

Publicizing Pedophilia

Legal and Psychiatric Discourse

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When a criminal case, primarily centred on moral issues, is placed before the courts, and attended by both legal considerations and psychiatric testimony, an excellent opportunity is available for comparative analysis of legal and psychiatric discourse. One such case is *R. v. Pink Triangle Press*,¹ which provides insights into the role of psychiatric testimony, the differences between psychiatric and legal discourse, and the relation of law to the moral values of society.

At issue in the case was an article published in the December, 1977 issue of *The Body Politic*, a Toronto-based magazine dedicated to the civil rights of homosexuals. The article was essentially an interview with three male homosexual pedophiles, each of whom described in some detail his emotional and sexual relations with boys. The interview and commentary endeavoured to dispel the prevailing pedophile stereotype and to present a more realistic, understandable picture of the relationships. After the release of the issue, the author, publisher and two editors were charged under the Canadian *Criminal Code* with "use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous. . . ."²

The articulated central issue at trial was whether the article was "indecent, immoral or scurrilous,"³ but the rather free-wheeling, wide-ranging evidence included such matters as the legality of homosexuality and pedophilia and the offence of corrupting morals.⁴ After hearing testimony from a group of witnesses that included psychiatrists and psychologists, the trial judge found:

1. The article was not prurient.⁵
2. A community standard, essential to the legal determination of "indecent, immoral or scurrilous" had not been proven.⁶
3. The word "immoral" was too imprecise a guide to a finding of guilt.⁷

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¹(1979), 45 C.C.C. (2d) 385 (Ont. Prov. Ct.).

²R.S.C. 1970, c. C-34, s. 164.

³*Supra* note 1, at 387.

⁴This offence is extensively outlined in s. 159 of the *Criminal Code*, R.S.C. 1970, c. C-34.

⁵*Supra* note 1, at 391-92.

⁶*Id.* at 404.

⁷*Id.* at 408.

4. Given the character and context of the article, and the way the subject was handled, the article was not indecent⁸ or scurrilous.⁹

Each of the accused was found not guilty. Yet it is not merely the judgement in the case but its internal dynamics that concern us in this examination of legal and psychiatric discourse and intercourse. The trial transcript also provides direct insight into the following problems and questions posed by *R. v. Pink Triangle Press*.¹⁰

The first problem is the logic of discourse, which should be distinguished from the logic of argument. The rules of logic are universal, and applicable to the language of both disciplines. The logic of discourse, dealing with the rules of method, is specific to a discipline or set of disciplines.

There are rules in psychiatry and law for establishing the meanings of key terms. What are those rules? From which discipline do they originate? What is the key role of psychiatrists and psychologists who testify in a court of law? When psychiatrists testify, it is necessary that a common language of discourse be established; which set of rules for the meaning and reference of terms has priority?

The legal, psychiatric, and psychological professions presume credibility rules, since they are all concerned with the believability of witnesses. Is it possible to ascertain the genuineness of the testimony of witnesses in a law court, or the genuineness of a description of personal experience?

Assessments of credibility inevitably involve a conception of objectivity, either on behalf of the witness or on behalf of the interpreter of the experience. In addition to the rules of language and credibility, then, there are rules of evidence to establish objectivity. To what extent and in what manner can testimony, clinical observation, or long-term behavioural studies be utilized to establish objective connections among agents, objects, and events?

According to popular opinion, psychiatrists are notorious for differing with each other. How do the rules of objectivity in law impinge on the rules of objectivity in psychiatry to indicate which psychiatrists are the more credible expert witnesses before the court? How do the legal rules of evidence affect which types of psychiatric evidence are to be allowed into court as a basis for drawing judicial conclusions about connections between agents and events?

Law courts and psychiatrists form judgements. What is the basis for arriving at such judgements in each discipline? How do they differ, and how do these differences affect the status those judgements have in society? What is the effect of the respective status and interactions of the judgements in each field on the moral values in society? As I will try to show, moral neutrality is a procedural requirement in psychiatric assessments, whatever the difficulties encountered in observing the rule. By contrast, judges make judgements which have a prescriptive effect on the social norms of society. Interestingly, one of the bases for those prescriptive effects is the testimony of psychiatrists and psychologists who must themselves maintain a morally neutral stance.

⁸*Id.* at 408-409.

⁹*Id.* at 409-410.

¹⁰The transcript is from the Court Reporter's Office, Provincial Court (Criminal Division) Judicial District of York: Regina vs. Popert, Jackson, Hannon & Pink Triangle Press; Judge S. M. Harris, Jan. 4, 5, 8, 1979; 2 vols.

