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An excellent paper - well done.

# MADNESS AND THE CRIMINAL LAW:

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On October 16, 1991, in a small Texas town called Killeen, George Jo Hennard drove his pickup truck through the window of Luby's Cafeteria, pulled out a pair of semi-automatic pistols, and began to slaughter the lunchtime crowd. Moving from table to table, he shot indiscriminately as people struggled to evade his gaze and keep out of the line of fire; some hid successfully under tables, and one restaurant employee, Maria Serna, managed to escape by hiding in a freezer. All of his victims were utter strangers, but Hennard attacked them as if seeking revenge for some horrible wrong they had done to him, screaming about injustices and denouncing local communities such as Dayton and Belton. "This is what Bell County has done to me!" he yelled before opening fire. The shooting lasted roughly ten minutes, and then the gunman went to a washroom and shot himself in the head. In those ten minutes, Hennard killed twenty-two people, making the incident in Killeen (as those in the news media were careful to point out) the largest single mass killing in history.[1]

Hennard may have set the modern record, but the massacre at Luby's was only the latest in a chain of similar incidents involving lone gunmen, stretching back to August 1966, when Charles Whitman killed sixteen people with a sharpshooter's rifle from a Texas University tower. Following in Whitman's footsteps were James Huberty, who shot twenty-one people at a McDonald's in San Ysidro, California; Gene Simmons, who killed sixteen victims, including fourteen members of one family, in Russelville, Arkansas; Pat Sherrill, the postal worker who shot fourteen co-workers at a post office in Edmond, Oklahoma; and of course, there was Marc Lepine, who killed fourteen women at Montreal University's Ecole Polytechnique on December 6, 1989, the first such mass killer in Canadian history.[2]

Even as they become common, and lose their capacity to shock, these

crimes continue to mystify. What can turn apparently ordinary citizens into killing machines? To the perpetrators, mass killings may not be quite so motiveless as they appear to those of us who read the newspaper post-mortems - usually the murderous rage of the mass killer is a response to perceived slights, oppression, or injustice, an attempt to get back at the elements of society that have made their lives so miserable.[3] To the Marc Lepines and James Hubertys of this world, there are no innocent victims. Yet, such, surely, are not the motivations of sane people. It is impossible not to believe, intuitively, that something had gone terribly wrong in the mind of George Hennard - psychotic delusions, perhaps, or a deadly confluence of damaging life experiences, genetics, chemical imbalance, and the influence of the peculiar American cult of violence, producing a dysfunctional mental state that could only be described, reasonably, as "insanity". It is difficult to accept the notion of a sane man walking deliberately from table to table in a crowded restaurant, mercilessly shooting terrified and helpless strangers.

It may come as something of a surprise, then, to discover that as far as the law is concerned (or at least the law as it is applied in Canada and many American jurisdictions), mass killers like Huberty and Lepine were, in all likelihood, perfectly sane. There is usually no way to be certain, since massacres like the ones at Killeen, San Ysidro, or Montreal commonly end with the death of the killer himself, either by his own hand or by the police; there is often no chance for direct psychiatric examination. But there is little in the behaviour of these men (and these killers are, almost universally, men) to indicate anything that would qualify as legal insanity. Contrary to hopeful expectation, they do not seem to have suffered from complete delusional breaks with reality - on the contrary, evidence usually

points to exactly the opposite conclusion, that they had at least a basic appreciation of who they were, who their victims were, what they were doing, and what society expected of them. It does not seem likely that George Hennard, in his fury, had somehow lost the capacity to understand society's laws, rules, or mores - it was, at least in part, the rules of society that he was rebelling against (in the aftermath, police uncovered evidence of grudges against officials who took away his driver's licence and warned him that his property needed repairs under local safety codes[4]). Nor was he, in all likelihood, labouring under the delusion that he was shooting martians, fighting the Viet Cong, or shooting targets on the firing range. Mass killings are, typically, planned and deliberate, with the perpetrator acting on the basis of unreasonable perceptions, perhaps, but suffering no misconceptions as to the basic nature and quality of events. Marc Lepine understood he was killing women, just as James Huberty, who declared prior to the rampage at McDonald's that he was off to "hunt humans",[5] knew he was killing ethnic Mexicans. This is not to say that psychiatrists could not identify one or several pathological mental conditions afflicting each and every killer in the mould of a Lepine or Huberty - far from it - but that, at law, is not always relevant. Provided that one's actions were accompanied by a fundamental cognitive understanding of events, one stands every chance, in most common law jurisdictions, of being held accountable. Thus was Gene Simmons, the Arkansas killer, executed in 1990.

