CANADIAN INSANITY DEFENCE REFORM: CAPTURING A NEW SPIRIT OF MCNAUGHTAN.

by

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B.A., Simon Fraser University, 1981

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS (CRIMINOLOGY)

in the Department

of

Criminology

SIMON FRASER UNIVERSITY

October, 1983

APPROVAL

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Degree: MASTER OF ARTS (CRIMINOLOGY)

Title of thesis: CANADIAN INSANITY DEFENCE REFORM: CAPTURING A NEW SPIRIT OF McNAUGHTAN.

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ABSTRACT

The insanity defence, recognized in England as early as the 13th Century, has become well-established in the Canadian and American legal systems through the common law rules formulated in McNaughtan's Case (1843).

This thesis examines the insanity defence as a legal doctrine of criminal responsibility. This intractable doctrine is examined in a legal, medical, social, and political context. The primary objective of this thesis is to propose a Canadian reform approach, which would allow the insanity defence to function as a more socially useful doctrine of criminal responsibility. It is argued that a reform approach is necessary for the implementation of more rational, progressive, and humane policies toward the mentally ill offender.

This thesis begins with an historical analysis of legal doctrines of criminal responsibility, tracing its evolution from ancient systems of law to English common law.

The Canadian insanity defence is articulated in S.16 of the Canadian Criminal Code. This thesis analyzes the judicial interpretations and modifications of all the essential elements of S.16. As well, the evidential aspects and the dispositional criteria of the insanity defence are examined. A discussion of the inter-related doctrines of Automatism, Irresistible Impulse, and Diminished Responsibility is also included.

It is argued that the interface of law and psychiatry is a major source of contention in insanity defence trials. The

traditional conflicts between the two professions and the role of the psychiatrist as an expert witness in insanity defence trials are critically examined.

There have been numerous contemporary reform alternatives advanced by British and American jurisdictions, ranging from modification of the traditional McNaughtan test to total abolition of the insanity test. The theoretical and practical differences between the various reforms are analyzed.

Finally, this thesis argues for a specific Canadian reform approach which includes:

1. a broadened substantive test;
2. the recognition of "mental disorder negating mens rea as an affirmative defence;
3. a codified concept of diminished responsibility; and
4. improved dispositional criteria.

ACKNOWLEDGEMENTS

I wish to express my deepest gratitude to my mentor and Senior Supervisor, Dr. Simon N. Verdun-Jones, who directed me in the research and writing of this thesis. His invaluable assistance and kind support throughout my years of studies at Simon Fraser University, and his unique scholarship will always be remembered.

I wish especially to thank my thesis committee member, Dr. Duncan Chappell, for his interest in my research, and for his supervision in my graduate coursework.

In addition, I extend appreciation to Dr. Neil Boyd, for serving as a member of my thesis committee; Dr. John Ekstedt, for chairing my thesis defence; and Professor Judith Osborne, for undertaking the role of external examiner.

I also wish to acknowledge Professor Gerry Ferguson, of the University of Victoria Law School, for providing me with his scholarly "Report on the Insanity Defence"; and to the Department of Justice, in Ottawa, for release of that Report.

Last, but not least, I am greatly indebted to Aileen Sams, who took on the laborious task of preparing the manuscript in thesis format. I also thank her for all the assistance she has given me throughout my graduate program.

DEDICATION

This thesis is dedicated to the loving memory of my brother, Ben.

and

To my husband, George.

TABLE OF CONTENTS

I. Introduction

Few areas of the criminal law have proved as intractable or generated as much controversy as the insanity defence.

The insanity defence is premised on the time-honoured concept that one who commits a criminal act while insane should not be held responsible for his act. This notion of criminal responsibility stems from the ancient view that such an individual has neither the criminal intent, nor free will, at the time the act was committed and, therefore, cannot be punished. The defence of insanity, recognized in England as early as the 13th Century, has become well-established in the Canadian and American legal systems through the common law rules of McNaughtan's Case (1843).

Contrary to public belief, studies have shown that the insanity defence is invoked with relative infrequency (Pasewark, Pantle, & Steadman, 1979; Steadman, 1980; Pasewark, 1981). The data from some studies underscore the discrepancy between the lavish attention devoted to the insanity defence (by the media and legal commentators) and the infrequency of its successful invocation (Pasewark, Pantle, & Steadman, 1979).

The cause celebre of John Hinckley, Jr.,[1], in the United

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[1] John Hinckley, Jr. was found "not guilty by reason of insanity" on June 21, 1982 for his assassination attempt on President, Ronald Reagan, his shooting of the President's Press Secretary, a Secret Service Agent, and a police officer on March 30, 1981.

States, touched off a nationwide furore about insanity and the criminal law. The stunning verdict, regarded by the media, as the most "successful" insanity defence in modern U.S. history, demonstrates to many that there is something fundamentally wrong with the insanity defence.

> "Only in the U.S. can a man try to assassinate the leader of the country in front of 25 million people and be found not guilty.... If John Hinckley's bullets seemed to hit dangerously close to the heart of the nation, his acquittal struck explosively at its sense of moral righteousness" (Time Magazine, July 5, 1982:22).

This significant case has brought new life to the long-debated controversy of mental illness and criminal responsibility. Most Americans felt that the verdict was symptomatic of a runaway leniency in the system (Comment, National Review, 1982; Comment, Newsweek, 1982), and a nationwide poll conducted by ABC News reported that 75% of those interviewed thought that the jury's finding was unjust (Time Magazine, July 5, 1982:22).[2]

Discussion of the insanity defence inevitably leads to an examination of the basic purposes and goals of the criminal law. Traditionally, these have been: deterrence of the offender and the rest of society; rehabilitation of the offender; protection of society by incarceration of the offender; and retribution for society (Packer, 1968). These avowed aims are relevant to the

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[2]A recent Associated Press/New York Times poll showed that 87% of the public believed that the insanity defence was being used too often and that 70% of those polled favored abolition of the insanity defense for murder cases (Comment, National Law Journal, May 3, 1982, at 11, col. 1).

appraisal of the social usefulness of the insanity defence.

This thesis examines the insanity defence as a doctrine of criminal responsibility in a legal, medical, social, and political context. The primary objective of this thesis is to propose a Canadian reform approach, which would allow the insanity defence to function as a more socially useful doctrine of criminal responsibility. It is argued that a reform approach is necessary for the implementation of more rational, progressive, and humane policies toward the mentally ill offender.

Chapter II traces the evolution of legal doctrines of criminal responsibility from ancient systems of law to English common law. In the Pre-McNaughtan section, the historically relevant English cases of Arnold, Hadfield, and Oxford are discussed. McNaughtan's Case (1843), the most significant case in the history of insanity jurisprudence, is analyzed in some detail. The common law rules, formulated in McNaughtan, were subsequently adopted as a definitive test of criminal responsibility by most common law jurisdictions of the world. Finally, in the Post-McNaughtan section, the Canadian development of the insanity defence - from its Criminal Code enactment of 1893 to its modern articulation of S.16 of the Criminal Code - is examined.

Chapter III provides a succinct analysis of the law concerning the substantive, procedural, and evidential aspects of the Canadian insanity defence. The judicial interpretations

and modifications of all the essential elements of S.16 of the Criminal Code are examined. By analyzing the authoritative cases, one can appreciate the social policies that our Courts make. In addition, there is a discussion of the inter-related doctrines of Automatism, Irresistible Impulse, and Diminished Responsibility.

Chapter IV argues that the interface of law and psychiatry is the major source of contention in insanity defence issues. This chapter analyzes the traditional conflicts between the two professions and critically examines the role of the psychiatrist as an expert witness in the insanity defence trial. The rules of evidence and law, which govern the psychiatrist's forensic involvement in the insanity defence trial, are examined in depth.

Chapter V documents the contemporary reform alternatives which have been advanced by British and American jurisdictions. These range from modifications of the traditional McNaughtan approach to total abolition of the insanity defence. This chapter begins with a critique of the McNaughtan Rules as a legal test for insanity. Then, the theoretical and practical differences between the various reform options will be analyzed. Finally, an argument for retention of the insanity defence is provided.

Chapter VI proposes a specific Canadian reform model of:

1. a broadened substantive test;
2. the recognition of "mental disorder negating mens rea" as an

affirmative defence;

3. a codified concept of diminished responsibility; and
4. improved dispositional criteria.

In the final analysis, it is argued that a reform approach is necessary in realizing a more socially useful defence of insanity in Canada.

II. Historical Development of Insanity Jurisprudence

Pre-McNaughtan

Attempts to formulate concepts of criminal responsibility extend as far back as recorded history. The evolution of legal doctrines of criminal responsibility can be traced from ancient systems of Hebrew, Greek, Roman law, and English common law.

Ancient Hebrew law, which distinguished between crimes committed "intentionally" and "unintentionally", recognized that "deaf mutes", "imbeciles", or "minors" were not responsible for their actions (Danby, 1933; Platt & Diamond, 1966; Quen, 1974 and 1981).

Legal notions of criminal responsibility were elaborated in Greek moral philosophy. Prescriptive Greek law contained references to classes of people who were not generally considered responsible for their actions. Plato recognized that individuals had a "free will", which rendered it possible for them to be responsible for the "good" and "evil" in their lives (Platt & Diamond, 1965; 1966). Aristotle argued that the capacity for choice was critical to the question of moral culpability and that, because this capacity of choice is lacking in animals, young children, and insane persons, they should not be held morally responsible for their behavior (Quen, 1974;

Lunde, 1976). Aristotle further believed that an individual was only morally responsible if, with knowledge of the circumstances and freedom from external compulsion, that person deliberately chose to commit a certain act (Platt & Diamond, 1965; 1966).

In the 6th Century, the Code of Justinian (483-565) recognized the privileged legal status of children and the insane. The laws of ancient Rome characterized an insane person as one who "does not know what he is doing" as a result of mental derangement. In terms of moral and legal responsibility for behavior, the child was described as "not very different from a madman", but unlike a madman, a child retained certain civil rights and, in time, attained the status of a responsible citizen (Lunde, 1976). While these individuals were not punished for their behavior, they were, however, deprived of their freedom and other civil rights, such as the right to make contracts.

As early as the 13th Century, English common law recognized the principle that one who commits a criminal act while insane should not be held criminally responsible for the act. This maxim stems from the view that such an individual has at the time, neither the criminal intent, nor free will, to commit the act.

The origins of the defence of insanity in English law can be traced to the reign of Henry III (1216-1272), whereby persons who committed homicide were pardoned if they were believed to be of unsound mind (Biggs, 1967; Gray, 1972).

By the reign of Edward I (1272-1307), complete madness became accepted as a defence to a criminal charge.[1] In 1278, King Edward I ordered the release of a man convicted of killing his daughter because at the time of the offence that man was "suffering from madness" (Biggs, 1967).

During the reign of Edward II (1307-1327), the Statute De Prerogativa Regis was passed, giving the King jurisdiction over "idiots" and "lunatics". "Idiots" were those born without understanding (mentally retarded) and "lunatics" were considered as those suffering from madness (mentally ill) acquired in later life (Biggs, 1967; Lunde, 1976).

The first articulation of the criteria for lunacy became known as the "wilde beeste test".[2] For a criminally accused person to be found insane, it must be demonstrated that his mental abilities were no greater than those of a "wild beast" or "brute". This formulation[3] was first advanced by Henry Bracton,[4]

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[1]Prior to this time, the life of an insane Defendant could be saved only by a pardon from the King.

[2]The concept appears to have developed from the medieval superstition of demonic possession, the accepted church psychology which distinguished man from beast on the basis of reason.

[3]The test was extremely ambiguous. Contemporary judges and juries were presumed to have a common sense understanding of the mentality of a wild beast. Clearer distinctions were not made until the 17th Century.

[4]The first prominent jurist to deal with the subject of insanity and criminal responsibility. Bracton sought to justify the desirable goal, of not punishing those who lacked the requisite criminal intent to commit a crime, by recognizing the requirement of mens rea as a necessary component of crime.

a 13th Century judge in the King's Court, and was gradually accepted and applied in case law following a generally strict line for the next three centuries (Quen, 1974 and 1981).

By 1326, "absolute madness" was a complete defence to a criminal charge and insanity was considered grounds for mitigation of punishment (Biggs, 1967).

William Lambarde of Lincolns' Inn (1536-1601), an English jurist, of the Eirenarch era[5] of 1582, expanded on Bracton's view of the necessary mental element by introducing the concepts of an "understanding will", "freedom of choice", and knowledge of "good and evil" (Biggs, 1967:83-84).

Moreover, by now, the fundamental principle that a crime consists of two necessary elements, (namely: a criminal act (actus reus) and a criminal intention (mens rea)) was clearly established in English common law.

> "We must consider with what mind or with what intent a thing is done...in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure intervene, nor is a theft committed except with the intent to steal...And this is in accordance with what might be said of the infant or the madman, since the innocence of design protects the one and lack of reason in committing the act excuses the other"(quoted in Sayre, 1932:974).

Various tests for determining criminal insanity were proposed by eminent English jurists and commentators in the 17th

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[5] In 1581, William Lambarde published a manual for Justices of the Peace entitled "Eirenarcha". Thus, a Justice of the Peace became known as an "Eirenarcha" and the period became known as the "Eirenarch Era".

century. Sir Edward Coke (1552-1634), a distinguished jurist, formulated classes of "non compos mentis"[6] which exculpated an individual from criminal responsibility (Coke, 1853). In addition, he introduced the notion of "lucid intervals",[7] arguing that some mentally unsound persons vacillate between madness and sanity and that such persons should be held criminally responsible for acts committed during a "lucid interval", even though the person at other times might be quite mad and, therefore, not responsible:

> "...a lunatic that hath sometimes his understanding, and sometimes not...is called non compos mentis, so long as he hath not understanding of the crime" (Coke, 1853).

Sir Matthew Hale (1609-1676), Chief Justice of the Court of Kings Bench, an astute legal scholar, was the next to elaborate on this subject. Lord Hale was the first to adopt a test for distinguishing between insanity which will exculpate one from criminal responsibility and that which will not.

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[6]The four classes of "non compos mentis" defined by Coke are:

1. An idiot, who from his nativity by a perpetual infirmity is non compos;
2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding;
3. A lunatic that hath sometime his understanding, and sometimes not,...and therefore he is called non compos mentis so long as he hath not understanding;
4. He that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken. But that kind of non compos mentis shall give no privilege to him or his heirs.

[7]This concept became known as "temporary insanity". However, it was not widely accepted by the courts of the time.

In his treatise, History of the Pleas of the Crown, Lord Hale was the first to distinguish between degrees of insanity. Lord Hale defined "total insanity" as "absolute madness", a condition that leaves the victim "totally deprived of memory and reason". While Hale acknowledged "partial insanity", he, nevertheless, rejected that concept. He contended that many are under a degree of "partial insanity"[8] when they commit their offences but argued that only the "totally insane" can be exonerated from criminal responsibility for their actions.

Despite Lord Hale's attempt at refinement, the most widely used test at the time measured the Defendant's sanity by his ability to distinguish the nature of his actions and to recognize the difference between "good and evil"[9] (Weihofen, 1954; Platt & Diamond, 1965 and 1966).

The Arnold[10] case in 1724, the first of the historically significant insanity trials in England, evolved into the "wild beast" test[11]. This test provided that a criminal Defendant is not responsible if he

> "...be wholly deprived of his understanding and memory, and does not know what he is doing, no more than an

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[8]In theory, "partial insanity" could excuse criminal conduct but in the words of Lord Hale, "it would be a matter of great difficulty".

[9]Knowledge of good and evil is known as the root of the "right and wrong" test.

[10]Rex v. Arnold, 16 How. St. Tr. 695, 764 (1724).

[11]This case is usually recognized as the codification of the "wilde beeste" test of insanity in English common law earlier articulated by Bracton.

infant, than a brute, or a wild beast..." (The Trial of Edward Arnold, 16 State Trials 695 (1723) at 764-765).

At that period of time in England, the term "brute" referred to farm animals, and "wild beasts" referred to rabbits, foxes, deers, bears, badgers etc. Furthermore, emphasis was on the lack of intellectual ability and understanding rather than the 'ravenous' wild beast image that the phrase conjures up in modern society (Platt & Diamond, 1965).

Arnold was convicted[12] for having shot and wounded Lord Onslow, while labouring under an insane delusion that Onslow had bewitched him and at times entered his body to torture him (Quen, 1981; Platt & Diamond, 1965; Gray, 1972).

With the dawning of the 19th Century came the most significant of earlier English cases, in the field of insanity jurisprudence. The Hadfield Case[13] challenged the relationship between sanity and "knowledge of good and evil" (Wingo, 1974; Simon, 1967). More specifically, Hadfield's Case added "insane delusions" to the "wilde beeste" test as a basis for the insanity defence.

Hadfield, a veteran of the Franco-British Wars of the 1790's who had suffered severe head wounds in battle[14], attempted to assassinate King George III to achieve martyrdom.

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[12]Despite being found guilty and sentenced to death, Arnold was granted a reprieve by Lord Onslow upon his recovery from gun-shot wounds. He commuted Arnold's death sentence to life imprisonment.

[13]Hadfield's Case 27 How. St. Tr. 1282 (1800).

[14]Hadfield sustained severe brain damage as a result of the wounds and was discharged from the army because of insanity.

At his treason trial, testimony revealed that Hadfield had developed a delusion that God would destroy the world but that he, Hadfield, was the saviour of all mankind.[15] In order to accomplish this mission in life, Hadfield reasoned that he must sacrifice his own life as had Jesus Christ. However, believing that suicide was a mortal sin, Hadfield decided to attempt to kill the King knowing that regicide was a capital crime and punishable by death. Hadfield concluded that killing the King would attain his execution and, through it, his martyrdom.

Hadfield's brilliant counsel, Thomas Erskine, argued that, although Hadfield knew that shooting at the King was a capital offence, his act was based upon false beliefs and delusions, which were not of his own making but, rather, were symptoms of his insanity.[16] Erskine argued vehemently against the notion of total insanity as follows:

> "Delusion where there is no frenzy or raving madness, is the true character of insanity...I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the immediate offspring of disease" (Hadfield's Case, 27 How. St. Tr. 1282 (1800).

Erskine's oratory so impressed Chief Justice Kenyon that an acquittal[17] was directed, although Hadfield was retained in

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[15]Moran (1981) has argued that Hadfield was 'put-up' to this by a man named Banister Truelock.

[16]This appeared to be the first attempt at formulating the concept of a "product test". This phenomenon of "delusional beliefs", however, was not widely accepted by contemporary Courts.

[17]The Court, in effect, accepted the emphasis on the effect of delusions.

custody for disposition for the safety of society.

The Hadfield Case was considered a landmark because it was an outright rejection of two concepts previously applied by the Courts, namely:

1. it denied that a criminal Defendant must be totally insane before he could be acquitted, and
2. it severed the relationship between insanity and the ability to distinguish "good from evil" or "right from wrong" (Wingo, 1974; Simon, 1967).

In 1800, the Criminal Lunatics Act[18] was passed largely in response to the attempted murder of King George III by Hadfield.[19] The Act contained a two-fold procedure for the "safe custody" of insane persons charged with offences: firstly, a newly codified special verdict of "not guilty by reason of insanity"; and, secondly, the Act provided for the automatic commitment to custody of persons upon the rendering of the special verdict. This Act was the first statutory provision[20] to expand the notion of legal insanity and establish procedures for

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[18]While this act was popularly known as the "Criminal Lunatics Act" the official proclamation is "An Act for the Safe Custody of Insane Persons Charged with Offences" (1800), 39 & 40. Geo. III, Ch. 94.

[19]The use of the insanity defence increased as a growing number of capital offences were recognized in England. Defendants invoked the insanity plea to avoid death. Courts argued that it was beneficial to ameliorate the harshness of sentencing to death one who could not be said to possess the requisite criminal element. See Crotty, 1974 for an historical analysis.

[20]The legislation provided complete exemption from conviction for persons so mentally disordered that it would be unreasonable to impute guilt.

an insanity acquittal.

In a further attempt to refine insanity jurisprudence, the concept of "irresistible impulse" was introduced in the case of Edward Oxford.[21] In 1840, Oxford, known to be mentally ill for eighteen years, attempted to assassinate Queen Victoria by firing a pistol at her. Evidence was adduced at his trial that Oxford was unable to comprehend the significance of his act. As a result, the trial judge Chief Justice Denman suggested a test that would presage the notion of "irresistible impulse". In his charge to the jury, he instructed as follows:

> "If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the act that he was committing" (quoted in Collinson, 1812:636-674).

Oxford was subsequently acquitted on grounds of insanity.[22]

McNaughtan

The most important case in the history of insanity jurisprudence originates from the case of Daniel McNaughtan[23] in

[21] Regina v. Oxford, 173 Eng. Rep. 941 (N.P. 1840).

[22] Queen Victoria was not at all pleased with the outcome and the Oxford Case, in fact, significantly contributed to the negative response to the McNaughtan Case.

[23] McNaughtan's Case, 8 Eng. Rep. 718, 722 (House of Lords, 1843). For a unique and absorbing account of this case, see Richard Moran, (1981).

England. Its profound impact on insanity jurisprudence is evidenced by its adoption as an affirmative criminal defence in virtually all of the common law world. Despite the plethora of debate and controversy, spanning a period of over 140 years, McNaughtan survives as the legal test for insanity in many jurisdictions.

Daniel McNaughtan[24] was a young Scotsman who shot and killed Edward Drummond, private secretary to the English Prime Minister, Sir Robert Peel, on January 20th, 1843. He shot Drummond under the mistaken impression that his victim was, in fact, Sir Robert Peel whom he believed to be responsible for a campaign of systematic persecution against him.

At McNaughtan's trial, evidence revealed that McNaughtan suffered from symptoms of paranoid schizophrenia, the most significant of which were his delusions of persecution. McNaughtan had believed for some time that Sir Robert Peel and his Tory government had organized a conspiracy to destroy him.

After his arrest, McNaughtan made a statement as follows:

> "The Tories...have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland, and all over England; in fact they follow me wherever I go. I cannot get no rest from them night or day...I believe they have driven me into consumption... They have accused me of crimes of which I am not guilty; they do everything in their power to harass and persecute me; in fact they wish to murder me. It can be proved by evidence. that's all I have to say" (McNaughtan's Case, 8 Eng. Rep. 718, 722 (House of

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[24]Moran (1981) has discovered a second known signature of McNaughtan which clearly confirms this spelling of the family name.

Lords, 1843).

McNaughtan's outstanding counsel, Alexander Cockburn, suggested to the court that even though McNaughtan's conduct had to a large extent appeared "rational" and even though he clearly knew "right from wrong",[25] he nevertheless was suffering from a form of insanity which deprived him of all "power of self-control". In his address to the jury, Cockburn argued:

> "I am bound to show that the prisoner was acting under a delusion, and that the act sprung out of that delusion...and when I have done so, I shall be entitled to your verdict..." (McNaughtan's Case, 8 Eng. Rep. 718, 722 (House of Lords, 1843)).

Cockburn further explained that a significant part of his case[26] would involve expert medical testimony, since "a precise and accurate knowledge of this disease can only be acquired by those who had made it the subject of attention and experience, of long reflection, and of diligent investigation" (McNaughtan's Case, 8 Eng. Rep. 718, 722 (House of Lords, 1843)).

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[25]The "right from wrong" dichotomy was strongly influenced by beliefs in witchcraft, phrenology, and monomania (Dawson, 1981; Weinhofen, 1954). Phrenology, a doctrine espoused by the Viennese physician Francis Gall, taught that each function of the mind was localized in its own corner of the brain, so that a man's mental faculties could be calibrated by measuring the corresponding bumps on his cranium. Monomania (which compartmentalizes the mind) is a basic precept which is predicated upon the assumption that one idea could dominate the other cognitive aspects of the mind. Therefore, it could be argued that if a person had an insane delusion, it would totally control that person. (Monomania also suggested the concept of 'partial insanity'). While these psychological theories were accepted in 1843, they were later discredited (Schiffer, 1978).

[26]Cockburn relied heavily on the relatively modern opinions of the American psychiatrist, Issac Ray, set forth in his then publication, Medical Jurisprudence of Insanity, (1st ed., 1838).

Cockburn produced a number of medical experts, all of whom testified that McNaughtan was insane at the time when the offence was committed.

> "Medical experts called by the defence directed testimony to the existence of delusions so strong as to override a person's moral perception of right and wrong, rendering him incapable of exercising control over acts connected with that delusion, and the presence of such delusions" (McNaughtan's Case, 8 Eng. Rep. 718, 722 House of Lords, 1843)).

Upon completion of the defence's medical evidence, Lord Chief Justice Tindal, after determining that there would be no contrary medical evidence, directed the jury to return a "verdict of not guilty by reason of insanity".

McNaughtan was kept in "safe custody"[27] until "Her Majesty's pleasure be known" at Bethlem Hospital (known locally as "Bedlam") until 1864. He was subsequently transferred to Broadmoor, a new home for the criminally insane, where he remained until his death on May 13, 1865.

While the McNaughtan trial captured immense public interest, it was his acquittal that brought immediate protest and vehement indignation. Contemporary newspapers bitterly criticized the special verdict rendered and the public simply refused to believe that McNaughtan was insane.[28]

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[27] In the 19th Century "successful assertion of the insanity defence consigned the Defendant to conditions that were similar to and in many cases worse than the conditions that existed under the prison regime of the day" (Verdun-Jones and Smandych, 1981(a):103).

[28] One commentator recently argued that the insanity verdict served to discredit McNaughtan and the political ideas he represented by interpreting his act as the product of a diseased mind. In essence, the verdict served effectively to eliminate

Queen Victoria was outraged with the verdict, particularly, in view of the fact that there had been previous assassination attempts on the Royal Family - three directed at the Queen herself. The Queen registered a formal protest by letter to Sir Robert Peel, demanding that the House of Lords clarify the law on insanity.

The furore spilled over into Parliament, and after a debate, the House of Lords summoned the judges of England to explain their views. The House of Lords then formulated five questions for the fifteen law lords regarding the criminal responsibility of individuals with insane delusions. The five questions were as follows:

1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion with respect to one or more particular subjects or persons; as for instance, at the time of the commission of the alleged crime, the accused knew he was acting contrary to the law, but did the act complained of with a view, under the influence of insane

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[28](cont'd) him from British society by confining him in a hospital for the rest of his life. "A guilty verdict, which would undoubtedly have been accompanied by a public hanging, might have risked elevating McNaughtan to martyrdom, thereby encouraging, rather than calming, political protest in Britain" (Moran, 1981:6). See also White's (1982) review article wherein he concluded that Moran's thesis was not proven. See also Szasz's (1963) critical analysis of the case of Ezra Pound wherein he argues that by means of "psychiatric incarceration" the government of the day avoided committing "injustices" that may influence public opinion. Pound was found unfit to stand trial on charges of treason and was hospitalized for 13 years. For another case with political dimensions, see Verdun-Jones' (1980(b)) analysis of the Canadian case of Louis Riel.

delusion, of redressing or revenging some supposed grievance of injury, or of producing some supposed public benefit?

2. What are the proper questions to be submitted to the jury when a person, alleged to be inflicted with an insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, and insanity is set up as a defense?

3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

4. If the person under an insane delusion as to the existing facts commits an offense in consequence thereof, is he thereby excused?

5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion as to whether the prisoner was conscious at the time of doing the act that he was acting contrary to the law, and whether he was labouring under any and what delusion at that time? (McNaughtan's Case (1843-60)) All E.R. 229, at 230. (H.L.).

The first and the fourth questions were with reference to delusions. The second and third questions were with reference to the questions to be submitted to the jury, and the fifth

question was with reference to the testimony of medical men at trial.

The combined answers to the second and third questions by fourteen of the fifteen justices comprised the now infamous "McNaughtan Rules," framed as follows:

> "To establish a defense on the ground of insanity, it must be clearly proved, that at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong" (McNaughtan's Case, 8 Eng. Rep. (H.L. 1843) at 719).

The remainder of the justices' responses, delivered by Chief Justice Tindal held the law to be: a) that one acting under an insane delusion would be excused only if the law would excuse in any case if the facts, with respect to which the delusion existed, were real; b) that the jury should be so charged as to focus attention on the defendant's knowledge of the wrongfulness of the particular act in question, rather than knowledge of the difference between right and wrong in the abstract; (Spring, 1979(a); 1979 (b)). On whether "wrong" meant 'contrary to the law', the justices' answer was unequivocal.

The newly promulgated rules provided that a criminal defendant is not responsible for criminal acts if a mental disorder prevented the person from knowing what he was doing, or, if he was unaware of his act, he nonetheless did not know that it was wrong. The common feature and main focus of such a disjunctive approach is the requirement of cognitive impairment, that is, that the Defendant be unable to distinguish between

"right and wrong"[29] (Wingo, 1974).

Prior to McNaughtan, no clear formulation had emerged as a uniformly accepted test of criminal responsibility. Rather, insanity tests varied considerably from case to case. McNaughtan may have simply been the culmination of a series of English attempts to solidify insanity jurisprudence.[30] There is general agreement among scholarly commentators that the essential concepts of the McNaughtan Rules were "already ancient and thoroughly embedded in the law" (Platt & Diamond, 1966:1258) and "that the judges believed themselves to be reaffirming the established test for insanity rather than be engaged in the process of fashioning a new one" (Verdun-Jones, 1980(a):6).