Language

Expert witnesses are prevalent in cases such as the one under examination; they establish who pedophiles are, at whom their activities are aimed, and what activities are involved.

Pedophiles are to be distinguished from homosexuals. Some homosexuals are pedophiles, though most pedophiles are heterosexual. Homosexual pedophiles form a minority group within both overlapping classes of homosexuals and pedophiles. The trial was therefore concerned with a minor class of both homosexuals and pedophiles: homosexual pedophiles. Authoritative witnesses agreed that non-abusive pedophiles were to be distinguished from violent, sadistic child abusers.

Among non-abusive homosexual pedophiles, sex was considered by some as an integral part of the relationship. Dr. Leonard Goldsmith pointed out during the trial, however, that “sexual contacts are only a portion of, a part of the range of activities that go on . . . certainly between the men who are interviewed here, and their lovers.”¹¹ Thus, for others, affective relating constitutes a significant part of the relationship. Simon, one of the interviewees, had stated in the article, “And that’s really more pleasurable to me than having sex . . . because there’s so much affection . . . A lot of my relationships with boys have not been all that sexually satisfying to me. Especially with the pre-pubertal kids — there’s never been anything really sexual.”

Dr. James Long defined a pedophile as an “adult having sexual behaviour, experience with a child.”¹² Dr. Jerry Cooper defined pedophiles as people who “feel they must love children and children are the only outlet for them.”¹³ In this definition, the stress appears to be on “love” rather than “sex,” but Dr. Cooper explains further that the expression given to this love is primarily sexual: “a pedophile is somebody whose sexual needs can only be met by a child.”¹⁴ “Pedophiles enjoy sex with children under the age of twelve.”¹⁵

It seems possible to distinguish pedophiles behaviourally: those adults whose principal affective objects are children, and those adults who have sexual relations with children. One can also parallel motivational considerations to these behavioural distinctions: the adult behaviour (whatever it may be) is motivated by love or by sexual need. As well, it is possible to differentiate by consequences: the satisfaction of sexual desires of the pedophiles involved, or, as some of the defence witnesses added, the satisfaction of the love needs of the children. In the particular case under examination, the children concerned were male.

These considerations are not incompatible. In testimony concerning homosexual pedophilia, Dr. Roswell defined pedophilia as “love of young boys” and added that it “necessarily entails sexual relations.”¹⁶ One easily resolves the difficulty by defining “latent pedophiles” as men who love boys but who do *not* express their love through sexual activities.

It is worthwhile noting that the witnesses for the accused agreed with the

¹¹*Id.* at 366, vol. I.

¹²*Id.* at 54.

¹³*Id.* at 75.

¹⁴*Id.* at 94.

¹⁵*Id.* at 96.

¹⁶*Id.* at 212.

witnesses for the Crown on the definition. In fact they seemed to stress the sexual factor even more by leaving out any reference to the presence of love. Pedophilia was the “condition in which a person’s primary sexual attraction is toward a person who is much younger.” Dr. Goldsmith gave the textbook definition of a homosexual pedophile as one who “obtains sexual gratification through the use of young boys as sexual objects.”¹⁷

On the basis of the definitions used by both Crown and defence witnesses, a basis of discourse could be established, though with a great deal more difficulty than should have been necessary. Latent homosexual pedophiles have as the prime objects of their love young boys; active homosexual pedophiles express their love as well as sexual needs by seeking sexual gratification with young boys. Boys who enter into such relations generally come from non-supportive homes in which they appear to be starved for affection.

On another issue, the age of the children involved, the authoritative witnesses seemed to agree that the object of love of a pedophile is a pre-pubertal child. As Dr. John Money testified for the accused, “The Greek derivation for pedophilia is child love and in today’s usage the term may be used literally for a person who is pre-pubertal, but is also used, rather muddlesomely, I think, for people who are already in the pubertal stage of teenage development.”¹⁸

In spite of all the testimony, the trial judge defined homosexual pedophilia in terms of (a) sexual relations (b) primarily with pubertal boys. “In the context of this trial, as a scientific term, ‘pedophile’ means a homosexual male who can only obtain full sexual satisfaction by means of sexual relations with pubertal or in rare instances pre-pubertal boys.”¹⁹ For the Judge, in the usual everyday sense, by contrast, pedophilia “means simply a lover (not necessarily sexual) of young people.”²⁰ It is apparent from the judgement that the Judge either misunderstood or was misquoted in the scientific definition with respect to the age of the objects of pedophile interest. Although nothing in the judgement seemed to depend on this confusion, such confounding of basic categories tends to reduce the credibility of the Judge. In other words, with respect to the meaning and reference of terms, the rules of the expert witnesses ought to remain paramount; it should not be possible for a judge to prescribe linguistic meanings.

