

# Book reviews

## *Seminal Issues in Mental Health Law by Jill Peay*

*Published by Ashgate (2005), £135*

This excellent resource is a collection of thirty-five essays, chapters and extracts on civil mental health law from various authors, drawn from a range of sources between 1973 and 2005 (with three-quarters of the selections dated after 1990). The texts, which are mainly academic journal articles, are reproduced with original typography, pagination and bibliographies which, whilst occasionally reduced to uncomfortably small font sizes, will be a help in research and referencing. It is indexed by name but not, unfortunately, by subject. The long introductory essay by the editor, Professor Jill Peay (London School of Economics), provides an interesting and useful commentary on the choices of material, highlights areas where the law has moved on from the positions discussed, and draws out a theme from the collection as a whole.

Whilst Peay suggests that this is a volume to be dipped into rather than read through, there is structure behind its arrangement, and I found it rewarding to read from cover to cover. The book is divided into three parts (titled respectively 'principles', 'process' and 'trends') and many essays provide a development, or a contrast, to preceding themes. In particular, the first half dozen selections in the 'principles' section, read in the order presented, serves as an excellent primer in the basic arguments at stake over the purposes of mental health law.

In her editorial introduction, Peay writes of her impression that mental health law has appeared to be in a state of flux throughout her working life. That working life spans the lifetime of England and Wales' *Mental Health Act 1983*: from doctoral research into Tribunal practice in the final years of the 1959 Act to participation in the expert committee originally charged by Government to consider how the 1983 Act might be subject to what was promised as "root and branch" reform. That promise has heightened the sense of shifting ground in mental health law over recent years, during which we have seen two massively detailed and universally derided draft Bills, as well as pre-legislative scrutiny procedures echoing former Royal Commissions in scale.

But this book appears as the reform process appears to have spectacularly collapsed, leaving a compromise remarkable even in comparison to the knockabout history of previous legislative change. There is to be no new Mental Health Act under this administration, but instead a slim amendment Bill to patch up those parts of the current law that are in conflict with human rights rulings, whilst also broadening the scope of professional discretion over the scope of its general powers. The cautious welcome given by mental health professional and patient groups to the dropping of the hugely unpopular draft Bill is tempered with anxiety that an amendment Bill could import some of its most worrisome aspects into current law.

In the past, Government's role in the development of mental health legislation has been characterised as one of arbitration between warring factions of professional interest, with lawyers arguing to curtail doctors' powers over their patients in the name of civil liberties, and doctors resisting such limitations in the name of clinical discretion. In contrast, our present age appears to present a veneer of agreement between these usually rancorous professional interests, in unified opposition to the plans of Government policy makers. Whether this is yet more evidence of shifting ground, or an ephemeral phenomenon of political alliances and *realpolitik*, it indicates to me that this is a good time to have a volume that seeks to set out, in Peay's words, "a clear perspective on our mutual history" and attempts "to capture innovative critical moments in mental health law, put them into context with each other, make them readily accessible to readers and thereby, hopefully, avoid the wheel being rediscovered".

Whilst allowing that the extent of such a "race memory" of mental health law as her volume hopes to achieve is problematic amongst academics, Peay suggests that it is absent in Government policy-makers, as a result of the bureaucratic shuffling of civil-servants who may otherwise develop suitable expertise. As with all generalisations, this is unfair in some specific cases, and of course we should remember that decisions about policy are the responsibility of Ministers rather than officials. Nevertheless, looking on at a Government process that has so effectively alienated all of its "stakeholders" whilst building a theoretical system that proved impossible to resource, Peay's comment seems to me to chime with an analogy used by Aneurin Bevan, who wrote of leaders and thinkers losing touch with those who are grounded in reality by the nature of their work and becoming "adrift like passengers in an escaped balloon"<sup>1</sup>. The escaped balloon of the draft Mental Health Bill appears to have popped. Although it is perhaps far-fetched to suggest that it slipped its moorings for lack of a compendium of legal academia such as this (after all, academics and commentators on mental health law are quite capable of their own flights of fancy), the value of a resource such as this should now be self-evident.

In her introductory essay to this volume, Peay makes a number of well-judged observations about the instability of mental health law, including a proposition that there is probably no ideal system or approach that will transcend or dissolve the intrinsic tensions between civil rights ('autonomy-based principles') and civil society ('socially-based protective principles'). This is a refreshingly grounded acknowledgment, especially given that the editor of this book cannot claim to be non-partisan in current debates over the appropriate theoretical basis for psychiatric coercion: Peay concedes that her introduction, on its own terms and as a synoptic account of the essays that she has selected, "reads like an argument for capacity-based legislation".

