even with this generalization there was at least one notable exception. The casebook authored by Profs. Joseph Goldstein and Jay Katz of the Yale Law School interrogated the relationships among legal, psychiatric and psychoanalytic stances for legal and social usefulness. This casebook put power relationships at the heart of law in juxtaposition with both the epistemological considerations attached to psychiatry
and psychoanalysis and the pragmatic problem of application even in the event of clear pertinence of psychological, psychiatric or psychoanalytic empirical claim.

Let me give two of the myriad issues raised in this casebook at very different levels of analysis. The first is at the heart of family law. Jurisprudentially the family is the cell or basic building block of the liberal state. In a mass state the question invariably arises about under what conditions and how can or should the state intervene into the intimacy of the family. Such a question goes to one of basic education, what should the state do in its broad educational mandate to shape values of the children under its "parental" wing or its sovereign authority?

This question is at the heart of the most ancient of philosophies and theologies. It is also central to the question of how a state both survives internally and recapitulates itself without becoming ossified. The question calls forth all the nature/nurture questions that never disappear but recur with new disciplinary markers and asserted scientific "findings." So today the question of the "nature of man" recurs in the United States in a tension between religious fundamentalists and scientists with respect how much is given at or before birth and how much is shaped by cultural impacts. But even if the recurrent battle between religion and science were bracketed, the question of the extension and limitation on cultural shaping of human psychology would be less than obvious. The problem of the plasticity of human development and consciousness is one that is unlikely to be theoretically resolved. But it is also one that is more than theoretical. It is at the heart of contemporary real world legal and medical struggles. It involves the very young and the very old. It involves the limits of state welfare and the limits of medical possibility. For example, what should a state provide different for learning given the very different psychological makeup of student populations. Should interventions for the "best" be different than for the average? If so who are best, those who can draw, those who are more athletic, those more musical, mathematical, etc? What should a state do for those who have learning problems at the "deficient" end of the curve? If the answer is that the state should tailor programs for every variation is this possible, cost effective, etc? But this is only one set of questions that I just mark here in the relationship of the psychiatric disciplines for legal analysis. Goldstein and Katz opened those questions and others concerning
the very practical intervention of the state into conflict resolution with family problems.

I can best characterize this very real set of problems figured even in this early law and psychiatry set of reading under the rubric of parental custody duties and rights. Goldstein and Katz put this analysis under the legal heading of what was in the best interests of children. The question generated its own dense literature in the United States and the rest of the world which can only stay unresolved. Goldstein with Albert Solnit and Anna Freud in two books, The Best Interests of the Child and Beyond the Best Interests of the Child argued that by the time the courts get involved at least in the bureaucratic space in the United States, the best interests of the child were already past. These authors coined a term, psychological parent and argued on the basis of psychoanalytic theory that it was better for the child to be placed quickly with the “psychological” parent assuming at least minimal parenting capacity than to allow the kind of extended legal conflict over custody.

But even if this were adopted as policy it at best concerned cases of custody dispute in divorce situations. It did not provide much help with abuse cases where the question is one of terminating or severely monitoring parental control of a child. But do we want to accord the prime value of child custody based on a child’s interest? Are there other values that are at least as central, all other matters equal (hardly ever the case)? So for example if we are dealing with the custody of aboriginal children should the state provide protection to the group over the child. We all know that many states have had policies now discredited to at least an ideological extent to in fact remove children from aboriginal people to socialize the children to the values of the dominant culture. At any rate the notion of best interest of the child and the notion of psychological parent did not resolve the questions concerning child custody in the United States and the problem is still of relevance for a course in law and psychiatry or a more specialized course in family law. It still has and must have significant jurisprudential valence.

Most courses in law and psychiatry in the United States were more circumscribed than suggested by the Goldstein and Katz materials. Certain issues dominated those courses. One issue at the heart of the intersection of law and
psychiatry was typically placed into criminal law courses. Criminal insanity as a
defense to the attribution of criminal liability constituted the very dramatic
ostensible contest between law and psychiatry as separate disciplines. As early as
the entry of psychiatry into the forensic scene, psychiatrists seemed to operate on
a view of human normality and transformative possibility very different from that
of jurists. Liberal jurisprudence, indeed one can argue western jurisprudence
always assumed the capacity of the offender to control his own behavior. The
assumption, what in liberalism became the assumption of individual autonomy,
defied the determinism of nineteenth and twentieth century forensic psychiatrist
who saw pathology where jurists saw, perhaps evil and certainly bad or respon-
sible behavior.