Credibility and Objectivity

Both the legal profession and the psychological profession are concerned with the credibility of witnesses. Law is concerned with the validity of an expert opinion, science with its truth. The basis for assessing a valid opinion in law is the absence of judgement on the part of the witness.

The expert witnesses for both the Crown and the accused agreed that the journalistic account of what a pedophile would say was credible; that is, the accounts were not incongruent with testimony they had heard in their clinical experience

¹⁷*Id.* at 363, vol. 2.

¹⁸*Id.* at 247.

¹⁹*Supra* note 1, at 392.

²⁰*Id.*

from patients who were pedophiles.²¹ In fact, personal experience and commitment to pedophilia added to the credibility of the account. In the case of the *legal* witnesses, however, the presence of strong subjective convictions damaged the credibility of the witnesses.

Credibility in law entails, as much as possible, the omission of subjective prejudices which might distort the issue. Claire Hoy, a columnist for the *Toronto Sun*, and witness for the Crown, lost credibility because he was blatantly biased against homosexuals, a fact which he admitted.²² The court, not surprisingly, found that he was “not objective.” Hoy’s testimony that the article traversed common standards of decency would have been an “objective” opinion if he could have given evidence that his was the view of a large number of readers who actually read the article in *The Body Politic* and, hence, that a common standard of decency had been breached.

Objectivity for science entails that the findings of one scientist not be inconsistent with those of another and that judgement be excluded. As Dr. John Money quoted from a speech he gives to medical students: “As difficult as it may seem for you personally to maintain an attitude of non-judgementalism on matters pertaining to human sexual relationships, it is necessary for you to be able to do that in order to relate to your patients.”²³ Dr. Sommers echoed the same criterion: “All my training is oriented towards adopting a non-judgemental attitude towards whatever range of behaviour people come to consult me with. I attempt not to pass judgement on persons who come to me with their problems.”²⁴

The Judge also insisted on objectivity, but it is objectivity which is inherently judgemental. Like the scientist, the Judge recognized that he could not let his personal feelings enter into his judicial opinion: “As a person I am appalled and disgusted by the acts of Simon, Peter and the others — but my feelings are subjective — and as a Judge, I must judge with objectivity.”²⁵ In other words, the objectivity of a Judge entails a detachment from personal feelings, but not a detachment from values. The psychiatrist’s detachment from values, though applied to patients, seemed to have no restrictions when evaluating the article.

Though there was agreement by the witnesses that the article advocated a change in the law with respect to non-abusive pedophiles,²⁶ there was radical disagreement on the way the article could be characterized generally. Dr. John Money, who appeared as an expert witness for the accused, declared it to be “scientific,” though other witnesses for the accused were content to characterize the article as intelligent, sensitive and restrained journalism.²⁷ Witnesses for the Crown found the article to be non-objective because it accepted pedophilia,²⁸ rationalizing and condoning such behaviour, according to Dr. Jerry Cooper, and

²¹*Supra* note 10, at 50, vol. I; 255, 287, vol. II.

²²*Id.* at 124, vol. I.

²³*Id.* at 291, vol. II.

²⁴*Id.* at 400.

²⁵*Supra* note 1, at 410.

²⁶*Supra* note 10, at 364, vol. II.

²⁷*Id.* at 385.

²⁸*Id.* at 218, vol. I.

subtly advocating such behaviour, according to Dr. Peter Roswell. By contrast the expert witnesses for the accused thought that the article was written to inform²⁹ and thereby demystify, rather than sensationalize, the issue.³⁰

If one analyzes the different perspectives on characterizing the article, one finds that they are precisely that: different perspectives not directly contradicting one another. Insofar as the article reported material, it was accurate and unsensational. Insofar as it engaged in advocacy, it did accept pedophilia and advocate a change in the law. But in accepting pedophilia, did it advocate the act itself and go even further in recruiting individuals, particularly latent homosexuals, into the practice?

Here the real issue was not the intent of the article, since no evidence was presented for either interpretation, but whether these would be consequences of publishing the article. Did the article establish pedophilia as a valid form of sex³¹ or did it not,³² and did it provide permission for latent pedophiles to act out³³ and even cause someone to act out? If these were consequences of the publication, was the article "offensive to the average Canadian — tasteless and . . . beyond the common grounds of decency?"³⁵ This issue went beyond the expertise of the psychological witnesses; the expert witnesses for the Crown were not very alert to this boundary, however, and consequently they lost credibility.

