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Law and Mental Health: A Relationship in Crisis?

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An Introduction to the Lectures of Supreme Court of Canada Chief Justice Beverley McLachlin and Nova Scotia Provincial Court Judge Anne Derrick

What is the significance of the rule of law to the area of professional knowledge and practice that is "mental health"—or to the interaction of those two aspirational, one might say euphemistically-named social systems: the mental health and justice systems? This question centres upon the rule of law—specifically, I suggest (as I relate further in closing), a thick conception of the rule of law grounded in an ideal of state-subject reciprocity[1]—and not, or not directly, upon the individual and social good of health. It is this overarching question that I wish to pursue in setting the

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1. As Michael Rosenfeld notes, the rule of law "is an 'essentially contestable concept,' with both descriptive and prescriptive content over which there is a lack of widespread agreement." ("The Rule of Law and the Legitimacy of Constitutional Democracy" (2001) 74 Southern Calif LR 1307 at 1308). A wide-ranging account of theoretical approaches to the rule of law, including approaches taken by the Supreme Court of Canada in recent years (favouring a "minimalist" conception), is provided by Mary Liston in "Governments in Miniature: The Rule of Law in the Administrative State" in *Administrative Law in Context*, Colleen Flood & Lorne Sossin, eds (Toronto: Emond-Montgomery, 2008) 77. Liston has described the rule of law as registering within the public imagination as "a political good, a public discourse, and a constitutive component of democratic citizenship." (Mary Liston, "The Rule of Law Through the Looking Glass" (2009) 21:1 Law and Literature 42 at 43.)
The model of the rule of law that I draw upon centres on the idea that law, or legality, implies a commitment to public justification of state action (including justification of the actions of statutory decision-makers exercising powers conferred by law). On this model, the legal values of rationality and fairness are constituent parts of the work of justification and of the rule of law. These commitments carry an expectation that legal authorities will take account of the significant interests as well as perspectives of those affected by state action–that is, their perspectives on the facts and also on the nature and relative weight of the legally-protected interests relevant to a dispute. See David Dyzenhaus, "Law as justification: Etienne Mureinik's conception of legal culture" 1998 (14) SAJHR 11, and "The Legitimacy of the Rule of Law", in David Dyzenhaus, Murray Hunt & Grant Huscroft, eds, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009) 33.
This approach to the rule of law arguably coincides in certain key respects with the ideas advanced in an article published by Justice McLachlin (as she then was) in 1992: "Rules and Discretion in the Governance of Canada" (1992) Sask L Rev 167 (a revised version of the Heald Lecture, College of Law, University of Saskatchewan, 23 September 1991). There, McLachlin J rejected a conception of the rule of law that would set laws and court-based law-interpretation (positioned on the side of the rule of law) against administrative discretion (positioned on the side of arbitrariness). Instead, she argued, the "real issue" in forging a defensible account of the legitimacy of the administrative state is "finding a rational basis for the exercise of discretion, whether in the courts or in administrative agencies, with the objective of establishing better decision-making and ensuring that the rule of law is maintained in the administrative as well as the judicial sphere" (at 167). This is a fitting description of the ideal of legitimacy that informs the modern law on the review of the substance of administrative decisions, and in particular, of discretion. It is also an appropriate starting-point for the project of evaluating the mental health and justice systems in their interaction with persons with mental health problems. Also see McLachlin CJ, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 Can J Admin L & P 171.

stage for the two lectures that follow, in which prominent members of the Canadian judiciary address topics at the intersection of mental health and the law.

It may be suspected that to take up the relationship between law and medicine, or more specifically between mental health law and mental health care, is to confront a deep and perhaps irresolvable divergence of values and ends: a clash of cultures.[2] On one side of this divergence—an over-simplification which nonetheless reflects the typical contours of these debates is a position strenuously defended by some members of the mental health profession. This position, which is one of resistance to law, and which for some grounds actions expressly defiant of law,[3] is rooted in the argument that law is at best irrelevant to, and at worst an insensitive brake upon, the therapeutic ends of mental health practice. Indeed it may be argued that law, as applied to mental health interventions, supports absurd conclusions: conclusions wholly detached from reality, at least in the extreme cases in which controversies arise–reflecting a rigid privileging of abstract individual rights even in the face of grave health risks.[4] From the other side, that of the mental health lawyer, may come the retort that our deepest human interest is the legally-privileged interest in directing our lives in accordance with our own values and experiences: the interest in personal autonomy. The lawyer may add, moreover, that mental health professionals are too quick to disrupt ordinary legal presumptions of

2. See Michael Bay, "Making the Law Match the Reality; Making the Reality Match the Law" (2006) J Ethics in Mental Health 4 at 4-5. The theme is developed also in Paul Appelbaum's influential *Almost a Revolution: Mental Health Law and the Limits of Change* (Oxford: Oxford UP, 1994).