Commenting on the historical importance of the now unequivocal recognition of the "right and wrong" test, an observer remarks:

> "McNaughtan clarified and brought order out of existing but confusing precedent and produced a distinct, workable rule from which the more modern tests of insanity have evolved" (Wingo, 1974:88).

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[29] According to one commentator, it is a cruel irony that the McNaughtan test was never applied to Daniel McNaughtan. He would be judged sane and legally responsible by the standards of the rules which bear his name. There was no question that McNaughtan could distinguish right from wrong (Moran, 1977 and 1981). The fact of the matter is that McNaughtan's case was a deliberate attempt by the judges to tighten up the criteria for legal responsibility. In other words, it was a deliberate policy decision on the part of the justices.

[30] It has been argued that the McNaughtan Court was forced to adopt concepts of the "right-wrong" test (which it already recognized as outdated) due to intense political pressure applied by the Queen (Dawson, 1981). See, also, Belli, 1971.

While it is significant to conclude that the definitive test of criminal responsibility had been formulated by the House of Lords as a direct consequence of the acquittal of Daniel McNaughtan, the promulgated rules marked the first instance of acceptance of what the Court responded to as the "budding science of psychiatry" (Gray, 1972:567). More significantly, from a historical perspective, "the McNaughtan rules effectively opened the door for practitioners of the emerging profession of psychiatry to participate fully in the criminal trial process" (Verdun-Jones & Smandych, 1981:85). Psychiatrists not only posed as expert witnesses in criminal trials"...but also laid claim to expertise in the prediction and control of dangerousness" (Verdun-Jones & Smandych, 1981:103).

Post-McNaughtan

United States

The McNaughtan Rules, also known as the "right or wrong test", firmly dominated the Anglo-American law on criminal responsibility. With the exception of New Hampshire and Alabama, which passed their own standards in 1866 and 1887 respectively, the McNaughtan Rules were adopted as the sole, definitive test for criminal responsibility, in the United States, with little

modification until 1954.[31] At present, the McNaughtan Rules are used in 15 States; ALI (American Law Institute) Test in 30; one State has a combination of McNaughtan and Irresistible Impulse; three States have abolished the insanity defence; one State has a Justly Responsible Test; and eight states have a "Guilty but mentally ill" verdict. (See Appendix A). Chapter V will provide a detailed discussion of these modern developments.

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[31] District of Columbia Judge David Bazelon articulated the "Durham Rule" in Durham v. United States, 214 F. 2d 862, 864 (D.C. Cir. 1954). This alternative will be discussed in detail in Chapter V.

England

In England, the McNaughtan Rules[32] remained the only definitive test of criminal responsibility until the Homicide Act of 1957 introduced the concept of "diminished responsibility" first developed in Scotland. Prior to 1957, approximately 20% of all persons brought to trial for murder in England were found "not guilty by reason of insanity". By the late 1970's, as a result of the new Act, less than 1% were found "not guilty by reason of insanity", and approximately 37% fell under its diminished responsibility provisions.[33] This "diminished responsibility" doctrine is analyzed in Chapters III and V.

Canada

It is upon the McNaughtan Rules, disseminated by the justices of England, that Canada's law relating to the defence of insanity rests.

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[32]The McNaughtan Rules were crystallized in the Trial of Lunatics Act (1883) (Crotty, 1974).

[33]See Report of the Committee on Mentally Abnormal Offenders, (1975) Comnd. 6244, London, H.M.S.O. at P. 316 (The Butler Report). See, also, Dell, 1982 for a complete discussion of diminished responsibility as the doctrine exists in England today.

Prior to the enactment of the Canadian Criminal Code, the two documented applications of the insanity defence were the treason trial of Metis, Louis Riel in 1885 and The Queen v. Dubois (1890) Q.L.R.[34] Because of Canada's strict adherence to the narrowness of the McNaughtan Rules with its primary focus on "cognitive impairment" both were unsuccessful in their insanity pleas and were subsequently executed (Verdun-Jones, 1980(b)).

In 1893, the McNaughtan Rules were enshrined as permanent legislation when the Canadian government enacted the Criminal Code.[35] The specific provision for the defence of insanity is articulated in S.11 as follows:

1. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.
2. A person labouring under specific delusions but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some

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[34] For a comprehensive historical discussion, see Verdun-Jones 1980(a) and 1980(b).

[35] This was patterned after the English Commission's Draft Bill of 1880. The bill, however, owes much to Sir James Stephen's earlier draft legislation of 1878. The Canadian Criminal Code received Royal Assent in July, 1892 and became effective on July 1, 1893 (See Verdun-Jones, 1980(a)).

state of things, which, if it existed, would justify or excuse his act or omission.

3. Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

While it is evident that the 1893 Code provisions represented a modified version of the McNaughtan Rules, there are several significant differences between the Canadian test of insanity and the English common law test proclaimed in McNaughtan (Verdun-Jones, 1980(b):200-203). These critical amendments are as follows:

1. "natural imbecility" is added;
2. "appreciate" is substituted for "know";
3. emphasis on "capacity" to "appreciate" and/or "know" rather than on mere "knowledge"; and
4. the requirement of a "defect of reason" is omitted (Verdun-Jones, 1980(a):22-23).

Despite these significant differences "between the McNaughtan Rules and what is now S.16 of the Criminal Code, Canadian courts have generally tended to view the Canadian insanity defence as being merely a written version of the English common law...and little attempt has been made to consider the legislative intention underlying the changes made in the 1892 codification" (Verdun-Jones, 1980(a):70).[36]

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[36]This author's view would have to be modified somewhat in light of the Supreme Court of Canada decisions in Barnier and Cooper. These cases are discussed in Chapter III.

Except for a few "insignificant changes", the insanity test formulated in the 1893 code remains essentially intact (Verdun-Jones, 1980(a):25).

In 1956, a Royal Commission[37] was established to examine the law on the subject of insanity. Chaired by The Honourable Mr. Justice McRuer, the commission concluded in their report that the existing test of criminal responsibility ought to remain unchanged. The Report went on to emphasize that the significant difference between the McNaughtan Rules and the Canadian test of insanity is as follows:

> "...the use of the word "appreciate" rather than the word "know" is a critical distinction which greatly expanded the scope of the insanity defence in Canada" (McRuer Report, 1956:20).[38]

The present statutory provision relating to the defence of insanity is articulated in S.16 of the Canadian Criminal Code as follows:

> 16(1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
>
> 16(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
>
> 16(3) A person who has specific delusions, but is in

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[37]Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases, by The Honourable J.C. McRuer, Chairman (Ottawa: Queen's Printer, 1956) (McRuer Report).

[38]In light of recent Supreme Court of Canada decisions, it is arguable that this is the case. See Chapter III for a treatment of this issue.

other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

16(4) Everyone shall, until the contrary is proved, be presumed to be and to have been sane.

III. The Substantive Law-Canadian Judicial Interpretation of S.16 and Related Issues

This chapter will provide a succinct statement of the law dealing with the substantive, procedural, dispositional, and evidential aspects of the Canadian insanity defence. It will also include an analysis of the inter-related doctrines of Automatism, Irresistible Impulse, and Diminished Responsibility.

The Term "Natural Imbecility"

While the term "natural imbecility" was not contained in the original formulation of the McNaughtan Rules, it was introduced in the 1892 Canadian Criminal Code primarily as an alternative to the "disease of the mind" branch of the insanity defence.

Apart from S.16(2), no further reference to the phrase "natural imbecility"[1] can be found within the Criminal Code. Furthermore, there has been no definitive interpretation of that expression in the Criminal Code. The sole attempt at any clarification appears in S.2 where it is suggested that

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[1] Parliament has seen fit not to replace this archaic term for more contemporary medical terminology. The McRuer Report did not recommend any change when considering this point. The medical profession in their Diagnostic and Statistical Manual of Mental Disorders, 3rd edition (1980)(DSM-III) has rejected the term in favour of "mental deficiency" and "mental retardation".

"imbecility" is a form of mental defectiveness more severe than "feeble-mindedness" (Schiffer, 1978).

To date, there has been no authoritative interpretation of the term "natural imbecility" in Canadian case law. In fact, there has been no serious judicial consideration of the concept of "natural imbecility" except for the dissenting judgment of Mr. Justice Dubin of the Ontario Court of Appeal in R. v. Cooper [2] (Stuart, 1982; Braithwaite, 1981). Dubin, J.A. held that the term "natural imbecility" must be given a separate legal meaning from that of "disease of the mind" and that there was sufficient evidence that Cooper suffered from a state of natural imbecility to require that the issue be left with the jury. In his reasons, Dubin, J.A. concluded that:

> "Since the term 'a state of natural imbecility' is included in S.16 of the Code, it must be given, in my opinion, an independent meaning from the term a 'disease of the mind'. I would have thought that the term 'a state of natural imbecility' has reference to the imperfect condition of mental power from congenital defect of natural decay as distinguished from a mind once normal which has become diseased.... In any event, the determination of whether a person is in a state of natural imbecility is not resolved solely by consideration of intelligence quotients. It should be based on the evidence relevant to the patient's psychiatric history, his ability to function, his academic and vocational achievements, his skills, and emotional and social maturity." (R. v. Cooper at 159-160).

Upon Cooper[3] reaching the Supreme Court of Canada, the

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[2](1978), 40 C.C.C. (2d) 145.

[3]Cooper v. The Queen (1980), 51 C.C.C. (2d) 129 (S.C.C.). It is significant to note that, since Cooper had many more diagnoses and various mental disorders other than retardation, "natural imbecility" was not the real issue in this case. Thus, the Court did not have to decide on a definition of "natural imbecility".

majority of the Court allowed the appeal without dealing with the specific issue of "natural imbecility" and without any discussion of the definition. Martland, J., speaking in dissent, held that there was no evidence of a "state of imbecility" raised at trial. Mr. Justice Dickson, delivering the majority judgment, simply concluded:

> "...I should state that Mr. Justice Dubin discussed at some length 'natural imbecility'. I have refrained from doing so as I believe the present appeal can be decided without broaching that aspect of the case" (Cooper v. The Queen at 153).

Despite its lack of interpretation in Canadian case law, "natural imbecility", in any event, is rarely invoked as the basis for an insanity defence. It is contended that most "imbeciles" would be found "unfit to stand trial" and thus no adjudication of an insanity plea would be required (Ferguson, 1982).

The Term "Disease of the Mind"

Traditionally, the term "disease of the mind" has proven intractable and has demonstrated an elusiveness for satisfactory definition by both medical and legal disciplines. The controversial nature of the phrase "disease of the mind" is exacerbated by the non-existence of one definition of mental disease, which is generally accepted by the medical profession (Fingarette, 1966; 1974; 1976).

In response to such a difficulty, Anglo-Canadian Courts have made significant attempts at clarification. In Bratty v. A.G. Northern Ireland,[4] Lord Denning gave the term its broadest interpretation to date by acknowledging that "the major mental diseases, which the doctors call psychoses...are clearly diseases of the mind"...and that "...mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind" (at 981). Lord Denning held that psychomotor epilepsy was a "disease of the mind" and that the question of whether an accused suffers from a "disease of the mind" is a proper issue to be resolved by the Judge.

In an earlier decision, R. v. Kemp,[5] the primary issue entertained by the Court, Devlin, J., was whether "arteriosclerosis" came within the meaning of "disease of the mind". The Court ruled that hardening of the arteries did constitute a disease of the mind.

The Canadian judicial approach, of couching the definition of "disease of the mind" in wide terms to avoid psychiatric labelling determining criminal responsibility, is evidenced in R. v. Simpson.[6] The central issue in this case was whether or

[4][1961] 3 W.L.R. 965 (H.L.); [1963] A.C. 386 (H.L.). See also R. v. O'Brien (1965), 56 D.L.R. (2d) 65 (N.B.C.A.) where the Court ruled that psychomotor epilepsy was a disease of the mind.

[5][1957] 1 Q.B. 399.

[6](1977), 35 C.C.C. (2d) 337 (Ont. C.A.). See also R. v. Borg [1969] 4 C.C.C. (2d) 262 (S.C.C.) and Kjeldsen v. The Queen (1982), 64 C.C.C. (2d) 161 (S.C.C.) where the Supreme Court of Canada has ruled that personality disorders, including psychopathy, are clearly capable of constituting a "disease of the mind".

not a "personality disorder" could consitute "disease of the mind" within the meaning of S.16(2). Martin, J.A. held that a "personality disorder", regardless of any medical evidence to the contrary, is recognized as a "disease of the mind" and concluded that the question raised must be resolved as a question of law:

> "The term disease of the mind is a legal concept, although it includes a medical component, and what is meant by that term is a question of law for the judge.... It is the function of the psychiatrist to describe the accused's mental condition.... It is for the judge to decide whether the condition described is comprehended by the term 'disease of the mind'" (R. v. Simpson at 349-50).

In R. v. Cooper,[7] a case which provides one of the most lucid and detailed expositions of insanity law in Canada, the Court relied on the principle established in R. v. Simpson[8] that the term disease of the mind" expresses a legal concept and thus requires a legal definition. Mr. Justice Dickson, speaking for the majority of the Supreme Court of Canada concluded that:

> "...in a legal sense 'disease of the mind' embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion" (Cooper v. The Queen at 144).

One legal commentator (Ferguson, 1982) significantly points out that the wide definition of "disease of the mind" given in Cooper, supra not only broadens the potential scope of the insanity defence but also narrows the potential scope of the

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[7] Above notes 2 and 3.

[8] Above note 6.

defence of automatism since insanity is the only legal defence for automatic behavior caused by a disease of the mind.

In R. v. Rabey,[9] it was established that a mental disorder may constitute a "disease of the mind" whether it is permanent or temporary, curable or incurable, recurring or non-recurring. Mr. Justice Martin also reaffirmed the principle that "disease of the mind" is a question of law for the judge to determine. The judge has the jurisdiction to determine what mental conditions are within the meaning of that phrase and whether there is any evidence that a defendant suffered from an abnormal mental condition comprehended by that term. Assuming this hurdle is passed, whether there is evidence a defendant did suffer such a "disease of the mind" is a question of fact to be left with the jury (Stuart, 1982).

The Phrase "Appreciating the Nature and Quality of an Act or Omission"

In Canada, the success of an insanity defence at trial normally depends on the first of the two tests enunciated in S.16(2) of the Criminal Code, namely, the "appreciating" branch of the insanity defence.

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[9](1980), 54 C.C.C. (2d) 1 (S.C.C.). The whole point of Rabey was that the Court made a deliberate policy decision to broaden the definition of "disease of the mind" and to narrow the scope of automatism. See also Bratty v. A.G. Northern Ireland, above note 4.

The McRuer Report[10] emphasized the significant difference between the Canadian criterion of "appreciating the nature and quality of an act or omission" and the original McNaughtan criterion of "knows the nature and quality of his act". In essence, the McRuer Report contended that the word "appreciating" not being a word that is synonymous with "knowing" is a much broader concept having far-reaching legal and medical implications.[11] The report concluded as follows:

> "Mere knowledge of the nature and quality of the act ('Did the person know what he was doing?') is not the true test to be applied. The true test necessary is, was the accused person at the very time of the offence - not before or after, but at the moment of the offence - by reason of disease of the mind, unable fully to appreciate not only the nature of the act, but the natural consequences that would flow from it? In other words, was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act?" (McRuer Report at 13).

MacKinnon, J., in R. v. Adamcik,[12] reaffirmed the view of the McRuer Commission that "mere knowledge of the nature and quality of the act is not sufficient. There must be, in addition, an ability to appreciate the true significance of the conduct - a capacity to measure and foresee the consequences of the act".

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[10] Report of the Royal Commission on the Law of insanity as a Defence in Criminal Cases (McRuer Report) (1956).

[11] Prior to 1956, Canadian Courts, relying on English precedents, routinely ignored this distinction and used the words "know" and "appreciating" interchangeably as if they were the same.

[12] (1977), 33 C.C.C. (2d) 11 (B.C.Co. Ct.).

The McRuer distinction was specifically adopted by the Supreme Court of Canada in Cooper v. The Queen,[13] wherein it was held that the words "appreciate" and "know" were not synonymous. It was expressly established that the test of "appreciation" encompasses "emotional as well as intellectual awareness of the significance of the conduct".[14] Dickson, J. speaking for the majority and quoting extensively from the McRuer Report[15] stated:

> "The draftsman of the Code...made a deliberate change in language from the common law rule in order to broaden the legal and medical considerations bearing upon the mental state of the accused and to make it clear that cognition was not to be the sole criterion. Emotional, as well as intellectual awareness of the significance of the conduct, is in issue.... To 'know' the nature and quality of an act may mean merely to be aware of the physical act, while to 'appreciate' may involve estimation and understanding of the consequences of the act" (at 145).

Mr. Justice Dickson, in Cooper, supra, sums up the intent of Canadian insanity legislation as follows:

> "...the word 'appreciates' imports an additional requirement...unique to Canada...of perception, an ability to perceive the consequences, impact, and results of a physical act" (McRuer Report at 147).

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[13] Above note 3, at 145.

[14] Given Cooper's "emotional as well as intellectual awareness of the significance of the conduct" interpretation, whether "emotional" significance really constitutes part of the insanity defence is questionable in light of the recent case of Kjeldsen. Kjeldsen was a psychopath, who had no emotional-guilt responses. This case will be discussed in an upcoming section.

[15] The Court adopted the McRuer test of "appreciation" with the exception that the word "fully" was deleted.

The Supreme Court of Canada in R. v. Barnier[16] held that "appreciating" would include "knowing" but that the converse would not necessarily be true. Mr. Justice Estey also accepted the McRuer test and, in delivering reasons for the unanimous Court, made this distinction:

> "The verb 'know' has a positive connotation, requiring a bare awareness, the act of receiving information, without more. The act of appreciating, on the other hand, is a second stage in a mental process requiring the analysis of knowledge or experience in one manner or another. It is therefore clear on the plain meaning of the section that Parliament intended that, for a person to be insane within the statutory definition, he must be incapable, firstly, of appreciating in the analytical sense the nature and quality of the act or of knowing in the positive sense that his act was wrong" (at 203).

By virtue of Cooper[17] and Barnier,[18] the term "appreciate" has a broader scope than mere "cognitive knowledge". In addition, both refer to the foreseeability of consequences as being an element of the term "appreciate". In particular, Mr. Dickson in Cooper,[19] emphasized that there had to be an "ability to perceive the consequences, impact, and results of a physical act".

Having made these clarifications, the Court was asked to consider the relevant consequences of an act or omission which can be properly used to measure the defendant's capacity to

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[16](1980), 51 C.C.C. (2d) 193 (S.C.C.). at 203.

[17]Above note 3.

[18]Above note 16.

[19]Above note 3, at 147.

appreciate. In Kjeldsen v. The Queen,[20] the Supreme Court of Canada held that the phrase "nature and quality" refers to the "physical" consequences which result from the act or omission in question.[21] Mr. Justice McIntyre, giving reasons for the unanimous Court stated:

> "To be capable of 'appreciating' the nature and quality of his acts, an accused person must have the capacity to know what he is doing; in the case at bar, for example, to know that he was hitting the woman on the head with the rock, with great force, and in addition he must have the capacity to estimate and to understand the physical consequences which would flow from his act, in this case that he was causing physical injury which could result in death" (at 295).

Moreover, McIntyre J., accepted the proposition, held by the lower Court, that the meaning of "appreciate" excludes the emotional reaction of an accused to his act and its consequences. In his final analysis, McIntyre, J. cited Martin's, J. A. comments in Simpson[22] as follows:

> "Appreciation of the nature and quality of the act does not import a requirement that the act be accompanied by appropriate feeling about the effect of the act on other people.... No doubt the absence of such feelings is a common characteristic of many persons who engage in repeated and serious criminal conduct" (Kjeldsen v. The Queen at 298).[23]

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[20](1982), 64 C.C.C. (2d) 161 (S.C.C.). Five psychiatrists agreed that Kjeldsen was a dangerous psychopath with sexual deviant tendencies. The Court ruled that psychopathy did constitute a "disease of the mind".

[21]The term "nature and quality of an act" had been held to refer solely to the physical aspect of the act in question, as opposed to its legal or moral character in R. v. Codere (1916), 12 Cr. App. R. 121 at 27.

[22]Above note 6.

[23](1982), 64 C.C.C. (2d) 161 (S.C.C.). The Court seems to be going beyond Simpson by laying down a more strict rule - an

The significance of the judgment in Kjeldsen is that, for most practical purposes, if "the nature and quality of an act" is limited to its physical consequences, any meaningful inquiry as to the defendant's capacity to appreciate it is virtually precluded (Wood, 1982). In effect, the Supreme Court of Canada's pronouncement in Kjeldsen has narrowed the meaning of "appreciate"; this sharply contradicts the attempt at broadening the concept made in Cooper and Barnier, supra. Ultimately, with the Kjeldsen ruling, it will now be inordinately more difficult for an accused to raise the insanity defence successfully, if his only disease of the mind is "psychopathy" (Stuart, 1982). It would appear that the Supreme Court of Canada has made a precise policy decision to preclude psychopaths from successfully pleading the insanity defence.

The shrinking limits of S.16(2) are further evidenced in the recent Supreme Court of Canada decision of The Queen v. Abbey.[24] Abbey fell outside the ambit of S.16(2) despite his medically identifiable psychosis and delusions, which may have accounted for his actions. In this case, "the Crown appealed a dismissal of charges of importing and possessing cocaine for the purpose of trafficking on grounds that the accused, at the relevant time, was insane within the meaning of S.16(2). The

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[23](cont'd) evident policy decision?

[24][1983] 1 W.W.R. 251; (1982), 68 C.C.C. (2d) 394. This case is significant because, unlike Kjeldsen, Abbey had a clear psychosis as well as a set of delusions. In other restrictive interpretations of S.16(2), the Supreme Court of Canada was dealing with 'psychopaths'.

trial judge had found," inter alia that Abbey was suffering from a disease of the mind, a feature of which included the delusion that he was protected by some ultimate power from the penal consequences personal to him or his illegal conduct" (Wood, 1982:6). Mr. Justice Dickson, delivering reasons for the Court, restated the proposition established in Kjeldsen, supra, that the word "consequence" meant "the physical consequences of the act". Thus, the Court unanimously ordered a new trial based on the proposition that "a failure to 'appreciate' the penal sanctions attached to an offence does not render the accused 'incapable of appreciating the nature and quality' of his act so as to bring the insanity defence into play".

In light of the recent Supreme Court of Canada rulings, which in effect have severely limited the criteria for a defence of insanity, it is questionable whether the broader Canadian criterion of "appreciating" will result in any practical or significant differences in application than the original McNaughtan formula of "knowlege" (Wood, 1982).

The Phrase "Knowing that an Act or Omission is Wrong"

Regardless of whether an insane defendant was capable of appreciating the "nature and quality" of his act, he may be found insane within the alternative arm of S.16(2), if a state of "natural imbecility" or "disease of the mind" prevented him from knowing that his act was wrong.

Upon examination of the McRuer Report, it is abundantly clear that the Canadian test of insanity was intended to encompass a broader base by virtue of the criterion articulated in S.16(2) than the McNaughtan Rules because "wrong" was to mean "morally wrong" as well as "legally wrong". The report states:

> "Applying the provision of the Interpretation Act, the word 'wrong' must be given a broad meaning. We think it means wrong not only in the legal sense but something that would be condemned in the eyes of mankind" (McRuer Report at 13).

Despite the intended broad interpretation of "wrong", the Supreme Court of Canada has adopted the principle of two earlier English cases, which followed a strict interpretation of the McNaughtan Rules and rejected the more liberal Australian approach.

The interpretation of the word "wrong" has been unequivocally resolved in Canadian case law. In a landmark five-to-four decision, the Supreme Court of Canada, in Schwartz v. The Queen,[25] held that "wrong" meant "legally wrong" (contrary to the law), not "morally wrong". Martland, J. for the majority reasoned:

> "In brief, it is my opinion that the effect of S.16(2) is to provide protection to a person suffering from disease of the mind who has committed a crime if, in committing the crime he did not appreciate what he was doing or, if he did have that appreciation, he did not know that he was committing a crime" (at 149).

The first English case relied upon was R. v. Codere,[26]

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[25](1976), 34 C.R.N.S. 138; [1977] 1 S.C.R. 673 (S.C.C.).

[26](1916), 12 Cr. App. R.121 at 27-28.

wherein the Court rejected the argument that the issue should be "judged by the standard of the accused" and accepted as correct the principle that the act was "wrong" according to the "ordinary standard adopted by reasonable men".

The Supreme Court of Canada in Schwartz, supra, also relied on the leading authority, R. v. Windle,[27] wherein the English Court of Appeal flatly ruled that "wrong" means "legally wrong" and nothing more.

The Australian approach, in Stapleton v. The Queen,[28] while expressly rejected by the Supreme Court of Canada, would have been more in keeping with the McRuer distinction. The test propounded by the Australian High Court "not only defines 'wrong' as meaning 'morally' rather than 'legally wrong' but also emphasizes the critical importance of examining the question whether the accused has the capacity to distinguish between 'right' and 'wrong'" (Verdun-Jones, 1979:32-33).

The four dissenting justices would have adopted the opinion, relying on rules of statutory construction, that S.16 had acquired a moral connotation. Dickson J., in dissent, reasoned that if "wrong" meant contrary to the law, Parliament would have used the word "unlawful", as it had in other parts of the Code.

In the final analysis, the Schwartz decision has narrowed the portals of the insanity defence and removed what Parliament

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[27] [1952] 2 Q.B. 826 (C.C.A.).

[28] (1952), 86 C.L.R. 358 (H.C. Aust.).

intended to be a basic element of a uniquely Canadian test - namely, an inquiry into whether or not the accused viewed his own conduct as morally wrong (Verdun-Jones, 1979; Ferguson, 1982; Orchard, 1981; Colvin, 1981; Pavlich, 1977).[29] Upon examining the differences between the Canadian criteria and the McNaughtan formula, one observer interestingly concludes:

> "Indeed, it might perhaps be argued that the majority judgment in Schwartz is more in harmony with the spirit of the English common law than with the spirit of the Canadian Code" (Verdun-Jones, 1979:35).

Delusions - S.16(3)

The special provision of S.16(3) provides that an accused, who suffers from specific delusions but is in other respects sane, may raise the insanity defence if those delusions caused him to believe in the existence of a state of things which, if it existed, would have provided justification or excuse for his conduct.

The difficulty with this section is that it provides a defence for a person who, from a medical perspective, is non-existent.

> "It may be that a person who was in all other respects sane would be capable of exercising reason within the context of his delusions but...such person is unknown to medical science" (Schiffer, 1978:137).

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[29] There is some evidence which suggests that the Courts may be interpreting "wrong" in a broad sense despite the Schwartz ruling. See Regina v. Budic, (1977), 35 C.C.C. (2d) 272(Alta. C.A.) and (1979), 43 C.C.C. (2d) 419(Alta. C.A.).

The McRuer Commission, recommending that S.16(3) be repealed, commented as follows:

> "The preponderance of medical evidence condemned the wording of this subsection on the ground that it describes a person who could not exist. The opinion of these witnesses was that no one who has 'specific delusions' could be 'in other respects sane'. We think that from a medical point of view the arguments put forward in support of this opinion are conclusive" (McRuer Report at 36).

In R. v. Budic (No.3),[30] the Court expressly refused to allow S.16(3) to prevent the successful raising of the insanity defence to a murder charge. McGillivray, C.J.A., in delivering for the Court, opined:

> "Considerable argument has been made with regard to s-s.(3) of S.16, which relates to delusions; but it does not seem to me that specific delusions can exclude the defence of disease of the mind which is the subject of s-s.(2) of S.16, when that disease may have resulted in the appellant not knowing that what he was doing was wrong" (at 433).

This was so despite there being sufficient evidence of the accused's specific delusion that he was being poisoned and that the deceased doctor was part of a conspiracy to prevent him from getting medical treatment. "One can only applaud this judgment which in essence ignores a fundamentally discredited section" (Stuart, 1982:334).

Notwithstanding the above, one commentator (Wood, 1982) suggests that due to the severe limitations now placed on S.16(2), future insanity defences must attempt to combine the two subsections of S.16 in a concentrated effort to ensure that

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[30](1979), 43 C.C.C. (2d) 419 (Alta. C.A.).

genuine cases of insanity secure appropriate acquittals.