Another factor affecting the credibility of both expert witnesses *and* officers of the court is the misuse of argument. Scientists sometimes appear to use analogies. For example, Dr. John Money in his testimony stated: "A paraphilia is not a contagious condition and so exactly the same reasoning applies to pedophilia. Therefore, reading this kind of material could not turn a person into a pedophiliac."³⁶

The argment appears to run:

Paraphilia is not contagious

Pedophilia is analogous to paraphilia

Therefore, pedophilia is not contagious

Therefore, publication of an article on pedophilia could not induce pedophilia.

But, in fact, the argument is strictly deductive.

Since paraphilia is any kind of unconventional love,

Since pedophilia is one type of paraphilia,

Therefore whatever is the case with paraphilia is the case with any particular sub-group.

Therefore, since all paraphiliacs are not contagious pedophilia as a specific type is not contagious.

Dr. Money also provided an example of inductive analogy. Lewis Carroll, who wrote *Alice in Wonderland*, was a heterosexual pedophile who did not

²⁹*Id.* at 256, 363, 416, vol. II.

³⁰*Id.* at 382, 397.

³¹*Id.* at 210, vol. I, 419, vol. II.

³²*Id.* at 257, 288, 412, vol. II.

³³*Id.* at 259, 422, 425.

³⁴*Id.* at 357, 413.

³⁵*Id.* at 22, vol. I.

³⁶*Id.* at 254, vol. II.

simply read pedophile material but published it and collected drawings of little girls, “but there is no evidence whatsoever that he ever became an active pedophile from having actually written the material.”³⁷

The argument is as follows:

Latent homosexual pedophilia and latent heterosexual pedophilia are identical with respect to what activates the latency.

Expressing one’s pedophile tendencies in writing is akin to writing about pedophilia, and the two are in turn akin to reading material depicting pedophilia.

Since there is no evidence that Lewis Carroll became an active pedophile through expressing his pedophile feelings, there is no basis for concluding that a homosexual pedophile would be stimulated to become active by reading the material.

This is a clear case of specious analogical reasoning. Though there may be a basis for equating latent homosexual and heterosexual pedophiles (though no evidence is provided for such an equivalence), there is no basis for equating Lewis Carroll’s *writing* (through which he may perhaps sublimate his pedophiliac feelings) with a latent homosexual’s *reading* of descriptive material about others, by means of which his own repressed tendencies may be stimulated. Such an example of loose analogical reasoning ought to have weakened the credibility of the witness of a “scientific expert,” especially if the improper logic of his argument had been revealed in cross-examination.

The counsel for the accused used similarly stretched analogies in arguing for a restriction of the testimony brought before the court: “It’s akin to saying on a charge of assault against Elizabeth, we don’t know which Elizabeth, so it might have been the Queen, and therefore treason.”³⁸ The lawyer was arguing that since the chronological age of the children, with the exception of the seven-year-old, was not mentioned in the article, one cannot presume that all the children involved are prepubescent, just as one cannot presume that since Elizabeth is mentioned the person might be the Queen. The analogy is invalid. In the case of chronological age, one cannot in good logic use one example to type the majority of the group referred to in the article. but this illogic is not revealed by making an analogy between such a move and a very different situation. In the lawyer’s analogy the move is from a particular name to the class of all persons under the name to another particular who has the same name. The two sides of the analogy have totally dissimilar relationships.

The analogical reasoning used in the judgement is *proper* in the sense that it is both analogy proper, and not disguised deduction, and, in a second sense, that it is used properly. The Judge argued that even in cases in which the community standard (the Social Rule) is clear in establishing that certain behaviour is indecent (the destruction by the Nazis of six million Jews), writing about those events, including a description and analysis of the methods, does not offend community standards. Similarly, even if homosexual pedophilia is indecent, describing and analyzing it is not.³⁹ In the same vein, the Judge also cited the case

³⁷*Id.* at 255.

³⁸*Id.* at 82, vol. 1.

³⁹*Supra* note 10, at 19, vol. 1.

of rape as an act, and the description of rape found in various journals.⁴⁰ These two analogies are proper in the sense that there is an analogy in the *relationship* of the act and the description of the acts, such that genocide and rape are self-evidently more indecent than benign homosexual pedophilia, and, therefore, the descriptions thereof cannot be found to be indecent if the descriptions of genocide and rape are not found to be indecent.