Peay's theoretical even-handedness on the issue of the law's social function, which is echoed in a number of the essays in this volume, should, I think, be reflected upon by those who would criticise the present Government for trying to use mental health law for purposes of social control. Peter Bartlett's essay in this collection accuses such critics of squeamishness, arguing (in echo of Bean and others in the volume) that social control is an inevitable and unavoidable component of mental health legislation. I think that I would rather take this view than try to divorce issues of social control from psychiatric practice, as the essayists with the most radical suggestions in this volume attempt. In a 1994 essay in the collection, Tom Campbell (incidentally the overall editor of the series in which this volume appears) proposed that if any form of preventive detention were

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1 Bevan, A. 1952 *In Place of Fear*, Chapter 2

justifiable on grounds of risk to others, it should be justifiable in the case of *all* people, and not only those given some form of psychiatric diagnosis. Campbell accepts that his proposal might appear to be bizarre (and it is certainly counter-intuitive in terms of the general protection of civil liberties), but seems to suggest that this strangeness is merely an attribute of prejudice against the mentally disordered. I think that that he is mistaken in this, and gives insufficient weight to concerns that such rigorous ideological exclusion of 'social control' issues from the realms of medical law would be likely to criminalise and imprison vulnerable people who would otherwise be civil detainees in hospital. For some hard-headed types (one thinks of Thomas Szasz) this may be an acceptable consequence of the abolition of all traces of paternalism, but for many others there must be compromise to allow society to retain some protective function over the vulnerable. Indeed, although Campbell is surely right to want to remove discrimination on the basis of *diagnosis*, his proposal gives insufficient weight to the question of potentially justifiable discrimination on the basis of *prognosis*, which lies behind the treatability test operative for some conditions under the current law. I recall little discussion in this volume on the issue of 'treatability', and I wonder if this is a shortcoming, particularly given that the concept is under fire from the Government and is likely to be excised from the current criteria for compulsion under amending legislation. Whilst the practical effectiveness of the treatability criterion under the current law is often questioned, my own view is that it establishes an important and fundamental principle for compulsion that it may be dangerous to jettison.

However, concerns about social control are only part of the impetus behind the arguments for capacity-based legislation, and it is the role of a capacity-based threshold for intervention that is the volume's dominant theme. Some of the essays (e.g. Gordon on Canadian law in 1993; Richardson on English and Welsh law in 2002) set out a case for the abolition of mental health law *per se* in favour of a broad-ranging legislation dealing with the mentally incapable, although Richardson recognises that such a proposal has no chance of being accepted by the UK Government. Both writers, as with many supporters of a capacity-test in mental health law, justify their arguments on the discriminatory inconsistency between rules concerning the imposition of physical and mental health care. That there is such inconsistency is inarguable, but that is not the same thing as it being indefensible (there is a striking statement by Kathleen Jones in the first essay of the volume to the effect that the law tolerates ambiguity and paradox in its own workings, but is intolerant of such qualities when they are displayed by the mental health professions). In a pivotal essay in Peay's collection, taken from the pages of this journal in 2000<sup>2</sup> (but now regrettably divorced from a companion piece from Robert Robinson<sup>3</sup> putting an alternative view), Mike Gunn sets out a case for capacity-based legislation and, in a curious choice of phrase that attracts comment in Peay's editorial, accuses the Richardson Committee's proposals relating to capacity-based criteria as being "not pure" but "infected" with pragmatism. Peay counters that this overlooks the fact that the committee upon which she served had in fact put forward as alternatives a "consistent" capacity-based model and a "pragmatic" model, stating that the moral dilemmas in choosing between them were a matter for politicians. One might equally question the value of conceptual 'purity' in approaches to social policy. Such an answer to Gunn's reproach is given by one of the oldest essays in this collection: Treffert's article on the US from 1974 entitled "Dying with their rights on".

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2 'Reform of the Mental Health Act 1983: The Relevance of Capacity to make decisions'. Professor M. Gunn JMHL Feb 2000 pp39-43

3 'Capacity as the Gateway: an alternative view' Robert Robinson JMHL Feb 2000 pp 44-48