Automatism

The doctrine of automatism in Canadian law, although a separate defence, is closely associated with the defence of insanity. The relationship between insanity (insane automatism) and non-insane automatism is quite significant. The important distinctions are as follows:

1. "non-insane automatism", if successfully invoked, is a complete defence to all criminal charges (including those involving strict liability) and leads to an absolute acquittal; whereas, "insanity", if successfully invoked, results in indefinite detention under a Lieutenant-Governor's Warrant (S.542(2)); and
2. if the "insanity" plea is alleged, the burden of proof is upon the accused on the civil standard of "on the balance of probabilities" (S.16(4)); whereas if "non-insane automatism" is alleged, the accused only has to lead some *prima facie* evidence of non-insane automatism and the burden of proof is then placed firmly upon the Crown.[31]

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[31]The burden of proof in automatism cases was clearly established in *Hill v. Baxter* [1958] 1 All E.R. 193. The accused must introduce evidence which, in the view of the trial judge, is capable of raising a reasonable doubt in the mind of the trier of fact: if he does not do so, then the issue of automatism will not even be put to the trier of fact. If the accused satisfies this evidential burden ("secondary" burden of proof), then, at the end of the case, the onus is on the Crown to prove "beyond a reasonable doubt" that the actions of the accused were not unconscious and were not involuntary (thus,

Lord Denning, in Bratty v. A.G. Northern Ireland,[32] enunciated a pragmatic test for "automatism" as "unconscious involuntary action"; it is therefore, a defence "because the mind does not go with what is being done". The Supreme Court of Canada first recognized the defence of automatism in Bleta v. The Queen[33]

The subsequent Canadian case of R. v. K, in establishing the defence of "psychological blow automatism",[34] adopted the Bratty principle as well as the proposition of Lord Goddard, in Hill v. Baxter,[35] that "automatism is the mere performance of acts in a state of unconsciousness". The Ontario High Court of Justice expressly held, in R. v. K, supra, that where there is evidence of a severe psychological blow to the accused which, in the opinion of medical experts, could produce a state of automatism, this defence should be left to the jury and, if they accept that the accused had diminished awareness of what was going on because of the state of automatism, they should bring in a verdict of not guilty.

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[31](cont'd) satisfying the "primary" or "persuasional" burden of proof).

[32]Above note 4.

[33][1964] S.C.R. 561; [1964] 44 C.R. 193.

[34][1971] 3 C.C.C. (2d) 84 (Ont. C.A.). This lower Court decision recognized the defence of automatism. See, also, the English case of R. v. Quick [1973] 3 All E.R. 347 (C.A.) for a discussion of the difficulties inherent in the process of distinguishing between insane and non-insane automatism.

[35][1958] 1 All E.R. 193 at 195.

There are two instances where automatism will not itself amount to a defence:

1. when it is caused by a "disease of the mind" or "natural imbecility"; and,
2. when it is caused by the voluntary consumption of alcohol and/or drugs.

With the exception of alcohol, drugs, and disease of mind, any illness or external force which may produce unexpected unconsciousness is a potential basis for the defence of non-insane automatism (Schiffer, 1978). Some of the more common forms of non-insane automatism accepted in Canadian law are: concussion, hypoglycemia, hypnosis, somnabulism, psychological blow,[36] muscle spasm, and reflex reaction.

Any automatism caused by a "disease of the mind" is referred to as "insane automatism" and thus subsumed under the defence of insanity, leading to a special verdict of "not guilty by reason of insanity" with concomitant indefinite detention under a Lieutenant-Governor's Warrant.[37] In other words, if the automatism is a result of a "disease of the mind", the defence of insanity alone is left open to a defendant as a legal defence.[38] If the automatism is caused by the excessive

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[36]This will now be severely limited in light of the Rabey case (discussed below). See Holland (1982-83) and Campbell (1980-81) for a complete discussion on this point.

[37]See section on Disposition.

[38]See Bratty v. A.G. Northern Ireland, above note 4; Rabey v. The Queen, note 39; R. v. Hartridge (1967), 57 D.L.R. (2d) 332 (Sask. C.A.).

voluntary consumption of alcohol or drugs, then the only legal defence available to a defendant is the separate defence of intoxication or drunkenness.[39]

The difficulty of making clear legal distinctions between insane and non-insane automatism is best illustrated in Rabey v. The Queen.[40] The central issue before the Supreme Court of Canada was whether the alleged automatism - the dissociative state arising from a "psychological blow" or emotional stress--constituted a "disease of the mind". If the automatism (the unconscious involuntary behavior) results from a "disease of the mind", then the only legal defence open to an accused is insanity and not automatism.

While the trial judge acquitted Rabey on the basis of non-insane automatism, the Supreme Court of Canada affirmed the Ontario Court of Appeal's finding by holding that the defendant's dissociative state may only be categorized as a "disease of the mind" (insane automatism), and not as a transient state arising from an external cause; and thus, the proper verdict would be a finding of insanity. Ritchie, J. for

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[39] R. v. Hartridge, Ibid; Revelle v. R. (1979), 21 C.R. (3d) 161.

[40] (1981), 54 C.C.C. (2d) 1 (S.C.C.). The central question in deciding any case involving the defence of automatism is whether or not the accused was suffering from a "disease of the mind". Rabey stands for the proposition that "disease of the mind" is a legal concept and thus a question of law for the judge to determine what constitutes a disease of the mind. Assuming that there is sufficient evidence that an accused's automatism was caused by a disease of the mind, a trial judge must put the insanity defence to the jury as a question of fact. See the recent case Fournier v. R. (1983), 30 C.R. (3d) 346 where the Court relied on Rabey.

the majority, (quoting Martin, C.J.A.), reasoned as follows:

> "In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a 'disease of the mind'...the dissociative state must be considered as having its source primarily in the respondent's psychological or emotional make-up" (Rabey v. The Queen at 7-8).

Mr. Justice Dickson, in his vigorous dissent, criticized the Court's decision by arguing that there is no basis for the Courts holding, as a matter of law, that emotional stress can never constitute an external factor giving rise to a successful defence of automatism. In his opinion, if an accused is driven into shock and unconsciousness by an emotional blow despite his susceptibility to that reaction then, provided he has no disease, there is no reason in principle why the defence of automatism should not be available.

The practical effect of Rabey will no doubt be a reduction in the number of defences based upon the psychological blow automatism doctrine. In essence, the Rabey case "has been driven to plug what is perceived as a dangerous gap in the defence of insanity" (Braithwaite, 1981:203).

Irresistible Impulse

The doctrine of "irresistible impulse" is intended to afford the defence of insanity in cases where the defendant appreciates the nature and quality of his act and knows that it is wrong but, through mental disease, is unable to control his

actions (Schiffer, 1978).

Traditionally, Courts have opposed the recognition of the irresistible impulse doctrine[41] "on the ground of the difficulty - or impossibility - of distinguishing between an impulse which proves irresistible because of insanity and one which is irresistible because of ordinary motives of greed, jealousy or revenge" (Smith & Hogan, 1973:139).

Canadian judicial response follows the English approach. In R. v. Creighton,[42] Riddell, J., revealing skepticism as to whether or not any impulses are genuinely irresistible, remarked:

> "Under our law, if a man when he commits an act is not by reason of insanity, or disease of the mind or imbecility, incapable of appreciating the nature and quality of the act and of knowing that it is wrong, he is responsible. The law says to men who say they are afflicted with irresistible impulse 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help...'" (R. v. Creighton at 350).

Notwithstanding the liberal approach (favoured by Sir James Fitzjames Stephen as well as the McRuer Commission) that S.16, if construed broadly, may include cases of irresistible impulse on the basis that an accused who has no self-control does not know or appreciate the nature and quality of his acts (Ferguson, 1982), the Supreme Court of Canada has unequivocally rejected the recognition of a doctrine of "irresistible impulse" in

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[41] The McRuer Commission did not recommend adoption of a test of irresistible impulse be added to S.16.

[42] (1908), 14 C.C.C. 349.

Canadian criminal law.

A restrictive approach was taken in R. v. Borg[43] (Blom, 1969) by the Supreme Court of Canada and the authoritative decision in Chartrand v. The Queen[44] "would appear to have driven the final nail in the coffin of a broad approach to the interpretation of S.16" (Verdun-Jones, 1979:41).

Diminished Responsibility

The doctrine of "diminished responsibility" originated more than a century ago in Scotland. The concept, first formulated by Lord Deas in H.M. Advocate v. Dingwall,[45] was originally limited to crimes of murder but later extended to lesser crimes (Topp, 1975; Gannage, 1981).

The innovation of "diminished responsibility", as an affirmative partial defence to murder, was introduced in English law by The Homicide Act of 1957.[46] This English legislative creation, providing for mitigation of punishment in murder cases where a defendant is mentally disordered although not insane, states in part:

> "Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising

[43] [1969] 4 C.C.C. (2d) 262 (S.C.C.).

[44] [1977] 26 C.C.C. (2d) 417 (S.C.C.).

[45] (1867), 5 Irv. 466.

[46] 5 & 6 Elizabeth 2 c.11 (U.K.).

from a condition of arrested or retarded development of mind or any inherent causes induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing".

The English doctrine of diminished responsibility, which ultimately reduces the crime from murder to manslaughter, is a question of fact to be decided by a jury. English juries are instructed by the Courts that what must be established is a mental state "bordering on insanity, although not reaching it; a mind so affected that the responsibility is diminished from full responsibility to partial responsibility"[47] or "not quite mad but a borderline case".[48]

In Canada,[49] there is no statutory enactment of the doctrine of diminished responsibility apart from S.216 of the Code with reference to infanticide. That is not to say, however, that such a doctrine does not exist in Canadian case law. Canadian courts, in fact, have developed a limited form of diminished responsibility which recognizes that there exist various mental disorders which fall short of insanity but nevertheless may operate to negate the defendant's capacity to form the requisite mental element, required for such an offence (Verdun-Jones, 1979; Gold, 1979).

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[47] H.M. Advocate v. Savage [1923] S.C.J. 49 at 51.

[48] R. v. Spriggs [1958] 1 Q.B. 270 at 276.

[49] This signifies one of the rare occasions where the Canadian Parliament did not follow the English lead (in the form of diminished responsibility). The McRuer Commission expressly decided against the introduction of diminished responsibility into Canadian criminal law.

More v. The Queen[50] was the first authoritative case in Canada to confront directly the issue of intent and mental disorder short of insanity. The Supreme Court of Canada expressly held "that the psychiatric evidence, although not tending to establish insanity, was nevertheless directly relevant to the question of whether the killing was 'planned and deliberate'" (Verdun-Jones, 1979:43) and that this determination is a question of fact that should have been left to the jury. The court, in essence, recognized the existence of what might be referred to as a "doctrine of diminished capacity" by reducing the offence of capital murder to non-capital murder. The More decision, supra, had a powerful impact on the development of subsequent case law and the notion of diminished responsibility in Canada (Gannage, 1981).

The progressive decision in More, supra, was expressly adopted in both McMartin v. The Queen[51] and R. v. Mitchell.[52] Subsequent cases clearly supported the principle that on a charge involving a crime of specific intent (such as murder), evidence of mental disorder short of insanity within S.16 may nevertheless negate an accused's capacity to form the specific intent to commit murder and thus reduces the murder to

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[50] [1963] S.C.R. 522.

[51] [1964] S.C.R. 484; [1965] 1 C.C.C. 142 (S.C.C.).

[52] [1965] 1 C.C.C. 155 (S.C.C.).

manslaughter.[53]

While the above line of authority in Canadian case law seems to indicate an outright acceptance of a limited form of diminished responsibility there exists, however, a line of opposing case law which expressly disclaims the existence of any such doctrine.[54] These decisions reflect the conservatism of our courts.

Despite the Supreme Court of Canada's unanimous decision, in Chartrand v. The Queen,[55] to reject the defence of diminished responsibility, it should not be considered as conclusive authority since the lack of intent was never specifically raised in this case (Gannage, 1981; Stuart, 1982). More significantly, the Court did not discredit or overrule the line of authority which recognized the defence of diminshed responsibility (Ferguson, 1982).

It has been speculated that the Court's basic reluctance to recognize diminished responsibility as an affirmative defence is attributed to the fear "that once the proverbial floodgates are opened, the courts will be deluged with such pleas...the courts

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[53] R. v. Blackmore (1967), 1 C.R.N.S. 286; R. v. Baltzer (1974), 27 C.C.C. (2d) 118; R. v. Meloche (1975), 34 C.C.C. (2d) 184 (Que. C.A.); R. v. Browning (1976), 34 C.C.C. (2d) 200 (Ont. C.A.); Lechasseur v. The Queen (1978), 1 C.R. (3d) 190 (Que. C.A.); R. v. Hilton (1977), 34 C.C.C. (2d) 206 (Ont. C.A.).

[54] Mulligan v. The Queen [1977] 28 C.C.C. (2d) 266; [1977] 1 S.C.R. 612; R. v. Wright (1979), 48 C.C.C. (2d) 334 (Alta. C.A.); Chartrand v. The Queen, [1977] 26 C.C.C. (2d) 417 (S.C.C.).

[55] [1977] 26 C.C.C. (2d) 417 (S.C.C.).

seem to have opted for certainty, rather than to venture into an unknown area that could result in the opening of Pandora's box" (Topp, 1975:212).

Notwithstanding such considerations, many legal commentators feel that the crucial question remaining for Canadian Courts to consider is whether the doctrine of diminished responsibility in Canadian jurisprudence will be limited to offences of 'specific intent' rather than 'general intent', as is the common law defence of drunkenness (Verdun-Jones, 1979; Gannage, 1981; Topp, 1975; Schiffer, 1978; Reynolds, 1979; Mewett & Manning, 1978).

Evidence, Burden of Proof and Onus

In Canada, a presumption of sanity is established by S.16(4) of the Code, which provides that, until the contrary is proved, everyone is presumed to be and to have been sane.

It is a further established principle, in Canadian case law, that the party raising insanity as an issue (be it the defence or the prosecution)[56] must prove it on the civil standard of "a balance of probabilities"[57] rather than on the normal criminal standard of "beyond a reasonable doubt".

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[56] R. v. Simpson, (1977) 35 C.C.C. (2d) 337.

[57] Clark v. The King [1921] 2 W.W.R. 446; Smythe v. The King [1941] S.C.R. 17; R. v. Gibbons [1946] O.R. 464; R. v. Latour [1951] S.C.R. 19.

Once an accused's state of mind has been put in issue by the defence, the principle that the Crown may adduce medical evidence of the Defendant's insanity is clearly established in R. v. Kemp[58] and confirmed in Bratty v. A.G. Northern Ireland.[59] This principle has been followed in Canada. However, in Canada, the Crown is not restricted to raising the insanity defence only in cases where the accused has put his state of mind in issue.

Normally, the defence of insanity is raised by the defence; however, recent Canadian decisions have held that the Crown is entitled to lead evidence of an accused's insanity even if the Defendant has not raised insanity as a defence.[60] It is significant to note the severe restrictions, set upon the Crown's power to adduce evidence of insanity. In R. v. Simpson, [61] the Court emphasized that the Crown may only raise the issue of insanity where the evidence is "significantly substantial" and creates a "grave question" whether the accused had the capacity to commit the act. This reasoning was adopted in Regina v. Dickie,[62] In the recent Ontario Court of Appeal decision,

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[58][1957] 1 Q.B. 399.

[59][1961] 3 W.L.R. 965 (H.L.).

[60]In England (in Bratty v. A.G. Northern Ireland) it is well established that the Crown can only adduce evidence to establish a defence of insanity where the accused has put his state of mind in issue. This is also the case in the United States. Note that Canadian Courts have departed from the English approach.

[61] (1977), 35 C.C.C. (2d) 337.

[62](1982), 63 C.C.C. (2d) 151 (Ont. Co. Ct.).

Regina v. Saxell[63], it was ruled that there are certain factors which a trial judge must consider when determining whether leave should be granted to the Crown to raise insanity, when the accused has chosen not to do so. The judge must ask whether there is persuasive evidence of guilt and substantial evidence of the accused's insanity, and must show regard for the seriousness of the charge and the dangerousness of the accused.

The Court held, in R. v. Frank,[64] that the Crown could introduce rebuttal evidence of insanity even though the defendant did not wish to put his mental state in issue and had explicitly denied insanity. In R. v. Simpson, supra, the Ontario Court of Appeal held that a trial judge must put the defence of insanity to the jury, if there is sufficient evidence for them to consider it, even if the Defendant has disclaimed the defence and the Crown is not alleging that the Defendant has put his state of mind in issue.

If there is evidence of an accused's insanity, and neither the defence nor Crown has alleged it, a trial judge is still bound to direct a jury to weigh the evidence on a balance of probabilities. If the evidence met that onus of proof, then the special verdict of "not guilty by reason of insanity" must be

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[63](1981), 59 C.C.C. (2d) 176 (Ont. C.A.).

[64][1971] 2 C.C.C. (2d) 287.

[65]Cooper v. The Queen, above note 36.

entered.[65] In R. v. Talbot,[66] the trial judge himself called witnesses to testify as to the defendant's sanity.

Disposition

The right to custody of all persons found "not guilty by reason of insanity" is assumed under Federal authority in criminal cases and then delegated to the Provincial Lieutenant-Governor, who derives his authority from the Criminal Code and not from any vestige of Royal prerogative (Jordan, 1983).

The criteria for disposition following a special verdict of "not guilty by reason of insanity" are set out in S.542, S.545, S.546, and S.547 of the Criminal Code.

S 542(2) states that if a defendant is found insane, the Court "shall order that he be kept in strict custody...until the pleasure of the Lieutenant-Governor of the Province is known". Under S.542(2), an insane defendant's mandatory detention is justified and not subject to habeas corpus until the Lieutenant-Governor "makes known his pleasure" (Schiffer, 1978:125-26). If the Lieutenant-Governor fails to make known his pleasure within a reasonable time, he may be compelled to do so by way of mandamus (Schiffer, 1978:124).

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[66] (1977), 38 C.C.C. (2d) 560 (Ont. H.C.).See, also, Regina v. Irwin (1977), 36 C.C.C. (2d) 1 (Ont. C.A.).

S.545(1) establishes that the Lieutenant-Governor may make an order "for the safe custody of the accused" or for "discharge of the defendant either absolutely or subject to conditions".

In Canada, in almost all instances where an accused is found insane, a warrant for committal to a psychiatric institution is issued by the Lieutenant-Governor. These Lieutenant-Governor's Warrants (referred to as LG Warrants) are for the indefinite detention of the accused. S.546 provides the Lieutenant-Governor with absolute discretion regarding the release of the insane defendant.

S. 547(1) establishes that the Lieutenant-Governor may appoint a board of review to assist in the evaluation of those detained under LG warrants.[67] While such an advisory board, if appointed, can make recommendations for release of LG warrant patients, the Lieutenant-Governor is not bound by their decisions. The review board reports whether, in its opinion, the person has recovered and whether it is in the public interest to discharge the detainee either absolutely or conditionally. If the Lieutenant-Governor chooses to reject an application for release, such discretion is not judicially reviewable (Schiffer, 1978). The only judicial comment in point is expressed in Re Brooks Detention[68] as follows:

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[67] This function is not mandatory. Each case is reviewed every six months by the board. The board must consist of between three and five members, at least one of whom must be a psychiatrist and at least one of whom must be a lawyer.

[68] (1961), 38 W.W.R. 51.

> "I am...firmly of the view that the Lieutenant-Governor cannot exercise his discretionary powers in any arbitrary fashion.... If an arbitrary decision were made, I feel that the matter could then be reviewed by way of habeas corpus under the common-law right of the court to intervene where the liberty of the subject is involved" (Re Brooks Detention at 53).

While it was clearly recognized in Re Abel et al and Advisory Review Boards[69] that advisory boards have a duty to act fairly, the Court did not hold that the Lieutenant-Governor must act fairly in his decisions regarding the detention or release of an insane defendant.

In Re McCann v. the Queen,[70] the Court of Appeal in a commendable fashion, held that the ad hoc review board's recommendations must be reached upon the basis of procedural fairness. It is arguable whether the B.C. Court of Appeal held that the Lieutenant-Governor was required to observe such principles of natural justice.

In the most recent civil rights case of R. v. Saxell,[71] the Ontario Court of Appeal overruled the decision of the lower Court that S542(2) was inoperative by reason of the Canadian Bill of Rights' guarantees of equality before the law; due process; protection against arbitrary detention and imprisonment; and/or cruel and unusual punishment. The Superior Court held that the detention of the defendant is justified on the basis of protection of the public and treatment of the

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[69](1981), 56 C.C.C. (2d) 153 (Ont. C.A.).

[70](1982), 67 C.C.C. (2d) 180 (B.C.C.A.).

[71](1981), 59 C.C.C. (2d) 176 (Ont. C.A.).

defendant. Furthermore, the Court held that the trial judge had no jurisdiction to determine whether, how long, and where an accused is to be detained.

In light of the now entrenched Canadian Charter of Rights and Freedoms, it remains open for the Courts to decide whether the findings in Saxell, supra, indeed contravene such fundamental freedoms.

IV. The Role of Psychiatrists in Insanity Defence Trials: A Major Source of Contention

> "What could they have possibly seen in each other; they are so different. He, the law, is so formal, rigid, and traditional. She, psychiatry, is so flighty, expansive, and unconventional. His style is objective and moralistic; her style is subjective and nonjudgmental...anyone who really knew them both could have told you it would never last".
>
> Professor Alan Stone (1982:15)

McNaughtan's Case, which spawned the substantive law of insanity in most common law jurisdictions of the world, also, gave psychiatrists a prominent role in the administration of the insanity defence. The interplay between law and psychiatry constitutes a major source of contention and controversy in criminal law. The vast academic literature on the insanity defence abounds with debate concerning the intermingling of these two disciplines and confronts forensic psychiatrists and legal practitioners with ethical dilemmas that defy easy resolution. Because of the profoundly irreconcilable and problematic nature of the union between law and psychiatry, proponents for abolishing the insanity defence invariably argue against the participation by psychiatrists in insanity defence proceedings.

This chapter will examine, firstly, the role of the psychiatrist as an "expert witness" in an insanity defence trial as defined by both the rules of evidence and the rules of

substantive criminal law; and, secondly, focus on the ethical dilemmas created by this liaison; the utility of psychiatric testimony; the scientific imprecision of psychiatric assessment; and the proposed reforms.

The cause celebre of John Hinckley, Jr. touched off a nationwide furore about insanity and the criminal law in the United States and refuelled the debates, concerning mental illness and criminal responsibility. At the heart of the renewed controversies is the uneasy alliance between law and psychiatry.

Hinckley's 'acquittal' by reason of insanity triggered a flood of anti-psychiatry literature.[1] A psychiatrist-commentator, Willard Gaylin,[2] expressed this negative view of psychiatric involvement in insanity proceedings:

> "Too many of these witnesses become advocates, and that means abandoning their proper roles. To be a physician and advocate, to see ambiguity everywhere and feel committed to express certitude will inevitably undermine the integrity of the witness and confound the purpose of justice" (Newsweek, May 24, 1982:60).

Professor Alan Stone, of Harvard Law School, describes the sight of competing psychiatrists testifying for and against a defence of insanity as "clowns performing in a three-ring circus"[3]

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[1]Proponents of the insanity defence (who generally favour psychiatric participation in the adversarial process) applauded the Hinckley verdict (Time Magazine 1982:22; Stone, 1982).

[2]He does point out, however, that to make matters worse, lawyers vary widely in their abilities to use expert witnesses skillfully.

[3]The debate has been carried back and forth on such matters as the "battle of experts", "psychiatric-shopping", the "hired gun" and "prostituting for a fee" image of some forensic

(Time Magazine, July 5, 1982:24). Another observer had these forceful comments about the relationship of psychiatrists and the adversarial process:

> "The jury...they listen to half the psychiatrists testify that the customer was insane and to the other half swear he was mentally fit,...in effect, the jury is not judging the defendant; it's judging the psychiatrists. Of course the jury may also judge that all psychiatrists are unreliable and decide the case on the basis of whether they like the defendant's looks or not"(New York Times, June 23, 1982:A27).

The Hinckley verdict also elicited the opinion that the courtroom is the wrong arena for psychiatric expertise.

> "The entire psychiatric profession looks absurd when two experts deliver semi-intelligible testimony so mutually contradictory that it is hard not to suspect that at least one of them is a quack" (National Review, July 9, 1982:812).

Recent decades have witnessed the emergence of psychiatry from a developing behavioural science to a profession that wields an enormous and pervasive influence on society. In criminal trials, the need for psychiatric opinion evidence in determining the legal status of an offender is becoming commonplace today. "The psychiatric expert has become a tactical (if not a legal) necessity in the insanity trial" (Schiffer, 1978:31).

Having attempted to establish the legal criteria for 'insanity', the Courts then invite the forensic psychiatrists - the so-called 'experts' on human behaviour - into the adversarial arena. The policy underlying the relationship of the

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[3](cont'd) psychiatrists (Stone, 1982).

Courts and psychiatry is founded, according to Szasz (1961), on two basic tenets: to escape from the guilt feelings associated with meting out punishment, and to improve the administration of justice.

Szasz describes the relationship between the Courts and psychiatry as follows:

> "The guilt-relieving function of the law is especially important when psychiatric testimony is sought about criminal responsibility...since the rules of criminal procedure specify that an insane defendant should not be punished, the Court must, especially if there is doubt, have adequate assurance of the offender's sanity. The responsibility for this judgment has been placed on the shoulders of the psychiatrist. In effect, then, the psychiatrist is asked by the Court to give it assurance that it can proceed with punishment without feeling guilty" (1963:112).

In the insanity trial, psychiatrists are usually called as 'expert' witnesses, by either the defence or the prosecution, to aid the court in an evaluation of the mental state of an accused person (Bromberg, 1969:1343).[4] The psychiatrist is directed toward the specific task of providing information about an accused so that the jury could render the ultimate moral judgment about his blameworthiness (Bazelon, 1974(a):21). One contemporary writer succinctly states:

> "One of the major functions of the nineteenth and twentieth-century psychiatrist has been to assist judicial authorities in making decisions as to who is to be punished and who is to be treated as a mental patient" (Halleck, 1966:379).

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[4] As discussed earlier in Chapter III, in Canada, the judge can also call expert witnesses to testify (see R. v. Talbot (1977), 38 C.C.C. (2d) 560 (Ont. H.C.).

Underlying psychiatric involvement in the insanity defence trial, is the basic assumption that "the unreasonable man is a sick man and that a sick man is not responsible for his actions" (Halleck, 1966:383). Thus, the use of the psychiatrist in determining criminal responsibility flows from humanitarian sentiments to temper the harshness of punishment and, in effect, to humanize the rule of law. Furthermore, it is premised on the assumption "that psychiatrists are 'expert' at resolving the issues...and that psychiatric opinions and terminology assist the judge or jury in reaching accurate and humane decisions" (Ziskin, 1975:202).

The psychiatrist, who testifies in a case where the insanity plea has been raised, is essentially asked to give his opinion as to whether, at the time of the crime, the accused appreciated the nature and quality of the act and/or knew that it was wrong. In other words, the expert opinions that psychiatrists are asked to render, are given in order to satisfy the criteria of the 'legal' test of insanity. As Mr. Justice Dickson astutely pointed out, in Cooper v. The Queen,[5]

> "Section 16 of the Criminal Code does not set out a test of insanity but, rather the criteria to be taken into account in determining criminal responsibility".

Thus, a legal, not medical determination, must ultimately be made.

Once the forensic psychiatrist enters the adversarial arena to participate in criminal proceedings, involving an insanity

[5] (1980), 51 C.C.C. (2d) 129 (S.C.C.).

plea, the juxtaposition of medical definitions of "mental illness" and legal definitions of "insanity" raises considerable dilemmas.

The McNaughtan Rules, with their emphasis on cognition - knowing the nature and quality of the act, knowing that the act was contrary to law, pose impossible questions for psychiatry (Ormrod, 1975:196). Halleck (1966:387) claims that "the obvious difficulty with the rule is that practically everyone, regardless of the degree of his emotional disturbance, knows the nature and quality and rightness or wrongness of what he is doing". Psychiatrists have rightly pointed out that it is almost impossible for them to testify honestly under this rule.

> "Whenever a psychiatrist is called upon to testify, under the McNaghten Rule of a knowledge of right and wrong, as to the sanity or insanity of a Defendant, the psychiatrist must either renounce his own values with all their medical-humanistic implications, thereby becoming a puppet doctor, used by the law to further the punitive and vengeful goals demanded by our society; or he must commit perjury if he accepts a literal definition of the McNaghten Rule. If he tells the truth stating on the witness stand that just about every defendant, no matter how mentally ill, no matter how far advanced his psychosis, knows the difference between right and wrong in the literal sense of the phrase he becomes an expeditor to the gallows or gas chamber" (Diamond, 1961:60-61).

Because the McNaughtan Rules recognize only one aspect of that personality - cognitive reasoning - as the determinant of conduct, many psychiatrists have claimed that they ignored the modern dynamic understanding of man as an integrated personality, "Manifesting non-rational and irrational as well as rational, compulsive as well as volitional behaviour; and that

ultimately, psychiatrists were forced to testify on whether or not an accused knew right from wrong and hence to decide the ultimate issue of moral responsibility, which should be left to the jury" (Bazelon, 1974(a):20).

The association between law and psychiatry is aggravated when experts blur the distinctions between legal and medical concepts. In some cases, psychiatrists are not sufficiently aware of the task that the legal system imposes on them; thus, they fail to distinguish between determinations of mental status, and the legal statuses to which the mental statuses must be related (Poythress, 1977; 1982). Commenting on why many psychiatrists often shun the courtroom, one psychiatrist succinctly explains:

> "A fundamental problem is that for the most part the law seeks clear-cut 'yes-no' decisions, while the psychiatric evidence is often an in-between 'maybe'" (Cooper, E., 1980:10).