3. Numerous commentators have exposed the absence of concern for law in institutional practices of forensic and civil psychiatric committal and involuntary psychiatric treatment. See, e.g., Jill Peay, *Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983*, (Oxford: Clarendon Press, 1989); *Decisions and Dilemmas: Working with Mental Health Law* (Oxford: Hart, 2003); Lora Patton, "These Regulations Aren't Just Here to Annoy You: The Myth of Statutory Safeguards, Patient Rights, and Charter Values in Ontario's Mental Health System" (2008) 25 Windsor Rev Legal & Soc Issues 9; Aaron A Dhir, "The Maelstrom of Civil Commitment in Ontario: Using Examinations Conducted during Periods of Unlawful Detention to form the Basis of Subsequent Involuntary Detention under Ontario's *Mental Health Act*" (2003) 24:2 Health L Can 9; Michael Bay, *ibid.* See also Peter Bartlett, "Introduction" to the Special Volume: Perspectives on Law and Psychiatry: Exploring the Legal and Social Issues Surrounding Mental Disability (2008) 25 Windsor Rev Legal & Soc Issues 5; and Peter Bartlett, "Psychiatric Treatment: In the Absence of Law?: Case note on *R (on the application of B) v Ashworth Hospital Authority and another* [2005] UKHL 20" (2006) 14 Medical L Rev 122.

4. For the argument that there is "too much process" in the psychiatric system (as that argument has been raised in the US context), and that the time has come for the pendulum of legal process protections to shift back to a less adversarial model, see Samuel J Brakel & John M Davis, "Overriding Mental Health Treatment Refusals: How Much Process is "Due?" (2008) 52 Saint Louis ULJ 501. In Canada, the work of John Gray & Richard O'Reilly pursues a related line of argumentation. See, for instance, John E Gray & Richard L O'Reilly, "Supreme Court of Canada's 'Beautiful Mind' Case" (2009) 32 Int J of Law & Psychiatry 315.

individual liberty, capacity and decision-making authority, as if the power to do so flowed from medical expertise alone rather than from the specific terms of one or another publicly-conferred, carefully-circumscribed legal mandate.[5]

In light of such divergent perspectives, we may ask: what common values, what common principles and indeed common challenges can we identify in order to better orient mental health law and mental health care toward the shared project of advancing the fundamental interests of persons experiencing mental health problems, and most particularly, those most vulnerable to mental health crisis? At the same time, what dangers (in particular, what dangers for the rule of law) may lie in the attempt to coordinate the values and ends of mental health law and mental health care? These are among the matters that must be confronted if we wish to face the challenges, one might say the state of emergency,[6] marking the interaction of the justice and mental health systems in Canada.

The two lectures that follow take up various dimensions of these complex social and legal questions, and encourage us to test the assumptions we bring to the debates. The first, entitled "Medicine and the Law: The Challenges of Mental Illness," was delivered by Chief Justice Beverley McLachlin of the Supreme Court of Canada,[7] in Halifax, Nova Scotia, in October 2010.[8] In her remarks, McLachlin C.J. recounts historical developments in societal attitudes toward mental illness and accompanying developments in mental health law, both in the criminal and civil spheres. She concludes that while law has progressed some way in overcoming the discriminatory attitudes and institutional expressions thereof which prevailed in the not-so-distant past, there remains progress to be made–including, but not limited to, more adequate resourcing of

5. See the articles cited in *supra* note 3. The point is made with particular force by Michael Bay, *supra* note 2.

6. The lectures that follow alert us to the ways in which what may seem a set of disconnected or random "tragedies" involving conflicts between public authorities and persons with mental health problems are better understood as indicia of systemic societal problems of a magnitude that I suggest merits the descriptor "state of emergency." At the same time, the descriptor has a more sinister edge, as the concept of the state of emergency plays an important role–not only in medical law but, of course, in national security law–in grounding "exceptional" forms of state action forgoing adherence to the ordinary expectations of the rule of law.

