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Mental disorder and criminality in Canada

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ABSTRACT

This article examines the relationship between mental disorder and criminality in Canada from the colonial period to the landmark 1992 Mental Disorder Amendments that followed the passing of Bill C-30. The history of this relationship has been shaped by longstanding formal and informal systems of social regulation, by the contests of federal–provincial jurisdiction, by changing trends in the legal and psychiatric professions, and by amendments to the federal Criminal Code. A study of these longer-term features demonstrates that there has been no linear path of progress in Canada's response to mentally unwell offenders. Those caught in the web of crime and mental disorder have been cast and recast over the past 150 years by the changing dynamics of criminal law, psychiatry, and politics. A long historical perspective suggests how earlier and more contemporary struggles over mental disorder and criminality are connected, how these struggles are bound by historical circumstance, and how a few relatively progressive historical moments emerging from these struggles might be recovered, and theorized to advantage.

1. Introduction

In 1985, Owen Swain was tried on charges of assault and aggravated assault dating back to 1983 when he allegedly "swung his two young children around by the feet to rid them of evil spirits and carved an X on his wife's chest" (Globe and Mail Newspaper, 12 February, 1986: A15).

The Crown prosecutor raised a successful insanity defence, which resulted in Swain being held in "detention at the pleasure of the Lieutenant Governor." By recommendation of the Advisory Review Board, and on order of the Lieutenant Governor, Swain was sent to a mental health centre for psychiatric examination and assessment for a thirty-day period. But, between the assaults in 1983 and the start of the trial in 1985, Swain had already been institutionalised, treated and, on psychiatrists' recommendations, had returned to his home. Swain therefore considered the court decision to send him back for psychiatric examination and assessment to be unjust, and he appealed this decision on the basis that, among other things, S. 542(2) of the Criminal Code empowering the Lieutenant Governor to detain mentally ill offenders violated subsections 7, 9, 12 and 15(1) of the 1982 Canadian Charter of Rights and Freedoms. These sections of the Charter guaranteed that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"; "everyone has the right not to be arbitrarily detained or imprisoned"; "everyone has the right not to be subjected to any cruel and unusual treatment or punishment"; and, "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, *or mental or physical disability*" (Canadian Charter of Rights and Freedoms, Section 15.1 (1982), emphasis mine).

Swain lost his case at the provincial level, but he launched a successful appeal with the Supreme Court of Canada in 1991. The Supreme Court of Canada found that the Criminal Code's provision of indefinite detention at the pleasure of the Lieutenant Governor did indeed violate subsections 7 and 9 of the Charter. The government was given six months to create and pass remedial legislation to put the Criminal Code in line with the Charter. Moreover, though not subject to official Supreme Court decisions, other provisions of the Criminal Code pertaining to insanity were also thrown into question during the course of this trial.

Owen Swain's successful appeal was the catalyst to major legal reform relating to mental disorder and criminality in Canada. This legal reform was itself shaped by the interplay of law, crime, psychiatry and mental illness over the course of a century and a half. While this article can only begin to do justice to this history, there are nevertheless merits to considering here the relationships of psychiatry, criminal law and mental disorder from a broad historical perspective. First, the history of the relationship between mental disorder and criminality in Canada has been shaped by longstanding formal and informal systems of social regulation, by the contests of federal–provincial jurisdiction, by changing trends in the legal and psychiatric professions, and by amendments to the federal Criminal Code. A study of these longer-term features helps explain certain peculiarities about this relationship in Canada. Second, reconstructing a longer view of the subject allows for an analytical perspective that helps to better situate mental disorder and criminality in Canada. It is easy to conclude that the Canadian history of mental disorder and criminality has offered little optimism in terms of improving the

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situation for the mentally disordered offender or of organizing a more enlightened medico-legal response. Nevertheless, a long historical perspective also suggests how earlier and more contemporary struggles around these issues are connected, how these struggles are bound by historical circumstance, and how a few relatively progressive historical moments emerging from these struggles might be recovered, and reconsidered to advantage.