I should say that the jurists who assumed and still assume as a model individual
autonomy could very well also assume a hard core determinism either because of
theological, philosophic, or biological commitments. Philosophers have worked
out such a position as compatibilism, i.e, one can be both responsible and deter-
mined.

Criminal law professors of my generation often had a try at writing about
criminal responsibility and the insanity defense both because of its dramatic
nature, i.e, it usually was asserted in capital punishment cases and because it was
a useful point of departure for questions concerning the reaches of human responsi-
bility in general. Corollary issues also fit the criminal law or law and psychiatry
course, for example on the question of the competence of a defendant to stand trial
because of an asserted deficiency in capacity based on mental illness or defect.

Several other issues fit the "classic" law and psychiatry course. One such issue
dominant at that time but still an issue involved the question of what set of social
control institutions normatively and effectively should be deployed with non
criminal but potentially dangerous people who were mentally ill. The set of issues
that revolved about what was called in the United States civil commitment was
central to whole course in law and psychiatry.

The question of civil commitment necessarily opened law and psychiatry ana-
lyses to more broad based issues. But originally the question was what to do with
someone who was mentally ill and exhibited behavior that might be socially
dangerous to the person's self or others. The legal practice in the United States made it very easy to lock someone up in a mental asylum with little legal protection based on the word of a doctor and perhaps a one other person. By the late 1960's in the United States, it became obvious because of courses in law and psychiatry and more importantly because of a renewed public interest generally in civil rights that whole populations of people had been incarcerated in public mental health hospitals which except for the name were very much like prisons.

Law and psychiatry courses exploring this set of issues dealt with epistemology, power and rectitude. What did mental illness mean? What did insanity mean? How do psychiatrists and others provide definitional clarity to insanity or mental illness as concepts? If mental illness could be adequately defined, what did that mean concerning prediction of dangerousness? Were the mentally ill anymore dangerous than others? How did mental illness relate to other kinds of illness or disease? What relationship existed between mind and body? These and other issues became grist for classroom and for contest in the courts and state legislatures.

The issues in civil commitment also became more specific with that class of offenders who were then called sexual psychopaths. Sexual offenders fell into two general groups, pedophiles and rapists who often presented very different characterological profiles. Was there really such a discernable class of offenders and could their loathsome behaviors be predicted before the act. Could they be treated once they acted? The question of treatment was and is important for this class as well as most other people who voluntarily or involuntarily become a "consumer" of mental health service, public or private.

Politics and economics quickly came to the center of analysis when either civil commitment of the mentally ill or the sexual psychopath became the object of study. Whatever mental illness means and this is still disputed when the question is invoked in law it usually means someone or many are presented with a difficult dispositional problem. It became clear that many people had been locked away sometimes for very long periods, who were not dangerous, maybe not even mentally ill whatever the meaning. Rather some of these people were just unlucky in the wrong place at the wrong time or poor or in some other way socially inept. Some were no doubt railroaded by relatives to whom they presented care prob-
Law and psychiatry resolved newer dispositional patterns for this class in the so-called deinstitutionalization of the mentally ill. But despite a movement to community treatment models the pendulum has been to allow some involuntary commitment after a period of very tightened standards for involuntary hospitalization. Unsurprisingly institutionalization has opened other issues of the treatment and control of this class of people. The issues generated by civil commitment in earlier law and psychiatry courses have altered but still pose analogue concerns with the proper and effective use of state power and resource allocation.

One reason that deinstitutionalization became possible was the development of psychopharmacology. Drugs for psychotic depression and mood disorders allowed at least important behavioral shifts so that whole populations of people who were psychically disabled could function in the community. But the promise of psychopharmacology has itself generated its own set of cultural and legal problems for the intersection of law with psychiatry.

The promise of such drugs to check the deepest depressive states or inhibit the most threatening hallucinations couple with the success of antibiotics the last several generations has created a consciousness and expectation of medicine and pharmacology that has its own problems not only with effectiveness but also with human self imagine in the world. So we have the use of drugs in athletics to enhance performance. Children in high school use steroids emulating professionals who feel the need to use to survive as professionals. We have generations of students on drugs to enhance educational performance and we have over indulgence, addiction, etc. We may also have diminishing returns in some areas of pharmacological use and we have new generation bacteria and viruses altering structure to thwart what we do have. We have the use of some of these drugs in the food supply to the point that they may be causing grave problems to ground water and to the ingestion of the food itself. We also have the problem of research development and global capital that inheres in all huge business enterprise with regulation, pricing and control. All of this is now a part of law and psychiatry and the basis for its own separate course.

