

Mental Illness, Medicine and Law

Martin Lyon Levine (ed.)

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This compendium of essays is published as a volume of Ashgate's *International Library of Medicine, Ethics and Law*. The general editor of the series is Professor Michael Freeman of University College London, who sets out the rationale of the series in that "few academic disciplines have developed at such a pace in recent years as bioethics, and ... important writing is to be found in a range of books and journals, access to the whole of which is likely to elude all but the most committed of scholars". Scholars of psychiatric ethics can already turn to a number of other published anthologies: Professor Jill Peay's selection of 'seminal' writing on mental health law¹ shares both a publisher and many themes in common with this work; the Oxford University Press *International Perspectives on Philosophy and Psychiatry* series contains important contemporary work on ethics², and for three decades Bloch and Chodoff's *Psychiatric Ethics*, which is now in its fourth edition³, has been a standard anthology of original essays and has generated companion volumes including a 'case-book' and an anthology of journal pieces rather similar in scope to this⁴.

The editor of this particular volume is Professor Martin Levine, whose appointments at the University of Southern California straddle both law and medicine, but who wears his doctor's hat in his introductory overview of the essays selected. Professor Levine was set some ground rules for his selection, the most notable of which was that only full essays could be included, thus ruling out excerpts from longer essays or books. The series aims to include "essays of central theoretical importance", although in the introduction Levine reveals that his working criteria for selection were in fact "the most interesting essays"; essays with a "focus on cutting-edge issues"; or simply "shorter essays". In any case, the book contains fifty-three papers, half of which were published after 1999, although the most recent is dated 2004. These are arranged into eighteen themed groups, with themes including detention; treatment rights; overdiagnosis and overmedication; the social construction of madness; informed consent; confidentiality; false-memory syndrome; intellect-enhancing drugs; professional boundaries, advocacy; and issues on the psychiatrist as expert witness. Papers are reproduced as originally published, with full references. Regrettably there is no subject index, which seems a little mean of the publishers for a volume of this price: the Oxford University Press anthology is roughly the same size and has a subject index, so it is not an unfeasible task.

All but nine papers are by American practitioners: four are from UK practitioners; two from Israel; and there are single papers from Canada, Holland and Sweden. As such, the collection as a whole has a markedly American slant. This, of course, is not a criticism in itself: on a theoretical level, many important writers on psychiatric ethics are American, and even essays dealing with practicalities specific to the United States can be read for broader relevance. For example, the three essays here on the ethical

1 Jill Peay (2005) *Seminal Issues in Mental Health Law*. Ashgate. Reviewed in JMHL May 2006 pp102–106

2 See, for example, Tim Thornton (2007) *Essential Philosophy of Psychiatry*, OUP; Bill Fulford, Tim Thornton, George Graham (2006) *Oxford Textbook of Philosophy and Psychiatry*, OUP.

3 Sidney Bloch, Stephen A. Green (2009) *Psychiatric Ethics 4th edition*, Oxford University Press.

4 Donna L. Dickenson, Bill (KWM) Fulford (2001) *In Two Minds: A Casebook of Psychiatric Ethics*. Oxford University Press; Stephen A. Green, Sidney Bloch (1999) *An Anthology of Psychiatric Ethics*. Oxford University Press.

dilemmas posed by ‘managed care’ raise points relevant to resource limitations in other healthcare systems, and an essay touching on psychiatry and the death penalty sits within, and brings an acute focus to, a chapter focusing on the appropriateness of doctors’ involvement in the legal and testimonial role of forensic psychiatry, however much the combination of serial judicial killing and a ‘western’ forensic psychiatric service must be peculiar to the United States.

However, with an eye to their international audience, many journal editors will require their authors to avoid unintentional parochialism, such as referring to ‘the law’ without specifying the jurisdiction concerned. Some of the essays in this volume appear to have escaped such editorial scrutiny when first published, and as such unwary readers from outside the United States might run into trouble. A minor but colourful example is the contention by Appelbaum, when discussing medical confidentiality, that “the law’s first foray into this area” was the 1828 New York statute granting privilege to medical communications. Such a statement is liable to objection from France, which passed a similar statute in 1810⁵, and perhaps also from England, where the common law position that denies privilege to medical confidences where a court requires disclosure stems from a ruling made at the spectacular 1776 bigamy trial of the Duchess of Kingston⁶.