The adversarial system's "mad-bad" dichotomy creates dilemmas for lawyers and experts. Psychiatric experts who often couch their evidence in esoteric medical jargon may be viewed by lawyers as "fuzzy apologists for criminals" and lawyers who conduct strenuous and sometimes embarrassing cross-examinations may be viewed by psychiatrists as "devious and cunning phrasemongers" (Strauss, 1972:77-90).[6]

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[6] See, United States v. Brawner, 471 F.2d 969,1036-37 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part)(noting that the psychiatrist's testimony is particularly vulnerable to cross-examination and is easily ridiculed in closing argument).

Many legal practitioners advocate throwing the psychiatrists out of their "temple of law". Meanwhile, there is growing sentiment in the psychiatric establishment that it was led on, exploited, and humiliated by its liaison with the law (Stone, 1982).

Ordinarily, if a forensic psychiatrist determines that a defendant is 'mentally ill', the Courts would be most reluctant to punish, because implicit with a 'mentally ill' label is the notion that one is already suffering. This, of course, precludes any punitive action being meted out by the Courts because "our collective conscience does not allow punishment where it cannot impose blame" (Halleck, 1966:380).

Dr. Thomas Szasz, the pioneering psychiatrist[7] and outspoken critic of psychiatry, questions the long-standing assumptions of psychiatry and the ethics of participation in the insanity defence. Because mental illness is a myth, Szasz (1961; 1963) contends that psychiatric diagnoses are merely medical labels that stigmatize patients and that the rhetoric of psychiatry is used as a means of social control, by offering a "cloak of scientism" to justify policy decisions.

The rationale of the Courts is such that "if the offender is too sick to be punished then surely he is sick enough to be treated for his disease" (Szasz, 1963:144). Szasz, who views

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[7] It is well-documented that some of the most prominent and severest critics of psychiatry come from their own ranks (Ziskin, 1978; Halleck, 1966; Fersch, 1980; Ennis and Litwack, 1977).

psychiatry as an institution which is a repressive social agency, whose aim is to control certain types of social deviation, criticizes this system of "game rules" as a "callous game":

> "While psychiatric testimony frequently inhibits overt punishment, it fosters punishment disguised as therapy...he is not punished by imprisonment for a specified period of time, but instead by incarceration in a mental hospital for a term not specified in advance and possibly lasting for life" (1963:114).

In more recent writings, Szasz (1977; 1979), argues that the involuntary detention of those acquitted by reason of insanity is the nation's newest form of slavery:

> "The insanity plea and the insanity verdict, together with the prison sentences called "treatments" served in buildings called "hospitals," are all part of the complex structure of institutional psychiatry which...is slavery disguised as therapy" (1970:112; 1977:105).

Ziskin (1975), another prominent critic and known "anti-expert" expert, concluded that the literature is overwhelming to the effect that psychiatrists cannot reliably and accurately determine mental condition at the time of the examination, let alone the prior time when the crime was committed; and to have forensic psychiatrists provide alleged expert opinion about the accused's mental condition at a point in the past is to "force the court to countenance conjecture in the guise of expertise" (Fersch, 1980).

Hakeem dogmatically asserts that psychiatrists are frequently in disagreement over their diagnosis, observations, and theories and that "psychiatrists are in disagreement on whether they are in agreement or in disagreement on the subject"

(1958:650). Commenting on their expertise in matters before the Court, he alleged that:

> "Psychiatrists have not attained the level of competence and scientific reliability and validity necessary to make their testimony eligible for serious consideration by the Courts...psychiatry does not have knowledge that would be helpful in the administration of justice...they have succeeded because they now possess more social power than they had in the past" (1958:650).

While acknowledging that a psychiatrist can be a valuable resource in a criminal trial, one commentator suggests that most expert witnesses involved in insanity defences lack elementary knowledge of the legal setting and the particular behaviour about which they are testifying; thus, "the average psychiatrist is better equipped to perform surgery than to testify in an insanity trial" (Tanay, 1981:127).[8]

Rules of Evidence

The role of the forensic psychiatrist, as an expert witness in the adversarial process, is bound by conventional rules of evidence. "Well-established rules of evidence govern the nature of expert evidence and its mode of presentation" (Diamond & Louisell, 1965:1335). In theory, the ordinary rules of evidence are logical and necessary devices established "to ensure that the expert is not drawn into issues that do not concern him or

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[8] It is significant to note that Tanay does not confine his criticisms to only psychiatrists. He attributes blame as well on inexperienced lawyers and judges and contends that insanity defence trials are often a tragicomedy of errors and incompetence.

that could be better determined by other kinds of witnesses giving other kinds of evidence" (Diamond & Louisell, 1965:1336). An exception to the traditional rules of evidence has been created to permit the psychiatric expert to testify in Court as to their opinions, conclusions, and judgments (Ennis & Litwack, 1974:735).

The expert witness has a special role in the insanity trial according to Bazelon (1974(a):19) - he is the only witness (in certain circumstances) who is allowed to testify to a conclusion as well as to the facts (McWilliams, 1974). If the sanity of the accused is in issue, evidence as to the 'state of mind' of the offender is both relevant and admissible. The forensic psychiatrist is the only expert who is asked to form opinions as to a man's responsibility and man's punishability (Halleck, 1966:393).[9]

The general rule, regarding the qualifications of experts, is that expert testimony will not be admissible unless:

1. the subject-matter of the trial or inquiry involves issues beyond the competence of a lay jury to determine if unaided by such experts; and,
2. the witness' expertise was gained through a course of study or habitual practical experience (Schiffer, 1978:196-97).

This specific rule calls for psychiatrists to testify only on

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[9] That is to say, is a man responsible in terms of a legal test? If an accused is found 'not guilty by reason of insanity' then he ought not be punished because he is not 'responsible' within the meaning of S.16 of the Criminal Code.

issues beyond the competence of laymen. Courts have evolved the rule that an expert's opinion is admissible only if his skill, with respect to the subject of testimony, is greater than that of the jury - outside the jury's realm of knowledge (Manning & Mewett, 1976:341).

> "If the expert is qualified in his field, the implication is that the opinion he is expressing is one which the triers of fact could not themselves have formulated...so when a psychiatrist expresses his opinion that an accused was insane at the time he committed an act, he is lending his special knowledge to the jury to aid them in performing their function" (Schiffer, 1978:199).

In insanity defence trials, through established rules of evidence, it is, therefore, well settled that psychiatric testimony is admissible to prove that an accused was at the time of the offence incapable of forming the necessary intent to commit the crime (McWilliams, 1974:160).[10]

It is not enough that the expert witness may possess specialized knowledge or qualifications, however; his evidence must be in the nature of "opinion evidence". It is the function of the Court to decide whether the testimony given is, in fact, in the category of "opinion evidence" - an opinion on facts already proved involving scientific or technical knowledge. Further criteria are that such evidence is relevant and that it is not superfluous.

"The Court must look not only to the witness himself, to

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[10] In insanity defence trials, this allows a jury to implement the doctrine of 'diminished responsibility' to reduce the degree of responsibility of an accused - i.e., from murder to manslaughter.

> consider whether he is a professional or other expert, but even more to the character of his evidence, to decide whether it is in the category of opinion evidence. The fact that a witness may possess specialized knowledge or qualifications not possessed by the ordinary witness is not decisive of the matter. Unless his testimony was also in the nature of opinion evidence, that is an opinion on facts already proved scientific or technical knowledge, it is not expert evidence within the limitation of S.7 testimony, even of a person possessing special skills, is not expert testimony if it merely establishes the proof of facts through the employment of such special skills" (McWilliams, 1974:165).

The conventional rules of evidence governing admissibility of expert testimony centre around three matters - hypothetical question, hearsay, and ultimate issue.

The form of the hypothetical question, first formulated in McNaughtan's Case, is used in insanity defence trials as a means of eliciting psychiatric opinions about an accused's state of mind. The hypothetical question, by premising the facts upon which the question is framed for an opinion, avoids the determination of truth of those facts and leaves that for the court to decide so that, if a decision is contrary to the premises of the hypothetical question, the Court will be in a position to reject the opinion. A skilled witness cannot, in strictness, be asked his opinion respecting the very point which the jury is to determine, but he may be asked a hypothetical question such as: "Assuming the following facts to be true, what would your opinion of the accused's mental state be, doctor?" which in effect will determine the same question (McWilliams, 1974:155).

The strictness of this rule is premised upon the need to restrict the information being admitted to the jury. Some authorities claim that this legal practice is a great source of irritation to some psychiatrists. The psychiatrist is asked, in effect, to respond to hypothetical questions in which the lawyer describes situations the expert believes have no bearing on the particular proceedings, or that illustrate points contradictory to the specific case (Simon, 1967:81).

The Supreme Court of Canada has ruled, in Bleta v. The Queen,[11] that, where the facts upon which the "hypothetical question" would be based are not in dispute, the expert witness may be asked directly for his opinion. Mr. Justice Ritchie, commenting for the majority, held as follows:

> Provided that the questions are so phrased as to make clear what the evidence is on which an expert is being asked to form his conclusion, the failure of counsel to put such questions in hypothetical form does not of itself make the answer inadmissible. It is within the competence of the trial judge in any case to insist upon the foundation for the expert opinion being laid by way of hypothetical question if he feels this to be the best way in which he can be assured of the matter being fully understood by the jury, but this does not, in my opinion, mean that the judge is necessarily precluded in the exercise of his discretion in the conduct of the trial from permitting the expert's answer to go before the jury if the nature and foundation of his opinion has been clearly indicated by other means".

According to the "Proof of Premises rule", an expert witness ought to state to the Court the premises of fact, on which he bases his opinion, so that the jury may assess that opinion after they have decided the issues of fact. "Facts on

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[11] [1965] 1 C.C.C. (2d)1, at p.6.

which an expert opinion is based must somehow be proved...an expert opinion is of value only to the extent that it is based on facts which are shown to be true" (McWilliams, 1974:152).

The law concerning "secondary sources of information" in Canada has now been settled. In the Supreme Court of Canada decision, The Queen v. Abbey,[12] in which one of the issues raised by the Crown concerned the evident reliance by the trial judge upon some of the secondary evidence, which formed the basis for the psychiatric opinions offered by the expert witness, Mr. Justice Dickson ruled as follows:

> "While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the fact upon which the opinion is based must be found to exist" (at p.22).

As a result of the Abbey ruling, supra, it will now be necessary to call the accused to testify as to his own state of mind (at or near the time of the commission of the crime) if the psychiatric opinion tendered in support of his insanity is based upon his own account of that state of mind to the expert witness (Wood, 1982). However, it is possible to introduce the defence without calling the accused if, there exists sufficient original evidence of his state of mind, so as to make it unnecessary for

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[12] [1983] 1 W.W.R. 251; (1982), 68 C.C.C. (2d) 394. Prior to Abbey, the practice in Canada was that secondary sources of information relied upon by expert witnesses were related in evidence with little if any questions raised as to such a procedure.

the expert to rely upon anything he may have told him during pre-trial assessments (Wood, 1982).[13]

The strictness[14] of the "hearsay rule" is founded on the law's expectation that the expert base his opinion only upon first-hand observation. An exemplification of the issue of hearsay is evidenced in R. v. Arbuckle[15] and R. v. Rosik,[16] wherein it is articulated that "if hearsay evidence is relied upon by the expert the judge should warn the jury that the hearsay cannot be regarded as proof of the truth of what was said, but can only be considered for the purpose of appraising the resulting opinion...if the premises on which the opinion is substantially based have not been proved (based on hearsay) they should attach little weight to the expert's opinion" (R. v. Arbuckle, at 41).

The attempt by the rule to exclude third party information has evoked severe criticism. "Psychiatric evidence is based upon the psychiatrist's observation and analysis, and its admissibility should not be governed by the hearsay rule, but rather it should be treated as an exception to the rule"

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[13]This ruling only takes effect if the defence of insanity is contested by the Crown. Of course, if it is not, the Abbey ruling will have no application.

[14]While in theory the hearsay rule appears to be strict, it is not, in practice. The policy seems to be such that, if the basis of opinion is clear, nobody would normally object.

[15](1967), 2 C.C.C. (2d) 32 (B.C.S.C.).

[16](1970), 2 C.C.C. (2d) 351; [1971] 14 C.R.N.S. 400 (S.C.C.).

(Silverman, 1972:168).[17] In addition, it has been argued that it is essential that psychiatrists rely on statements of the accused, facts and opinions gathered from friends, relatives, as well as observations and opinions of other professionals, in order to formulate his own opinions of the patient's mental condition and therefore the implementation of the hearsay rule restricting admissibility of evidence may be arbitrary and capricious (Diamond & Louisell, 1965:1350-53).

It is a general rule of evidence that an expert cannot usually be asked to express an opinion upon any of the issues, whether of law or fact which the jury have to determine; however, according to the proposed Canada Evidence Act[18], a witness may give opinion evidence, that embraces an ultimate issue to be decided by the trier of fact, where:

1. the factual basis for the evidence has been established;
2. more detailed evidence cannot be given by the witness; and
3. the evidence would be helpful to the trier of fact.

Inherent problems arising from the use of psychiatrists as expert witnesses in the courtroom centre around controversial issues such as privilege, self-incrimination, full-disclosure, and confessions.

A particular dilemma confronting the psychiatric expert is the matter of testimonial privilege. The law is clear that there

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[17] Whether one finds this approach compatible - an attitude which is rather trusting of psychiatric evidence - is an open question.

[18] Bill S-33, Section 36, 1980-81-82.

is no privilege that affixes to a relationship between a psychiatrist and patient and judges have consistently denied that a privilege should attach to communications made within the doctor-patient relationship.[19]

In the courtroom, psychiatrists are compelled by law to reveal any communication and admissions made by an accused-patient. Manning & Mewett apprehend that:

> "Psychiatric examination is unlike examination or being questioned by police officers in that the accused is psychologically trusting of the psychiatrist. He or she will feel that the psychiatrist is there to assist the accused rather than to hurt the accused...there are many accused who are surprised to find the psychiatrist, to whom they have freely spoken, standing in the witness box and testifying against them" (1976:350).

Diamond & Louisell, on this point, were moved to remark:

> "Psychiatry, with its special investigatory devices of persuasion, insinuation into a subject's confidence, lie 'detection', hypnosis, 'truth serums', projection tests and other procedures, can flagrantly violate basic constitutional and other personal rights" (1965:1335).

A further exemplification of this issue would be the case where a defence-retained psychiatrist turns 'double agent' (Schiffer, 1978:32).

In Canada, while many arguments have been made in favour of recognizing a psychiatrist-patient privilege, to date, they have

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[19] Wheeler v. LeMarchant (1881), 17 L.R. Ch. D. 675 (C.A.); A.G. v. Mulholland; A.G. v. Foster, [1963] 1 All E.R. 767 (C.A.).

not succeeded in changing the present law (Ho, 1980; Tacon, 1979).[20] There is, however, some proposed legislation pending which would recognize a form of privilege for psychiatric assessment in Canada.[21] S.165 reads as follows:

> "Any statement communicated by an accused to a qualified medical practitioner during the course of a court-ordered psychiatric observation, examination or assessment is privileged and, unless the accused has first put his mental condition in issue, no evidence of or relating to that statement is admissible against the accused in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence, other than a hearing to determine the fitness of the accused to stand trial or conduct his defence".

The concept of self-incrimination is another contentious issue and one of great concern for many psychiatrists. In compulsory psychiatric examinations, if an accused should reveal to his psychiatrist information which may be damaging to his own defence, serious evidentiary and ethical implications arise. Will (and should) any statements obtained, under such circumstances, be admissible as evidence against an accused at this trial? (Schiffer, 1978:36). "In Canada, it would appear that the concept of self-incrimination has no application whatsoever to pretrial statements made to persons in authority"

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[20] See Ho's (1980) comprehensive discussion in favour of extending a testimonial privilege over inculpatory statements made during psychiatric examinations and Tacon's (1979) argument that admissions, confessions and other inculpatory statements made by the accused during a compulsory mental examination be made inadmissible in evidence at trial. See, also, Dickens' (1978) cogent discussion of these matters.

[21] Canada Evidence Act, Bill S-33, Section 165, 1980-81-82.

(Ratushny, 1973:9).[22] Furthermore, some commentators have concluded:

> "It seems clear enough that in each individual case the facts must be looked at and the subjective test applied to determine whether or not a psychiatrist is in law a person in authority. If a psychiatrist is found to be a person in authority..., the ordinary confession rules should be applied to determine whether or not any statement made by the accused was freely and voluntarily made" (Manning & Mewett, 1976:349).

The sensitive issue of "full disclosure" creates a further dilemma for the forensic psychiatrist. While it has been espoused that in the courtroom "good psychiatric testimony generally is compatible only with full disclosure...", a serious conflict arises, "can, and should society permanently afford a defence based primarily on psychiatric evidence when the defendant simultaneously relies on the privilege against self-incrimination?" (Diamond & Louisell, 1965:1347-49).

In addressing these problematic issues, some analysts succinctly postulate as follows:

> "Because of the nature of the communication made between a psychiatrist and a patient, and because of the nature of the statements made on remands for psychiatric examination and the need for an accurate assessment, it would appear that the law must develop in other ways to accommodate these different situations" (Manning & Mewett, 1976:352).

More significantly, do the rules governing the matters of privilege, self-incrimination, full-disclosure, and confession lead to a flagrant violation of the accused's fundamental constitutional rights? Moreover, do they constitute a blatant

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[22] See Regina v. Sweeney (No.2) (1977), 35 C.C.C. (2d) 245 (ont. C.A.), for a discussion on this point.

infringement of a psychiatrist's professional ethics? It is evident from the lack of development in the law in these areas that, to date, the evidentiary and ethical questions remain unanswered.

One commentator has gone so far as to suggest that the fairest and most logical solution, to overcome the potential prejudices to the accused, would be to eliminate the compulsory pre-trial psychiatric investigations or to direct that psychiatric examinations should entail such basic safeguards as a Miranda type warning and the right to have counsel present (Schiffer, 1978:50).[23]

Reliability of Psychiatric Assessments

While the historical evolution of the insanity defence has been strongly influenced by scientific understanding of mental illness and its relationship to criminal conduct, the academic community continues to question the scientific basis for psychiatric assessment of volitional responsibility (Bonnie, 1983). In their relentless attacks, many have argued that psychiatric predictions and opinions are notoriously unreliable and are no more valid than those of laymen (Halleck, 1971; Ericson, 1976; Ziskin, 1975) and that "most specific diagnoses do not accurately describe even those symptoms perceived by the examiner, to say nothing of the actual symptoms exhibited by the

[23]See, also, the suggestions made by Tacon (1979).

patient" (Ennis & Litwack, 1977:709-10).

Critics further complain that experts often fail to reveal the factual basis for their testimony. The most complete statement in point is that of Judge Bazelon, who commented:

> "Psychiatry, I suppose, is the ultimate wizardry. My experience has shown that in no case is it more difficult to elicit productive and reliable expert testimony than in cases that call on the knowledge and practice of psychiatry.... One might hope that psychiatrists would open up their reservoirs of knowledge in the courtroom. Unfortunately in my experience they try to limit their testimony to conclusory statements couched in psychiatric terminology. Thereafter they take shelter in a defensive resistance to questions about the facts that are or ought to be in their possession. They thus refuse to submit their opinions to the scrutiny that the adversary process demands" (1974(a):18).

Some empirical studies have shown that because there are no specific guidelines for defining mental illness, diagnosis becomes dependent upon other factors - for instance, the individual perceptions and values of the psychiatrist and social class of the patient (Temerlin, 1970; Traficante, 1980; Rosenwieg et al, 1961; Redlich et al, 1953). If psychiatrists perceived a history of lower socio-economic status, they would be more likely to diagnose a greater degree of mental illness and a lesser likelihood of recovery (Temerlin, 1970). Another scientific study of the insanity defence clearly demonstrated that the value system of the judge and jury is far more important than either the evidence of the psychiatrist or the actual wording of the test of criminal responsibility (Simon, 1967). It is argued that the jury's determination of the mental state of an accused is largely governed by the credentials and

presentation of the psychiatric experts who testify (Kadish, 1968). Ennis and Litwack (1977) noted potential sources of bias in mental status assessments by psychiatrists. It has also been argued that the psychiatrist's training prepares him to look for and to see psychopathology, where it is expected to exist (Rosenhan, 1973).

The area most vulnerable to criticism, as evidenced by the extensive academic commentaries, is that of clinical predictions of dangerousness. Because psychiatric predictions of dangerousness is one of the most important judgments psychiatrists make, and furthermore, because it leads to involuntary commitment, it is imperative to recognize that such predictive ability is very limited in terms of reliability and accuracy. It has been repeated extensively in the literature that there is no body of knowledge on which psychiatrists can predict dangerousness (Ziskin, 1978; Fersch, 1980). The American studies and literature overwhelmingly support this contention (Steadman & Cocozza, 1975; 1978; Cocozza & Steadman, 1976; Steadman, 1973; Shah, 1975; Rubin, 1972; Diamond, 1976; Wenk et al, 1972; Petrila, 1982; Rice, 1977; Hinton, 1983; Maggio, 1981; Steadman & Morissey, 1981; and Pasewark, 1981; Dix, 1980; Rice, 1977; Fersch, 1980).[24]

[24]While there have been studies (Kastrup et al, 1977; Miller, 1976), which have reached the opposite conclusion, Maggio (1981), upon reviewing the literature, dismisses them as 'not reliable'. Monahan (1981) published a recent monograph to assist mental health practitioners to improve the appropriateness and accuracy of their clinical predictions of violence. He has argued that, under certain 'conditions and circumstances', prediction of short-term dangerousness is possible. See Webster

Based on their review of the professional writings, Ennis and Litwack (1977:696) have concluded that:

1. there is no evidence warranting the assumption that psychiatrists can accurately determine who is "dangerous"; and
2. the constitutional rights of individuals are seriously prejudiced by the admissibility of psychiatric terminology, diagnosis, and predictions, especially those of "dangerous" behavior.

There is, also, an abundance of Canadian literature which supports the contention that future violence by a mental patient cannot be reliably predicted by psychiatrists, or anybody else (Toews et al, 1980; Klein, 1976; Menzies et al, 1981; Quinsey & Boyd, 1977; Bartolucci et al, 1975; Browning et al, 1974; Quinsey, in Hucker et al, 1981).

The Law Reform Commission of Canada charges that "clinical predictions of dangerousness are at best suspect, and at worst, totally unreliable" (1976:59). There is a tendency for psychiatrists to ascribe mental illness to persons who have committed violent, aggressive, or destructive acts.[25]

The Law Reform Commission of Canada points out that virtually all recent research and data indicate no compelling reason for the criminal process to deal automatically with the mentally ill defendant more harshly and restrictively than sane persons. From their review of the relevant research, the Law Reform Commission of Canada found that:

[24](cont'd) et al (1982) for a summary of Monahan's treatise.

[25]This is based on actuarial as opposed to clinical predictions.

1. the incidence of mental disorder in prisons approximates that in society generally;
2. released prisoners who have a history of mental disorder are less likely to return to prison than normal prisoners;[26] and
3. the mentally disoriented do not exhibit a higher incidence of violent behaviour than the citizen of the community at large.

In summary, the Law Reform Commission of Canada contends that "no conclusive correlations have been found between mental disorder and dangerous violent conduct" (1976:59). This conclusion is consistent with Szasz's earlier argument that "there is no evidence that mental patients are more dangerous than non-mental patients" (1963:91).

Murphy, another skeptic of psychiatric predictability of dangerousness, forcefully comments:

> "The psychiatrist almost never learns about his erroneous predictions of violence. But he almost always learns about his erroneous prediction of non-violence - often from newspapers, headlines announcing the crime. The fact that the errors of underestimating the possibility of violence are more visible that errors of over-estimating inclines the psychiatrist, whether consciously, to err on the side of confining rather than releasing. His modus operandi becomes 'when in doubt, don't let him out'" (1973:239).

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[26] There is compelling empirical evidence to the contrary. Steadman et al (1978:816) found that the arrest rate among psychiatric patients were considerably higher than general population rates, primarily because of the large proportion of patients previously arrested. One additional finding was that the number of patients with prior arrests had increased markedly over the years. See, also, the thorough review by Rabkin (1979).

One commentator, (Hinton, 1983), upon his review of the most recent literature, concluded that there is gross overprediction of dangerousness by psychiatrists. Studies conducted by investigators have produced findings that, out of nine cases, eight are incorrectly diagnosed as "false positives" (Wenk, 1972:393), while others contend that there is no empirical support for the belief that psychiatrists can predict dangerous behaviour - even with "the most careful, painstaking, laborious, and lengthy clinical approach to the prediction of dangerousness, false positives may be at a minimum of 60% to 70%" (Rubin, 1972:397-98).

Authorities such as Dr. P.K. Lepperman, past president of Mental Health Ontario, and Dr. Merville, past president of the Ontario Psychiatric Association, both estimate there is evidence that only 1% of people in mental institutions are actually dangerous. They further claim that studies have also shown that the crime rate for mental patients is as low or lower than that of their fellow citizens of the same age and sex (Parthun, 1978:14).

Despite persistent warnings that often psychiatrists are playing wizard to the problems of society for which they have no expertise (Bazelon, 1974(b):1321), the tendency in contemporary society is not to get involved - to pay others to do our 'dirty work' for us, and to bestow them with the status of 'experts' so that we can feel relieved and persuaded that the problem might be solved. "Members of the community collaborate in this trend

by willingly giving over their resources, by accepting the definitions of the problem advocated by the experts, by not questioning the interests of the experts and by making little or no direct personal effort" (Ericson, 1976:366). Nevertheless, experts are not challenged and judges and juries, believing that psychiatrists are 'experts' usually defer to their judgments and recommendations (Ennis & Litwack, 1977:694).[27]

Reforms Conclusion

It is now clear that current attitudes of concerned mental health professionals and legal practitioners reflect the growing need and willingness to re-evaluate the interaction of psychiatry in the Courts (Fersch, 1980).

Numerous strategies have been proposed in an effort to ameliorate the problematic nature of psychiatric involvement in the criminal process. Among these include:

1. changing the present law to deal adequately with "insane" defendants with regard to the question of criminal responsibility in insanity defence trials;[28]
2. developing the rules of evidence, governing the presentation of "expert testimony", to protect the constitutional rights

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[27] It is arguable, in Canada, whether these assumptions would be considered as truisms.

[28] Various proposed alternatives to McNaughtan will be canvassed in Chapter V.

of the accused;[29]

3. not permitting psychiatrists to testify as expert witnesses until they can prove, through empirical research, that their judgments are reliable and valid (Ennis & Litwack, 1977:737-38);

4. limiting psychiatric testimony to descriptive statements which exclude diagnoses, opinions, and predictions (Ennis & Litwack, 1977:742; Morse, 1978). Several writers (Ziskin, 1975; Fersch, 1980; Snow, 1973; Diamond, 1973; Clark, 1982; Dickens, 1978) have asserted that psychiatrists should not have any involvement in the criminal justice system and that all psychiatric and psychological determinations of dangerousness be discontinued;[30]

5. developing some cross-disciplinary training programs for psychiatrists and lawyers to help make the administration of mental health justice more equitable. Because "much of the controversy over psychiatric testimony on criminal responsibility, has been compounded by ignorance on both the legal and medical sides of the debate" (Quen, in Hucker et al, 1981:8), the need for greater interdisciplinary education is well-documented. Mental health practitioners have been found ignorant of the relevant legal criteria for the issues before the Court, and lawyers have resorted to

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[29] See Canada Evidence Act, Bill S-33, 1980-81-82.

[30] Medical insight should become relevant only after conviction, when the proper disposition of the accused is in issue.

harassing tactics because of their own lack of understanding in the mental health area (Poythress, 1977; Sidley, 1976; Marcus, 1980; Stevens & Roesch, 1980); and

6. providing court-appointed psychiatrists in an attempt to eliminate adversarial bias. It is contended that the role of psychiatrist in the courtroom should be that of a disinterested expert giving considered judgment based on lengthy and careful investigation, including full histories. "Psychiatrists should not be used as last resorts, or in an endeavour to find loopholes or solve the problems of counsel who can think of no other argument than 'mental' ones" (Cooper, E., 1980:10). Dr. Fred Jensen, Deputy Clinical Director of Metropolitan Toronto Forensic Service, proposes that the psychiatrist become the "amicus curiae" - friend of the court. "Panel of psychiatrists might be summoned to give expert opinion that could be used by both sides, subject to cross-examination. The panel would be called by the judge" (Cooper, E., 1980:10).[31]

McNaughtan's Case cemented the alliance between law and psychiatry. What must be confronted is that the relationship is predicated on a profound hypocrisy. Through the insanity defence, Courts found defendants "not guilty by reason of insanity" and then automatically relied on psychiatry to confine them for the rest of their lives (Stone, 1982).

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[31] It is arguable whether this scheme would be a viable alternative. Would this not leave the accused at the mercy of 'politically' chosen experts?

In the end, someone must assist the Courts (even with a narrow insanity defence) in making determinations about criminal responsibility or non-responsibility.[32] Morse, a proponent of restricting psychiatric testimony, argues that psychiatrists are "experts" at observing behaviour and thus, better at assessing than laymen. He concludes that:

> "...because the experts are attuned to crazy behavior he may help the factfinder attend to a fuller range of the actor's behavior...that lay persons may not notice but that may be relevant to legal decision-making" (1978:605).[33]

Therefore, experts should serve only as guides to behaviour and "lay decision-makers should assume full responsibility for the hard social, moral, and legal decisions that must be made" (1978:654).

