WORKING PAPER 14

THE CRIMINAL PROCESS AND MENTAL DISORDER

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A major problem with the Working Paper is that it does not adequately deal with the concept of responsibility, even though there are other papers by the Law Reform Commission which develop a conception of responsibility on both the individual and collective levels. [1] This omission leads to an unquestioning acceptance of the belief that psychiatrists should remain the definers of reality in the domain of the offender who is alleged to be mentally disordered, thereby strengthening the links between the criminal control and mental control systems. This in turn perpetuates the trend of allowing individual offenders to displace responsibility for their offensive actions, and the rest of us to displace responsibility for doing something about them: both the individual and society can get rid of *their* problems of wrongful conduct by hiring agents of criminal control *and* mental control to assume responsibility.

The Working Paper repeatedly states that the issue of responsibility will be dealt with in other publications, and that traditional issues in criminal law theory cannot be elaborated upon. [2] Yet throughout the Working Paper the issue of responsibility within the wider framework of criminal law theory is crucial. Indeed, beginning on page 29 there is a cursory discussion of responsibility which seems to accept the desirability of a decline of that concept in the criminal justice system. The Working Paper implies that in a sense we all have no more than "special leave tickets" which give us the status of persons on release under indeterminate sentence, persons whose freedom can be revoked at any time either by the criminalization process or by the mentalization process. [3]

The failure to fully consider the topic within a "crime-responsibility-punishment" framework has also resulted in an acceptance of what is now the dominant trend in formal social control: if an offender does not "fit" within the requirements of a just criminal control system, he can then be

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[1] *See* THE LAW REFORM COMMISSION OF CANADA, THE PRINCIPLES OF SENTENCING AND DISPOSITIONS, WORKING PAPER 3 (1974); DIVERSION, WORKING PAPER 7 (1975); IMPRISONMENT AND RELEASE, WORKING PAPER 11 (1975).

[2] THE LAW REFORM COMMISSION OF CANADA, THE CRIMINAL PROCESS AND MENTAL DISORDER, WORKING PAPER 14, at 3, 30-31 (1975).

[3] *Cf.* Kadish, *The Decline of Innocence*, [1968] CAMB. L.J. 273.

considered as a suitable candidate for the mental control system. This position goes against the views of many psychiatrists,[4] social scientists,[5] and legal theorists,[6] who argue that any just form of state control must be based on the assumption that all conduct, including conduct deemed wrongful or harmful by others, is willed and meaningful from the actor's perspective, and must be reacted to as such.

In other words, if the work of the Law Reform Commission had been to consider "The Mental Process and Criminal Disorder", they would have come to very different conclusions. They would have considered the possibility that psychiatry should not have a place in any formal system of social control. In addition to arguing for decriminalization in other Working Papers, the Law Reform Commission would have used this Working Paper as a basis for arguing in favour of dementalization.

The Working Paper also seems inconsistent with the Law Reform Commission's view that there should be more collective responsibility within the community for handling problems of social control.[7] The tendency in contemporary society is not to get involved, to pay others to do our "dirty work" for us, and to enshrine them with the status of "experts" so that we can feel relieved and persuaded that the problem might be solved. As the Working Paper states at the outset,[8] there is a one-in-eight chance of being incarcerated through the mentalization process during anyone's lifetime, and 20,000 Canadians are incarcerated through the criminalization process at any given time. This degree of formal social control is a multi-billion dollar enterprise,[9] one which continually expands its operations, finds more problems, and thereby requires more resources in an amplifying spiral. Members of the community collaborate in this trend by willingly giving over their resources, by accepting the definitions of the problem advocated by the experts, by not questioning the interests of the experts, and by making little or no direct personal effort. The Working Paper sees no need for a curtailment of this trend, and in fact advocates expansion in some areas.[10]

This trend of turning over our responsibilities for social control to formal systems has helped to encourage increasing use of the mentalization process for matters which were traditionally the preserve of the criminalization process. Mental health professionals have taken on the task of controlling deviant conduct as a means of bolstering societal values, a task which the Law Reform Commission claims to be a primary function of the criminal law.[11] Moreover, mental health professionals as agents of social

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[4] *See, e.g.*, T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961), LAW, LIBERTY AND PSYCHIATRY (1963), and THE MANUFACTURE OF MADNESS (1970).

[5] *See* Ericson, *Responsibility, Moral Relativity, and Response Ability; Some Implications of Deviance Theory for Criminal Justice*, 25 U. TORONTO L.J. 23 (1975).

[6] *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

[7] *Supra* note 1.

[8] *Supra* note 2, at 5.

[9] *Id.* at 5-6.

[10] *Id.* at 51.

[11] *Id.* at 7.

control have managed to free themselves partially from the moral and practical limitations which constrain the use of the criminal sanction.[12] Therefore, even when the criminal sanction cannot be applied, psychiatric sanctions often can be.