Although the analogies are proper, case relevancy seems questionable. For the Crown did not challenge the description of non-abusive homosexual pedophilia. Rather, the Crown claimed that the description was provided within a context wherein they allegedly rationalized the act and argued for its legitimation. The real question is whether articles that not only described genocide and rape but apparently condoned such acts and went further in providing a rationale and argument for their legitimacy would be found to be indecent. But the Judge did not provide any judgement on whether the article did or did not provide rationalizations or attempt to legitimate such acts. Thus, although analogy was properly utilized as a form of argument, the application of the argument was inappropriate.

In fact, there was not a single case of analogical argument used by either court officials or expert psychological and psychiatric witnesses which was at the same time:

1. an authentic analogical argument (and not one that appeared to be so);
2. in the proper form; and
3. properly applied to the case.

By this I do not imply that psychiatric expert witnesses and court officials are not credible, but only that their credibility was equally affected in this case.

Evidence

There were a number of causal connections in dispute at trial. One of the most important was the effect of a non-abusive pedophile on children with whom he has been involved. A second issue focussed on the effect of the articles on individuals with a propensity to pedophilia. Evidence is the foundation for forming such causal connections. Psychiatry and psychology have different criteria for evidence than law. One criterion for allowing legal testimony to be considered as evidence is whether the information is helpful.⁴¹ Written material in other places on which witnesses have based their opinions but which is not before the court is not helpful.⁴² As the Judge stated with respect to journal articles and other studies, "unless they are reprints of decided cases, resort to research papers is not an appropriate way to deal with these matters, and it would not be appropriate for me, for instance, to use them unless they were filed as exhibits."⁴³

Both science and law use case studies. Unlike science, law can use a single case study to establish a precedent, and therefore continuity over time. When Dr. Frank Sommers was asked whether a single article could stimulate a latent

⁴⁰*Id.* at 405.

⁴¹*Supra* note 10, at 19, vol. I.

⁴²*Id.* at 88.

⁴³*Id.* at 263-64, vol. II.

pedophile into activity, he replied, "I cannot make a generalization on that. I would have to see the specific individual and conduct a pretty thorough intensive investigation of a person's history, mental state, and all the circumstances surrounding the case before I could arrive at that conclusion."⁴⁴ Thus, one cannot generalize that "latent pedophiles are stimulated by articles of the type exhibited describing pedophilia" and, in any concrete case, many dimensions of the individual's life would have to be explored before such a conclusion could be drawn. Dr. John Money went even further to declare that such a proposition could not be proven at all because it contradicts an established generalization in sexology — that the development of active pedophilia is the product of internal development and not external stimuli.

There is no way in which one could substantiate the proposition that even if a person was predisposed that the actual reading of material would be sufficient to tip the balance. This is a condition which develops within the person and it's an internal complex developmental process that takes place and it's not a simple response to the act of reading one piece of material.⁴⁵

In law, particulars — case precedents — make the law; they establish rules and qualifications to rules. In science, a detailed examination of a case is necessary to make a causal connection, which could only be constructed into the form of a law if many cases were studied and then only when contradictions with standing generalizations could be overcome.

In science, constant conjunction is established by means of clinical *and* longitudinal studies. For example, in the dispute between Crown and defence witnesses over the harm caused to children who were induced into pedophilia, the experts for the Crown cited only clinical experience. Witnesses for the Crown contended there would be psychological harm.⁴⁶

The witnesses for the accused testified that a pedophilic relationship neither caused homosexuality in the child⁴⁷ nor induced a propensity to pedophilia,⁴⁸ but this was not the real issue of contention on the effect on the child. Was the child harmed psychologically? The defence presented evidence to argue that psychological harm occurred, not from the pedophile act itself, but because of the reaction and intervention of society.⁴⁹ Given this contention, it was society in general and the law in particular which produced the harm and not the pedophile.

An expert for the accused, Dr. Sommers, cited long-term studies that indicated:

In the nine cases presented, where reasonably accurate records have been kept for a period of ten to thirty years on the same individuals having been involved as adolescents in lengthy sexual affairs with

⁴⁴*Id.* at 422.

⁴⁵*Id.* at 255.

⁴⁶*Id.* at 224, vol. I.

⁴⁷*Id.* at 251, vol. II.

⁴⁸*Id.* at 285, 405, 408.

⁴⁹*Id.* at 283, 408.

adult males, there is no evidence that in these cases that such involvement on the part of adolescents had lasting effects, such as developing homosexuality, or that these individuals suffered deleterious effects from such relationships.⁵⁰

Dr. Sommers did not indicate that they were not affected or that they did not have adjustment and identity problems as a result of such involvement, but only that whatever the effects they were not destructive in a lasting way. Further, the study focussed on adolescent boys and not pre-pubescent children. In other words, the study did not necessarily contradict the testimony of the Crown witnesses on this matter. But the longitudinal studies had more evidential effect than the reports of clinical experience, which were more susceptible to subjective interpretation.