If capacity is to take on a central role in future mental health law – and although the legislature for England and Wales may duck the issue this time, there is likely to be pressure on the domestic and Strasbourg judiciary to establish it on grounds on non-discrimination – it will be necessary to decide what it means to be capable of refusing treatment. Peay provides a useful run-through of approaches to defining capacity by Roth, Meisel and Lidz from 1997, and an older piece from Grisso and Appelbaum showing empirical studies based around the MacArthur Treatment Competence Study of the 1990s. The 1997 essay reaches the awkward conclusion that “the search for a single test of competency is a search for a Holy Grail”; the earlier essay used tests acknowledged to be too cumbersome for daily clinical use, but indicated that an assessment tool for clinical use was in development. The authors of this essay have indeed gone on to do much developmental work in conceptualising capacity-tests (although a reader of this volume will not be directed towards this, which is unfortunate). I believe that, even with the passing into law of the *Mental Capacity Act 2005*, there is still a need for a proper conceptual understanding of incapacity that could serve as a robust threshold for the imposition of psychiatric treatment in the face of refusal or resistance. Without such a definition, and confidence that it will be used in practice, I am unsure of its benefit in a mental health law context described by Peay as involving “questionable science, individual prejudice and overpowering beneficent intentions”. The danger is of course that refusing consent to an intervention considered as necessary by your doctor is taken as a sign of incapacity. Anyone doubting the potential for fluidity in defining capacity should consider the remarkable fact that, in the last year, the Law Society and the Government informed a Parliamentary committee that any patient who required ECT would be unlikely to be in a position to capably refuse consent to it, when in practice over a third of statutory second opinion authorisations of ECT were to such patients<sup>4</sup>. Whatever else lies behind that fact, it seems likely that the notions of capacity involved are inconsistent. When Aneurin Bevan warned of the tendency for intellectual activity to drift he specifically pointed to the dangers of “symbol worship”, where words persist whilst the reality that lies behind them shifts and changes, so that “ideas degenerate into a kind of folklore which we pass onto each other, thinking we are still talking the reality around us”.<sup>5</sup>

This collection is nevertheless comprehensive enough to cater for most shades of enthusiast and doubter alike, and many essays are themselves examples of academic balance between competing claims (some authors whose general position one tends to perceive in caricature through an imagined familiarity with their arguments prove to be more nuanced in these pieces: for example the ‘legalist’ Larry Gostin wrote in 1983 on the importance of vigilance against attempts by the legal profession to erect a superstructure of technical procedures or cumbersome legal regulations, or to substitute the discretion of lawyers and courts for that of mental health professionals on matters of treatment). But between these covers, Marxist critique of the language of rights rubs against civil-libertarian demands of ‘new legalist’ perspectives, and Benthamite calls for codification of implicit powers sit alongside various sceptical examinations of the power of law itself. Unsworth’s 1993 essay on Victorian law and lunacy is a stylish reminder of the value of the past in understanding the present, which has led me to search out his 1987 book *Mental Health Law and Politics* (his essay is also a good lead into the ‘revisionist’ historical approaches of writers such as Castel and Scull who otherwise fall outside of the scope of this volume). If mental health

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4 *Mental Health Act Commission 2006, In Place of Fear? Eleventh Biennial Report 2003–05, para 4.71–3.*

5 Bevan, A. *supra*

services are undergoing ‘reinstitutionalisation’, as was claimed in the striking but controversial 2005 BMJ editorial by Priebe and Turner reprinted in this volume, those historians may yet be futurologists’ best tools.

The medical sciences are represented with rather less range, being most visible in Peay’s essentially polemical inclusion of a slice from Bentall’s *Madness Explained* (2003) that argues a continuum between psychosis and normal mental functioning. Peay suggests that, by questioning the boundaries between madness and sanity, Bentall’s arguments support the notion of legislation based upon decision-making capacity that is applicable to persons irrespective of diagnostic label. Perhaps so, but their inclusion in this volume also recalls the anti-psychiatry influences on the ‘new legalism’ that gave much impetus to current thinking on mental health law. This is not to say that Peay has constructed an anti-psychiatry subtext to her collection. I find Bentall’s thesis (and in particular his use of a comparison between the boundaries of madness and the boundaries of hypertension) to be much more subtle than the anti-psychiatric canon to which it has a perhaps superficial resemblance (one that is noted by Bentall himself), and Peay’s inclusion of a user perspective of mania from Kay Redfield Jamison is as effective a critique of Szaz or Laing as the 1978 essay included here by Antony Clare. But one professional standpoint – that of the “Neo-Kraepelinian” and traditional classificatory psychiatry challenged by Bentall’s thesis – remains intriguingly alien to the concerns of this volume. It could be a mistake to read too much into this, as no doubt much written work in this field falls outside of the scope of this volume, although the products of this excluded approach – the diagnostic manuals DSM-IV and ICD-10 – are nonetheless themselves no small players in numerous criminal and civil courtroom dramas. Could it be that the relative consensus apparent in recent years between the medical and legal professions is more fragile than it appears?

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