More seriously, readers in the UK could be confused by apparently general statements such that, for example, “current law embodies the ethical norm that the doctor can only recommend treatment, while it is up to the patient, if competent, to decide whether or not to accept it” (from the editor’s introduction) or that to be “committable in the traditional sense”, a patient must pose “a danger to herself or others” (from Ritchie *et al* on advance directives). Perhaps it is a sign of the eccentricity and isolation of UK law that, within the majority of its jurisdictions, neither statement holds true. But for a reader within those jurisdictions, the ways in which UK law apparently diverges from ‘ethical norms’ (i.e. by allowing treatment without consent of capacitated patients in UK jurisdictions other than Scotland, and detention on the grounds of benefit to health as well as safety throughout the UK) raise enormous ethical questions that are not really explored in this book.

The European reader will also miss reference to the European Convention on Human Rights, and find papers such as Marty and Chapin’s discussion of ‘legislative tenets of treatment in the least restrictive environment and freedom from harm’ in need of some translation to ECHR values. From my reading of this piece, it would seem that the exchange rate in the relative value of such rights echoes that in the currency markets: at least on paper, you get more in the United States.

There is a huge resource of material in this volume that will be of great use to readers in any jurisdiction. In many ways it makes a good companion to Peay’s earlier collection⁷, given its different geographic focus, and inclusion of clinical or biomedical perspectives. There are interesting essays by doctors defending the widespread use of stimulant drugs for attention deficit hyperactivity disorder; discussing children’s suicidality and SSRI drugs; and discussing problems of the ‘clinical significance’ classificatory criteria in the DSM-IV. But it is not all biomedicine: the anthology opens, for example, with a paper from a quite well-known Swedish medical study (Kjellin *et al* from 1997) that attempted to measure ethical benefits and costs of coercion, finding that even those who are detained can feel that they have retained some autonomy, and that self-reported improvement in mental health appeared to be associated with perceived

5 Angus McLaren (1993) ‘Privileged Communications: Medical Confidentiality in Late Victorian Britain’ *Medical History*, 37: 129–147, p.138.

Bigamous Duchess: The Benchmark Precedent for Medical Confidentiality’ Social History of Medicine Vol. 19, No. 1 pp. 37–53.

6 Angus H. Ferguson (2006) ‘The Lasting Legacy of a

7 See n.1 *supra*.

respect for autonomy. Tom Tyler, writing from 1992 in the *Southern Methodist University Law Review*, sets out roughly parallel findings into the psychological consequences of judicial procedures – emphasising the need for respect for dignity, openness and user participation – that should translate not only to judicial settings (such as the Tribunal in England and Wales), but also to mental health law assessments generally. These are useful things to have to hand. Similarly, an article by an academic colleague of the editor provides an excellent summary and classificatory account of the varieties of community treatment order (although readers in England and Wales should watch for the statement that “we do not permit inpatient forcible medication to shorten commitment when the patient is competent”. My copy is now annotated “but *we* do”).

Anti-psychiatry gets an airing with what I would describe as one of Thomas Szasz’s occasional pieces: in this instance a polemic from 2003, aimed across the Atlantic at the UK Home Office’s proposals for ‘dangerous people with severe personality disorder’, which glancingly traces the Szaszian critique as a whole. It is telling, I think, that the response to Szasz by J R McMillan, which is also reproduced in this volume (the two pieces appeared originally in the *Journal of Medical Ethics*), manages to set aside Szasz’s general critique as largely irrelevant whilst agreeing with the points being made against preventive detention. This is an interesting encounter, but it would surely leave Szasz essentially incomprehensible for any newcomer to his work, and has rather the effect of establishing him as the straw man in this volume. Perhaps to provide a balance of iconoclasts between the fields of law and medicine, the volume includes Dennis Fox’s anarchist-orientated paper ‘A critical-psychology approach to law’s legitimacy’, which argues that ‘law fully in command’ displaces ethics, so that questions of right or wrong become a specialty of professionals and justice an industry. As with much anarchist critique, such ideas can be taken either as an argument for equity and cooperation outside the law, or to legitimate the actions of the egoist to himself. In the hands of some consultant psychiatrists it could be a great danger.

