

Book review

Depression: Law and Ethics, edited by Charles Foster and Jonathan Herring*

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Depression: Law and Ethics is not Charles Foster and Jonathan Herring's first collaboration. The two Oxford-based academics have written two Springer Briefs in Law together;¹ and, with Israel Doron, they edited *The Law and Ethics of Dementia*.² Readers of the latter book will find aspects of *Depression* familiar. Both books are separated into parts written from first-person, clinical, ethical and legal perspectives. *Depression* is not, however, completely modelled on *Dementia*. It does not, for instance, have any analogue of the older book's 'Social Aspects of Dementia' section.³ One reason for this may simply be space. *Dementia* sprawled across 539 pages, but *Depression* is less intimidating at 303. This obvious difference in size is accompanied by a subtler shift in emphasis. *Depression* is not an attempt to capture the entire 'state-of-the-art' across several disciplines. As the editors explain, their goal is more modest. They aim to facilitate a conversation between different groups that have theorised depression in different ways: 'sufferers, clinicians, philosophers, and lawyers'.⁴

The order that the parts of the book appear in may also reflect a shift in editorial philosophy. *Dementia* started with 'Medical Fundamentals', but *Depression* starts instead with 'Sufferers': three pieces written from a first-person perspective. These are extremely short, the longest is just four pages, and they are written with a lyricism that few will expect from a book subtitled 'Law and Ethics'. They provide an intimate introduction to experiences that, as Iain McGilchrist says in the first, are not 'like anything on Earth'.⁵ depression should not be confused with 'being sad, even the saddest you have ever been'.⁶ His point is reinforced by Jay Griffiths, who, appropriately in this surprisingly poetic section, draws attention to some metaphors for depression: black holes, cliff edges and drowning. She notes that such metaphors, when spoken by someone with depression, are

* Published by Oxford University Press (2017), 336pp, £60hb ISBN: 978 0198801900.

1 Charles Foster and Jonathan Herring, *Altruism, Welfare and the Law* (Springer 2015); Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017).

2 Charles Foster, Jonathan Herring and Israel Doron, *The Law and Ethics of Dementia* (Hart 2014).

3 Ibid Part IV.

4 Charles Foster and Jonathan Herring (eds), *Depression: Law and Ethics* (Oxford University Press 2017) vii.

5 Ibid 2.

6 Ibid.

not literary ‘decoration’ but a ‘desperate attempt to send out an SOS’;⁷ she then draws attention to the differences between them. Feeling as though you are surrounded by precipitous drops is not, for instance, the same as feeling as though you are drowning. Different metaphors capture different experiences that depression can bring. Her point is especially apt in the context of this book. In the abstract worlds of law and ethics, these metaphors are seldom visible on the page; but they are nevertheless likely to shape underlying ideas of what it is like to be depressed. In these circumstances, there is a real danger of an unexamined metaphor for one experience being mistaken for a complete phenomenology of a more complicated whole.

Although the ‘Sufferers’ section is short, the book’s attention to first-person experiences of depression is not tokenistic. It is also visible in the first essay of each subsequent section. This is most obvious in Richard Ashcroft’s introduction to the ‘Ethics’ section, which combines personal narrative with a clear distinction between standard approaches to ethics and depression, which are largely concerned with the correct response to a depressed person, and the need for an ‘ethics of depression’, which includes the depressed person as an actor within the ethical field.⁸ Less obviously, however, a concern with first-person perspectives also underwrites Mary Donnelly’s introduction to the ‘Law’ section. She draws on Matthew Ratcliffe’s phenomenological account of experiences of depression, which – like Griffiths’ chapter – pays close attention to the metaphors used to express depression,⁹ to illustrate how ‘severe depression itself limits assessors’ ability to determine capacity’.¹⁰ Similarly, Phillip Cowen, in the first chapter of the ‘Clinical’ part of the book, does not give an abstracted ‘symptomatology, diagnosis, and classification’ of depression but one constantly enriched with descriptions of what it is like to be depressed and what it is like to be around a person who is depressed.¹¹

Perhaps ironically, given the ‘Law and Ethics’ subtitle, the ‘Clinical’ section is in some ways the book’s most complete. In addition to Cowen’s chapter, there are introductions to the aetiology, epidemiology and cultural history of depression, and two chapters outlining the treatment options.¹² Although there is some repetition of material between chapters, particularly some of the historical information, the standard is high. Any lawyer or ethicist wishing to escape the unfortunate tendency of both disciplines to treat ‘mental disorder’ as a homogeneous category could start by using this section to learn more about depression in particular. A tension, also apparent in other chapters,¹³ does, however, cut across this part: balancing the need to include people with depression as part of the shared human community and the need to acknowledge how completely isolating the experience of depression can be.¹⁴ Although the book does not directly engage with this tension at any length, the ‘Clinical’ section contains some of its best indirect resolutions. Anthony James’s chapter on depression in childhood and adolescence and Julian C Hughes’s chapter on depression in the ill and dying both emphasise depression’s diversity.¹⁵ Doing so shows how it can be both entirely unique, unlike ‘anything on

⁷ Ibid 6.

⁸ Ibid 132.

⁹ Matthew Ratcliffe, *Experiences of Depression: A Study in Phenomenology* (Oxford University Press 2015) ch 2.

¹⁰ Foster and Herring (n 4) 207.

¹¹ Ibid 21.

¹² Ibid chs 5–7, 10–11.

¹³ For example, ch 3.

¹⁴ Ratcliffe (n 9) 64–71.

¹⁵ Foster and Herring (n 4) chs 8–9.