Part of this analysis needs to take into account what may be called the *medico-penal nexus* — the coming together of professional knowledge of law and psychiatric medicine that allowed for the construction of concepts like "criminal lunacy" and the "criminal lunatic". Although it was a powerful professional combination (of ideas, of scientific and legal works) that created intellectual space for such legal/medical categories, what ensued in the case of the "criminal lunatic" in Canada was neither a successful medical nor legal "capture" of madness in the sense that either Michel Foucault or Andrew Scull, for example, considered it to be for psychiatry and the psychiatric patient in general (Foucault, 1967; Scull, 1993, p. 3–9). Instead, as the medico-penal nexus was continually in flux over the course of the nineteenth and twentieth centuries in Canada, so too was the conceptualization of criminal insanity and the criminal lunatic. Moreover, this conceptualization only ever partially had its institutional expression in the asylum, in the prison/penitentiary, in the criminal lunatic asylum, or in the hybrid hospital. There was just too much confusion and contention about where mentally troubled criminals fitted, for a straightforward institutional response. As the focus of concern shifted from murderers not guilty by reason of insanity, to criminals who became mentally troubled only after their imprisonment, and to the unfortunate harmless mentally troubled individuals who happened to run afoul of the law, the emphasis on what was at stake also changed accordingly. The fact that such a diversity of people could be subsumed under the category of "criminal lunatic" itself suggests the difficulty that psychiatrists, law makers, judges and the public would have in coming to terms with this enduring and elusive issue. Finally, this study suggests that, despite the shifting intellectual, professional and representational strands that made and remade the concept of criminal insanity over a century and a half, there were, at the same time, some remarkably durable features of that history. The first was the persistence of psychiatric control over at least some aspects of the definition and response to those considered to be at once mentally ill and criminally minded. Psychiatrists, with one notable exception, played an important role in sustaining the belief that there was something distinct (epidemiologically, clinically, therapeutically) about those who were mentally and criminally abnormal. The second was the stability of the law of insanity in the Criminal Code and its use in the criminal courts. In Canada, this enduring legal structure was, for at least 100 years, not easily recast by changing professional, scientific or institutional circumstances — despite the growing body of critical assessments from many quarters including representatives of the provincial and federal governments. Moreover, as we shall see, in Canada, the endurance of legal custom, as inherited from English legal precedent in the form of the M'Naghten Rules, in many instances held more power than the Canadian law of insanity encoded into the Criminal Code itself. Nevertheless, by the end of the twentieth century, a sea change in values and attitudes, as represented by the reform movement of the 1970s, and the 1982 Charter of Rights and Freedoms, finally altered this aspect of Canadian state structure in appreciable ways. The effects of this change for the majority of individuals caught in the web of crime and mental disorder are uncertain but they deserve some critical reflection here.

2. Defining criminal lunatic: the colonial period to 1914

This period was characterized by the development of a relatively unplanned informal legal and institutional response to criminal lunacy. This reflected Canada's colonial status, its links to the British Empire, and the fledgling nature of its legal and medical professions. As such, it was a time of uncertainty about how mentally troubled offenders ought to be represented, managed and treated. Important developments in central Canada during the colonial period had a lasting effect on psychiatry and criminal responsibility in the post-Confederation era, from 1867 onwards. The relatively higher density of European settler populations in Upper Canada (Ontario) and Lower Canada (Quebec) led to the creation of professional and institutional responses to the mentally troubled criminal offender that predated those in other parts of British North America (BNA) to a considerable extent. After 1867, the federal structure of governance that determined the integration of BNA's remaining colonies into the Canadian federation created a dynamic of federal–provincial relations that further altered the nature of Canada's professional and institutional responses to mental disorder and criminality. This first period was of fundamental importance not only in its own right, but because it set patterns in the understanding and response to mental disorder and criminality in Canada that persisted well into the twentieth century. It was also during this period that the law of insanity defence was written into Canada's federal Criminal Code in 1892.

2.1. Early professional tensions and institutional responses

In nineteenth-century colonial Canada some criminal offenders were found to be insane and thus not held responsible for their criminal acts. Attorney General William Draper articulated this perspective in 1841 (Draper to Provincial Secretary, 1841). Criminal lunatics also included those found to be unable to stand trial due to their insanity, and those who manifested symptoms of insanity while imprisoned after conviction. Simon Verdun-Jones and Russell Smandych also include as criminally insane in nineteenth-century Canada, those who "were labelled 'dangerously insane' and subjected to preventive detention" (Verdun-Jones & Smandych, 1981, p. 86). In the early nineteenth century, criminals in British North America who were acquitted of their crimes on the grounds of insanity were generally kept in district or local jails. With the opening of temporary asylums in Lower Canada in 1839 and in Upper Canada in 1841, the district jails occasionally delivered their insane criminals over to the new institutions. These asylums were considered by some to be more appropriate institutions of confinement than the local jails. The county clerk of the peace, the local sheriff, or the judge of a particular trial initiated the process of transfer from the local jail to the provisional asylum.

After initial charges were laid against them, insane criminals often experienced protracted stays at the district jails until the local assizes, following a routine of scheduled stops, arrived to try their cases. Upon a verdict of not guilty by reason of insanity, the insane criminal was further detained in jail while a position in the asylum was sought. Further delays in the transfer of criminal lunatics to the asylums could result from the overcrowding of the new mental institutions. While this was obviously bad news for individuals caught in the system, the small numbers of criminally insane scattered in the colonies generated relatively little attention (Moran, 2002, p. 15–23).

This situation changed during the 1850s as an increasing population of criminal lunatics in the Kingston Penitentiary generated uncertainty and conflict about the proper institutional response. Kingston Penitentiary surgeon James Sampson sent criminal lunatics to the Toronto Asylum, and, in short order, Toronto Asylum psychiatrist Joseph Workman sent them back to the Kingston Penitentiary. Both men claimed that the other institution was the proper place for their management and control (Moran, 2000, p. 143–420). This generated a heated debate over the institutional status of the criminally insane that eventually came to a head, resulting in the creation of a third option in 1855 — the Rockwood Criminal Lunatic Asylum.

2.2. The Rockwood Criminal Lunatic Asylum

The establishment of the Rockwood Criminal Lunatic Asylum under the superintendence of John Palmer Litchfield, marked the official recognition of a new category of deviancy in British North America —