Psychiatry has always been used to control those whose words or deeds threaten the economic base of a utilitarian culture. In an earlier era, if a black slave neglected work or refused to work, he was deemed by psychiatrists to be suffering from "dysaesthesia aethiopis", and whipping was the cure.[13] Today, if a convicted criminal has a poor education and work record, a poor marital record, and a hedonistic attitude, he has a "personality disorder" and is deemed to be in need of involuntary "treatment".[14]

Criminal law and psychiatry often combine to assert the values of one side in a conflict and subjugate the values of the other side. Psychiatrists sometimes subvert the primary function of the law as a regulator of social conflict by concealing conflict under a therapeutic guise.[15] This justifies coercive control, allowing those not personally involved to believe such "treatment" is of benefit to both the individual and the society which is trying to make him "normal", which is to say "moral", which is to say "useful".

To repeat, psychiatry is useful as a secondary or back-up control mechanism: if at first you don't succeed with the criminal control system, because of due process requirements, resource problems, or whatever, try the mental control system. This is particularly convenient because hospitalization for mental "disease" need not be voluntary as it is for other diseases. With the tool of psychiatry, it is possible to dramatically affect the nature, duration and intensity of the state's control over an individual. If his medical health were our only concern, then surely his psychiatric treatment would have no more effect on his institutional career than treatment by a university health service has on the course content or graduation date of a student. But, given that its real purpose is social control, and not therapeutic treatment, psychiatry is sometimes *used* to put offenders in custody and to keep them there for longer periods than would have been necessary for purposes of punishment.

The Working Paper suggests some policies which perpetuate the use of psychiatry for control of deviance. For example, an argument is made in favour of using psychiatric treatment as a condition of probation,[16] thereby admitting that psychiatry is a tool of criminal control. If a person is to receive treatment for purely medical reasons, it would seem foolish to charge him with the criminal offence of breach of probation if he does not comply.

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[12] *Id.*

[13] Szasz, *The Sane Slave: Social Control and Legal Psychiatry*, 10 AM. CRIM. L. REV. 337, at 343 (1971-72).

[14] F. Coburn, Survey of Mental Health of Inmates at Prince Albert Penitentiary, at 5 (1972) (Research Report, Department of Psychiatry, University of Saskatchewan).

[15] Bazelon, *A Jurist's View of Psychiatry*, [1975] J. PSYCHIATRY & L. 175, at 185-7.

[16] *Supra* note 2, at 45.

To borrow an analogy used in the Working Paper, [17] could the person be required to have his tonsils out as a condition of probation, and be criminally charged if he failed to do so?

There is, of course, a more fundamental indication that the use of psychiatry is primarily to aid in the formal control of deviance. The indication is, quite simply, that the therapeutic effectiveness of psychiatry has never been adequately demonstrated.

The Working Paper states: "We recognize that mental illness is a medical category and properly leave its definition to the doctors." [18] The fact is that the doctors rarely give an accurate or workable definition of mental illness. Their diagnoses are notoriously unreliable, cannot come near to meeting the criteria of expert testimony, and are no more accurate than judicial assessments. [19] The Working Paper is apparently not aware of these limitations, or at least the implications of these limitations, for it asserts that it is not "necessary for criminal law to choose between various psychiatric schools of thought or diagnostic categories. These are properly left to the medical profession to define in the perspective of treatment of patients." [20] Does this mean that "treatment" of those who are "mentally ill" may somehow eventually lead us to define what it is we are treating? In this statement, the control function of psychiatry is blatantly revealed. It is solidified in the subsequent statement: "It is not so much mental disorder as its effects that concern us in the criminal process. The nature of an accused's mental illness may not be legally significant; its repercussions may be." [21]

These statements, highlighting the control function of psychiatry within the criminal process, make some of the Law Reform Commission's recommendations seem rather anomalous. For instance, it is recommended that in pre-trial reports there "should be no reference to the psychiatric likelihood of the accused committing an offence similar to that charged". [23] Yet diagnosing this likelihood of further offence is precisely what the psychiatric reports are for: to determine the "effects" and "repercussions" of "mental illness". [22a] This is why psychiatrists are the key agents in defining "dangerous offenders", [23] and perhaps why, in spite of the above recommendation, the Working Paper makes no reference to the problematic questions of existing or proposed dangerous offender legislation.

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[17] *Id.* at 48.

[18] *Id.* at 8.

[19] For a review of literature demonstrating all these points, see Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

[20] *Supra* note 2, at 8.

[21] *Id.*

[22] *Id.* at 58.

[22a] *Id.* at 8.

[23] Ennis & Litwack, *supra* note 19. *See also* Price, *Psychiatry, Criminal Law Reform, and the "Mythophilic" Impulse: On Canadian Proposals for the Control of the Dangerous Offender*, 4 OTTAWA L. REV. 1 (1970).

Another anomalous recommendation appears in the consideration of Lieutenant-Governor commitment proceedings. A recommended criterion for commitment is that there must be treatment available to help the accused. [24] Given that no such treatment currently exists [25] (except, of course, incapacitation through confinement and the administration of drugs), this recommendation is tantamount to saying that we should no longer use Lieutenant-Governor commitment proceedings. It would have been a lot easier, and less confusing, to have stated this unambiguously from the beginning, unless perhaps this recommendation was made in the hope that effective treatment will *eventually* be found.