Pharmacology has become decisive in law and psychiatric issues. The manifest and dramatic effectiveness despite untoward effects from the drugs whether
possibly irreversible tremors or violent reactions and acting out from anti depressive psychoactive agencies is part of the recurrent turn to biology for understanding and in fact reducing human epistemology to biology as mind is reduced or at least equated with brain. Brain mechanisms and neuroscience in general will become the heart or at least a new center for organizing materials for future classes in what might become designated classes in neuroscience and law.

From the outset of turning from metaphysics to human mechanism there have been tendencies to explain human behavior in exclusively biological terms. So the first generations of phrenologists were serious scientists even though they were proven wrong and though those following them reduced their empirically committed work to the ridiculous.

Significant work by first rate scientists is proceeding with exploration of neuroscience. Some hope that in fact the brain can be scanned in the not too distant future to detect lies and distortions. We would then no longer depend for example on notoriously unreliable eye witness testimony. Of course such an effective brain scan would be an impossible temptation for state use against potential criminals and terrorists accompanied by publics that fear both criminality and terrorism. But we may never reach any predictive accuracy but in fact be open to an analogous predictive problems we have had with delegation of interpretation of the human mind and behavior to psychiatrists to (faultily) predict dangerousness.

This question of prediction also accompanies another tendency that is an aspect of traditional analysis in law and psychiatry scholarship. This is the problem of preventive detention. The public in any mass society is readily frightened by crime and now by the specter of global terrorism. Certain scientists and policy makers in liberal states have always pushed for preventive detention. This means finding and taking people out of society before they can commit a public harm. It is antithetical to any libertarian strain in liberalism. It is also the hope of scientific policy engineers. It is in fact an antinomy in mass liberal state culture. The law is in place if generalized from sexual offender statues to do something like preventive detention in such traditionally liberal states as the Unites States, Holland, and England. Issues of liberty versus security are and will be at the heart of law and psychiatry curriculum necessarily.
The use of psychiatry as a discipline for law expressed the actualization of another aspect of mass society and governance. This has been with us for much of the twentieth century. Twentieth century mass society demanded regulation of public relationships to state bureaucracies. These agencies of the state were theoretically going to facilitate specialized, fine-grained, and quick response to changing economic and social contingencies. We have been reliant on specialized expertise in every walk of life. Law and psychiatry has and continues to present a frame for the analysis of science and the application of science's limits to ever generalized aspects of public and private social control. If the neuroscientist replaces the psychiatrist, such a figure will have even more scientific prestige than that exercised by a speculative and at best artful psychiatrist.

The question of legal and moral responsibility has always been central to law and psychiatry. The move toward any reductive but very powerful neuroscience as well as breakthroughs in genetics, etc. can in fact alter the ways we define the human animal and species. In even the most sophisticated and rich societies philosophy has become too often a version of rationalized science and no longer an independent discipline for the actualization of a way to live the good life. Also lawyers are losing their professional sense of calling for the public good and independent of client. Lawyers given globalization, as has been argued by the past dean of the Yale Law School Anthony Kronman in his book the Lost Lawyer, have become little different from other business consultants. This shift in consciousness and social function may also be an object for study in any law and psychiatry expanded syllabus.

July 2-9 of 2005 will be the 29th Congress of the International Academy of Law and Mental Health in Paris, France. Over one thousand abstracts are on file for the coming congress. Scholars, bureaucrats, clinical workers, economists, psychiatrists, lawyers, law professors, historians, psychologists, literary critics, linguists, neuroscientists, inter alia will present papers on the issues adumbrated above and others not mentioned.

Participants representing most of the world will be in attendance. Such meetings provide first rate intellectual analyses. Many of the papers will be published in the International Journal of Law and Psychiatry or in a book I will co-author on Legal
Consciousness with Prof. David Weisstub, who is responsible for the strength and breadth of the congress. Of equal importance is the conversation around the paper and topics and the dissemination of the fears, hopes and any clarifying intelligence that comes from such a confluence of disciplines and identities. Law and psychiatry as a confluence of issues and a core of fundamental concerns will continue to remain a factor in legal scholarship and policy circles in stimulating and frightening world.

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