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Emergent authority and expert knowledge: Psychiatry and criminal responsibility in the UK☆

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ABSTRACT

In the UK context, the rise of the discipline and practice of forensic psychiatry is intimately connected with the concurrent development of principles and practices relating to criminal responsibility. In this article, we seek to chart the relationship between psychiatry and the principles and practices of criminal responsibility in the UK over the early modern, modern and late modern periods. With a focus on claims about authority and expert knowledge around criminal responsibility, we suggest that these claims have been in a state of perpetual negotiation and that, as a result, claims to authority over and knowledge about criminal non-responsibility on the part of psychiatrists and psychiatry are most accurately understood as emergent and contingent. The apparent formalism of legal discourse has tended to conceal the extent to which legal policy has been preoccupied with maintaining the primacy of lay judgments in criminal processes of evaluation and adjudication. While this policy has been somewhat successful in the context of the trial – particularly the murder trial – it has been undermined by administrative procedures surrounding the trial, including those that substitute treatment for punishment without, or in spite of, a formal determination of criminal responsibility.

1. Introduction

The history of the relationship between psychiatry and criminal responsibility in the UK is marked by both continuity and change. Although it was for some time understood as a rather one-sided relationship – with forensic psychiatry and forensic psychiatrists thought to be parasitic on criminal law and lawyers for the growth of the forensic psychiatry profession and the legitimacy of its claims to expert knowledge – it is now recognised that the relationship might be more aptly described as one of co- or inter-dependence. It seems as though the rise of the discipline and practice of forensic psychiatry is intimately connected with the concurrent development of principles and practices relating to criminal responsibility. The history of forensic psychiatry as a sub-profession in Britain does not seem to be well-documented and we do not pretend to have filled the gap here — but what we know of earlier periods suggests that it and its knowledge claims have been moulded to a great extent by interaction with law (Eigen, 1995, 2004).

In our contribution to this collection, we seek to chart the relationship between psychiatry and the principles and practices of criminal responsibility in the UK from the early modern period to the present. We are interested in the different ways in which ideas produced within psychiatric discourse have been taken up in the criminal context. Our focus is closely trained on attributions of criminal responsibility at trial – the practice of assessing whether an individual charged with an offence is responsible at law for his or her actions – rather than the altogether broader subject of the role of forensic psychiatry and psychiatrists in relation to the treatment and sentencing of offenders. In this chapter, we address the ways in which claims about authority and expert knowledge around criminal responsibility have been both elaborated and contested. We argue that these claims have been in a state of perpetual negotiation and that, as a result, claims to authority over and knowledge about criminal non-responsibility on the part of psychiatrists and psychiatry are most accurately understood as emergent and contingent: they reflect the legal and cultural peculiarities of particular jurisdictions and, to a considerable extent, the influence of particular events and personalities. As we suggest in this article, in relation to matters such as the role of the jury, the differences between the development of Scottish law and that of England and Wales are particularly instructive in this respect. Although we track the rise in significance of expert psychiatric and psychological evidence in relation to criminal responsibility, most notably in the post-war era and since, the claims to authority over and knowledge about criminal responsibility are still controversial and contested.

A central theme of this article is the complex dialectical relation between psychiatric conceptions of mental disease and what one scholar has elsewhere termed 'manifest madness' — a construction of insanity in and through legal practices as something that can be read

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off from a defendant's acts on the basis of 'common sense' knowledge (Loughnan, 2007, 2012). The apparent formalism of legal discourse has, we suggest, tended to conceal the extent to which legal policy has been preoccupied with maintaining the primacy of lay judgments in criminal processes of evaluation and adjudication. We shall see that while this policy has been somewhat successful in the context of the trial – particularly the murder trial – it has been undermined by administrative procedures surrounding the trial, including those that substitute treatment for punishment without, or in spite of, a formal determination of criminal responsibility.

This article charts the key developments in the interaction between psychiatry and psychiatrists on the one hand and law and lawyers on the other as those interactions are framed by the issue of criminal responsibility. The periodisation we have adopted reflects significant epochs in the relationship between psychiatry and criminal responsibility. We close with a brief discussion about the nature of the interaction between psychiatry and law in the current era.

2. Inchoate developments (c. 1500 to 1843)

The history of the relationship between psychiatry and criminal responsibility in the UK begins well before either of these terms was coined. While the paucity of sources means that the early history of the principles and practices relating to crime and insanity is somewhat opaque, it is generally accepted that the practice of excusing insane individuals from trial long preceded the appearance of legal and medical principles relating to mental impairment. Individuals who were excused from trial were a diverse bunch and included some who could not communicate, some who had intellectual disabilities and some who were regarded as mad (Ward, 2012). According to the informal practice of excusing individuals, the insane individual's family would provide compensation to the victim or his or her family and look after the insane person. As trial by ordeal was replaced with trial by jury in the medieval era, insane individuals who had committed serious offences (such as homicide) became likely to be tried and, if convicted, left to the royal prerogative of mercy. During the early modern period, it became regular practice to acquit an insane person rather than leave him or her to be pardoned by the King. In his seminal historical work, Nigel Walker (1968, pp. 19–26) traces the earliest recorded acquittal on the basis of insanity (the felon was of unsound mind) to 1505 (Clarke, 1975, pp. 56–61). At this time, there was no elaboration of the meaning of phrases such as 'unsound mind', or any sense that they fitted into a discrete or specialised body of knowledge about mental abnormality.