Professor Stone (1982) contends that, when the smoke clears from all the controversy and when clearer heads prevail, it is the law that cannot survive without psychiatry.

> "The marriage between law and psychiatry is therefore just like many other marriages in which one hears it said at time of crisis, "I don't know what to do. I can't live with her, and I can't live without her" (1982:21).

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[32] Even most critics would agree (with the exception of Szasz perhaps) that there must be some psychiatric testimony or equivalent of same.

[33] See a critique of Morse by Bonnie and Slobogin (1980), who argue that the expertise of mental health professionals is so limited that their opinions should be entitled to no more weight than those of laymen.

V. Reform Alternatives

Since its articulation, the insanity defence has received exhaustive attention in the academic literature. The time-honoured McNaughtan Rules have been (and continue to be, in light of the Hinckley case) one of the most hotly controverted topics in Anglo-American criminal law.

The phalanx of professional literature expended on the intractable subject centers primarily on its abolition, retention, and/or modification. This chapter will examine the various reform options and contemporary proposals, which have been advanced in British and American jurisdictions.

Critique of McNaughtan - Impetus for Reform

Criticisms of the traditional McNaughtan approach to criminal responsibility have generated numerous responses, ranging from experimental modifications to total abolition.

Although commonly referred to as the "right-wrong" test, the McNaughtan Rules in actuality consist of two components. The first component absolves an accused of criminal responsibility if a mental disease rendered him incapable of knowing the nature and quality of his act. The second component excuses the accused if he lacked the ability to distinguish between right and wrong with respect to the act. Criminal responsibility will not attach

if an accused satisfies the requirement of either component of the test.

The most fundamental criticism of the McNaughtan test is the extremely narrow inquiry of its knowledge branch. Under the McNaughtan test, the cognitive aspects appear to be the sole factors considered in determining sanity. Because the test apparently focuses exclusively on the cognitive capacity of an accused rather than the volitional aspects of an accused's personality, it leaves open the possibility that an accused suffering from severe volitive incapacity and, therefore, not justly punishable, will be held criminally responsible. In essence, sanity is gauged according to whether the accused knows the difference between right and wrong while the degree of his awareness and the ability to control his conduct are rendered immaterial (Dawson, 1981).[1] According to the McNaughtan criteria, mentally ill persons failing to meet the rigid standards of the "right-wrong" test would be determined criminally responsible despite their mental infirmities (Arnella, 1977).[2]

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[1]The criticism of the knowledge test is that while many mentally ill defendants can distinguish between right and wrong they cannot control their wrongful actions. For instance, an accused may know that murder is wrong but because of a mental disease or defect he might murder because of some compulsion.

[2]Those mentally disordered persons, not insane according to the McNaughtan criteria, are often incarcerated rather than treated in hospitals and returned to mainstream society untreated (Dawson, 1981).

To focus entirely on cognition, while ignoring the volitional aspects of behaviors, seems antiquated in light of the current state of psychiatric knowledge.[3] This contention is supported by numerous academic contributors. "This is an anathema to modern psychiatry" (Platt, 1969:22)[4] because insanity does not only affect the cognitive or intellectual faculties, but also affects the whole personality of the person, including the will and the emotions (Amarilio, 1979; Kennally, 1976; Gerber, 1975; Spring, 1979; Bland, 1971; Dawson, 1981; Fingarette, 1972).

The McNaughtan test deprives the jury of information, concerning the accused's complete mental condition, by restricting expert psychiatric testimony to evidence relating only to the accused's ability to distinguish between right and wrong. Examination of either the accused's unconscious or his emotional condition is precluded (Weihofen, 1954; Slowinski, 1982).[5] One commentator is of the opinion that the McNaughtan

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[3] See Durham v. United States, 214 F.2d 862, 871-72 (D.C. Cir. 1954): "The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior....".

[4] When a psychiatrist is asked if the accused knew right from wrong, the psychiatrist is forced to engage in intuitive moralizing, which he views as an anathema.

[5] This criticism is viewed as unfounded by some who point out that most courts freely admit any evidence which is probative of the accused's mental condition (Goldstein, 1967:53-58). Certainly few, if any, McNaughtan courts restrict admission of psychiatric evidence strictly by cognitional defects. Much loose evidence is ultimately admitted (Gerber, 1975).

test effectively cloaks the fact-finder with judicial "blinders": it precludes jurors from considering any evidence showing the accused labored under a mental disorder which, while not rendering him incapable of distinguishing right from wrong, affected his ability to control rationally his behavior (Dawson, 1981).[6]

One psychiatrist has expressed the viewpoint that answers, supplied by a psychiatrist to questions of "rightness or wrongness" of an act or "knowing its nature", constitute a "professional perjury" because of lack of reliability (Diamond, 1962; 1964).[7]

Another writer argues that McNaughtan's cognitive emphasis conflicts with the doctrine of mens rea (Glueck, 1966). For centuries, the criminal law has required a guilty mind in order to impute criminal liability and has considered mens rea to include the volitional, as well as the cognitive, element (in such defences as provocation, duress, necessity, etc.) A person, who is responsible under McNaughtan, might have a volitional

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[6]Both Sir James Fitzjames Stephen and the McRuer Commission, in Canada, believed that a broad interpretation of the McNaughtan Rules would address the issue of overwhelming impulses, that an accused cannot control. However, the Schwartz case represented an extremely narrow interpretation of the rules. By defining "wrong" as meaning "legally wrong", the Supreme Court of Canada effectively precluded any consideration of the effect of an "overwhelming impulse".

[7]By its misleading emphasis on the cognitive, the right-wrong test requires courts and juries to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility. See United States v. Smith, 404 F.2d 740 (6th Cir. 1968); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968).

impairment sufficient to negate his ability to entertain criminal intent. Thus, Glueck argues, McNaughtan's narrowness in refusing to recognize volitional incapacity may contravene the mens rea doctrine steeped in our criminal law tradition.

An additional consequence of the rigidity of McNaughtan is that it requires the "total incapacity" of cognition before an accused may be absolved of criminal responsibility; - "substantial incapacity" is not sufficient. In other words, McNaughtan creates the problem of restricting its application to those persons who are grossly mentally disordered or retarded - those where total cognitive failure was present at the time of the alleged offence. Yet it is argued that few people suffer from "total incapacity".

> "The McNaughtan test literally calls for total impairment; the accused must not know at all. Thus the traditional English hallmark of 'total' insanity enshrined in the test continues to require a near impossibility. Few if any persons are 'total' madmen; insanity is rather a matter of degree and context" (Gerber, 1975:113).

This "all or nothing" approach ignores the existence of the grey area between sanity and insanity. It assumes that the knowledge test will take these factors into consideration and that the cognitive element is the sole or primary cause of behaviour (Kennally, 1976).

Critics believe that most mentally ill persons possess at least some knowledge of right and wrong (Morse, 1978; N. Morris, 1980; Glueck, 1966: 1952; Goldstein, 1967) and that strict and literal application of the McNaughtan rule results in conviction

of some defendants who are emotionally, but not cognitively, ill or those whose responsibility is doubtful.[8]

> "Except for the totally deteriorated, drooling, hopeless psychotics of long standing and congential idiots...the great majority and perhaps all murderers know what they are doing, the nature and quality of their act and the consequences thereof, and they are therefore 'legally sane' regardless of the opinion of any psychiatrist" (Zilbourg, 1943:273).

They argue the rule sends a great number of the mentally insane to prison and suggest a broader interpretation as the only means of achieving criminal justice under it (Morris G., 1975; Dawson, 1981; Waddell, W.C., 1979; Hamilton, 1980; Darbyshire, 1980; Slovenko, 1969; Glueck, 1966).

Abolition of the Insanity Defence

Proposals to abolish the insanity defence have been offered by a number of recognized authorities from the medical, legal, and academic communities. The rationales advanced to support the wide range of substitutes vary from the theory that the insanity defence unfairly abuses those in the criminal justice system to the viewpoint that the insanity defence is an easy way for a criminal defendant to escape punishment.[9] (Halpren, 1977).

Among psychiatrists[10] calling for abrogation of the defence

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[8] State v. Esser, 16 Wis. 2d 567, 115 N.W. 2d 505 (1962).

[9] See Fersch (1980) for a summary of the major arguments for abolition of the insanity defence.

[10] Not all psychiatrists are in favor of outright abolition of the defence. For example, Dr. Guttmacher (1968) would retain it because it gives the 'criminal law a heart'. He would, however, make several changes in the defence as administered at trial.

is Dr. Thomas Szasz, the outspoken and persuasive critic of all involuntary aspects of psychiatric treatment and coercion. Dr. Szasz (1963) argues that the so-called mentally ill are not a defined class that can be separated from the rest of society. Given that all men are human beings, and not machines, it is the absolute essence of humanity to give every person the dignity of assuming that he intends the consequences of his conduct. As pointed out in the Chapter IV, Dr. Szasz views the involuntary and indeterminate commitment which follows a successful verdict of 'not guilty by reason of insanity', as more "punishment disguised as treatment".

Dr. Seymour Halleck (1966), another psychiatrist advocating abolition, argues that the insanity defence is not as benevolent and humane as usually assumed. It is his thesis that the criminal law presumes that all persons are capable of free choice of conduct; therefore, when we determine that a mentally abnormal accused is not responsible for his acts, we are asserting that he is not a real person. This, combined with the involuntary commitment to a mental facility, will create a stigma greater than an outright criminal conviction.

Dr. Halleck further argues that the individual, whose criminal conduct is engendered by sociological factors such as poverty or persecution, may be driven to his prohibited acts by forces equally powerful to those motivating the mentally ill defendant. Why, therefore, do we recognize the insanity defence but deny the sociological one? Others, such as Judge Bazelon

(1977), have argued that there is little difference between a compulsion to commit crimes because of psychiatric reasons (which the law recognizes), and an equally strong compulsion grounded in socio-economic conditions (which the law has never recognized).

Halleck (1966) has also suggested that good psychiatrists, like good lawyers, cost money; and those who can afford the forensic psychiatrists disproportionately plead the defence.[11]

In recommending abolition, Dr. Halleck proposes that no evidence of mental disorder be allowed at the trial proceedings, even to negate mens rea. Dr. Halleck, like Justice Weintraub,[12] is concerned because the insanity defence is usually raised only in capital cases or cases where long prison terms might result. This situation, they argue, obscures the need to treat offenders charged with comparatively minor offences who do not raise the defence, preferring instead to take a chance on a relatively short sentence on conviction rather than to assert the insanity defence and be indefinitely committed.

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[11]It is interesting to note that while Halleck (1967) claims that the insanity defence is unfair because it is only available to the rich, Dr. Szasz (1963) claims that it is only applied to the poor and minorities as a stigmatizing weapon of oppression.

[12]Justice Weintraub (1964) argued that the insanity defence is only a mechanism to avoid the death penalty. Unlike Halleck, though, he proposes that psychiatric testimony should be allowed at the trial only as it bears on the mens rea issue; but in capital cases, the jury should hear full medical testimony, unfettered by a legal test, in order to determine whether to recommend life imprisonment.

Professor Hart (1968) makes a recommendation for abolition similar to Dr. Halleck's. In support of his position, he argues that, except in rare cases of total irresponsibility, no satisfactory line can be drawn between the bad and the sick. It is his opinion that, no matter how advanced the psychiatry, psychiatrists cannot confidently know if an accused at a given moment in the past could not or simply would not conform his conduct to a legal standard. The resultant conflicting psychiatric testimony on this point at trial causes unnecessary confusion for the jury. Thus, the criminal trial should be free of psychiatric testimony with medical insight becoming relevant only after conviction, when the proper disposition of the accused is in issue.

Lady Wootton (1963), a noted English magistrate and sociologist, is perhaps the most radical of all abolitionists. It is her view that state of mind should not be relevant to a determination of guilt but only in respect of disposition. She argues that the insanity defence should be abolished because psychiatrists are incapable of determining if an accused, at the time of the crime, could not, or merely would not, conform his conduct to the requirements of the law.

Lady Wootton premises her argument on the theory that our criminal law system, based on "punishment as retribution for past wickedness", is outdated. Thus, she argues, the emphasis should be on the prevention of future criminal behavior rather than on the imposition of blame (the so-called "social hygiene"

approach). If the primary goal of criminal justice is to prevent crime: "it is illogical to confine this prevention to occasions when forbidden acts are done from malice aforethought" (1963:51).

Wootton recommends a criminal law system which eliminates the mental element in nearly all crimes.[13] To accomplish this, Lady Wootton would abolish all notions of mens rea and insanity at the trial. The only question would be: Did the defendant perform the prohibited act? If the answer is yes, evidence of mental disorder would be permitted at sentencing. In other words, under Wootton's proposal, mens rea would be discarded from the definition of legal accountability, the state of the accused's mind being relevant only to his post-conviction disposition.

Wootton suggests that, after the defendant has been found to have committed the act, a "treatment tribunal" would assess the future possibility of dangerous behavior and the likely effect of a particular decision upon the accused. In her view, the issue of sanity clearly would bear on the determination of the appropriate sentence, which, could range from immediate release to the lifelong commitment in a prison or hospital (1963:95-112).

Lady Wootton's "strict liability" proposal has been the subject of much disapproval. By abolishing all notions of mens rea and insanity at the trial stage, Wootton's proposal

[13] Except in extremely rare cases of total irresponsibility.

effectively eliminates the concepts of "blame and guilt", which constitute an essential element of criminal liability (Brooks, 1974). The disregarding of the concept of criminal responsibility would be inconsistent with accepted notions of free will, upon which our criminal laws are so firmly based (Fingarette, 1966; 1976; Hart, 1968). Packer (1968) has succinctly argued that to abolish the insanity defence is ultimately to "deprive the criminal law of its chief paradigm" (at 131-32).

More particularly, Wootton's model negates the varying levels of responsibility in our criminal law, which operate in an important manner to distinguish not only between various degrees of crimes but also between "criminal" and "non-criminal" conduct (Robitscher & Haynes, 1982).[14]

Furthermore, Wootton's proposed system necessarily precludes a doctrine of diminished responsibility from consideration: it may be contended that such a doctrine offers much to the criminal law's system of dealing with mentally abnormal defendants (Robitscher & Haynes, 1982).

As well, Wootton's abolition scheme usurps the traditional role of the judge and the jury. The use of the "treatment

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[14] Brooks notes, for instance, that "what is in the actor's mind will determine whether a taking of property is criminal or not. The naked act of 'taking' could be a borrowing or a theft, innocent or criminal, depending exclusively on the taker's state of mind" (1974:128).

tribunal"[15] may be subject to constitutional objections in the United States. Both Federal and most state constitutions provide that each person has the fundamental right to be tried by a jury of his peers[16] (Goldstein, 1967; Robitscher & Haynes, 1982). The "treatment tribunals" eliminate the jury's role of determining the nature of the offence committed, because they would be asked only to decide whether an accused committed the act. Under Wootton's model, the jury would no longer be empowered to determine the level of guilt or degree of blame to be attached to that act. In some instances, criminal statutes (in the U.S.) articulate a fixed minimum and maximum penalty for each offence. Sentences imposed by the Courts generally correlate with the requisite mental element by which the crime is defined (Robitscher & Haynes, 1982). For example, when a defendant is convicted of first degree murder, a judge may be restricted by statute as to the sentence that he may impose.

Professor Norval Morris (1982), another influential abolitionist, proposes the elimination of the special defence and a legislative substitution of a qualified defence of

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[15]Wootton's proposed treatment tribunal is a body that would not be bound by current principles of criminal law.

[16]A treatment tribunal would be composed of persons with expertise in various phases of rehabilitation. Only in the rare case in which the defendant is an expert would the treatment tribunal represent the "peers" of the accused. Goldstein(1967) points out that Wootton's proposal of removing the issue of responsibility at the trial has already been judicially struck down on the basis of denial of a defendant's right to trial by jury of his peers; right to due process; and his protection against cruel and unusual punishment.

"diminished responsibility".[17] It is his contention that decisions are "based on terminology that is too vague to be understood by anyone". In an interview, Morris stated:

> "We ask juries to decide whether a defendant had a 'substantial capacity' to know right from wrong or had a 'substantial capacity' to control himself. Those concepts are manifestly ambiguous. They turn some cases into circuses which have no moral validity" (U.S. News & World Report, Inc., 1982:15).

Morris's (1968) approach admits evidence of mental illness as to the presence or absence of mens rea and dismisses the problem of completely acquitting and setting free mentally disordered offenders.[18]

> "The accused's mental condition should be relevant to the question of whether he did or did not, at the time of the act, have the prohibited mens rea of the crime of which he is charged. There should be no special rules like McNaughten or Durham;...Evidence of mental illness would be admissible as to the mens rea issue to the same limited extent that deafness, blindness, a heart condition, stomach cramps, illiteracy, stupidity, lack of education, 'foreignness', drunkenness, and drug addiction are admissible. In practice, cases raising these issues are rare, and they remain rare if mental illness were added to the list" (1968:518-19).

The same year Lady Wootton published her views on the insanity defence, liberal scholars, Professors Goldstein and Katz (1963), of Yale University, published their own, less extreme and less polemical, proposal to abolish the insanity defence.

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[17] See the section on "Diminished Responsibility" discussed in this Chapter.

[18] Morris notes that the "guilty but mentally ill" legislation is a step in that direction.

Goldstein & Katz viewed the insanity defence as a manipulative tool utilized to punish the mentally ill: those acquitted under it are rarely freed but are held indeterminately in mental hospitals or for longer periods of time than if they had been found guilty of the offence and received prison sentences. It is their thesis that the insanity defence is not really a "defence" at all. They argued by analogy that "self-defence", which applied only to persons against whom each of the elements of a crime could be established and resulted in acquittal, is similar to the insanity defence. Goldstein & Katz pointed out, however, that, "unlike the acquittal of self-defence which means liberty, the acquittal of the insanity defence means deprivation of liberty for an indefinite term in a mental institution" (1963:858).

Goldstein & Katz believed that the net effect of the insanity defence, while ostensibly designed to reach a therapeutic and humane result, was actually more punitive than traditional punishment methods.[19]

Goldstein & Katz recommended that the insanity defence should be abolished[20] and that evidence of mental abnormality

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[19] They argue that the defence of insanity is not benevolent, but rather it is a device for authorizing indeterminate restraint in cases in which a lack of mens rea would acquit (at 868).

[20] They argue that since the verbal limitations of McNaughtan in practical application are really no bar to courtroom admission of broad psychiatric evidence, including evidence going well beyond cognitional defect, the McNaughtan language in practice is harmlessly unoperational. Hence, mental illness sufficient to constitute an insanity defence would also be sufficient to invalidate mens rea - therefore, there may be no need for a separate defence.

only be considered to satisfy the mens rea and actus reus criteria of each offence.

In response to their proposal, some commentators feel that Goldstein & Katz's arguments can be accepted without the drastic measure of abolition (Robitscher & Haynes, 1982). Others view their solution as potentially dangerous and unacceptable to society (Morris, G., 1975).

Another commentator rejects Goldstein & Katz's proposal. Brady (1971) points out the important distinction between the concepts of mens rea and the insanity defence. The concept of mens rea centers on a particular mental state (such as intent, knowledge, recklessness or negligence), that is a necessary element of most crimes. The insanity defence is a broader concept; requiring an examination of the defendant's general mental condition. For example, a defendant may "intend" to commit an act (and have mens rea) but not know his act is "wrong". The insanity defence, therefore, is "broader" than a denial of mens rea.

In 1973, President Nixon characterized his administration's proposal to abolish the insanity defence as "the most significant feature of the proposed Federal Criminal Code"[21] designed to curb "unconscionable abuses"[22]

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[21] S.1400, 93rd Cong., 1st Sess. & 502 (1973).

[22] The "unconscionable abuse" argument is difficult to justify. Clearly, the significance of the proposal was not so much practical as political in view of the fact that a justice department spokesman estimated that fewer than 100 defendants a year (out of more than 50,000 Federal criminal cases brought annually) assert the insanity defence in Federal Court

of the insanity defence by criminals.[23] The Nixon proposal would abolish the defence of insanity completely as an excuse for criminal conduct and substitute for it an evidentiary rule, which determines the ability of the defendant to form the mens rea element required for conviction of the crime charged. This means that the complex defence based on insanity would no longer be available to accused persons charged with a Federal crime. The Nixon codification was as follows:

> "S.502 It is a defense to a prosecution under any Federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defence".

Under the Nixon proposal, therefore, a severely psychotic defendant could be convicted, provided he killed "intentionally" and with "premeditation".

President Nixon's scheme to abolish the insanity defence is not original. Various scholars urged this type of full-scale

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[22](cont'd) (Dershowitz, 1973).

[23]Unlike the reasons offered by Goldstein & Katz (1963) to support abolition, President Nixon's proposal shifted the emphasis from unfairness to the insane defendant to the ease with which the insanity defence could be used to manipulate the system. President Nixon's antagonism towards the insanity defence is premised on the view that the insanity defence provides an escape valve for criminals. His views were inspired by the story of Garrett Trapnell, a defendant accused of various aircraft piracy offences, who boasted about the way he manipulated the insanity defence by feigning mental illness. See United States v. Trapnell, 495 F.2d 22 (2d Cir.), cert. denied, 419 U.S. 851 (1974).

revision long ago (Morris, N., 1968; Goldstein & Katz, 1963).[24] N. Morris' (1968) proposal, a liberal version of the Administration's, would eliminate the substance of the insanity defence and use it only as a rule of evidence to negate the mens rea requirement and thus to negate the existence of a complete crime.

The view, adopted by Nixon's Administration, was that insanity and mens rea are inextricably interwoven and any separate defence, which would totally excuse a defendant from criminality, is irrelevant.

Nixon's proposal has not escaped criticism. The late Professor Packer (1968) pointed out that the Administration's proposal failed to make the proper distinction between the concepts of "mens rea" and the "insanity defence". He draws this distinction in the following way. He argues that the insanity defence is not implied or intrinsic to defences with defined, specific mental elements, such as purpose, knowledge, recklessness or negligence. Insanity is an overriding, sui generis defence, that is concerned not with what the actor did or believed, but with what kind of person he is. In truth, Packer concludes, the insanity defence has no more to do with the mens rea element in a particular crime than does the defence

[24] Platt (1974) points out that those familiar with new codifications will recognize the similarity of Nixon's proposal to the "diminished capacity" test. However, what makes it radically different from all other insanity provisions is that the "partial responsibility" or "diminished capacity" test in the bill is the only test under which evidence of mental disease or defect is permissible.

of infancy.

Commentators have also discussed the serious constitutional questions posed by the Nixon scheme (Platt, 1974). Another serious observer of the criminal justice scene concluded that the President's statement on the insanity defence is yet another manifestation of distorted priorities in law enforcement objectives (Dershowitz, 1973).

The pragmatic "mens rea" approach, advocated by the Nixon Administration, has been adopted in three states[25] and has been endorsed by the present Reagan Administration. The current Attorney-General of the United States, William French Smith, is sponsoring Senate Bill 2572[26] now pending in the United States Senate. This bill governs the issue of insanity in Federal criminal trials.

Under the proposed Bill 2572, mental disease or defect would be a defence to a prosecution under any Federal statute only if, as a result of the disease or defect, the defendant "lacked the state of mind required as an element of the offence charged". Mental disease or defect would not otherwise constitute a defence to a Federal criminal charge. The bill would present the jury with three choices in a case involving a claim of insanity. It could find the accused 'guilty'; 'not guilty'; or, if he would have been found guilty except for the

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[25] Idaho, Montana, and Alabama.

[26] S.2572, 97th Cong., 2d Sess. 701 (1982). See Attorney-General Smith (1982) for a full discussion of the proposed legislation.

fact that his mental disease or defect precluded a finding of the existence of the knowledge or other mental element specified by the penal statute, 'not guilty only by reason of insanity'. The latter verdict is designed to serve only as an automatic trigger for a civil commitment inquiry.[27]

Separate proceedings would be held by the courts, with appropriate safeguards for the rights of the acquitted person, to determine whether he should be released or committed to a mental institution.

Public sentiment and antagonism toward the insanity defence[28] prompted the Idaho legislature to adopt a similar approach. Citizens of Idaho were outraged upon learning that a college student who had raped two Idaho women was acquitted on grounds of insanity and then, upon his release, attempted to murder a nurse (Hagan, 1982).

Under Idaho's new legislation,[29] if a defendant is convicted, the law provides for an examination of his mental condition. Even if the defendant is found to require psychiatric treatment, the law requires that the judge "shall pronounce

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[27]Under civil commitment provisions of Senate Bill 2572, a defendant who is not convicted only because of a mental disease or defect that is so severe as to preclude a finding of the intent or knowledge specified as an element of the offence would be committed immediately to a facility for psychiatric examination.

[28]Publicity surrounding those acquitted by reason of insanity portrays to the public a criminal justice system by which criminals can escape through an insanity plea loophole.

[29]Idaho Code 18-207 (1982)..

sentence as provided by law". Hence, consideration of the defendant's mental condition is only a factor at sentencing (Comment, American Bar Association Journal 1982:531).

In 1978, the New York State Department of Mental Hygiene recommended the abolition of the insanity defence and the adoption of a "diminished capacity"[30] rule. In their report to the Governor they advocated "adoption of a rule of diminished capacity", under which evidence of abnormal mental condition would be admissible to affect the degree of crime for which a defendant could be convicted (at 9).

Under the rule proposed by the New York Department of Mental Hygiene, mental disease or defect is not, as such, a defence to a criminal charge, but in any prosecution for an offense, evidence of mental disease or defect of the accused may be offered, whenever such evidence is relevant to negative an element of the crime charged requiring the defendant to have acted intentionally or knowingly.

This alternative proposes a system that allows mental illness to act only as a mitigating factor that reduces the severity of an offence to a lesser included crime but does not exculpate a defendant.[31] Once convicted, defendants would go to prison, if a term of imprisonment is imposed. Any mental health

[30] Report to Governor Hugh Carey, The Insanity Defense in New York (1978).

[31] Under this scheme, some persons suffering from severe mental disorders may be convicted of serious criminal offences and dealt with entirely within the penal rather than hospital system.

services would be provided in the correctional setting.

> "Under a rule of diminished capacity, evidence of abnormal mental condition would be admissible to affect the degree of criminality for which an accused could be convicted...the result would entail conviction and processing in the correctional system for serious offenders, and acquittal - perhaps civil commitment - for minor offenders" (New York Report 1979:140-41).

The New York attempt to reform the insanity defence by replacing it with a "diminished capacity" test was the subject of severe criticism. The New York Times editorial published this scathing review:

> "For all its excursions through social commentary and public opinion, the report fails to deal with one fundamental basis for the insanity defense--that society ought not to treat people as criminals when they are not truly responsible for their actions.... The Mental Hygiene Department clearly wants relief from the burden of treating the criminally insane. A final judgment should not rest on so narrow a base" (cited in Fersch, 1980:117).

The New York proposal was further criticized for "its explicit assumption that the correctional system is the appropriate place in which to treat the mentally ill person who commits a serious offence" (Verdun-Jones, 1979-321).

In light of its inherent theoretical problems, the New York proposal was rejected by the New York Law Revision Commission and did not constitute part of the New York Insanity Defense Act of 1980, which adopted less radical changes (Weyant, 1981; Halpern, Rachlin et al., 1981).

Irresistible Impulse Test

The most widely accepted criticism of the McNaughtan test of insanity is that it exculpates one from criminal responsibility only in cases of cognitive incapacity. It does nothing for the defendant, who knows the conduct to be wrong but, as a result of mental disease or defect, is powerless to control that conduct. A defence based on a concept of "irresistible impulse", while not adopted in McNaughtan's case, was recognized as early as 1840.[32]

In an attempt to ameliorate the harshness of the McNaughtan test, American courts have supplemented it with the "Irresistible Impulse" Test,[33] which considers the volitional aspects of a defendant's personality. There is the recognition that mental illness may affect an accused's will and emotions as well as his cognitive or intellectual capacity. This move was principally influenced by the arguments of psychiatrists to the

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[32] In Regina v. Oxford, 173 Eng. Rep. 941(1840), Lord Chief Justice Denman made reference to control and resistance. "If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible" (At 950). For a full discussion of the historical development of the irresistible impulse test see Keedy (1952), and Weihofen (1954).

[33] Irresistible impulse is not used as the sole test of insanity but, rather, it is used in conjunction with the McNaughtan test. The test originated in the United States at about the same time the McNaughtan Rules were formulated in England. In England, the test was known by the expression the "policeman-at-elbow-law"; a concept of the irresistible impulse, in the sense that it appeared clear that an accused would have gone ahead in committing an offence even though a policeman was at his elbow (Maggio, 1981).

effect that McNaughtan failed to protect a class of persons who suffered from serious mental disorders. The psychiatrists theorized that criminal acts are often the result of a strong, internally generated emotional force that controls behavior, notwithstanding the cognitive aspect of the personality (Glueck, 1966).