7. Chief Justice McLachlin was sworn in as a Justice of the Supreme Court of Canada in April 1989. She was appointed Chief Justice of Canada on 7 January 2000. As I note in more detail further on, the speech reproduced for publication in this journal is one of many public addresses and publications that she has produced during her tenure on the Supreme Court.

8. This was the Dr Saul Green Memorial Lecture, given on 19 October 2010. A substantially similar lecture was given in Alberta under the title "Medicine and the Law: The Challenges of Mental Illness," remarks given in honour of Justice Michael O'Byrne at the Universities of Alberta and Calgary, and 17 and 18 February 2005 <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm05-02-17-eng.asp>.

legal guarantees (e.g., to ensure that one does not languish in lock-up while awaiting psychiatric assessment)[9] and increased coordination among the justice and mental health systems. The final part of her essay addresses continuing patterns of discrimination against persons with mental illness, as expressed in attitudinal and structural barriers to participation in a range of basic social goods, from employment to health care, and in the form of violence, including violence on the part of public authorities.

The second lecture, "'We Shall Not Cease from Exploration': Narratives from the Hyde Inquiry about Mental Health and Criminal Justice," was delivered by Nova Scotia Provincial Court Judge Anne Derrick,[10] again in Halifax, in February 2011.[11] In this lecture, Judge Derrick draws upon her experience presiding over a Fatality Inquiry (under the Nova Scotia *Fatality Investigations Act*[12]) regarding the November 2007 death of Mr. Howard Hyde—though her lecture also strikes new ground in addressing matters beyond the scope of that Inquiry. The Inquiry in question commenced in

9. This problem is discussed by McLachlin CJ at 25, with reference to the Ontario case *R v Hussein* (2004), 191 CCC (3d) at para 33, 26 CR (6th) 368 (Ont Sup J). But see the subsequent decision of the Ontario Court of Appeal, *R v Phaneuf*, [2010] OJ no 5631, 104 OR (3d) 392, upholding a decision of the Divisional Court [2009] OJ no 5618, which questioned a reading of *Hussein* which would require that a criminal accused must be immediately transferred to hospital upon the ordering of a psychiatric assessment. In a postscript at paras 28-32, the Court of Appeal supplies procedural guidelines whereby the constitutionality of a period of detention while awaiting psychiatric assessment may be assured.

Also see the more recent decision of Nordheimer J of the Ontario Superior Court in *Centre for Addiction and Mental Health v Al-Sherewadi*, 2011 ONSC 2272, [2011] OJ no 1755. This judgment overturns a decision of the Ontario Court of Justice refusing to issue a treatment order because the accused was to be held in a provincial detention centre before transfer to forensic hospital. In the decision below, Hogan J had issued a warrant of committal requiring that the accused be transferred to the Centre for Addiction and Mental Health—which had advised that no forensic beds were available, and that as a result, the accused would be taken to a holding cell at a division of the Toronto Police Service. In his decision, Nordheimer J comments on the recent tendency of judges of Ontario's Mental Health Court to issue warrants of committal under s 672.46(2) of the *Criminal Code*, where the Crown is not able to assure immediate transfer to a forensic hospital for the purpose of carrying out a treatment order or psychiatric assessment. Nordheimer J states: "Just as a person who is arrested cannot expect an immediate bail hearing, or a person who is charged with a criminal offence cannot expect an immediate trial, similarly a person who is found to have a mental illness cannot expect immediate treatment. To hold otherwise is to insist on a system of perfection that is unrealistic in any normal society." Commentary upon the decision is provided by April Lim, "Debate over putting mentally ill behind bars stirred by court ruling" (Postmedia news: 21 April 2011) online: Global News <http://www.globalnews.ca/health/Debate+over+putting+mentally+behind+bars+stirred+court+ruling/4658110/story.html>.

10. Judge Anne Derrick was appointed to the Provincial and Family Court of Nova Scotia in September 2005. Prior to that, her legal practice centred upon public interest and equality litigation, as well as criminal defense work. She has participated widely in public, professional and judicial education efforts, having delivered over seventy public addresses since the late 1980s, from keynote speeches and plenary panel presentations at national conferences to lectures and workshops given to students and community advocacy organizations.

11. This was the 34th Annual Horace E Read Memorial Lecture (2011). Horace E Read was Dean of Dalhousie Law School from 1950-1964.