In science, longitudinal studies over time are often used to establish constant conjunction on a higher plane. Within the legal system, however, one finds that such studies are sometimes employed to disestablish conventional beliefs, and to indicate change in opinion and attitudes. "The views of responsible psychologists and psychiatrists as well on these issues . . . change over the years, is that correct, even with our own culture?"⁵¹ "It's clear from your answers, then, that society's attitudes and the profession's attitudes towards pedophilia and how to deal with pedophiles has changed over the years in terms of the degree of severity in which it is viewed."⁵²

The results of longitudinal studies may be considered an "end" for science; the legal system might use these "ends" as a means to further another end, that of disestablishing conventional beliefs and so on. As a consequence, conventional wisdom about causal connections can be undermined. Hence, attitudes to pedophilia were constantly compared with previous attitudes toward masturbation and homosexuality. Just as changes in social attitudes have occurred with regard to the latter two forms of sexual release, so a similar change might follow with respect to non-abusive pedophilia.

Science, then, uses longitudinal studies to verify or falsify causal connections alleged to reflect reality, i.e., whether children are permanently damaged by an involvement with a non-abusive pedophile. Law plays a greater part in debunking popular or conventional beliefs, although it only does this properly with the grounding of scientific evidence.

Law, therefore, not only occupies a distinctive world, but one which may at times override science, since its purpose is to prescribe facts rather than describe reality. Used correctly, law accomplishes this prescription by separating true opinion from false opinion, using science and its expertise for this purpose. Science is considered experientially prior and given priority in depicting reality; law is considered logically prior, since it prescribes action and belief on the basis of this depiction. Law emerges as a dialectical synthesis of scientific understanding and opinion.

⁵⁰*Id.* at 408.

⁵¹*Id.* at 67, vol. I.

⁵²*Id.* at 148.

Judgement and Social Rules

One of the criteria referred to by the Judge was the necessity of being objective in the sense that personal feelings were to be set aside in arriving at his ruling. A second criterion was “the right of free discussion and dissemination of ideas unless there be a clear incitement to unlawful action.”⁵³

Western society requires all of us to respect the “right of free discussion and dissemination of ideas,” subject only to the qualification that there be no “clear incitement to unlawful action.” In other words, the Social Rule guaranteeing freedom of the press became a primary consideration in the judgement in spite of the fact that the trial was ostensibly not about freedom of the press. Contrast this basis of judgement with that of expert Crown witnesses who concluded that the article did attempt to provide a mantle of respectability and legitimation for homosexual pedophiles. And if it did, the question arises whether that in itself is an incitement to break the law.

If one argues that a law is mistaken (as the article seemed to), some grounds for legitimating the actions of the law-breaker are provided. Though such a judgement about the article legitimating the actions of the law-breaker (as distinct from law-breaking *per se*), goes beyond the mandate of the expertise of the witnesses, it is not an irresponsible one. What makes the judgement faulty is that the opinion is neither one of an expert nor one that takes into consideration the effect on other Social Rules. Nevertheless, explanations that create a basis for legitimacy do not constitute a clear *incitement* to law-breaking. In other words, the important qualification to the Social Rule guaranteeing freedom of the press was not breached.

What about the breach of the Social Rule with which the accused were charged: breaking the community standard of decency through publication of the article? The Judge stated that the Crown had not presented sufficient evidence to argue that (a) a common standard of decency existed that proscribed publication of this type of article and (b) that the community standard was indeed breached by the publication.

If the Crown had presented both types of evidence convincingly, there would still be a judgement to be made. Does the Social Rule providing for the protection of the rights of free discussion and the free dissemination of ideas (subject to the qualification that unlawful action not be incited) have a higher status than the Social Rule against distributing indecent material through the mails? That is, even though the existence of an applicable Social Rule on indecency is established and even if its breach is established, the Judge would still have the task of assessing the priority of the Social Rule protecting freedom of the press and the Social Rule inhibiting the dissemination of indecent material.