Under this test, an accused, who knew the nature and quality of his act and knew that it was wrong, is still excused from criminal responsibility if, because of mental disease or defect, he could not prevent himself from committing the act. The "irresistible impulse" doctrine shifts away from a pure "right-wrong" dichtomy[34] and is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or refrain from doing his act.[35]

As early as 1887, the Alabama Supreme Court recognized the concept, in Parsons v. State.[36] The Court held that, where the insanity defence arises in a criminal trial, the jury should be given the following instructions:

"If he (defendant) did have such knowledge, he may

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[34]This rule is not concerned with whether the defendant knew right from wrong. It asks instead whether the defendant was so mentally unbalanced as to lack the volition to control his acts.

[35]Thompson v. Commonwealth, 193 Va. 704, 70 S.E.2d 284 (1952) at 292.

[36]81 Ala. 577, 2 So. 854 (1887). This is the leading American case employing the irresistible impulse test.

> nevertheless not be legally responsible if the following two conditions concur: (1)If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in relation of cause and effect, as to have been the product of it solely".

The "irresistible impulse" test, which attempted to mitigate the harshness of McNaughtan, was repudiated by American and Canadian jurisdictions. According to one critic, the term "irresistible impulse" is rarely employed, and is really a misnomer. The rule is actually a test of an accused's inability to resist doing wrong, since the central theme is loss of control (Goldstein, 1967:68-70).

The British Royal Commission on Capital Punishment[37] rejected the doctrine because the rule is limited to instances where the act was committed on sudden impulse.[38]

> "The real objection to the term 'irresistible impulse' is that it is too narrow, and carries an unfortunate and misleading implication that, where a crime is commited as a result of emotional disorder due to insanity, it must have been suddenly and impulsively after a sharp internal conflict". (at 157).

Despite its acceptance in various states[39] as a supplement

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[37] Royal Commission on Capital Punishment, 1949-1953 Report 110 (1953).

[38] It has been argued that mentally abnormal offenders rarely commit crimes at the peak of their psychic disorganization but only after the psychotic impulse has passed (Gerber, 1975:124).

[39] Though approximately eighteen states, plus a majority of Federal courts, at one time applied the irrestisible impulse test along with that of McNaughtan, all but one state have rejected it. The A.L.I. test covers "irresistible impulse." This will be included in a subsequent discussion. In England, the defence of "diminished responsibility", based on lack of control, is covered by the Homicide Act of 1957.

to McNaughtan, most courts in rejecting it questioned the viability of the doctrine. The American Law Institute concluded that the test was unsatisfactory because it is "impliedly restricted to sudden spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection".[40] Chief Judge David Bazelon stated that the "irresistible impulse" test gives:

> "...no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test" (Model Penal Code 4.01, (Tent. Draft No.4, 1955) Comments at 157).

According to those who defend it, irresistible impulse is not restricted to sudden, uncontrollable actions or impulses (Keedy, 1952; Weihofen, 1954). They argue that by using this rule in conjunction with the McNaughtan rules, it is assured that volitional, instead of only cognitive, capacities of an accused will be considered. Dean Goldstein (1967), responding to the criticism, pointed out that the phrase "irresistible impulse" is merely a textwriter's caption and is really not an appropriate title to describe the test in practice. He argues that most of the cases do not even use the phrase and that it is more accurate to describe the rule as concerned with lack of control and to use the shorthand designation 'control' test. Because the jury is not told that proof of sudden, unplanned action is required for them to find loss of control, a planned act may be sufficient to absolve an accused of criminal

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[40] Model Penal Code 4.01, (Tent. Draft No. 4, 1955).

responsibility (Goldstein, 1967:69).

The irresistible impulse formulation has also been attacked because it is difficult to apply with any degree of accuracy, when a trier of fact must determine whether the accused was incapable of controlling himself or simply refused to control himself. The difficulty in distinguishing between the 'irresistible' and the 'unresisted' is emphasized.[41]

Another argument advanced is that the concept overlaps in a number of cases with other criminal law precepts. For instance, the concept of "in the heat of passion", while often recognized as a mitigating factor, is not legally recognized as an excuse (except in provocation). It is felt that courts have been reluctant to release from responsibility those who, by definition, know their acts to be wrong (Spring, 1979(a); 1979(b)).

The irresistible impulse rule is further criticised on the ground that scientists do not agree as to the existence of such a state of mind (Weihofen, 1954). Some courts[42] believe it is questionable that a condition sufficient to satisfy the test could exist - namely, a mental disorder which selectively impairs volition without affecting cognition.

Other critics conclude that irresistible impulse does not improve McNaughtan (Goldstein, 1967). In finding "irresistible

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[41] See the earlier discussion of irresistible impulse in Chapter III.

[42] Durham v. United States, 214 F. 2d 862 (D.C. Cir. 1954).

impulse" unsatisfactory, one court suggested that the test was "little more than a gloss on McNaughtan, rather than a fundamentally new approach to the problem of criminal responsibility".[43]

Justly Responsible Test

Concluding an exhaustive four year study, the English Royal Commission on Capital Punishment[44], in 1953, recommended that an accused should not be criminally responsible for his unlawful act if:

> "...at the time of the act the defendant was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible" (at 116).

This proposed formulation, in essence, provides no definitive test of insanity but rather leaves the jury to decide the issue of insanity based on their own common sense in light of all the evidence presented in individual cases.

While this specific proposal was rejected in Great Britain,[45] a modified version surfaced in the United States as an alternative formulation to the American Law Institute Test in

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[43] Judge Bazelon in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[44] Report of the Royal Commission on Capital Punishment. 1949-1953 (Great Britain, Cmnd. 8932).

[45] Several dissenting Commission members considered it a non-test which exposes an accused to unlimited arbitrariness of jurors. They argued that an unguided jury would result in lack of uniformity in decision-making (Report at 286-87).

its 1955 Tentative Draft Report.[46] This new approach, now referred to as the "Justly Responsible Test" provided:

> "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is so substantially impaired that he cannot justly be held responsible."

In a further attempt at refinement, Judge Bazelon, delivering for the majority in United States v. Brawner,[47] advocated the framing of the test to the jury as follows:

> "A defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act" (at 1032).

Despite Judge Bazelon's belief that the "justly responsible test" will eliminate encroachment by experts on the jury's function, the American Law Institute Council expressly rejected the modified proposal. The main criticism was that the test provided no legal standard or criterion to guide the jury (Goldstein, 1967).

The majority of the District of Columbia's Court of Appeals, in rejecting the justly responsible test, opined:

> "It is one thing...to tolerate and even welcome the jury's sense of equity as a force that affects its application of instructions which state the legal rules that crystalize the requirements of justice as determined by the lawmakers of the community. It is quite another to set the jury at large, without such crystallization, to evolve its own legal rules and

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[46] Model Penal Code, S.4.01 (alternative (a) to (1) of s.4.01, Tentative Draft No. 4, 1955).

[47] United States v. Brawner, 471 F.2d 969(D.C. Cir. 1972).

standards of justices".[48]

Notwithstanding altruistic intentions, the "Justly Responsible Test" received virtually no support in common law jurisdictions. It was not until 1979, in the United States, that the test evidenced a resurrection. In State v. Johnson,[49] the Rhode Island Supreme Court abandoned the McNaughtan test for criminal responsibility and replaced it with the minority "justly responsible" formulation of the American Law Institute test. By including the "justly responsible" language in its formulation, the Johnson Court emphasized that the issue of substantial mental impairment constituted a legal question for the jury rather than a medical question for expert witnesses (Hamilton, 1980).

Durham Rule or Product Test

The first articulation of a "product test" came as early as 1869, when the New Hampshire Supreme Court rejected McNaughtan and adopted a new rule of criminal responsibility, excusing one whose act was the 'product' of mental disease.[50]

The test allowed the jury to determine as a question of fact whether an accused suffered from mental disease depriving him of the capacity to entertain a criminal intent. This newly

[48] Ibid, at 989.

[49] 339 A.2d 469 (R.I. 1979). See Hamilton (1980) for a review of the case.

[50] State v. Jones, 50 N.H. 369, 9 Am. Rep. 242 (1870).

formulated rule, however, was ignored by all other United States jurisdictions until 1954[51], when the Court of Appeals for the District of Columbia adopted it in the landmark case Durham v. United States.[52] Writing for the Court, Judge Bazelon formulated the "Durham Rule", which provided that:

> "...an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect" (at 874-75).

Under Durham, the two relevant questions are: first, whether the defendant suffered from a mental disease or defect; and, second, whether that condition caused the unlawful act.

The Durham Court sought a broader standard of responsibility, which would allow expert witnesses to inform the jury of all relevant information concerning an accused's personality.[53] The Durham Court recognized that the human mind

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[51]Its inspiration was derived from the British Report of the Royal Commission on Capital Punishment even though it did not become the law in England.

[52]214 F.2d 862 (D.C. Cir. 1954). The District of Columbia Circuit Court became dissatisfied with its McNaughtan and Irresistible Impulse tests. The Court noted that the McNaughtan test failed to acknowledge that "a man is an integrated personality and that reason (cognition), which is only one element in that personality, is not the sole determinant of his conduct" (at 871). The irresistible test was rejected because it failed to recognize mental illness characterized by brooding and reflection (at 874).

[53]The Durham test completely replaced McNaughtan in those jurisdictions which adopted it. Because it deemphasized the cognitive element, looking instead to the accused's volitional makeup on a subjective basis, its advantages over McNaughtan were clearly apparent. Although much considered, the Durham rule was adopted by only two other jurisdictions. Maine (Me. Rev. Stat. Ann. tit. 15, & 102 (1965)) and Virgin Islands (V.I. Code Ann. tit. 14, & 14 (1957)). At least twenty-three states have expressly rejected the rule.

functions as an integrated whole. Because the function of cognition and control cannot be separated, the mind is a functional unit that cannot be only partially diseased.[54] It was the Court's hope that, as the science of psychiatry progressed, the periphery of mental illness would be brought into focus.[55] The psychiatrist as expert witness could then explain the accused's mental state to the jury. The Durham Court, with great optimism, foresaw the cooperation of law and psychiatry in the exploration of the norms of human conduct (Goldstein, 1967:83).

For these reasons, the Court deliberately set no precise definition of the standard of criminal responsibility and left the phrase "mental disease or mental defect" undefined.[56]

While the Durham Court was heralded by the majority of psychiatrists as a most progressive legal step,[57] legal critics assailed the Durham Rule as, in reality, a "non-rule", since the standard was left virtually undefined (Goldstein, 1967:84; Platt, 1969:561). The specific lack of an operational definition of "mental disease or mental defect" to aid the jury was a

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[54] See United States v. Freeman, 357 F.2d 606 (2d Cir. 1966), for a discussion of Durham's recognition of the modern theory of the integrated personality of man and repudiation of the primitive disciplines of phrenology and monomania reflected in McNaughtan (at 615-21).

[55] Durham, above note 52 at 876.

[56] Durham, above note 52 at 875. The expert's testimony in each trial in which the insanity defence was raised would provide the definition.

[57] Many psychiatrists felt they were now freed from the confining atmosphere of McNaughtan.

fundamental flaw of Durham which resulted in the 'battle of the psychiatrists' having the effect of "usurping the jury's function" (Goldstein, 1967). In effect, psychiatrists testifying in Court were given a "carte blanche" in the determination of mental disease or defect and, hence, of criminal responsibility (Arens, 1974; Gerber, 1975).

In 1962, the District of Columbia Circuit, in McDonald v. United States,[58] recognizing the problems inherent in leaving the jury unguided except by experts, established a judicial definition of the terms "disease" and "defect". The Court clearly recognized the potential abuse of conclusory expert testimony and, in stating the legal definition, elaborated:

> "Our purpose now is to make it very clear that neither the Court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect.... Consequently,...the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls" (at 850-51).

Notwithstanding the attempt in McDonald[59] to alleviate the fundamental problem of the Durham Rule by defining "mental disease or defect", the Court found, in Washington v. United

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[58] 312 F.2d 847 (D.C. Cir. 1962).

[59] Soon after McDonald, the rate of insanity acquittals, which has risen steadily since Durham in 1954, dropped dramatically (Goldstein, 1967; Halleck, 1966; Bazelon, 1977). In 1962, 13.8% of the criminal defendants who were tried in the District of Columbia were found not guilty by reason of insanity. By 1964 the percent had dropped to 5.9% (See Arens, 1974 at 17).

States[60] that expert witnesses continued to usurp the province of the jury by expressing moral and legal judgments through ad hoc conclusory labels. Attempts to prohibit psychiatrists from giving conclusions, as to whether or not the crime charged was the "product" of mental illness, did not prove fruitful.

Dissatisfaction with the dominant role of psychiatrists continued. Accordingly, eighteen years later, the District of Columbia, in United States v. Brawner,[61] abandoned the Durham Rule in favour of the American Law Institute (A.L.I.) test. Judge Bazelon,[62] the author of the Durham opinion, in repudiating the Durham Rule, conceded that Durham enhanced rather than alleviated the difficulties of the traditional test of insanity.

The bold experiment to use scientific knowledge, as a means of improving McNaughtan, failed.

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[60] 390 F.2d 444 (D.C. Cir. 1967). The Court adopted the view which had consistently been advocated by a 'strong minority' of the Court that "Psychiatrists be prohibited from testifying whether the alleged offense was the 'product' of mental illness, since this is a part of the ultimate issue to be decided by the jury" (at 455).

[61] 471 F.2d 969 (D.C. Cir. 1972).

[62] In 1977, Judge Bazelon wrote: "I am disappointed that psychiatric understanding and acceptance of the law have moved so little in the past twenty years" (at 39). It was Bazelon's view that the lessons learned from Durham concerning the conclusory nature of the testimony of psychiatrists; the ambiguity and uncertainty in psychiatry; the inability of psychiatrists to predict dangerousness; the overriding significance of psychiatrists' hidden agendas of maintaining the mystique of psychiatry and saving themselves from embarrassment - have had no influence on changing the way in which psychiatrists understand or approach the insanity defence (Fersch, 1980).

American Law Institute Test (ALI)

One year prior to the Durham[63] decision, the American Law Institute (A.L.I.)[64] undertook a study of the criminal law in an attempt to create an improved and workable definition of criminal responsibility.[65]

After nine years of research, numerous drafts and revisions, the A.L.I. adopted Sec.4.01 of the Model Penal Code test of insanity in 1962:

1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.
2. As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by

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[63] Above note 52.

[64] The American Law Institute was organized in 1923 by a distinguished group of judges, lawyers and legal scholars as a permanent organization devoted to the clarification and improvement of the law. This group was headed by Professors Herbert Weschler of Columbia University, who served as the chief reporter, and Louis B. Schwartz, of the University of Pennsylvania.

[65] The A.L.I members indicated that the inherent difficulties of the McNaughtan Rules and the irresistible impulse test must be corrected. The law must recognize that, when there is no black or white, it must content itself with different shades of gray.

repeated criminal or otherwise antisocial conduct.[66]

Eighteen years after Durham, the District of Columbia Circuit in United States v. Brawner,[67] overruled the Durham rule and replaced it with the A.L.I. test.

The A.L.I. test, the dominant force in the law pertaining to the defence of insanity, has been hailed as the sensible compromise between the traditional McNaughtan and the 'radical-appearing' Durham Rules (Goldstein, 1967:93).

Chief Judge Haynsworth of the Fourth Circuit, in U.S. v. Chandler,[68] accepted the A.L.I. rule as the preferred formulation on the basis of the balance between cognition and volition. This balance demands an unrestricted inquiry into the whole personality of an accused:

> "With appropriate balance between cognition and volition, it demands an unrestricted inquiry into the whole personality of a defendant.... Its verbiage is understandable by psychiatrists; it avoids a diagnostic approach and leaves the jury free to make its findings in terms of a standard which society prescribes and juries may apply" (at 926).

The test of insanity provided by the Model Penal Code, commonly known as the ALI test, recognizes impairment of both

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[66]Model Penal Code S.4.01 (Final Draft 1966); ALI Model Pen. Code, Tent. Drafts, 104(1962). The drafters created a possible alternative by allowing the adopting jurisdictions to replace the word "criminality" with "wrongfulness".

[67]471 F.2d 969 (D.C. Cir. 1972). The real significance of the Brawner decision is that the Durham Rule has been replaced by the ALI rule. In the Brawner case, the United States Court of Appeals for the District of Columbia Circuit joined the other Federal courts of appeals in adopting the ALI approach (at 986).

[68]393 F.2d 920 (4th Cir. 1968).

cognition and volition as a result of mental defect or disease. In a general way, it is the McNaughtan Rule with irresistible impulse added. The ALI test includes McNaughtan's moral component and embraces the control component of the irresistible impulse test. But unlike the irresistible impulse test, and like the Durham test, it allows for brooding and reflection.[69]

The ALI test considers three elements: cognition, volition, and capacity. Dean Goldstein (1967) gives this succinct description of the broader test:

> "The test is a modernized and much improved rendition of McNaghten and the 'control' tests. It substitutes 'appreciate' for 'know', thereby indicating a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct. And it uses the word 'conform' instead of 'control', while avoiding any reference to the misleading words 'irresistible impulse'. In addition, it requires only 'substantial' incapacity, thereby eliminating the occasional references in the older cases to 'complete' or 'total' destruction of the normal capacity of the defendant" (at 87).

During the trial proceedings, the emphasis of the ALI rule will center on the determination of two issues: first, did the defendant substantially lack the capacity to appreciate the wrongfulness of his act, and, second, did the defendant substantially lack the capacity to conform his behavior?

The advantages of the ALI approach are compelling. First, the ALI test adds a volitional component missing in McNaughtan -

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[69] Unlike McNaughtan, the ALI test excuses one from criminal responsibility if he knew his act was wrong but could not avoid committing it. It differs from the irresistible impulse test, however, in that it is not restricted to sudden and spontaneous acts. See Hill v. State, 252 Ind. 601, 251 N.E.2d 429 (1969).

namely, the ability to conform to legal requirements.[70] Secondly, the 'all or nothing' approach of McNaughtan is avoided by allowing a 'not guilty by reason of insanity' verdict based on substantial incapacity.[71] As Justice Kaufman explained in United States v. Freeman,[72] "by employing the telling word 'substantial' to modify 'incapacity' the rule emphasizes that 'any' incapacity is not sufficient to justify avoidance of criminal responsibility but that 'total incapacity' is also unnecessary".

Thirdly, by referring to the accused's capacity to 'appreciate' the wrongfulness of his conduct, the rule takes note of the fact that mere verbal knowledge of right and wrong

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[70] An example of volition vs. cognition would be if a defendant who commits a crime knows (cognition) that what he did was wrong but due to his mental condition (e.g. schizophrenia) was unable to control his conduct (volition). For example, a defendant having a mental deficiency affecting his volitional capacity, but not his cognitive ability to differentiate between right and wrong (e.g. forms of schizophrenia), can now be found insane, a finding which would have not occurred under the McNaughtan approach.

[71] Perhaps the most significant change is that under the ALI test, a lack of substantial capacity is sufficient to escape criminal liability, while under both the McNaughtan and irresistible impulse tests, total impairment of capacity is required. An example of the type of case the ALI test sought to reach by its use of 'substantial' is the schizophrenic who is responsive to commands and, therefore, theoretically able to conform his conduct to the law, yet is extremely disoriented from the reality (Model Penal Code S.4.01, Comment at 158 (Tent. Draft No.4, 1955).

[72] 357 F.2d 606 (2d Cir. 1966). Kaufman, J. wrote the majority opinion, which adopted the ALI test in that jurisdiction.

does not prove sanity.[73] The choice of the word 'appreciate' rather than 'know' was critical in that mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance.[74] By modifying 'criminality' with the word "appreciate", rather than "know",the ALI authors recognized the grey area dividing the two terms with respect to the human mind. By viewing the mind as a unified entity, the ALI test brings the legal test of insanity into harmony with modern psychiatric knowledge, which is opposed to any concept which divides the mind into separate compartments as the McNaughtan test does.[75]

Fourthly, the ALI test is couched in simple, comprehensible language enabling psychiatrists to communicate more clearly their clinical observations to the jury. In addition, the language is sufficiently common, to both legal and medical professions, so that its use in the courtroom permits communication between judges, lawyers, experts, and jurors. The parties can communicate without the use of a "vocabulary that is either stilted or stultified, or conducive to a testimonial

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[73] The ALI formulation is consistent with the concept that mere verbal knowlege of right and wrong does not prove sanity. This concept was expressed by the court earlier when McNaughtan was modified to recognize this. See People v Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

[74] United States v. Freeman, above note 72 at 623.

[75] Ibid. The test views the mind as a unified entity - recognizing it can be impaired in different ways and does not require total incapacity (at 196).

mystique permitting expert dominance and encroachment on the jury's function"[76] Because of this, the jury is able to reach its own conclusion as to the defendant's criminal responsibility rather than accept the expert's opinion as determinative.[77]

Furthermore, the ALI test is conducive to expert testimony promoting a broad medical-legal investigation. It is broad enough to permit a psychiatrist to present a full picture of the defendant's mental impairments and flexible enough to adapt to future change in psychiatric theory and diagnosis.[78]

Many thoughtful observers have expressed favourable views concerning the ALI formulation as a significant improvement over McNaughtan, irresistible impulse, and Durham (Dawson, 1981; Waddell W.C., 1979; Hamilton, 1980; Darbyshire, 1980; Diamond; 1962). These commentators generally agree that, by adding a volitional aspect to a sanity determination, the ALI test permits a more accurate and complete assessment of an accused's state of mind than do the traditional tests (Fingarette, 1976; Goldstein, 1967; Diamond, 1961).

Despite the apparent enthusiasm toward the new formulation, the ALI test has not escaped criticism. As one critic points

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[76] Re Ramon M. 22 C.3d 419, 149 Cal. Rptr. 387 (1978).

[77] In adopting the test, the Brawner Court retained its definition of 'mental disease or defect' articulated in McDonald v. U.S. (above note 58). Both McDonald and Washington v. United States (above note 60) were deliberate attempts to solve the problem of usurpation of jury function by experts, thereby avoiding the weakness of Durham.

[78] People v. Drew, 22 Cal. 3d 333, 345 n.8, 583 P. 2d 1318, 1324 n.8, 149 Cal. Rptr. 274, 281 n.8 (1978).

out, the ALI test is little more than a rewriting of the McNaughtan and irresistible impulse tests (Platt, 1969).

One major complaint of the ALI test is that its language will not prove any easier to apply than McNaughtan. The important words in the test such as 'substantial', 'appreciate', 'mental disease or defect', and 'result' are vague and undefined (Goldstein, 1967; Morris, N., 1968).

One strong objection to the ALI use of the 'substantial impairment' requirement is that it would be susceptible to purely personal interpretations by jurors (Kuh, 1962; 1963; Trificante, 1980). Furthermore, it creates uncertainty because of the inherent ambiguity in referring to a 'substantial' degree without establishing any reference points by which that degree can be determined. Whether the test is total or substantial incapacity, the jury is asked to draw an arbitrary line between criminal responsibility and non-responsibility. (Comment, Maine Law Review, 1973).

Judge Bazelon claims tht the use of the word 'result' would lead to conclusory expert opinions in the same manner which resulted from the 'product' language of the Durham test. He warns against "...the articulation of a catchphrase that facilitates conclusory expert testimony and that obscures the moral and legal overtones of the productivity question".[79]

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[79] United States v. Brawner, above note 67 at 1010 (Bazelon, C.J. concurring in part and dissenting in part).

Goldstein (1967) charges that the ALI variant of the control test is subject to the same criticism aimed at the irresistible impulse test: to date, there is no objectively verifiable test that is capable of measuring a defendant's capacity, at sometime in the past, to control himself. Thus, any attempt to measure the absolute or substantial lack of capacity has been criticized as increasing the number of insanity acquittals, thereby weakening the deterrent value of the law.[80]

Some critics predict that the ALI rule will not accomplish the changes it sought to effectuate and will fall prey to the shortcomings of the prior tests (Goldstein, 1967; Trificante, 1980; Diamond, 1962). They argue that psychiatric testimony will continue to be phrased according to test language and psychiatrists will continue to testify in conclusory terms without adequate explanation of the factual basis for their conclusions.

Perhaps the strongest criticism of the ALI concerns subsection (2) of its codification which categorically denies the defence to sociopaths and psychopaths.[81] Dr. Diamond (1962) argues strongly that:

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[80] Wade v. United States, 426 F.2d 64, 75 (9th Cir. 1970).

[81] In the California case, People v. Drew, 22 Cal. 3d 333, 345 n.8, 583 P.2d 1318, 1324 n.8, 149 Cal. Rptr. 274, 281 n.8 (1978) psychopaths have been characterized as persons who are intellectually aware of the consequences of their acts but feel no remorse or pity and are abnormally disposed toward repeated commission of criminal acts. Historically, these types of offenders have been precluded from asserting the insanity defence in California.

> "Restrictive clauses aimed at excluding certain specified categories of individuals from exculpation simply do not make any psychiatric sense. They are as arbitrary and capricious as excluding defendants with red hair or blue eyes or Negro blood from the benefits of the law of criminal responsibility. They define by legislative fiat what is and what is not a psychiatric condition" (at 194).

Another critic supports the contention that psychopathy is never manifested solely by repeated criminal conduct and, thus, any effort to exclude psychopaths from the insanity defence based on Paragraph (2) will undoubtedly fail (Kuh, 1963:626).

In the landmark California case, People v. Drew,[82] the court, in adopting the ALI test stated:

> "Adhering to the fundamental concepts of free will and criminal responsibility, the American Law Institute test restates McNaghten in language consonant with the current legal and psychological thought".

In the court's opinion, the ALI test, having won widespread acceptance, is the best replacement for McNaughtan now available.[83]

Today, it is clear that the competing insanity tests in the United States are the traditional McNaughtan and the ALI. Support for the ALI test is carrying the day, however (Waddell,

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[82] 22 Cal. 3d 333, 345 n.8, 583 P.2d 1318, 1324 n.8, 149 Cal. Rptr. 274, 281, n.8 (1978). The significance of this case is its adoption of the ALI test of insanity in California. This was an improvement over the Currens (290 F.2d 751, 1961) whereby the 'substantial capacity to conform' part of the ALI test was adopted but not the 'cognitive' part of the ALI test (e.g., 'appreciate the criminality of his conduct'). It is argued that removal of the cognitive branch of the test is inconsistent with the fundamental concept of mens rea and the moral basis for criminal liability (Hamilton, 1980).

[83] See Traficante, 1980 for a comprehensive and critical commentary of this case and see People v. Drew (Pepperdine L.R., 1980).

W.C., 1979; Dawson, 1981; Hamilton, 1980; Darbyshire, 1980). At present, the ALI test (or a version substantially similar to it - a combined cognition-voilition test) has been adopted by a majority of the states, Federal circuits, and the U.S. Court of Military Appeals (Watkins, 1981; see Appendix A).

Diminshed Responsibility - Diminished Capacity

The doctrine of "diminished responsibility", or "diminished capacity", is a 'middleground' of criminal responsibility judicially created, in the United States[84], to mitigate the harshness of the all-or-nothing McNaughtan approach (Adelson, 1974; 1975). This compelling doctrine allows the Courts to deal adequately with situations where an accused's lack of mental capacity could not satisfy the stringent standard set by McNaughtan, but where it was clear that he had much less than complete control of his mental faculties, at the time that the offence was committed.

In reality, as was pointed out in Brawner,[85] (in the U.S.) the doctrine has nothing to do with diminishing the responsibility of a defendant due to his impaired mental condition; rather, it admits evidence of impaired mental

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[84]The doctrine developed in the United States is known as "diminished capacity" as opposed to "diminished responsibility" in England. The distinction between the two will be made in the subsequent discussion.

[85]United States v. Brawner, above note 67. at 998.

condition in determining whether this defendant had (or was capable of having) the mental state required to find any defendant guilty of the crime charged.

"Diminished responsibility" or "diminished capacity" allows a mentally abnormal, but legally sane, defendant to have his mental abnormality taken into account in assessing criminal responsibility. The doctrine is founded on the notion that there are certain situations in which an individual should have the penalty for crime reduced because of a mental abnormality, that falls below the level of 'legal insanity' (Arenella, 1977).

Unlike insanity, which focuses upon the question of whether an accused who is suffering from mental disease or defect should be held criminally responsible for his acts, diminished responsibility or diminished capacity (in the U.S.) looks instead to the accused's ability to harbor a 'specific state of mind', that is a required element of a particular crime.

The test for determining insanity differs from that for determining diminished responsibility or diminished capacity. The insanity defence focuses on the general issue of whether at the time the defendant acted, the defendant possessed the mental capacity to commit crimes. When a defendant offers a plea based on insanity, the issue is whether a defendant who is suffering from mental disease or defect should be held criminally responsible for his acts (Morris, G., 1975).

The doctrine of 'diminished responsibility' or 'diminished capacity' (in the United States), on the other hand, focuses on

the specific issue of whether at the time the defendant acted, he actually possessed the requisite mental state that is an element of the particular crime. The issue is whether at the time he acted, the defendant possessed the capacity to have the mental state required as an element of the offence charged against him, or if he did possess such capacity, did he in fact have such mental state (Morris, G., 1975).

With diminished responsibility, or diminished capacity, the focus is upon the degree to which a person, found guilty of a criminal act, should be held responsible (Arenella, 1975). Although the doctrine may be viewed as a modification of the procedures surrounding the insanity defence, the doctrine is not a substitute for the insanity defence. It merely results in conviction for a lesser offence, whereas the insanity defence, if proven, results in an 'acquittal'.