12. *Fatality Investigations Act*, SNS 2001, c 31.

2009 and extended over many months, with a Report released in December 2010.[13] As Judge Derrick relates, Mr. Hyde's death in a Nova Scotia correctional facility followed a set of interactions with police, health care, and correctional authorities which together signalled a deep failure on the part of these public authorities to respond sensitively or appropriately to his needs and interests, including his historical and immediate struggles with mental health problems. Judge Derrick's lecture draws significantly upon the groundwork of the Hyde Report, specifically her attention in that report to the ways that a range of institutional actors interacted with Howard Hyde during his final days, and her analysis of the policies and practices most relevant to those interactions. Thus Judge Derrick's lecture, like her Report, brings together the personal elements of Howard Hyde's story with a broader account of the function or dysfunction of a range of societal and institutional forces in order to illuminate the failings of, and possibilities for change within, the mental health and justice systems.

Each of these lectures thus affords a glimpse into the mind of a respected jurist as she endeavours to expand her own and the general public's awareness of challenges at the intersection of the mental health and justice systems. The challenges adverted to include, among others, the phenomenon of criminalization of mental illness (i.e., the overrepresentation of persons with mental health diagnoses in the criminal justice system, a phenomenon commonly linked to the joint operation of stigma and a lack of material, social and therapeutic supports in the community).[14] In addition, and relatedly, the lectures suggest the failure of public authorities on both sides of the justice / mental health divide to recognize—or to have received the educational and other resources required to adequately recognize—the humanity of those experiencing mental health problems and mental health crises in particular.[15] Finally, both lectures invite us to reflect upon developments in and beyond law that hold out the possibility of meaningful reforms.

I have suggested that we may look to these lectures for elucidation of the significance of law, or of the rule of law, to the ways that the justice

13. Nova Scotia, Inquiry under the Fatality Investigations Act, SNS 2001, c 31 into the Death of Howard Hyde, *In the Matter of a Fatality Inquiry Regarding the Death of Howard Hyde* (Halifax: Nova Scotia Provincial Court, 2010) <http://www.courts.ns.ca/hyde_inquiry/hyde_inquiry_report.pdf> [Hyde Report].

14. See Derrick J at 45-50. While Chief Justice McLachlin does not use the term "criminalization", she adverts both to the high numbers of persons with diagnosed mental illness in the correctional system (at 16), and to the thesis that if increased supports and coordination of mental health and legal systems were in place, it might be possible to avert such mental health crises as attract the attention of the criminal justice system (at 15-17, 30-32).

15. See McLachlin CJ at 25-26, 30-32; Derrick J at 41-42, 46-50 and 58.

and mental health systems interact in affecting our lives: most particularly, when we are most vulnerable to psychological distress and to social forces of marginalization, exclusion, and violence. Indeed, one may expect a certain level of agreement between them on the basic thesis that law demands of the mental health and justice systems a certain faithfulness, both independently and in their interaction, to the values inscribed in our legal order. Such faithfulness or fidelity to law must necessarily encompass the universal guarantees registered in the *Canadian Charter of Rights and Freedoms*,[16] including the right to equality and to liberty (which in turn may be understood to ground the right to individual autonomy), in addition to the essential rule of law expectation of congruence between the law on the books and the law as applied. And yet, while both lectures adhere to these general statements of legal principle, they may by no means be reduced to a singular shared prescriptive claim or set of claims.

In order to facilitate the reader's critical appreciation of the two lectures, let me briefly take up some areas of common ground as well as differences between them. I address, in turn, (1) starting-points, i.e., the institutional positions from which each lecturer begins in approaching her subject; (2) the nature and scope of the analyses, i.e., the different aspects of the vast subject of mental health and the law taken up in the two lectures; and (3) the prescriptive dimensions of the lectures.