The Judge’s findings were quite the reverse. The Social Rule guaranteeing freedom of the press was not only overriding with respect to publishing this article, but, in fact, the publication of this article could be placed directly under the protective umbrella of the freedom of the press Social Rule, since the article informed the public about an important issue. The Judge went even further to suggest, without any evidence provided in the testimony, that such publication

⁵³*Supra* note 1, at 410.

would have a therapeutic effect on non-abusive pedophiles and even prevent their repression, repression which would lead them to become child abusers — in contradiction to his own judgement, based on the evidence, that printed material would not alter the type of pedophilia and the clear evidence that there was no interchangeability between a non-abusive pedophile and a child abuser:

It is my opinion that the right of the public to be informed — that right which is the cornerstone of freedom of the press — includes the right to know about this type of behaviour, the better to understand it, the better to deal with it, the better to keep men like Simon, Peter and Don from becoming so repressed and suppressed and confined to the closet that their untreated sexual problems may lead to (child sex-murder) cases.⁵⁴

The Judge went beyond his mandate in forming this judgement, because the judgement is not based on evidence placed before him in the Court.

But the most important point is the responsibility of adjudicating between overlapping Social Norms. The task of adjudicating between the Social Rule against the distribution of indecent material and the Social Rule guaranteeing freedom of the press is complicated by a third set of Social Rules. Society has a very strong Social Rule: children must be protected. To protect children, society has the right to intervene in the sexual proclivities of individual members of society. There was no particular controversy about the existence of the rule or its justification. Indeed, these were assumed. Informing the legal case was the controversy whether the duty of society to protect children, when applied to the case of non-abusive active homosexual pedophiles, harmed the children more than it helped them. From the evidence, there could be no clear conclusion. Had this controversy been explicit during the proceedings, the judgement might have differed, in that this implicit third set of Social Rules might have presented a more forceful challenge to the freedom of the press Social Rule. But precisely because the judgement on this matter remained inconclusive, due to the implicitness of this third set of Social Rules, society could not exercise its rights to intervene in discussions in the press about challenging certain rights of society to intervene in the sexual proclivities of individual members of society. Thus, the Social Rule guaranteeing freedom of the press, the Social Rule prohibiting the dissemination of indecent material, the Social Rule protecting children, and the Social Rule permitting the intervention in the sexual proclivities of individual members of society in certain types of cases (such as when the rights of children have to be protected) all had to be adjudicated.

How are they adjudicated? First, the officers of the court, particularly the Crown in this case, have the responsibility of establishing that the Rules exist: “The trial Judge must determine *on the evidence* what is the community standard of acceptance of material that is or may be indecent, immoral or scurrilous.”⁵⁵

I am of the opinion that all in all the evidence adduced from the majority of both Crown and Defence witnesses establishes nothing which

⁵⁴*Id.* at 406.

⁵⁵*Id.* at 400.

really assists the Court in ascertaining the limits of community tolerance, that is, the community standard in this area. It would have been more helpful to have the evidence of competently conducted public surveys of community opinion. Such was not proffered, nor was even the evidence of what might have purported to be several or many persons making up a representative sample of the Canadian community demographically speaking.⁵⁶

Second, the breach of the Social Rule must be established; but this too, is not sufficient. Even establishing these two “facts” in law, the existence of the community standard and its breach, is not sufficient. The Court requires agreement that, in the case before it, one Social Rule is more applicable than another. That is, even if one might judge that the Social Rule guaranteeing freedom of the press is more applicable than the legislated Social Rule preventing the dissemination of indecent material through the mails, it is also possible to conclude that the Social Rule guaranteeing the protection of children was applicable in this case and overrode the Social Rule protecting the rights of the press.

There is a fourth problem:

During the trial the issue was to some extent clouded by the Crown’s emphasis on an allegation that the article approved, counselled and encouraged the commission of pedophilic sexual acts which would be offences under the Criminal Code (such as gross indecency, buggery, assault or assault causing bodily harm) and that by reason thereof the article and Ex. 1 were indecent, immoral or scurrilous . . . If there was conselling, that in itself would be an offence under ss. 22 or 422. But that is not what is charged here. If the Crown relied on 22 or 422 then it should have charged the accused under the appropriate section. It did not do so.⁵⁷

The problem remains that the accused were *not* charged with advocating unlawful action, but with disseminating indecent material through the mails. In other words, it is not sufficient to establish that:

- (a) a Social Rule exists;
- (b) the Social Rule was breached; and
- (c) the Social Rule overrides another Social Rule applicable to the case.

One must also establish that the existing, breached and overriding Social Rule is the one under which the law was invoked to bring charges against the accused.

Thus, with respect to legal cases involving conflicts with and among Social Rules, two empirical legal facts need to be established; first, the existence of such rules and second, their breach. Further, two normative standards are established by the Court: the hierarchy of Social Rules in *society* and the applicability of the existing, breached and higher Social Rule in *law*. The Crown failed to establish even the very bottom level — that a Social Standard existed which would find the article indecent — let alone that the standard was breached through the mode by which it was distributed.