The defence of diminished responsibility, or diminished capacity, allows the Court to admit psychiatric opinion on virtually all aspects of an accused's mental condition[86] for the sole purpose of determining whether the defendant, in fact, had actually formed the requisite mental state or 'specific intent', such as premeditation in first degree murder, for the crime charged.

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[86] United States v. Brawner, above note 67 at 1002 (provided such evidence is based on sufficient scientific support and would assist the trier of fact in reaching a decision on the ultimate issue).

The defence is limited to crimes which require, as an element of the offence, the existence of a 'specific' intent to commit the proscribed act or, in those jurisdictions which have abolished the common law distinction between specific and general intent, to any crime that requires proof of a particular mental state[87] (Lewin, 1975).

Morse (1979) thoughtfully makes the important distinction between the two forms of 'diminished responsibility'. The first variant - the mens rea approach of "diminished capacity" - operates to negate an element of the crime charged, thereby exonerating the defendant of that charge. More specifically, the mens rea variant allows the accused to show that he lacked the mental state constituting one of the elements of the offence charged because of mental abnormality. If the mental element of an offence is lacking, the accused cannot be convicted of that offence, but may be convicted only of a lesser included offence (provided that the mens rea of the lesser offence can be proven beyond a reasonable doubt). For instance, a mentally disordered defendant charged with first degree murder, on an intent to kill

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[87] 'Specific intent' crimes require proof of some particular mental state beyond the mere intent to engage in the proscribed conduct. 'General intent' crimes require only that the person voluntarily commit the forbidden act.

Although in theory the diminished capacity defence could be applied to any crime requiring evidence of intent to commit a criminal act, the courts have limited the scope of this defence to crimes that require 'specific intent' as opposed to crimes requiring only 'general intent'. Otherwise, an unlimited application of this defence could result in the complete exoneration of a defendant charged with a 'general intent' crime which does not incorporate a lesser offence (Arenella, 1977).

theory, may be able to show that he or she was unable to 'deliberate and premeditate', thereby reducing liability to second degree murder (e.g., killing with intent, but without premeditation and deliberation).[88]

This 'mens rea' type of diminished responsibility is known as "diminished capacity", in the United States, and has been judicially adopted in at least fourteen jursidictions.[89] Only California and the District of Columbia have fully developed this concept of 'diminished capacity' in its broadest form, which recognizes diminished capacity in a prosecution for any crime requiring a 'specific intent'. The remaining twelve states have limited the applicability of the concept to crimes involving multiple degrees when the gradation into degrees is based on changes in the required mens rea (Bryant & Hume, 1977).[90]

The second variant identified by Morse (1979) is the "partial responsibility" or "diminished responsibility" approach which operates formally to reduce the degree of crime for which

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[88] People v. Wolff, 61 Cal. 2d 795, 394 P. 2d 959, 40 Cal. Rptr. 271 (1964).

[89] While commentators (Morris, G., 1975) have claimed that as many as twenty-six states recognize the doctrine of diminished capacity, it has been argued that a careful reading of the decisions indicates that only fourteen states have recognized the defence by court decision (Bryant & Hume, 1977). These fourteen states have recognized diminished capacity by court decision: California, District of Columbia, New Jersey, Washington, Iowa, New Mexico, Virginia, Texas, New York, Connecticut, Kentucky, Nebraska, Rhode Island, and Utah.

[90] The degrees of homicide illustrate such gradations.

the defendant may be convicted and punished even if all the formal elements of crime were satisfied. This second type of "diminished responsibility" is closer to an affirmative defence according to Morse because mental abnormality short of legal insanity may be taken into account to assess a defendant's blameworthiness. Professor Morse says that this defence holds that, even if the accused had the requisite mens rea, his mental state was so diminished through mental disorder that he can be held only 'partially' responsible - thus, a sort of junior insanity defence.

This second type of "diminished responsibility" or "partial responsibility" was introduced, in England, by S.2 of the Homicide Act of 1957[91] as a partial defence which applies only in prosecutions for murder and allows a reduction of responsibility only to manslaughter. Unlike the United States' "diminished capacity", diminished responsibility does not require proof that the mental disease actuated the absence of a particular mental element of the crime. It merely requires proof that the defendant was afflicted with a mental disease during the commision of the offence. Because diminished responsibility only operates as a tool for mitigating capital murder to manslaughter it is, in reality, an ameliorative[92]

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[91] 5 & 6 Elizabeth 2 C.11 (U.K.). This was patterned after the Scottish doctrine of diminished responsibility. See earlier discussion in Chapter III. Also, see Dell (1982) for a full discussion of the present use of the doctrine in England.

[92] Lewin (1975) notes that diminished capacity defence has been frequently confused with the Scottish diminished responsibility defence (adopted by England). Because diminished responsibility

doctrine. Diminished capacity, on the other hand, requires the negating of an element of an offence, thus it is, a causative doctrine (Lewin, 1975:1055).

Nowhere in the United States has the doctrine of "diminished capacity" been as coherently and fully developed as in California. In theory,[93] California courts have judicially adopted the mens rea variant of diminished capacity in some form since 1949.[94] The line of decisions gradually departed from the strict cognitive view of sanity set forth in McNaughtan.

The California Supreme Court first recognized the concept in People v. Wells,[95] holding that a jury may consider psychiatric testimony to determine whether a defendant acted with "malice aforethought".

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[92](cont'd) provides amerlioration for defendants upon whom society has imposed the harshest penalties, American courts have refused to adopt the defence (at 1055).

[93]Morse (1979) and Arenella (1977) have both argued that California's 'diminished capacity' is, in essence, the 'diminished responsibility' model in mens rea clothing.

[94]The doctrine was developed in a direct response to the narrow phrasing of McNaughtan. The primary impact of diminished capacity has been to make a defence available to a defendant who, although suffering from some degree of mental disease or defect, was not legally insane under the strict McNaughtan standard.

[95]33 Cal. 2d 330, 202 P.2d 53 (1949). Evidence of mental abnormality may be used to negate the elements of any specific intent crime, including those without lesser included offences, even if the outcome is acquittal. In 1965, the California Supreme Court noted that, although this doctrine had been referred to as 'diminished responsibility', the term 'diminished capacity' was a more accurate name for the theory (People v. Anderson, 63 Cal. 2d 351, 364, 406 P.2d 43, 52, 46 Cal. Rptr. 763, 772 (1965).

Ten years later, the doctrine was solidified, in People v. Gorshen[96], when the California Supreme Court, reaffirming Wells established that a defendant may attempt to demonstrate that he was unable to entertain a particular mens rea because of a debilitating mental condition. The court held that psychiatric evidence is admissible to negate the elements of "premeditation and deliberation" thereby reducing a homicide from first degree to second degree murder.[97]

In 1964, the doctrine underwent further refinement. In People v. Wolff[98], the Supreme Court of California interpreted the "deliberation-premeditation" formula to require something more: to convict a defendant of first degree murder, the Court ruled that "the true test must include consideration of the somewhat limited extent to which this defendant could maturely and meaningfully reflect upon the gravity of his contemplated act".

Under the so-called Wells-Gorshen rule, evidence of diminished mental capacity, whether caused by intoxication, trauma, or disease, can be used to show that a defendant did not have a specific mental state essential to proof of the offence.

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[96]51 Cal. 2d 716, 731, 336 P.2d 492, 502 (1959).

[97]The Court stated that when the question is whether an intent to kill was formed by premeditation and deliberation, a defendant may seek to prove that because of mental impairment he 'could not and therefore did not deliberate'. This is similar to the Canadian cases of More (note 49) and Mitchell (note 51) in Chapter III.

[98]61 Cal. 2d 795, 394 P. 2d 959, 40 Cal. Rptr. 271 (1964) See Hasse, 1972 for a thorough analysis of this case.

The concept was further modified, in People v. Conley[99], wherein the Court held that evidence of diminished capacity could be presented to negate the element of "malice", thereby reducing the degree of homicide to voluntary manslaughter. The Conley Court concluded:

> "A person who intentionally kills may be incapable of harboring malice aforethougt because of a mental disease, defect, or intoxication, and in such a case his killing, unless justified or excused, is voluntary manslaughter".

Expanding the concept, in People v. Mosher, the Court gave the doctrine its broadest application in homicide cases by admitting psychiatric testimony to prove that a defendant could not entertain an intent to kill, thereby reducing a homicide from voluntary to involuntary manslaughter'.

The Court further elaborated, in People v. Taylor[100], that, in non-homicide cases, the evidence of diminished capacity may negate the mens rea of any specific intent crime.

The most significant development of the concept of diminished capacity apart from that of California was its acceptance by the District of Columbia Court of Appeals in United States v. Brawner.[101] The Brawner Court, reversing a conviction for first degree murder, held that psychiatric

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[99]64 Cal. 2d 310, 316, 411 P. 2d 911, 914, 49 Cal. Rptr. 815, 818 (1966). This case signified the official creation of "non-statutory voluntary manslaughter".

[100]220 Cal. App. 212, 216 33 Cal. Rptr. 654, 657 (1963).

[101]Above note 67. The Brawner case offers a good discussion of the proper interplay of diminished capacity and the insanity defence.

evidence may negate the mens rea of any specific intent crime. The Court noted that prior decisions had permitted evidence of intoxication[102] to negate a required mens rea and, thus, concluded that "logic and justice" required that evidence of less specific debilitative conditions also must be considered.

The California model of diminished capacity, evolved as a means of ameliorating the rigors of McNaughtan, continued unimpeded until, in 1978, in People v. Drew,[103] the Supreme Court adopted the more liberal ALI test for insanity. Now with Drew, the continued relevancy of the model became open to question[104] (Waddell, C.W., 1979). The San Francisco murder case of People v. White[105] seems to have been the catalyst which brought critics of the doctrine together in their demands that

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[102]In the District, as in most of the states, intoxication (even if voluntary) is a defence to a crime requiring specific intent.

[103]Above note 82.

[104]The argument is that, since it is no longer necessary to meet the harsh standard of McNaughtan, there is also no longer a need for a diminished capacity defence. With the ALI test of 'substantial capacity' rather than 'total incapacity' it is suggested that there is no need to resort to a diminished capacity defence to avoid, "the stultifying effect upon psychiatric testimony of the McNaghten Rule" (In Re Ramon M., 22 C.3d 419, 149 Cal. Rptr. 387 (1978).

[105]Cal. App., 151 Cal. Rptr. 861 (1979). At his trial for killing San Francisco Mayor, George Moscone, and City supervisor, Harvey Milk, Dan White argued that his mental faculties had been seriously impaired by a steady diet of junk food - thus, the term "Twinkie Defence" was coined. After the jury found him guilty of manslaughter (the lesser offence because he did not have the capacity of malice, premeditation and deliberation - the elements required for a first degree murder conviction) under the diminished capacity rule, angry crowds damaged the City Hall and demanded that the diminished capacity rule be repealed.

the legislation alter or eliminate the doctrine (Hardyman, 1978).

In late 1981, the California state legislature passed a bill to abolish the defence of diminished capacity and related defences, including intoxication.[106] The new legislation, instead, codified traditional forms of premeditation and deliberation[107] and of malice.[108]

Opponents of the diminished capacity doctrine have pointed out theoretical and practical problems involved in its implementation. Professor Arenella (1977) argues that the doctrine may supplant rather than supplement the insanity defence. He contends that seriously disturbed defendants may avoid an indefinite commitment to a mental hospital by relying on the defence which frequently leads to a reduced term in prison. He argues that studies, conducted in England, have shown that, when the number of diminished responsibility pleas have increased, the number of insanity pleas have decreased.[109]

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[106]California Senate Bill No. 54, amending Sections 21, 22, 26, 188 and 189 or the Penal Code, and adding Sections 28 and 29, approved by the Governor September 10, 1981, effective January 1, 1982.

[107]Ibid., amending S. 189 of the Penal Code: To prove the killing was 'deliberate and premeditated', it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

[108]Above note 106, amending S. 188 of the Penal Code: When it is shown that the killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

[109]Other commentators have noted that if a major concern about the insanity defence is that culpable defendants are too often acquitted, then the plea of diminished responsibility would

Professor Arenella's second criticism is that the issue of such doctrines to remedy flaws in the insanity test sidetracks meaningful reform of the insanity defence itself:

> "...indirect partial remedies do not cure the basic defects of the McNaughten test; they merely reduce the court's incentive to confront the difficult question of proper criteria for exculpation" (1977:854).

Another concern is that courts have relied on "compromise" partial defences. Juries, if divided on whether a defendant charged with murder in the first degree should be found guilty or not guilty by reason of insanity, compromise on the middleground of diminished capacity and convict him of the lesser offence of murder in the second degree (Arenella, 1977).

Again, on the theoretical level, one commentator (Morse, 1979) argues that diminished capacity is undesirable because it is not morally compelled and is socially harmful:

> "If some legally sane offenders are given reduced punishment, the deterrent effect of the criminal law is clearly lost as to them, and perhaps to society at large if persons believe it is easy to 'beat a rap' with a claim of partial responsibility" (at 298).

It is Professor Morse's contention that the educative function and social dictates of the criminal law are best reflected by unreduced conviction and sentences for legally sane offenders. It is his opinion that:

> "The lesson of the law should be that there is no compromise with notions of accountability except in extreme cases" (at 298).

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[109](cont'd) provide a workable supplement to the insanity defence by assuring the conviction of criminals who would otherwise escape the reach of the criminal justice sytem (Robitscher & Haynes, 1982).

An argument, focusing on the practical difficulties of the implementation of the doctrine, is that juries may not be competent enough to make distinctions as to degrees of mental impairment based on their evaluation of psychiatric testimony.[110] For instance, diminished capacity may require a jury to assess psychiatric testimony that makes a subtle distinction in the degree of mental impairment, that renders a defendant incapable of forming a "deliberate and premeditated" intent to kill (as required for first degree murder) but that does not prevent him from having an "intent to kill" (as required for second degree murder).

Notwithstanding the above arguments, most academic contributors favour the diminished capacity doctrine and overwhelmingly support its use in conjunction with an insanity defence (Leib, 1970; Cooper, G.B., 1971; Havel, 1971; Hasse, 1972; Adelson, 1974; Morris, G., 1975; Bryant & Hume, 1977; Maine Law Review, Comment, 1973; Fingarette, 1974).[111]

> "When diminished capacity is part of a system that also includes the traditional insanity defence it performs a valuable function. It is a rational alternative for those individuals whose mental disease or defect, though insufficient to constitute legal insanity, ought

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[110] Commonwealth v. Hollinger, 190 Pa. 155, 42 A. 548 (1899). The Court stated that to require the jury to make such an evaluation is to require the impossible.

[111] See United States v. Brawner, 471 F2d 969, 998-99 (D.C. Cir. 1972) for a good discussion of the appropriate interplay of diminished capacity and the insanity defence. It should be noted that diminished capacity standing alone is not a viable alternative since it would impose criminal sanctions on all criminal defendants with a mental illness regardless of how severe such illness may be.

> nonetheless be considered as a factor which mitigates the degree of culpability. Such a situation exists when the illness affects one of the mental elements of crime, but not the underlying moral culpability" (Nathan & Bonnie, 1980:1023).

Sharing that sentiment, Held (1980) concludes that a use of the two defences focussing on underlying blame could result in an appropriate use of the concepts, and bring their application more into line with other criminal law precepts. Ultimately, it is argued (Waddell, C.W., 1979), if Courts are given a chance to implement the ALI test, the opportunity will be available to restructure the diminished capacity defence in a manner that will lead to an effective inter-relationship with the insanity defence.

Butler Test

In England, the 1975 Report of the Committee on Mentally Abnormal Offenders,[112] chaired by Lord Butler, recommended the abolition of the McNaughtan Rules and the substitution of a new two-branch test. Patterned after the French approach, the "Butler Test" is considered (in the first limb) logical and (in the second limb) simple (Glazebrook, 1976).

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[112] Report of the Committee on Mentally Abnormal Offenders, (1975) Cmnd. 6244, London, H.M.S.O.

The first of the two alternative grounds deals with mental disorder[113] negating the requisite mens rea (e.g., intention, foresight, belief, knowledge etc.); while the second concerns itself with a specific exemption for those suffering from a severe mental disorder or a severe sub-normality notwithstanding the technical proof of mens rea.

The scheme, the committee recommends, is that a jury be directed to return a special verdict of "not guilty on evidence of mental disorder" if:

1. they acquit the defendant solely because he is not proved to have had the state of mind necessary for the offence and they are satisfied on the balance of probability that at the time of the act or omission he was mentally disordered; or
2. they are satisfied on the balance of probability that at the time he was suffering from severe mental illness or severe subnormality.

In this latter case, lack of responsibility is presumed without the necessity to prove a causal relationship between the mental disorder and the criminal conduct. It is sufficient to prove, that, at the time of the offence, an accused was severely disordered and, as a result, an exemption from criminal

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[113] "Mental disorder" while given a liberal interpretation by the Butler Committee is defined so as to exclude transient disorders caused by physical injury or the abuse of alcohol, drugs and certain types of non-insane automatism (See Ashworth, 1975 for a complete discussion of the Butler Report).

responsibility is justified.[114]

One noticeable, positive feature of the Butler test is that it avoids the rigidity and archaism of McNaughtan, by recognizing that an accused may know what he is doing yet be so severely disordered in intellectual, emotional, or control functions as not to be responsible for his behavior.

Moreover, in an attempt to bring the more seriously psychotic defendants within the second ground for the special verdict and to prevent psychiatrists from usurping the jury's function, the Committee provides a comprehensive definition of "severe mental illness".[115]

In another positive vein, the Butler Committee advocates progressive procedural changes.[116] In terms of disposition, the committee favours abolishing the existing rule that the special verdict be followed by mandatory indefinite commitment to a mental hospital. It recommended that the Court be empowered to impose a hospital order (with or without a restriction order) to order out-patient treatment, or to give an absolute discharge. Furthermore, there should be a new power to make a psychiatric supervision order, under which the patient would be discharged

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[114]The Committee believed that this dimension of the test would avoid the 'product' or causation difficulty of the Durham Test.

[115]These definitions are phrased in terms of factual tests (See p. 18.36 of Butler Report).

[116]See Summary of Recommendations at P. 674 of the Report.

into the community,[117] subject to readmittance to hospital if the supervising officer believes that this is necessary in view of the patient's mental condition or conduct.

In a more negative vein, despite the attempt by the Butler Committee to devise a clear and understandable formulation, that would reflect modern medical terminology, and to restrict expert witnesses to testifying as to the facts of the accused's mental condition rather than the question of responsibility,[118] the proposal appears to have all the hallmarks of the Durham fiasco.[119] It is argued, that since the definitive criteria of the test are in medical terms, expert evidence will not only be conclusory, but also be influential enough to usurp the jury's function of deciding on criminal responsibility (Stuart, 1982). Even the Butler Committee concedes that the second ground of the newly pronounced test "necessarily turns over the test of criminal responsibility to medical opinion" (at 229 of Report).

The 'no causation' (no connection between the offence and the severe mental disorder need be shown) component of the test is criticized because it leaves open the possibility that an accused will be exempt from liability for an offence which was not caused by or attributed to his severe mental disorder (Smith

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[117] Specific conditions for these S.65 patients are discussed in the Report - Para. 7.11 to 7.29.

[118] See Para. 18.17 Report.

[119] See Durham v. United States, above note 52. The main failing of the Durham experiment was that psychiatrists continued to 'testify to the naked conclusions...thereby usurping the role of the fact finder'.

& Hogan, 1978).

To date, the recently created "Butler Test" has not been implemented in any jurisdiction and has received very little academic attention. In light of the obvious advantages over some of the other reform options, the Butler test does warrant consideration as a serious contender in a reform perspective.

Guilty but Mentally Ill

The "guilty but mentally ill" approach to modifying the insanity defence is rapidly gaining momentum, in the United States.[120] The "guilty but mentally ill" verdict is hailed as a "true compromise" between those who advocate liberalizing the insanity defence and those who would abolish it altogether (Watkins, 1981). This "middleground" approach offers an alternative to the stark choice between conviction and acquittal, by allowing a jury to recognize that an accused may be mentally ill even if his illness is not such as to deprive him of the capacity to appreciate and control his conduct (Smith, W.F., 1982).

Michigan is the pathfinder for this controversial alternative system for those criminal defendants who wish to

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[120] Since Michigan enacted the guilty but mentally ill verdict, legislatures in Illinois, Montana, Indiana and Georgia have also added this fourth verdict. More than half of the remaining states are considering the addition of this verdict (National Law Journal, May 3, 1982, at 12, col.3).

plead insanity.[121] In 1975, Michigan was the first state to enact a plea and verdict of "guilty but mentally ill".[122] The "guilty but mentally ill" statute was adopted in response to the Michigan Supreme Court's decision in People v. McQuillan[123], which construed that commitment of insanity acquittees, without a finding of present insanity, was 'unconstitutional' if for longer than a short examination period. The Court held that failure to provide such a hearing violated the due process and equal protection requirements of the constitution. The Court applied its decision retroactively and, as a result, sixty-four insanity acquittees were released from mental hospitals within a period of one year. Within a short time, two of the sixty-four inmates, who were released as sane, committed violent crimes. In the wake of the public uproar and heavy criticism of the court,

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[121] The concept is not a new one. In 1883, the form of verdict in England and Wales upon a successful defence of insanity was changed from 'not guilty by reason of insanity' to 'guilty but insane' (Criminal Lunatics Act, 1884, 47 & 48 Vict., ch. 64 S.). This change was cosmetic rather than substantive, influencing neither the placement nor the duration of detention of persons so found (Morris, N., 1982: 527). Thus, in 1964, the Criminal Procedure (Insanity Act) restored the form of verdict in England and Wales to 'not guilty by reason of insanity' (1964, ch. 84, S.1).

[122] Mich. Comp. Laws S. 768.36 (Supp. 1980) (effective Aug. 6, 1975). Mich. Stat. Ann. S 28.1059.

[123] 392 Mich. 511, 221 N.W. 2d 569 (1964). The legislative action resulting in the creation of the GBMI (guilty but mentally ill) verdict followed this case wherein the Court held that, after a period of examination and observation following trial, a hearing on the issue of present insanity is required before an insanity acquittee can be committed. Such a statutory construction led the legislators to fear the premature release of potentially dangerous individuals.

the Michigan legislature passed the "guilty but mentally ill" statute.

The "guilty but mentally ill" legislation provides the jury with an alternative to the traditional verdicts of "guilty" or "not guilty by reason of insanity". When a defendant puts his sanity in issue as a defence to a charge, there are four forms of verdicts to be submitted to the jury: guilty, not guilty, not guilty by reason of insanity, and guilty but mentally ill.[124] In order to return the verdict "guilty but mentally ill", the jury must decide that:

1. the defendant was proven guilty beyond a reasonable doubt;
2. the defendant was mentally ill at the time of the crime; and
3. the defendant was not insane at the time of the crime.

The traditional insanity defence has not been eliminated under the GBMI (guilty but mentally ill) statute, as a defendant who is found to have been legally insane at the time of the offence will still be relieved of all criminal responsibility. Legal insanity in Michigan is determined by the ALI test. The Michigan statute provides that a person is "legally insane" if at the time of the alleged crime "as a result of mental illness...that person lacks substantial capacity either to

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[124]The maximum consequences in Michigan pursuant to each verdict are as follows: not guilty-discharge: not guilty by reason of insanity-no automatic indefinite commitment but, in effect, civil standards for commitment and release; guilty but mentally ill - a sentence by the trial judge that will be served in prison or in a mental hospital for a period up to the maximum for the crime charged; guilty-commitment to prison up to the maximum period for the crime charged.

appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law". A defendant found "not guilty by reason of insanity" is subjected to a psychiatric examination and is then either committed or discharged.[125]

By contrast, "mental illness", for the purposes of the GBMI verdict, is defined as a "substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life".[126] A defendant found "guilty but mentally ill", however, is treated for the present mental illness and also receives the sentence that would be imposed on one simply found "guilty" of the crime.[127]

Proponents argue that the GBMI verdict offers a reasonable compromise to the traditional tests of insanity because it

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[125]The NGRI defendants must be placed immediately in the custody of the Center for Forensic Psychiatry for evaluation for not more than 60 days. The Center reports on the defendant's present sanity and whether he meets the criteria for civil commitment. The defendant is then either committed or discharged after a judicial hearing (Mich. Stat. Ann S 14.800 (1050).

[126]Mich. Comp. Laws Ann S 768. 21a (1) (1982).
Mich. Comp. Laws Ann. S 330.1400a (1980).

[127]A defendant found guilty but mentally ill, if sentenced to a prison term, is committed to the custody of the department of corrections for further evaluation and such treatment as is psychiatrically indicated (Mich. Stat. Ann. S 28.1059). If treatment is ordered, and the defendant is later discharged from the department of mental health, he returns to prison to serve the balance of his sentence. (Id). If the prisoner is placed on probation, the trial judge, 'upon recommendation of the Centre for Forensic Psychiatry, shall make treatment a condition of probation(Id).
Mich. Comp. Laws S 768.36(3) Treatment may be provided by either the department of corrections or by the department of mental health.

creates beneficial effects. First, it forces the triers of fact to consider degrees of mental abnormalities, and second, it creates a statutory right to treatment (Amarilio, 1979), and third, it provides the public with greater assurance against premature release of violent mental patients (Morris, N. 1980).

The GBMI verdict, a "half-way house" between guilt and innocence", is "both constitutional and good sense" (Morris, N., 1982) and upholds the legitimacy of punishing those who have committed crimes (Watkins, 1981).

> "...the verdict offers a solution to some of the inconsistencies generated by the insanity defence by permitting the jury to both openly assign guilt and indicate its belief in the value of mental health treatment for the defendant" (Watkins, 1981:311).

Notwithstanding these proclaimed virtues, the GBMI approach has received little academic support. According to critical observers (Robitscher & Haynes, 1982), the wisdom of the new procedure is questionable. While the verdict of GBMI may have merit because it expedites criminal trials and provides continuing control of the defendant, it fails to conform to legal philosophy and traditional concepts of due process by allowing those incapable of formulating criminal intent to be found guilty.

Another critic charges that the legislation:

> "...destroys the concept of culpability, because it means no longer separating people who are legally responsible for their actions from those who are not. This kind of verdict gives the impression that persons convicted under it will be getting treatment. But if you examine these statutes, you will find they don't require treatment. This type of verdict is an absolute fraud" (U.S. News & World Report 5 Jul 82, p.15, citing

Professor Elyce Zenoff).[128]

Other critics (Nathan & Bonnie, 1980) make note of the fact that, when an accused is found GBMI, the question of mental illness becomes relevant only to the issues of disposition and sentencing. While treatment may be administered by the department of mental health, the department of corrections retains control over such individuals.[129] Restraint is measured not by the period of time necessary to effectuate cure and treatment, but by a predetermined statutory period tailored to fit the crime committed. Thus, a defendant must serve his entire sentence even if cured and, conversely, a defendant must be released once the sentence expires, regardless of his mental condition.[130]

Most commentators who have considered the "guilty but mentally ill" issue recognize that constitutional problems exist in allowing such a verdict. In the United States, commitment and imprisonment of persons found GBMI are subject to equal protection and due process challenges, and may also constitute cruel and unusual punishment in violation of the 8th amendment to the constitution (Slowinski, 1982; Stelzner & Piatt, 1983;

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[128]One Michigan study revealed that more than 75% of all defendants receiving the "guilty but mentally ill" verdict were immediately incarcerated in prison rather than a mental institution and received no psychiatric treatment. Most of the others had only occasional sessions with a Department of Corrections psychiatrist (The Insanity Plea on Trial, Newsweek, May 24, 1982. See, also, Hagan (1982).

[129]Mich. Comp. Law Ann. S 768.36(3) (West Supp. 1979).

[130]Ibid S 768.36(3)

Grostic, 1978; Amarilio, 1979). Furthermore, a defendant sentenced under the new verdict loses the due process right to a civil hearing prior to commitment and its collateral procedural safeguards. The GBMI prisoner receives neither a reduced sentence nor any special release procedures because of his impaired mental condition (Sherman, 1981).

Others argue that the GBMI verdict is almost identical, in its consequences, to a verdict of "guilty". From a defendant's standpoint, the "guilty but mentally ill" alternative is in all practicality no alternative at all. Even if successful, he or she faces a finding of guilt and sentencing under the criminal law. Such flaws have prompted one observer to remark:

> "A particular problem will be faced by defence counsel in advising the client on the relative benefits of pleading GBMI. Given the legal hollowness of the GBMI verdict, I suggest that the act of a defense counsel advising his client to plead GBMI would constitute ineffective assistance, and a breach of a canonized ethical duty" (Schwartz, 1975:850).

Another fault of the GBMI verdict is that the confusion stemming from the overlap between the statutory defence of "mental illness" and "legal insanity" and the tendency of jurors to compromise are certain to cause some legally insane defendants to be found guilty but mentally ill.[131] In effect, by convicting the defendant, the jury can condemn his behavior and

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[131] The argument here is that the determination of sanity or mental illness is still left with the jury. In light of the fact that the jury already is confused over insanity and easily rejects that defence, the availability of the insanity defense is not helped (in fact aggravated) by requiring the jury to make yet another determination (Comment, U. of Michigan Journal of Law, 1978).

keep a potentially dangerous person in custody. However, by also finding the defendant mentally ill, the jury may believe that their verdict will insure special treatment for him and will carry a lesser stigma than a regular guilty verdict (Comment, U. of Michigan Journal of Law, 1978).