(1) *Starting-points*

The fact that Chief Justice McLachlin and Judge Derrick have delivered these lectures at all arguably speaks to a historical shift in judicial attitudes and norms of judicial conduct in Canada. That is, in contrast to previous eras in which our judges tended to be more assiduously disengaged from the public sphere except where possessed of a specific legal mandate, it is now recognized that among the many functions proper to the judicial role—consistent with the guarantees of judicial independence and impartiality, and perhaps even implicit in the duty to protect the rule of law[17]—is that of

16. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

17. Chief Justice McLachlin has indicated that it is among the duties of Canadian civil servants to engage in public discourse about the institutions of governance that advance the rule of law at the domestic as well as international levels. Moreover, she has made it her own practice to do so. In an address to senior public servants at the 2004 Assistant Deputy Minister Forum, she stated: "[I]n my experience, when Canadians speak of the institutions that foster tolerance, inclusion, and respect for human rights, many around the world are willing to listen. We must continue to speak, and we must continue to be heard." Remarks of the Right Honourable Beverley McLachlin, PC, "Globalization, Identity and Citizenship (ADM Forum, Ottawa, 26 October 2004) online: <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm04-10-26-eng.asp>.

engaging the public on the challenges facing the justice system.[18] Or if this function was recognized in limited fashion in the past, it is now afforded more breadth. Just so, these lectures are directed not simply at elucidation of points of law or doctrine, nor at mere description of facets of the justice system, but rather at identifying, within the interaction of the mental health and justice systems, certain stressors upon and challenges to the fundamental values inscribed in our laws. Yet even as both lectures evince the expanded ambit of publicity implicit in contemporary understandings of the judicial role, they also reflect distinct institutional positions or starting-points, as I will explain.

Near the beginning of Chief Justice McLachlin's remarks, she relates that the depth of the challenges raised to law and to the justice system by the prevalence and complexity of mental illness was brought home to her by the remarks of a police officer with whom she happened to be dining. Of course, this is less a causal explanation of how she came to regard this topic as a matter of public concern than a rhetorical device, illustrating the significance of the matters she seeks to address as viewed from the front lines, specifically from the vantage of policing. At the same time, Chief Justice McLachlin's opening device conveys something of her isolation, in her institutional capacity as the Chief Justice of Canada's final appellate court, from the operational concerns faced by those populating the lower orders of the justice and mental health systems. Indeed, McLachlin C.J.'s lecture may be understood in part as seeking to bridge the gap between her institutional position and more practically-informed perspectives. That is, her lecture arguably seeks to link up the law on the books with the law as it manifests in life, both in adopting a broad law-and-society approach to the history of criminal and civil legal doctrine targeting those with mental health problems, and in adverting to the incidence (through references to

18. See Canadian Judicial Council [CJC], *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998), Principle 6 (Impartiality) & Commentary (esp D.3, 6 & 7):

> Principle D.3(d) recognizes that, while restraint is the watchword, there are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge. (Principle 6, Commentary D.6 at 42)

Also see McLachlin CJ, "The Changing Role of the Supreme Court of Canada and its Judges" (address to the County of Carleton Law Association Conference, 17 November 1990) at 14. The Supreme Court of Canada website provides links to twenty-five speeches given by Chief Justice McLachlin since her appointment as Chief Justice in 2000. She gave eight speeches in 2004 alone. See <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/index-eng.asp>. LexisNexis lists 15 articles by Chief Justice McLachlin, some of which, though not all, are published versions of speeches. That list does not capture monographs, and so leaves out, for instance, the article included in the Tribute to John Fleming noted in footnote 19, *infra*.

legal judgments as well as the daily papers) of historical and ongoing discrimination against and victimization of those deemed mentally ill.[19] Finally, Chief Justice McLachlin's lecture suggests an effort to reach beyond her institutional role in order to specifically acknowledge advances in medicine that she suggests may assist in abating the challenges that she invokes..

I have already noted that Judge Derrick's starting-point is her recent experience presiding over the Fatality Inquiry into the Death of Howard Hyde. This institutional standpoint conditions the set of perspectives she is able to draw upon in her lecture. The extraordinary access of the Inquiry to a range of witnesses—from persons intimate with Mr. Hyde, to police, hospital, and correctional workers, to experts offering evidence on various features of the wider mental health and legal systems as they interact with persons experiencing mental health problems—amounts to a considerable expansion of the matters to which a judge may typically attend when adjudicating an *inter partes* dispute.[20] At the same time, the focus of the Inquiry upon the singular event of Mr. Hyde's death roots Judge Derrick's observations in the humanity and singularity of this individual and his story. Thus if Judge Derrick has a certain advantage in the starting point of her observations, it is one afforded by the institutional mandate of the public inquiry in which she has participated, which goes some distance toward bridging the gap between the judicial role and the expertise of those at the front lines of the mental health and justice systems. That said, we may consider also how her position as a Provincial Court Judge, assigned specifically to criminal matters requiring lengthy trials, may condition her perspective.