Since psychiatrists are agents of control, it is worthwhile to ask if theirs is a task which can be performed within the limits of justice prescribed for other agents of criminal control. The answer is, of course, an unqualified "no". As doctors, psychiatrists are trained to err on the side of caution, to believe that it is better to suspect and treat illness and be wrong, than to reject illness and be wrong. [26] They also over-predict the continuance of illness, resolving doubt to the subject's disadvantage. [27] This is particularly serious since the subject cannot challenge psychiatric recommendations based on the doctor-patient interview, even though the doctor may have misconstrued or omitted pertinent information. [28]

The plight of the accused is compounded further by doubts as to the reliability and validity of psychiatric recommendations. Even though psychiatrists cannot meet the minimum standards of expert testimony, [29] their diagnoses do affect what treatment the individual ultimately receives, and therefore the time and conditions of any period in custody. [30] Even if the person successfully receives an incompetent-to-stand-trial judgment, he may suffer consequences more harmful than if he had been sentenced in just proportion to the nature and seriousness of his offence. [31]

If the person ends up in penal custody, he is particularly vulnerable to being labelled mad as well as bad. Prisoners are especially susceptible to the mentalization process because an inpatient setting is more conducive to a diagnosis of psychosis. [32] Also, prisoners are mostly working-class [33] and

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[24] *Supra* note 2, at 40-41.

[25] *See, e.g.*, Dershowitz, *Psychiatry and the Legal Process: A Knife that Cuts Both Ways*, 43 PSYCHOLOGY TODAY 47 (1969); Price, *supra* note 23; Ericson, *Penal Psychiatry in Canada: The Method of our Madness*, 26 U. TORONTO L.J. 17 (1976).

[26] Ennis & Litwack, *supra* note 19, at 720.

[27] *Id.* at 736.

[28] *Id.* at 745.

[29] *Id.* at 698.

[30] *See* Pasamanick, Dinitz & Lefton, *Psychiatric Orientation and its Relation to Diagnosis and Treatment in Mental Hospitals*, 116 AM. J. PSYCHIATRY 127 (1959-60).

[31] *See* McGarry, *The Fate of Psychotic Offenders Returned for Trial*, 127 AM. J. PSYCHIATRY 1181 (1971).

[32] Ennis & Litwack, *supra* note 19, at 722.

[33] *See* Bell-Rowbotham & Boydell, *Crime in Canada: A Distributional Analysis*, *in* DEVIANT BEHAVIOUR AND SOCIETAL REACTION 93 (C. Boydell ed. 1972); I. WALLER, MEN RELEASED FROM PRISON (1974); Carlson, *Some Characteristics of Recidivists in an Ontario Institution for Adult Male First-Incarcerates*, 15 CAN. J. CORR. 397 (1973).

thus are more likely to be presumed impulsive and "dangerous", [34] and possessed of the constellation of factors associated with psychiatric catch-all categories such as "personality disorder". [35]

Given the injustice associated with the psychiatric control system, it may not be surprising that it is not even effective as a means of social control, let alone as a therapeutic remedy. An unjust system is one which is more likely to inure than to cure.

In conclusion, I do not wish to leave an impression of total negativism. In my mind, the Working Paper is the best document to appear in Canada on this topic insofar as it takes a step towards ensuring just protections for those facing the possibility of being controlled through both the criminalization and mentalization processes. My central objection is that the Working Paper does not consider the concept of responsibility which the Law Reform Commission has been developing in other papers, and it does not relate that concept to a sociological view of psychiatry as an institution of social control. This leads the Law Reform Commission to overlook the basic question as to whether formal social control should be the sole preserve of the criminalization process, and whether we should strive for dementalization as well as decriminalization.

My suggestion is that we should move toward a complete separation of the mentalization and criminalization processes. It is misleading even to treat psychiatric statements as purely descriptive, [36] because to do so erroneously implies that there is some empirically specifiable medical illness of the mind which is present to describe, at least for those trained to describe it. Moreover, we have enough experience in this field to know that description and prescription are not separable in practice. Psychiatrists do take sides, and because they do and because of the many other considerations sketched in this paper, psychiatric opinions should be recognized for what they are and treated with no more status than any other *opinions* in the adversary process. [37]

As we attempt to separate the criminalization and mentalization processes, we should also attempt to de-escalate formal social control by striving for dementalization as well as decriminalization. Until we all realize that deviance may sometimes be an attempt to solve problems and that formal social control of all types may exacerbate these problems, we can only expect an expansion of both the criminalization and mentalization enterprises on the scale documented in the Working Paper. [38]

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[34] Ennis & Litwack, *supra* note 19, at 725.
[35] Coburn, *supra* note 14.
[36] *Supra* note 2, at 54-55.
[37] Bazelon, *supra* note 15.
[38] *Supra* note 2, at 5-6.