Elsewhere there is moderation rather than radical critique, perhaps surprisingly so for a volume that seeks “to focus on cutting edge issues”. In one of the older essays (from a 1977 issue of *Science*), Engel sets out his case for ‘biopsychosocial’ psychiatry, a meeting half-way between biological reductionists and those critical of psychiatry as a branch of medicine at all. This approach has recently been described as the mainstream ideology of contemporary psychiatry and subjected to a thought-provoking (and soon to be book-length) critique by the Massachusetts-based Professor Ghaemi, who argues that the approach has fallen into eclecticism and that other non-reductionist models should be reconsidered, such as Jaspers’ method-based psychiatry or Osler’s medical humanism⁸. In the three decades since Engel’s paper, what has become the biopsychosocial mainstream has also come under attack from the critical psychiatry movement and from the service users that it engages with⁹. None of this – which might have some claim to be ‘cutting edge’ – is evident from the selections in this volume, and there are no contributions from service users.

There is, nonetheless, plenty of thought-provoking material here. Papers by the Yale Professor Jay Katz and by the Maastricht researchers Berghmans and Widdershoven together provide excellent material on ethical aspects of informed consent, with helpful suggestions on practice (I found a third paper included on consent to be too basic, and too specifically orientated towards Israeli law, to be of general application). I thoroughly recommend the charming paper ‘Weaving a tangled web: the deceptions of

8 S Nassir Ghaemi ‘The rise and fall of the biopsychosocial model’ *British Journal of Psychiatry* (2009) 195, 3–4.

9 See Pat Bracken and Phil Thomas ‘Beyond consultation: the challenge of working with user/survivor and carer groups’. *Psychiatric Bulletin* (2009) 33, 241–243 and invited commentaries, p.243–246

psychiatrists' by the San Diego forensic psychiatrist Ansar Haroun and law professor Grant Morris. The authors catalogue concrete examples of the minor deceptions (evasion, suppression, euphemism, exaggeration, disguise, gesture, silence, or inaction) found in psychiatric practice, and ultimately argue that these must be understood in the context that a doctor's role is to be pro-treatment, and as such carries inherent pro-treatment biases, regardless of the doctor's other biases (which are also catalogued for good measure). People who are not doctors – including those charged with making legal decisions – are henceforth “on notice, and if they are deceived, they only have themselves to blame – not the innocent, though lying, psychiatrist”.

One of the longer papers sets out Michael Perlin's thesis that legal decision-makers are driven by the “pernicious power” of “sanism”, which is defined a product of irrational, unconscious and bias-driven stereotypes, analogous to racism or sexism. To this extent, Perlin argues that legal decisions regarding mental health law can be ‘teleological’ in the way in which they ignore or cherry-pick evidence and data. It might be argued that this very broad concept of “sanism” provides a rather vague *telos*; and indeed Perlin soon gets into trouble in identifying whether or not there is teleology at work even in the cases that he cites, or how this influences the efficacy of the outcome in therapeutic terms. That there is teleological decision-making in at least some mental health law cases seems evident enough¹⁰, but as an explanation ‘sanism’ seems to close down rather than provide an understanding of it. The courts appear to go through tortuous argument to deny the wishes and claims of a few notorious forensic patients on the basis of prejudices unconscious or otherwise, but in day to day decision-making the prejudice is likely to be no more sinister than a streak of paternalism; beneficence; confusion at the conflicting reports of experts and ‘social science data’; and pragmatism in the face of less than ideal disposal options. Nevertheless Perlin thus raises a potential critique of ‘therapeutic jurisprudence’ (which is surely just teleological decision-making in its most overt form), albeit one that he pictures as a critical tool to ensure that therapeutic jurisprudence works as intended. I suspect that there is much scope for further critical thought in this area today.

This volume would of course be an asset in any institutional library, where it would certainly fulfill its intention of making certain original texts that would otherwise fall into obscurity once again available to scholars. Even though this work of reference is not unique in its field, there is surely a case for arguing that the more the better, both to give scholars a range of sources and to avoid the canonisation of those sources that make it between library covers.

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¹⁰ See David Hewitt ‘A private function’, *JMHL* May 2005, pp83–95 (especially the final paragraphs). The paper is reprinted in David Hewitt (2008) *A tendency to laugh and sing: some notes on mental health law*, Northumbria Law Press, pp129–138. As Hewitt notes in the introduction to the latter publication (p.ix), “there are some classes of people of whose rights, it sometimes seems, all laws have been contemptuous”.