This "oxymoronic verdict" as one critic calls it (Stone, 1982) represents an extremist answer to the problems posed by mentally ill offenders. The main thrust of this legislation is to alter an accused's guilt, making mental illness less relevant; and allowing more defendants to be convicted (Hagan, 1982). Sherman (1981) argues that, while the insanity defence may be in need of reform, the threat to societal safety is not so severe that insanity acquittees should be deprived of their constitutional rights. Another legal contributor concludes:

> "The real virtue of the verdict...lies not in its legal rationale but rather in the fact that it satisfies the public demand for retribution" (Jordan, 1983:26).

Bifurcated Trials

An attempt at legislative reform, going beyond the articulation of an insanity test, involves the use of bifurcated trials, in which the issues of guilt and sanity are tried separately. In the two-stage proceedings, defendants pleading not guilty by reason of insanity have separate trials - first on the issue of innocence and then on that of insanity. A jury would determine who did the act, in the first phase, and either

a judge or panel of experts make the disposition determination, in the second phase.

A number of states have tried such an approach but all have been attacked on constitutional grounds. In California,[132] while not holding that bifurcated trials were unconstitutional, the Court did strongly opine that determining an accused's guilt without admitting evidence of his mental state at the time of the alleged offence would be denial of due process. Arizona, Florida, Wisconsin, and Wyoming have specifically declared bifurcation statutes unconstitutional.[133] These states have clearly indicated that due process may require evidence of insanity to be admissible in any proceeding to determine guilt. The defect was that sanity was presumed in the first proceedings.

Retention

The battle lines have been drawn between abolitionists and retentionists of the insanity defence in recent years. While there has been a serious movement in the United States toward abolition by those fundamentally opposed to any articulation of

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[132] People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949).

[133] State v. Shaw, 106 Arzi. 103, 471 P. 2d 715 (1970).
State ex rel. Boyd v. Green, 355 So.2d 789 (Fla. 1978)
Hughes v. Matthews, 576 F. 2d 1250 (7th Cir. 1978) (Wis.)
Sanchez v. State, 567 P. 2d 270 (Wyo. 1977).
See Robitscher & Haynes (1982) for an exposition on bifurcated trials.

an insanity standard, there remains enormous support for its retention. An impressive array of recognized authorities have rallied in support of the insanity defence (whether for retention of McNaughtan, restatement, modification, or expansion).

The prominent jurist, Judge Bazelon (1977) succinctly rationalized the necessity to retain the insanity defence:

> "The so-called insanity defense reflects society's unwillingness to impose condemnation and punishment when it cannot impose blame" (at 30).

and through the insanity defence "you humanize the law" (at 39).

Law Professor, Elyce Zenoff (U.S. News & World Report, Comment, 1982) defended the insanity defence as a key part of our criminal justice system because it preserves the concept of culpability separating those who are legally responsible for their actions from those who are not. "It exists in practically every civilized country; it is not some kind of aberration" (at 15).

In his influential exposition, Monahan's (1973) arguments for retention were based on the notion that "the citizen" and "the law" both need the insanity defence. He advocates retaining the insanity defence as the "lesser-of-two-evils" model. While conceding that the insanity defence is not without practical and conceptual problems, he contends that its value far outweighs its defects. He concludes that the consequences of abolition are too uncertain and too potentially disastrous without the establishment of a solid body of empirical evidence.

Many more commentators, representing the "who's-who" of the academic world, have contended that the longstanding recognition of the insanity defence is grounded in society's fundamental unwillingness to punish one who is not responsible for his conduct and the requirement of responsibility as one of the philosophical underpinnings of our criminal law (Packer, 1968; Brady, 1971; Gray, 1972; Fingarette, 1972; Morris, G., 1975; Kennally, 1976; Robitscher & Haynes, 1982; Tanay, 1981; Stone, 1982; Bonnie, 1983; Jordan, 1983; and Hagan, 1982; Maggio, 1981).

> "The insanity defence is deeply rooted in our legal tradition and a penal law based on fault must make provision for exempting from criminal liability persons who should not be held responsible for their conduct because of mental disorder" (Martin, 1981:30).

Despite the press every so often mounting a sensational campaign about a criminal "getting-off" through a successful insanity plea; subsequent public outcry for change; and politicians rallying to the cause, Tanay (1981) concludes that "whatever can be said against the insanity defence, it must be recognized that it has a capacity to endure...everyone seems to be against it, and yet, the concept and the practice survive" (at 134).

The concept and the practice survive because society's desire for vengeance is balanced by an equally strong conviction that punishment must be predicated upon moral culpability (Jordan, 1983).

> "Once the dust settles and the outcry subsides public retribution and moral culpability usually swing back

into balance and the insanity defence, as we know it, survives" (Martin in Hucker et al., 1981:30).

There is no question that some form of an insanity defence will be retained in most jurisdictions. The reality is that there will never be an "all-things-to-all-people" test. Pragmatically speaking, the best that can be expected of an insanity test is that the elements of cognition, volition, capacity to control behavior and amorphous blameworthiness factor be included (Comment, Alabama Law Review, 1973). It is only then that the particular semantic form utilized is relatively insignificant.

VI. A Canadian Reform Approach

As debate and controversy over the function and administration of the insanity defence have heightened considerably, in recent years, abolition of the defence has not become a serious alternative in Canada.[1] Rather, its survival was recently affirmed by Mr. Justice Martin of the Ontario Court of Appeal:

> "There is...no strong movement in Commonwealth countries to abolish the defence. In my view, the arguments for its retention are far stronger than those for its abolition. The insanity defence is deeply rooted in our legal tradition and a penal system based on fault must make provisions for exempting from criminal liability persons who should not be held responsible for their conduct because of mental disorder" (Martin, in Hucker, Webster & Ben-Aron, 1981:30).

If anything, the insanity defence is undergoing major transformation in Canada. There exists a movement for reform, which focuses on the formulation of an optimum test of criminal insanity, improvement of dispositional criteria following a "not guilty by reason of insanity" verdict, and abolition of criminal commitment in favour of civil commitment (Law Reform Commission of Canada, Report (1976) and Working Paper 29 (1982); Phelps, 1977).

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[1] It is the Law Reform Commission of Canada's view that a sufficiently strong case has not been established for rejecting the notion of an insanity defence (L.R.C.C. Working Paper 29, Criminal Law - The General Part: Liability and Defences (1982).

This thesis takes the position that the insanity defence is in need of major reform and proposes a specific reform approach of:

1. a broadened substantive test;
2. the recognition of "mental disorder negating mens rea" as an affirmative defence;
3. a codified concept of diminished responsibility; and
4. improved dispositional criteria.

A New Substantive Test

This thesis supports the proposition that no single insanity test will accomplish maximum results in every instance. Notwithstanding, a pursuit of a more suitable formulation must not be abandoned. While not articulating an exact test for criminal insanity, on the basis of the research, this thesis supports the contention that S.16 requires significant reformulation to:

1. eliminate archaic language (such as "natural imbecility", "disease of the mind");
2. include a volitional component;
3. include a "morally wrong" component;
4. include "appreciate" rather than "know" with respect to "wrongfulness";
5. recognize "substantial capacity" as opposed to "total capacity"; and

6. eliminate S.16(3).

It is submitted that the ALI test is the best replacement for S.16, since it covers the essential elements of cognition, volition, and capacity. The author finds the arguments proffered in support of the ALI test compelling and relies on same for support for propositions (2), (4), and (5) above.[2]

In Canada, there appears to be a general consensus in support of propositions (1) and (6)[3] (LRCC Report, 1976; Ferguson, 1982; Stuart, 1982; Schiffer, 1978).

In terms of proposition (3), this proposal relies on the McRuer Report's interpretation and the dissenting judgment in Schwartz v. The Queen,[4] which both give a broader meaning to the word "wrong".[5] Professor Ferguson (1982) thoughtfully points out that new legislation (LRCC alternative #2, discussed below) must include both "legally wrong" and "morally wrong", otherwise, the test may exclude an accused who, by reason of disease of the mind, appreciates his conduct as being "morally wrong" but does not think it is "legally wrong".

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[2]See the section on the ALI test in Chapter V. The arguments advanced in support of the ALI test do not need to be reiterated here.

[3]The LRCC Working Paper 29 (1982) has proposed two alternative tests which have replaced "natural imbecility" with "defect of the mind". In addition, S.16(3) has been deleted on the basis that it has been discredited as medically impossible, illogical, rarely used and already subsumed by S.16(2).

[4][1977] 1 S.C.R. 673.

[5]See Chapter III for the section on "the phrase knowing that an act or omission is wrong".

The Law Reform Commission of Canada's (LRCC Working Paper 29 (1982)) draft legislation alternative #2, with the exception of the "legal component", captures most of the proposed features. The recommended test is as follows:

> "Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease, or defect of the mind he lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law" (LRCC, Working Paper 29, 1982:50).

In fact, this alternative is little more than a modified version of the ALI test.

This thesis rejects the ALI Model Penal Code caveat[6] paragraph, which purportedly excludes psychopaths and sociopaths from invoking the insanity defence. It is argued that there is no definitive answer as yet to the question: Do psychopaths/sociopaths 'fit the definition of individuals who should be found criminally irresponsible'? (Morris, G., 1975). There seems to be no compelling reason, other than one of political expediency or social policy, why each case should not be handled on an individual basis - that is, depending on the psychiatric evidence adduced, some psychopaths may be found guilty and some may be acquitted by the special verdict.

In a Canadian perspective, it was clearly the express policy of the Supreme Court of Canada, in Kjeldsen,[7] to make it difficult for psychopaths to plead the insanity defence

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[6] Model Penal Code S.4.01 (Final Draft 1966)

[7] (1982), 64 C.C.C. (2d) 161 (S.C.C.).

successfully.

In the final analysis, it is submitted that any legislative decision to broaden the insanity defence is necessarily a "political" one. Even though a broadened insanity test may be rational and consonant with theories of criminal responsibility and modern psychiatric knowledge, the political dimensions of the defence must be considered. A widened insanity defence may be politically undesirable since it may be perceived by the public as providing more "loopholes" for criminals to escape punishment - thus, lessening the deterrent effect of the law with concomitant loss of public confidence in the criminal justice system. Professor Ferguson (1982) assesses the situation this way:

> "If the insanity defence results in confinement for a long time in a mental institution, the increase in insanity acquittals will be at least palatable to the public. If the insanity disposition results in no confinement or confinement for a much shorter time than the normal prison sentence for such conduct, the public will scream."(at 142).

The bottom line is, as one commentator warns, "one must never underestimate the powerful public demand for retribution" (Jordan, 1983:30).

At the heart of the issue is the balancing of the competing demands of the interests of the state (society's need for protection and retribution) and the accused (the individual's rights to exoneration from criminal responsibility). Any liberal amendment would presume in favour of the mentally disordered offender and, conversely, a narrow interpretation would presume

in favour of society.

It is the position of this thesis, that if the proposed reform features are incorporated into a new standard of criminal insanity, the exact semantics of the test are of little significance. The proposition, that the problems of criminal responsibility are not easily resolved by adopting any particular insanity test, is encapsulated in these comments of Judge Bazelon in U.S. v. Brawner:[8]

> "The practical operation of the defense is primarily controlled by other factors...we cannot allow our search for the perfect choice of words to deflect our attention from the far more important practical questions. For it is on those questions that the rationality and fairness of the responsibility defense will ultimately turn" (at 1039).

The seemingly interminable search for a legal definition elicited this opinion from some Canadian authors:

> "Rather than plunging into the esoterica of legal definitions of responsibility, we may do well to recognize the illusory nature of the defence of insanity, which in reality functions rather as a strategem (sic) for effecting dispositional alternatives" (Menzies, Webster, & Jackson, 1981:40).

Another commentator illuminated the question of framing a substantive test as follows:

> "...it might well be argued that less concern should be spent over the precise wording of the insanity defence and much more attention should be directed to devising a satisfactory policy in relation to the ultimate disposition of those persons acquitted by reason of insanity" (Verdun-Jones, 1980(a):73).

Moreover, there is some evidence to suggest that judges and juries may in fact interpret insanity in a manner unique to

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[8] 471 F.2d. 969 (D.C. Cir. 1972).

their own idiosyncratic perceptions of responsibility and morality quite apart from the actual legal test (Hogarth, 1971; Simon, 1967).

Mental Disorder (Short of Insanity) Negating Mens Rea

Mental disorder (short of insanity) negating mens rea is a doctrine predicated on the notion that mental condition, though insufficient to exonerate an accused, may be relevant to the specific mental elements of certain crimes or degrees of crimes. This mens rea variant of "diminished capacity", adopted in many U.S. jurisdictions has already been discussed at length in Chapter V. While this inter-related (but independent) doctrine to the insanity defence, has developed into an affirmative defence in the United States, in Canada,[9] the doctrine "is by no means firmly established" (Verdun-Jones, 1980(a):71).

As demonstrated in Chapter V, there is general agreement among numerous American authors that the doctrine is constitutionally mandated by due process (because it casts doubt on the prosecution's prima facie case guarantees); consistent with mens rea principles; and should be implemented in conjunction with an insanity test (Held, 1980; Waddell, C.W., 1979). Judge Bazelon, in U.S. v. Brawner, justifying its use alongside of the ALI test offered this persuasive comment:

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[9] See the section on Diminished Responsibility in Chapter III which discusses how a limited form of the doctrine crept into Canadian case law.

> "Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal liability" (at 999).

It has been argued by Canadian writers that, in the event of an expanded defence of insanity premised on a concept of substantial impairment, the doctrine would be limited only to the vaguest areas of premeditation and deliberation (Ferguson, 1982; Stuart, 1982; Schiffer, 1978). That is not to say, however, that it could not co-exist with a more liberal insanity test.

> This doctrine is a necessary and sound part of the general requirement of mens rea as an ethical prerequisite to conviction and punishment for serious crimes. Denial of psychiatric evidence to disprove mens rea would be, by this criteria, immoral and unjust" (Ferguson, 1982:163).

Furthermore, there is strong support for the contention that the doctrine should apply to both general and specific intent crimes (Morse, 1979; Morris, G., 1975; Stuart, 1982). It is interesting to note that in the Supreme Court of Canada case, Regina v. Leary[10], Mr. Justice Dickson, in dissent, vigorously attacked the distinction between general and specific intent crimes. His reasoning is consistent with U.S. commentators (Morse, 1979), who have asserted for numerous years that there is no good distinction in law between general and specific intent crimes.

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[10][1977] 33 C.C.C. (2d) 473 (S.C.C.).

It is the position of this thesis, that in the event of an expanded insanity defence, an evidential rule be enacted to allow any evidence of mental disorder negating mens rea to be admissible. This would apply to both general and specific intent crimes. In other words, it is proposed that mental disorder, short of insanity but negating mens rea, be adopted as an affirmative defence through codification. In the alternative, the doctrine should be firmly established in the case law such as that of voluntary intoxication.[11]

A statutory provision, not unlike the evidential rule of the ALI Model Penal Code, could be formulated:

> "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense" (S.4.02(1) Proposed Official Draft, 1962 at 193).

This provision, according to its authors, is not limited to inquiries concerning "specific" intent. Rather, "whenever evidence of mental condition is relevant to state of mind, it is admissible. Thus, even in a general intent crime, evidence of abnormal mental condition is admissible to negate the state of mind for conviction" (Morris, G., 1975:81).

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[11] See Director of Public Prosecutions v. Beard [1920] A.C. 479 (H.L.) for the famous Birkenhead Rules. Voluntary intoxication is only a defence to crimes requiring 'specific intent'. While intoxication can also ground a defence of legal insanity (based on alcohol resulting in 'delirium tremens'), a legal commentator (Stuart, 1980) suggests that only 'lip service' has been paid to the rule in England and in Canada. It is his contention that "it will be extremely difficult to mount a successful defence of insanity on the basis of intoxication alone, however severe the condition" (at 358).

Needless to say, in the event that the insanity defence in Canada is not widened, the doctrine of mental disorder short of insanity negating mens rea should still be established as a "de facto" defence:

> "Indeed, a strong argument could be made that the time has now come for Canadian courts to place increasing emphasis...on the doctrine of diminished responsibility which would preserve their sentencing flexibility while simultaneously permitting the mental illness of the defendant to be taken into account when determining both the extent of his criminal resonsibility and the nature of the appropriate disposition" (Verdun-Jones, 1980(a):73).

Diminished Responsibility

The McRuer Commission,[12] in 1956, after reviewing the Scottish and British doctrines of diminished responsibility, concluded that it should not be adopted in Canada. Two dissentients (out of the five member commission), however, did urge its adoption.

Almost three decades have elapsed with only sporadic calls for statutory enactment to recognize this "partial responsibility" doctrine (Cassells, 1964; Topp, 1975; Gannage, 1981). These commentators presented strong arguments for the codification of the doctrine as an alternative to the absolute notion that an accused is either completely responsible or completely irresponsible. It is their argument that a system of

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[12] Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (McRuer Report)(1956).

"partial" or "graduated" responsibility would make punishment commensurate with the capacity of the accused at the time of his unlawful act.

> "Some satisfactory statutory provision should be enacted which would lay down clearly to both judge and jury what constitutes a mental state short of insanity which materially affects responsibility and which the law recognizes as mitigating murder to manslaughter. Mitigation in that sense has already been recognized in "provocation" and "infanticide". Reason dictates that it ought to exist for the unfortunate who is on the borderline of insanity" (Cassells, 1964:28).

More recently, in his background paper to the Department of Justice in Ottawa, Professor Ferguson (1982) proposed a sensible test for diminished responsibility. The test is:[13]

> "(1)Every one is partially excused from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked significant capacity either to appreciate the nature, consequences or moral or legal wrongfulness of such conduct or to conform to the requirements of the law.
>
> (2) Every one partially excused under sub-section (1) of this section shall be convicted of the offence in a diminished degree (or in the second degree) and shall be subject to the same range of punishments as is applicable in respect of persons who are convicted of an attempt to commit the offence" (Ferguson, 1982:168).

According to Professor Ferguson, his scheme recognizes that the line between sanity and insanity is not black and white, but rather, it acknowledges that there exist degrees of sanity and insanity. Moreover, it recognizes partial responsibility not only by reducing the sentence but also by reducing the offence.

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[13]This test is wider than the British Homicide Act of 1957 as it extends to include all crimes. It is drafted in a manner consonant with the criteria of LRCC Working Paper 29 (1982) alternative #2.

This is significant, he argues, since the name attributed to an offence inherently indicates the seriousness and/or culpability of the person convicted--e.g., murder vs. manslaughter, rape vs. diminished rape (or rape in the first degree vs. rape in the second degree) (Ferguson, 1982:171).

The adoption of this proposal necessarily requires the Criminal Code to define gradations of offences. To this end, Ferguson (1982) offers these solutions:

> "First, it would be possible to refer to the offence as 'diminished offence' for example, 'diminished robbery' just as we refer to the offence as attempted robbery, conspiracy to rob, or accessory after the fact to robbery in other contexts. Second, it would be possible to create degrees of offences with each degree being statutorily defined. For example, first degree might mean intentional or wilful, second degree might mean reckless or negligent, and third degree might mean diminished responsibility" (at 171).

While such a proposal would not be without drawbacks,[14] it is the position of this thesis that a statutory provision establishing a doctrine of "partial responsibility" represents a necessary recognition that there exists no clear demarcation between sanity and insanity.

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[14] See the Diminished Responsibility section in Chapter V for a review of the arguments against the implementation of such a doctrine.

Disposition

The dispositional state of the insanity defence is illustrative of the historic demand for public retribution.

A successful invocation of the insanity defence triggers the automatic process of taking the insane offender out of the criminal justice system - thus meriting the distinction of the "oldest form of diversion".

> "The insanity defence, like all the other methods of diversion frustrates the need for revenge and evokes negative feelings in the victims and the public at large. It is the oldest form of diversion from the criminal justice system of those offenders who are deemed unsuitable for the imposition of the usual criminal sanctions. The criteria for this diversion are constantly evolving and have more to do with the political climate than psychiatry" (Tanay, in Hucker, Webster & Ben-Aron, 1981:122).

The notion of indeterminate detention, at the discretion of political authorities, has been the subject of much criticism. It is argued that "both the decisions to commit and to release the "criminally insane" are necessarily political and not medical decisions" (Boyd, 1980:162). Rather, involuntary commitment is "founded on control--a hierarchy of power. It is unfortunately a kind of control--a hierarcy of power--that appears to lack social utility" (Boyd, 1980:165).

Another commentator charges that:

> "...the real reason for the existence of a separate insanity defence is not in fact to exculpate 'mentally ill' defendants who would otherwise be convicted of criminal offences but to authorize the state to hold, contrary to the fundamental principles of criminal law, those who have been found not to possess the mens rea of an offence" (Schiffer, 1978:149).

The indeterminate detention of "not guilty by reason of insanity" acquittees is often justified on psychiatric predictions of "dangerousness".[15] As suggested in Chapter IV, there exists a growing body of literature which supports the conclusion that the prediction of dangerousness is beyond the expertise of psychiatrists.[16] The intractability of this approach:

> "...is clearly that whether it is magnitude, frequency, probability or imminence of injury to self or others, dangerousness has not been defined or standardized, nor can it be predicted with great accuracy" (Toews, Prabhu & El-Guebaly, 1980:611-612).

Since this is the case, the evidence seems to indicate that errors are made on the side of the safety of society rather than the liberty of the individual.[17]

In Canada, the Lieutenant-Governor's Warrant (LGW)[18] is the political mechanism which authorizes the involuntary commitment

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[15]See R. v. Abbey [1983] 1 W.W.R. 251; (1982), 68 C.C.C. (2d) 394. A commentator (Jordan, 1983) points out that the criterion of "dangerousness", which justifies indeterminate detention is missing; since, Abbey's defence was raised in the context of a "victimless", non-violent crime - importing cocaine. Thus, Jordan argues, detention is unnecessary either for the safety of society or for Abbey's own safety.

[16]Refer to the numerous studies cited in Chapter IV in support of this proposition.

[17]The debate of liberty vs. safety is interminable. Fercsh (1980) asks these questions: How is the individual's liberty to be balanced against the public safety? If there is to be an erring on one side which side should it be? What standards are there for making this kind of balancing? See his discussion on these issues. See generally, Weisstub, 1980.

[18]Refer to Chapter III under Disposition where these powers are defined.

and indeterminate detention of "not guilty by reason of insanity" acquittees. Its five distinguishing features are:

1. jurisdictional complexity;
2. emphasis on custody rather than therapy;
3. indeterminacy;
4. non-reviewability; and
5. problems of termination.

These have all been found to be inconsistent with the sentencing principles, formulated by the Law Reform Commission of Canada in its Report to Parliament on Mental Disorder in the Criminal Process (1976).

The arbitrary powers of the LGWs have generated much criticism in the literature.

> "Perhaps the most dramatic denial of freedom under the law in this area appears in the procedures for committal, certification and discharge. The indefinite commitment at the discretion of the Lieutenant-Governor, without benefit of statutory or other review, is not in keeping with present values and the dignity of man" (Jobson, 1969:202-203).

Furthermore, the Boards of Review can only "advise" the Lieutenant-Governor. If the advice is not followed, there is nothing the individual can do to compel his release or a review of his detention.

Detention at the pleasure of the Lieutenant-Governor places the acquittee in a limbo which is "neither entirely medical nor entirely criminal" (LRCC, Report, 1976:36). Thus, it is argued, having lost the protections of the criminal justice system, the detainee does not necessarily benefit from the civil protection

of provincial mental health legislation (Jordan, 1983). Accordingly:

> "...it is indeed questionable whether indefinite detention, without any of the statutory or common law rights of review accorded the civilly commited patient, can be tolerated" (Verdun-Jones, 1980 (a):73).

Several commentators have called for periodic judicial review of detention as an effective and powerful safeguard against the abuse of executive power (Kenny, 1982; Comment, New Law Journal, 1981; Ewachuk, 1976; Jobson, 1969; Comment, Harvard Law Review), 1981).

It is the position of this thesis that, in the event of the continued use of LGWs in Canada, "not guilty by reason of insanity" acquittees should be subject to the Court's protective intervention. Statutory review provisions, reflecting judicial procedural guarantees such as rights to appeal and judicial power to release, must be formulated in order to render meaningful any challenge of an administrative decision not to release. This would require the articulation of clear, legislative criteria for release of detainees. It would not suffice for political authorities to simply claim that the patient has not "recovered".

The LRCC proposed a solution to abolish the distinction between criminal committal (which falls within Federal jurisdiction) and civil commitment (which falls within

Provincial jurisdiction)[19] and recommended the abolition of the LGW. The Report states:

> "...not guilty by reason of insanity would be made a real acquittal, subject only to a post-acquittal hearing to determine whether the individual should be civilly detained on the basis of psychiatric dangerousness. This brings into practical effect what has always been the insanity defence's theoretical intent--to treat the insane individual as a psychiatric rather than a criminal problem" (LRCC, Report, 1976:22).

While the LRCC is commended for its libertarian notions in its policy formulation (Ericson, 1976; Haines, 1976; Mohr, 1978; Ewachuk, 1976; Jordan, 1983), the reality of it has not yet materialized.[20] One observer, while maintaining that the proposal was both constitutional and theoretically sound, succinctly argues that the obstacles preventing its implementation are primarily political in nature:

> "Politically, a de facto delegation by the federal government is more acceptable than a legislative retreat. More importantly, however, such a 'decriminalization' of the treatment of the 'criminally' insane might offend the ghost of public retribution, which is never far and which might clamorously demand its due" (Jordan, 1983:25).

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[19] One commentator (Boyd, 1980) suggests that this approach is negative due to the fact that the LRCC still finds merit in retaining psychiatric distinctions between non-responsible and responsible offenders. Furthermore, he warns of the problems inherent in the civil commitment process. See, also, Anand (1979) and Draper (1976) for a discussion of the dangers of civil commitment in Canada.

[20] Perhaps, serious consideration ought to be given to the Butler Committee's progressive dispositional procedures discussed earlier in Chapter V. A close analysis of some U.S. legislation would also be helpful.

Conclusion

The time-honoured insanity defence, through the criteria of S.16, defines the parameters of criminal responsibility and, through its dispositional criteria, authorizes indeterminate social control by the criminal justice system's obsequious agent, the mental health system.

It is the thrust of this thesis that the legal, medical, social, and political dimensions of the insanity defence must be confronted, re-examined, and re-assessed in a reform perspective.

> "Insanity per se is a public issue, and one which is not confined to the realm of criminal law and procedure. It touches sensitive areas of public policy and its political, social and medical implications are at least as important as its legal ones" (Jordan, 1983:14).

In light of Canada's recent Charter of Rights and Freedoms, it would be an auspicious moment for our policy makers, as guardians of our liberties, to make a commitment toward the goal of a more socially useful doctrine of criminal responsibility. A reform approach is a first step in implementing rational policies toward the mentally ill offender. Furthermore, a rapprochement of professionals from the medical, legal and academic communities with a view to ensuring just protections for those facing the possibility of being controlled, through both the criminalization and mentalization processes, must take place.

Only a progressive and humane approach would eradicate this poignant cry:

> "If your mercy is so cruel, what do you have for justice?"
>
> The Elephant Man

APPENDIX

Test Used to Determine Criminal Responsibility

	Test		Test
Alabama	Abolish	Mississippi	McNaughtan
Alaska	ALI (GBMI)	Missouri	ALI
Arizona	ALI	Montana	Abolish
Arkansas	ALI	Nebraska	McNaughtan
California	ALI	Nevada	McNaughtan
Colorado	McNaughtan & Irres.Imp.	New Hampshire	Durham
Connecticut	ALI (GBMI)	New Jersey	McNaughtan
Delaware	ALI (GBMI)	New Mexico	" (GBMI)
District of Columbia	ALI	New York	ALI
Florida	McNaughtan	Nth.Carolina	McNaughtan
Georgia	" (GBMI)	Nth.Dakota	ALI
Hawaii	ALI	Ohio	ALI
Idaho	Abolish	Oklahoma	McNaughtan
Illinois	ALI (GBMI)	Oregon	ALI
Indiana	ALI (GBMI)	Pennsylvania	McNaughtan
Iowa	McNaughtan	Rhode Island	Justly Res. Test
Kansas	McNaughtan		
Kentucky	ALI (GBMI)	Sth.Carolina	McNaughtan
Louisiana	McNaughtan	Sth.Dakota	ALI
Maine	ALI	Tennessee	ALI
Maryland	ALI	Texas	ALI
Massachusetts	ALI	Utah	ALI
Michigan	ALI (GBMI)	Vermont	ALI
Minnesota	ALI	Virginia	ALI
		Washington	McNaughtan
		West Virginia	ALI
		Wisconsin	ALI
		Wyoming	ALI

Irres.Imp. = Irresistible Impulse
ALI = American Law Institute
GBMI = Guilty but mentally ill.
Justly Res. = Justly Responsible Test

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