⁵⁶*Id.* at 403.

⁵⁷*Id.* at 398.

Legal-Psychiatric Intercourse

What then is the role of expert witnesses? With respect to the meaning and reference of terms where psychiatrists have expertise, law relied on the psychiatric professionals for the use of terms. With respect to the credibility of psychiatric witnesses (and in contrast to the popular misconception that all psychiatry is only opinion because of conflicts between experts) this case study indicates that the experts testifying for both the Crown and the accused were overwhelmingly in agreement. On examination of one area wherein they were apparently at odds — the harm caused to children by involvement with a pedophile — the evidence did not reveal itself to be contradictory, though careful cross-examination would possibly have shown that claims of creating an emotional identity problem and claims that there were no lasting disabilities or behavioural alterations created could be reconciled. In this respect the lawyers failed to fulfill their adversarial function.

The credibility of experts (and judges) suffers when they go beyond the limits of their expertise: when experts on psychiatry pronounce on the effect of journalistic articles on social norms, and when Judges pronounce on the effect of journalistic articles on psychic states when no evidence has been presented to support such a pronouncement. Credibility further suffers, to a lesser extent, when logic is misused. This suggests that psychiatric expert witnesses would do well to provide evidence only in the area of their expertise, while judges restrict their evaluation to those matters on which evidence has been brought before the court. In the area of credibility, objectivity is safeguarded by each type of professional staying within the bounds of the respective fields.

When it comes to causal connections — such as whether latent homosexual pedophiles can be activated by means of reading a newspaper article on the subject, or whether and in what ways children are harmed, and, perhaps, to some degree helped — the experts have the responsibility of testifying on believed causal connections and putting before the court references to evidence upon which they base their conclusions, while the officers of the court have the responsibility of reconciling different accounts of causal connections which overlap. The problem is not so much challenging the fallibility of a causal claim as in providing a coherent frame for different overlapping causal claims.

Law and Morality

The question then remains: If law adjudicates moral disputes, how does psychiatry aid in this adjudication? That there is a rule embodied in law that distribution of indecent material through the mail is forbidden is not in dispute, but the existence of the rule that the distribution of *this type of material* through the mails is forbidden is in dispute. This involves proving that the social standards of the community find such materials indecent, and that the mode by which the articles were distributed breaches those social standards.

The *existence* of social rules in such cases and the *breach* of those rules are necessary, critical factors in establishing the case. They are not sufficient factors; for it must also be established that no higher, more prevailing Social Rule, such as the protection of freedom of speech, would be breached if the accused were

found guilty of offending the first Social Rule. Finally, and this is where the rule of the law is cited, it must be clear that the charge of breach of an existing Social Rule, which is not overridden by other Social Rules, falls within the law under which the accused were charged.

The testimony of scientists, and psychological and psychiatric witnesses might seem to have no relevance to such a determination. Such testimony is in fact pertinent, however, since it deals with the explanations justifying the rules and their application. In adjudicating conflicts in Social Rules, psychiatric evidence is crucial. The psychiatrists and psychologists indicated that no evidence existed for the claim that latent homosexual pedophiles would be triggered into activity by the reading of the article. Any qualification to limiting freedom of the press on this ground would be inapplicable.

Similarly, the Social Rule requiring protection of children, which might possibly override any Social Rule protecting freedom of the press, is not found to be applicable when the weight of evidence seems to indicate that there might be short-term psychological damage. Indeed, such damage might be more than offset by the love the children need and receive. At the same time, evidence is presented which indicates there are likely no long-term destructive effects and no effects on the sexual proclivities of the youngster.

This explains why the logic of discourse in psychiatry is so different from that of law. Psychiatric and psychological witnesses clarify the basic language used within the legal discourse on relevant issues. The expert witnesses must meet the standards of authenticity, which include credible subjective testimony as well as objective scientific rules. Law, on the other hand, is intent on adjudicating conflicts between Social Rules using such scientific facts as are available to justify the adjudication. Thus, the law prescribes norms by qualifying Social Rules. The rule of law is intended to create a prescriptive realm into which the natural world and descriptions thereof are admitted only sparingly. Law establishes continuity, not generalizations, in terms of precedents and disestablishes applications of Social Rules where the "facts" warrant in order to allow history to develop. The expert psychiatric and psychological witnesses present those "facts." The psychological sciences provide the obstetrical instruments which allow law to serve as the midwife for the birth of new social norms.