Although used in court from at least this time onwards, terms such as 'unsound mind' were not so much legal or medical as ordinary, social expressions, although, then as now, the social meanings of insanity were complex. These meanings altered profoundly over the course of the sixteenth, seventeenth and eighteenth centuries. At the beginning of this era, as elsewhere in Europe, the Christian worldview dominated and madness was viewed as a manifestation of vice or sin. As Roy Porter (1987, pp. 108, 81) has thoroughly documented, the decline of the religious view of madness via the 'massive naturalisation of the understanding of insanity' paved the way for 'emergent secular and social mappings of madness', according to which insanity could be viewed 'naturalistically, historically and socially'. This was the basis on which an expert body of knowledge around lunacy and criminal insanity would later develop.

At the same time as the social meanings of insanity were changing, there were significant changes in criminal process that affected the ways in which insane individuals were dealt with in the criminal sphere. In the 1600s, discretion featured at each stage of the criminal process and all the circumstances of the case – including the nature of the offence, the victim and the accused person – affected the response to criminal conduct. This meant that the way in which insane individuals were dealt with varied widely. If an insane person was tried, he or she faced what John Langbein (2003) has called the 'accused speaks' or altercation trial. The 'accused speaks' trial involved 'large numbers of felony defendants, many of them transparently guilty', who were 'processed rapidly in jury trials' notable for the absence of legal counsel (Langbein, 2003, p. 25). If an insane individual was acquitted, no particular disposal was mandated, and what happened to the accused varied according to his or her personal circumstances (Beattie, 1986, p. 84). If an insane person was convicted, he or she faced the possibility of imprisonment or transportation to America or Australia from 1719, a development which 'widened the discretionary powers of the judge and jury in the face of the increasing number of capital statutes' that were passed in this era (King, 2000; Rabin, 2004, p.35). Over the eighteenth century, the trial process altered with features of the adversarial trial such as prosecution and defence counsel (although the latter had a limited role until the nineteenth century), a distinction between fact and law, and the rudiments of laws of evidence and procedure appearing before 1800 (see Beattie, 1986, 1991; Cairns, 1998; Langbein, 2003). The effect of these moves towards the formalisation of legal practices was to expand the space for exculpation from criminal liability on the basis of mental impairment.

It was in this changing procedural and punishment context that the first famous insanity case, that of Edward Arnold in 1724, took place (*Edward Arnold* (1724) 16 St Tr 695). Arnold was charged under the recently enacted *Black Act* with maliciously shooting at a prominent local member of the aristocracy, Lord Onslow. Arnold pleaded that he did not know what he was doing and did not intend any harm. Evidence adduced at trial by Arnold's family and the local community indicated that Arnold had engaged in 'irrational antics and minor acts of violence and damage', but evidence given about the preparation for the offence suggested that Arnold could 'form a steady and resolute design'. In his directions to the jury, Justice Tracy is recorded as stating that 'when a man is guilty of a great offence, it must be very plain and clear before a man is allowed such an exemption…it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast' in order to avoid punishment (Moran, 1985, p. 502; Walker, 1968, pp 55–56). Arnold was convicted but, as a result of Lord Onslow's intercession, he was imprisoned rather than executed.

The judge's directions in *Arnold's Case* have come to be called the 'wild beast' insanity test but this test was more of an informal standard than a 'precise formula' for assessing lack of intent (Eigen, 2004, p. 398). As the idea of an informal standard suggests, like other principles of criminal liability, exculpatory insanity had not yet undergone any sustained conceptual elaboration within the criminal law. Like other 'pleas of mental distress', insanity was raised in order to persuade the judge and jury that the accused's act was 'committed without criminal intent' (Rabin, 2004, pp. 1–2). At this time, the 'thin doctrine of capacity as a condition for criminal responsibility' that was a feature of the exculpatory criminal trial was only gradually being replaced by a more robust subjective concept of criminal fault (Lacey, 2001). In this context, references to potentially exculpatory mental states (such as 'unable to tell good from evil') were designed to challenge the authenticity of the manifest meaning of a defendant's acts as criminal. In the context of the criminal law, insanity was thus an informal standard for exculpation, rather than a strict test, and it was as much descriptive as prescriptive of the kind of abnormality that could exculpate an individual.

The situation at law reflected the wider social understanding of madness as manifest. In Roy Porter's (1987, p. 35) words, in this period, 'there were indeed inner as well as outer truths, but outward signs encoded inner realities'. Exculpation of an individual claiming to be insane was arrived at not so much by inferring his or her internal mental processes from his or her behaviour as by perceiving that behaviour in itself as constituting a mad condition. Without sophisticated accounts of individuals' mental states, evidence about conduct – alongside character and social status – provided the means for assessing culpability for offences. Thus, madness could be 'read off' conduct and ordinary or