Earth',¹⁶ yet still embedded in the world and shaped by individual differences, circumstances and age. In this respect, the case studies that illustrate some of the different ways that physical ill-health and depression can interact are especially valuable.¹⁷

By putting a 'Clinical' section in the same volume as parts on 'Ethics' and 'Law', this book makes plain the extent to which the latter two disciplines have failed to properly engage with depression as a theoretical entity in its own right, distinct to the vaguer notion of a 'mental disorder'.¹⁸ To point this out is not to criticise the contributors to the latter parts of the book. They, to borrow the editors' metaphor, are in the room, beginning a conversation. The contrast between these parts and the 'Clinical' section's attention to the diversity and phenomenological richness of depressive experiences is, however, glaring. For the most part, contributors to the 'Ethics' section are left evaluating the fit between extremely abstract ideas – authenticity, values-based practice, the metaphor of a physical disease, and mental capacity – and depression, a unique experience that none of these concepts was developed in direct response to.¹⁹ If depression really is 'not like anything on Earth',²⁰ then how helpful can such generic principles alone be? The evidence here suggests that they barely get ethical thought away from the starting line. Whether examining capacity,²¹ the Mental Health Act 1983,²² or the degree to which physicians should 'exhort and cajole' their patients to undertake psychotherapy,²³ this part of the book is almost entirely concerned with exactly when the, implicitly superior, knowledge of experts justifies exerting social pressure on people with depression. This is an important ethical question; but, as Ashcroft points out in his excellent introduction to the section, it is far from the only one.²⁴ Furthermore, depression leaves many grappling with the 'one truly serious philosophical problem . . . judging whether life is or is not worth living'.²⁵ Grappling with that problem, as opposed to treating it as an intellectual plaything, is terrible and ugly. It is still an *ethical* grappling nonetheless. Ashcroft is right to call for an ethics of depression that fully includes depressed people as moral agents;²⁶ but the editors' envisaged conversation between sufferers and ethicists may also require an ethics *in* depression, which treats depressive thought as, among other things, a species of moral thought.

'Ethics' also includes a chapter by Harry Minas on 'Depression in the Developing World'.²⁷ Although obviously an important subject, this is a strange fit for the section. The chapter gives an overview of prevalence, impact and treatment options in the developing world, but it does not directly engage with the ethical implications of the state

16 Ibid 3.

17 Ibid 94–102.

18 At least 'ethics' in its current academic form. As authors in the book point out, Mill and Montaigne, to name but two, had psychological crises, with at least some of the features of depression, which deeply influenced their work. Ibid 130, 200.

19 Ibid chs 13–16.

20 Ibid 3.

21 Ibid chs 13, 16.

22 Ibid ch 14.

23 Ibid ch 15.

24 Ibid 132.

25 Albert Camus, *The Myth of Sisyphus*, Justin O'Brien (trans) (Penguin 2005 [1955]) 1. Similarly, see Ludwig Wittgenstein, *Notebooks 1914–1916*, G H von Wright and G E M Anscombe (eds), G E M Anscombe (trans) (Blackwell 1961) entry for 10.1.17.

26 Foster and Herring (n 4) 132.

27 Ibid ch 17.

of affairs it reports. In this respect, the book's 'law and ethics' framing, with separate parts for separate disciplines, can obscure more than it reveals. Similar issues are found in the 'Law' section. Although John Coggon and Jonathan Herring are both professors of law, their respective chapters, for taking a public health approach to depression and for treating childhood depression as a child protection issue respectively,²⁸ are closer to political philosophy than to fine-grained legal analysis. There is nothing wrong with that. Indeed, these are two of the best chapters in the book. Nevertheless, their placement does make one of the biggest gaps left by the 'law and ethics' framing more obvious: politics. The political aspects of depression are mentioned in the preface,²⁹ and Coggon makes it completely clear that he is engaged in political philosophy;³⁰ but political explanation and argumentation has its own character, not reducible to either ethics on one side or legal analysis on the other.³¹ To the extent that a 'law and ethics' framing obscures the particular character of political thought, it seems likely to inhibit, rather than enable, the conversations that the editors wish to see.³²

These concerns should not distract from the virtues of the 'Law' section. Many of the chapters, in particular those pertaining to treatment, criminal liability, civil liability and employment serve as excellent introductions to relevant areas of law and its implications for people with depression.³³ Other chapters are narrower or more speculative. For instance, Richard Huxtable examines international trends towards more permissive policies on medically assisted dying.³⁴ In one sense, however, the scope of this part of the book is narrow. A lot of detail is given about England and Wales; but other jurisdictions, even within the UK, are seldom mentioned. Space restrictions almost certainly presented the editors with a choice between the detailed consideration of one jurisdiction and a superficial overview of many; and by taking the former option they have maximised the book's usefulness in England and Wales, especially to those from disciplines other than law. Their choice does, however, come at some cost in terms of a wider market, although this point should not be overstated. Many legal systems are similar enough to England and Wales for aspects of even the legal chapters to have broader appeal; and this issue barely affects the other parts of the book at all. Indeed, this book deserves a wide readership. It is always well written, often enlightening, and sometimes provocative. As is the nature of edited collections from a university press, its primary audience is likely to be other academics; but it will be just as valuable to students from a wide range of disciplines, especially those engaged in postgraduate study or otherwise writing a thesis on depression.

28 Ibid chs 19, 24.

29 Ibid vii.

30 Ibid 217–19.

31 This is far from a new distinction, see Aristotle, *Politics*, Ernest Baker (trans) (Oxford University Press 1995) bk III, ch 11.

32 For an extended argument on this general point, see John Harrington, *Towards a Rhetoric of Medical Law* (Taylor and Francis 2017).

33 Foster and Herring (n 1) chs 20–3.

34 Ibid ch 25.