19. Chief Justice McLachlin's efforts to bridge the gap between the court of last resort and the lived experience of legal subjects are represented concretely in the many public lectures that she has given (see *supra* note 18). That bridge runs both ways. For instance, McLachlin CJ has indicated that the "public mood" as regards the current state of the law should play a role in informing judicial interpretation and development of the common law. See her article "Negligence Law—Proving the Connection" in *Torts Tomorrow: A Tribute to John Fleming*, Nicholas Mullany & Allen Linden, eds (LBC Information Services: Sydney, 1998) 16 at 34: "At this point, however, a final and overarching policy point forces itself upon us. While lawyers debate the niceties of whether a given change may unduly favour plaintiffs or defendants, the public mood is changing and threatening to eclipse the legal debate. . . If the tort system is unable to meet public perceptions about justice, people may turn elsewhere. . . [and] recourse to private dispute resolution may have adverse consequences on the justice system" (35).

20. The CJC's *Ethical Principles for Judges* states: "Where the terms of reference require, judges serving on Commissions of Inquiry may exercise greater latitude in commenting on issues relevant to the inquiry." (*supra* note 18 at Principle 6, Commentary D.6 at 42).

(2) *Nature and scope of analysis*

Having proceeded from these different starting-points, the two lectures offer distinct analyses of different (though overlapping) aspects of the mental health and justice systems. Chief Justice McLachlin makes her points in broad strokes, covering volumes of historical and doctrinal material in the brief span of her remarks. As noted, her lecture surveys a set of important subjects at the intersection of law and mental health care. She traces certain fundamental historical shifts in the attitudes of Canadians toward, and the legally-condoned treatment of, those deemed mentally ill or intellectually disabled, while speaking more specifically to doctrinal shifts relating to criminal responsibility and the legal consequences of a finding of not criminally responsible on account of mental disorder, the civil standards for involuntary hospitalization and treatment, and the intransigence of societal discrimination against and victimization of persons with mental illness. The arc of these observations suggests that progress has been made toward fashioning appropriate responses to persons with mental health problems, both in legal doctrine and in the justice system more broadly, although structural and attitudinal barriers to full social membership have proven difficult to uproot. In particular, McLachlin C.J. transmits the idea that progress in medical knowledge has been a significant factor in driving positive social and legal change. At the same time, she acknowledges that what counts as progress in law is not universally agreed upon, as reflected in ongoing contestation about the substantive content of the value of autonomy as it informs the legal analysis of capacity to make decisions about treatment.[21]

Judge Derrick's lecture proceeds from the narrative of Howard Hyde's encounters with the mental health and justice systems to a set of reflections on the wider social forces implicated in that narrative. These include forces of stigma and criminalization, and with this, the ways in which facets of the mental health and justice systems, viewed within the wider context of a failed social safety net, have functioned to deepen the oppression of persons with mental illness. Indeed Judge Derrick's reflections do not stop at the factors of direct relevance to Howard Hyde's death, but encompass questions about intersecting grounds of oppression (i.e., the significance of characteristics such as class, race and sex to one's experience of the mental health and justice systems) and the unique challenges facing persons with mental health problems who are held in the federal correctional system.

21. McLachlin CJ at 30.

McLachlin C.J. is ultimately more sanguine than is Judge Derrick as she traces out a narrative of medical and legal progress. Yet her lecture nonetheless alerts us to a range of doctrinal and institutional settings in which the sensitivity of public authorities and public institutions to persons experiencing mental health problems must continue to be placed in question. Judge Derrick's remarks are rooted less in a model of progress than one of co-implicated institutional barriers, suggesting that the mental health and legal systems have together come to participate in a culture of crisis, marked by a coincidence of systemic neglect and targeted coercive interventions in the lives of persons with mental health problems.

(3) *Prescriptions*

Finally, these two lectures may be understood to differ in important respects in their prescriptive elements, even as they share certain basic normative commitments.

The differences in the prescriptive dimensions of the lectures are illustrated by the following example. At one point, Chief Justice McLachlin observes that the development of mental health courts represents an important institutional advance toward uniting the mental health and justice systems in the common cause of assisting in the recovery of persons experiencing mental health problems.[22] In contrast, Judge Derrick points out that mental health courts are not a solution, or not a complete solution, to the deep systemic failings conducive to criminalization. Indeed, she suggests that mental health courts may reproduce stigma, even as they fail to remedy the lack of accessible social supports that might avert the crises that attract the attention of the criminal justice system in the first place.[23]

More broadly, the two lectures differ in the manner in which they represent the place of law in responding to the problems that they expose. Justice McLachlin's lecture culminates in observations on the distinct yet inter-related mandates of medicine and law in answering the challenges that her lecture recounts. On the one hand, the challenge she puts to medicine at the close of her lecture is to increase knowledge of the "causes and possible courses of treatment"[24] of mental illness. On this approach, the contribution from medicine centres upon a biomedical model of illness and health. And what is the challenge put to law? McLachlin C.J. states that while laws cannot in themselves achieve the "ultimate goal" of restoring mental health, laws can "create a social and regulatory environment that assists medical professionals in delivering their services in a manner that

22. McLachlin CJ at 26.
23. Derrick J at 51-52.
24. McLachlin CJ at 33.

is both ethical and respectful of the rights and needs of the mentally ill."[25] Here a certain primacy is accorded to the interests identified under the medical model. Indeed, the challenge set to law is "to keep pace with medical developments and ensure that the legal regime governing mentally ill persons is responsive to the current state of scientific knowledge."[26] In this statement is reflected a concern that decisions within the legal system be informed by science, in particular scientific evidence on the efficacy and effects of treatment regimes.

One may worry that this prescriptive stance is one that urges law or legal authorities to adopt a level of deference to medical, or perhaps particularly psychiatric, knowledge[27] that amounts to "submission to" and not merely "respect for" this form of administrative expertise.[28] A more generous reading might conclude that in this passage McLachlin C.J. urges legal authorities to strike a balance between setting a rights-sensitive framework for mental health care and allowing mental health professionals the discretion, within that framework, to determine how best to advance the substantive goals of the mental health system.

The prescriptive dimensions of Judge Derrick's lecture are more firmly rooted in the thesis that law must lead any advances toward remedying the ills of the mental health and justice systems. Relatedly, the prescriptive dimensions of this lecture evince a particular concern to ensure that both the mental health and justice systems take account of the perspectives of those whose significant interests they affect or purport to advance. In this connection, Judge Derrick directs particular criticism toward the tendency to attribute mental health crises to the individual's "non-compliance" with medication—typically asserted in the media and elsewhere with strong intonations of incapacity, immorality, or both.[29] In her view, this

25. McLachlin CJ at 33.

26. *Ibid.*

27. See H Archibald Kaiser, "Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State" (2009) 17 Health LJ 139 at 155. Kaiser argues that in this passage, McLachlin CJ typifies social and legal tendencies toward adoption of a medical model of mental health interventions, which functions to deflect "broader questions involving discrimination and inequality, and responsibility for the remediation of these societal blemishes." (154-55). Kaiser's comments are directed at the above-noted statements as they appear in the version of McLachlin CJ's lecture presented in Alberta in 2005 (*supra* note 8).

28. I refer to David Dyzenhaus's characterization of deference in administrative law, endorsed by the Supreme Court of Canada in a set of cases beginning with *Baker v. Canada (Min of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 65: "Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" (*per* L'Heureux-Dubé J, citing D Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M Taggart, ed, *The Province of Administrative Law* (1997) 279 at 286).

29. Derrick J at 40-42. Also see Erin Talati, "When a Spoonful of Sugar Doesn't Help the Medicine go Down: Informed Consent, Mental Illness, and Moral Agency" (2009) 6 Ind Health LR 171.

response fails to register the range and complexity not only of mental health problems (including the social and institutional factors that may induce or exacerbate those problems) but also the range and complexity of individual experiences of medication, which may include significant side effects or failure to achieve the primary intended effect of alleviating distressing symptoms, or both.[30] The primary work of law, then, as it is represented in Judge Derrick's lecture, is expressly not to lend legitimacy to the enforcement of treatment compliance but rather to urge enactment of the social and material conditions supportive of resilience and recovery.

Those interested in following up the prescriptive dimensions of Judge Derrick's lecture may consult the eighty recommendations featured in the Hyde Report.[31] These recommendations speak to a range of government departments and public authorities, extending, for example, to the training of police, hospital, and correctional workers in such matters as crisis intervention, empathy, communication, and human rights principles, and more generally to the community-based provision of supports including therapeutic alternatives. Consistent with her emphasis upon the role of law in leading reforms to the mental health and justice systems, Judge Derrick closes her lecture with reference to domestic and international human rights instruments that may serve as sources of normative authority in the effort to address the systemic failings that her lecture describes. As the closing passages point out, the recent U.N. *Convention on the Rights of Persons with Disabilities*[32] is of particular note in this regard, in its recognition of the inter-penetration of human rights and social and economic supports.

Whether the reader is in the end fully satisfied with the prescriptions of one or both lectures, and in particular, with their closing characterizations of the respective roles of law and of medicine in orienting our responses to the challenges discussed, may depend upon one's initial assumptions or perspective. If there is a primary point of convergence as between the two lectures, it is their encouraging us to work in common toward developments in mental health law and mental health care that might diminish reliance upon coercive and in particular punitive state responses to persons with mental health problems—which may be understood to reproduce historical patterns of discrimination, destructive both of health and of fundamental legal values.

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30. Derrick J, at 40-42.
31. Hyde Report, *supra* note 13 at 350-83.
32. *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 46 ILM 433, UN Doc A/RES/61/106.

Conclusion

We are fortunate to be able to bring together these two lectures, which invite us to reflect upon the challenges, indeed the crises, marking the interaction of the mental health and justice systems with persons experiencing mental health problems in Canada. Here it should be observed that contemporary trends in mental health law have tended toward expansion of coercive mechanisms, expressed, for instance, in various provinces' adoption of diminished risk thresholds for involuntary hospitalization and regimes of community treatment orders.[33] In view of this, it is particularly refreshing to encounter representatives of the judiciary encouraging us to return to the foundational premises and objectives of our mental health and justice systems, to ask whether these systems are functioning in a manner that is adequate to our ideals. It is just such exercises in public deliberation, as expressed in the narrow arenas of decision-making under law and in the wider arenas of civil society, that mark us as a nation committed to the rule of law.

The rule of law may be understood to encompass requirements of rationality and fairness in law's application, and more generally, consistency of state action with the fundamental values inscribed in our legal order.[34] Viewed in this light, law is not a formalistic brake upon the pursuit of inherent goods like health, but rather a commitment on the part of public authorities to be attentive to the significant interests as well as the perspectives of those who are affected by their decisions and actions. Authorities within the mental health and justice systems bear a particular duty of attentiveness to persons experiencing mental health problems, who have proven vulnerable to state interventions egregiously insensitive to their interests and perspectives. With these observations, we may link up the rule of law to the front-line work of fostering respectful conversations not only among mental health and legal professionals, but among such professionals and persons experiencing mental illness: conversations admitting the possibility of alternative ways of conceiving of mental health problems and therapeutic responses, and reflecting a spirit of mutual exploration and recognition of the value-laden dimensions of illness and

33. A comprehensive account of the state of provincial mental health laws as well as laws relating to mentally disordered offenders under the *Criminal Code* is provided by Peter J Carver, "Mental Health Law in Canada" Chapter 8 in *Canadian Health Law and Policy*, 4th ed, Jocelyn Downie, Timothy Caulfield & Colleen M Flood, eds (Markham Ont: LexisNexis, 2011) 341.

34. See *supra* note 1.

wellness.[35] Supporting such exploratory conversations may be the most effective way of extending the rule of law to the embattled sites at the intersection of the mental health and justice systems.

I take both these lectures to support the rather radical proposition that the rule of law, and with this, fairness in the administration of justice, demands efforts to secure the resources (economic, social, educational, therapeutic) necessary to demonstrate attentiveness on the part of public authorities within the mental health and justice systems to the interests and perspectives of those affected by their actions and decisions. This means enacting the fundamental values of equality and respect for autonomy even or most particularly at the "capillaries" [36] of power: the police booking unit, the hospital, the jail—the sites at which we are most vulnerable to arbitrary state action. It is our responsibility to reflect on these challenges, as health care professionals, legal professionals, and above all, as the democratic public in whose name laws are enacted and legal authority is bestowed.

35. I attempt to draw such connections between rule-of-law values and the assessment of capacity to make treatment decisions in "Insight Revisited: Relationality and Psychiatric Treatment Decision Making Capacity," in J Downie & J Llewellyn, eds, *Relational Theory and Health Policy*, UBC Press, forthcoming 2011.

36. Michel Foucault, "Two Lectures" in *Power/Knowledge: Selected interviews and other writings (1972-77)*, ed C Gordon (New York: Pantheon Press, 1980) at 96.