"Insanity" is not, any longer, a medical or psychiatric description of mental dysfunction. When used in the criminal context, it is a legal term of art, not descriptive of mental abnormality <u>per se</u>, but of a specific variety and level of abnormality, sufficient to excuse the actor from criminal

culpability. The mere existence of disturbances of consciousness, character disorders, neurotic fears, paranoid delusions, or any of a whole host of dysfunctional states of mind, is not necessarily enough to protect the actor from a criminal sanction. All systems of criminal law make distinctions between states of mind which deprive the actor of responsibility for his actions, and those which, while they may make obedience to the law difficult, are not enough to exculpate, whether or not they were causally connected to recognized "diseases of the mind". This is necessary and inevitable. The difficulty is in deciding where to draw the line, who should be excused on the basis of sickness, and who should be punished for failing to resist the urges and perceptions which sickness may well have produced.

The insanity debate is dressed-up with terms such as "accountability", "criminal culpability", and "social responsibility", but the real quandary here is the problem of deciding what we, as a society, feel is the true nature of <u>evil</u>. Notwithstanding the advanced theoretical and philosophical justifications which can be advanced in favour of any legal conception of insanity, the definition of evil remains largely intuitive, and the law proceeds from intuitive assumptions about human behaviour. In the common law world, including Canada, legal theory has focused on free will, rationality, and superficially lucid choices made to achieve foreseen and foreseeable ends. There are some jurisdictions in America which have attempted to make allowance for "irresistible impulses" which might propel the actor towards certain deeds in spite of cognitive awareness, but in Canada the prevailing view is that those who know what they are doing, know what society views as improper, and choose to do it anyway deserve to be punished. Those who understand, ought to obey. In this philosophy, someone like Marc Lepine is the very sort of person

whom the criminal law was designed to deal with.

Modern medical and psychiatric approaches point to a radically different conception of human behaviour and motivations. Psychiatric science has conclusively demonstrated that cognition is only one facet of human thought processes, which are also influenced by unconscious drives, unpredictable moods, character disorders, and diseases which alter behaviour quite apart from any fundamental understanding of events and one's place within them. Meanwhile, the physical sciences have in recent years uncovered a sometimes baffling but highly suggestive body of evidence leading to a conception of the human mind as an organic thinking machine, the apparently free choices of which can be influenced, perhaps even determined, by the most minuscule variations in organic chemistry and structure. Science, in short, appears to be undermining the legal conception of culpability by changing the understanding of free will (some would say be eradicating free will as a sensible idea altogether). The mind is a strange thing, terribly subtle and still overwhelming in its complexity. There seems, on the evidence, to be more to free choices than the ability to understand what one is doing, and what society expects. Various diseases and dysfunctions, elusive in their definitions and difficult to classify according to causes, seem to buffet the consciousness and the choices conscious thought produces, quite independent of the superficial lucidity that is sufficient to amount to criminal liability.

This paper will examine legal theories of culpability in light of the advances that have been made in the psychiatric and neurobiological understanding of the mind and its functioning. To what extent can, and should, the law be brought into step with the theories of science? Have we reached the point at which the criminal law can discard the traditional view

of culpability in favour of a more sophisticated and scientific approach? Or is the question of criminal responsibility predominantly a moral issue that can be influenced but never determined by a scientific appreciation of the mind? In examining the existing law, and alternatives for change, this paper will attempt to arrive at a legal formulation of insanity which meshes more closely with the more compelling discoveries that have recently been made in the psychodynamic and neurobiological sciences. This will not be as part of an argument that the law must now lock step with, and defer to, the often uncertain views of sciences which are still, to a large extent, in their infancy; but it will be argued that, at a minimum, the notions of good and evil which underlie our law are due for change.

## Part I. The M'Naghten[6] Rules

> ... the jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party accused was labouring 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.
>
> *- Chief Justice Tindal's response to the questions of the House of Lords on the legal definition of insanity, 1843.*[7]

> 16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane.
>
> (2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has a disease of the mind to an extent

that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.

- *The Criminal Code*[8]

2. Section 16 of the said Act is repealed and the following substituted therefor:

16. (1) No person is criminally responsible for an act or omission committed while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

- *Proposed amendment to the Criminal Law, Ministry of Justice, July 1991*[9]

Daniel M'Naghten shot and killed Edward Drummond, private secretary to the English Prime Minister Robert Peel, on January 20, 1843. For him, it was an act of self-preservation. He believed himself persecuted by the Tory Party, and told the police that the Tories and their agents followed him everywhere he went, night and day, even abroad to France; the Tories were the architects of specious criminal charges, and did everything in their power to persecute him. Soon enough, he was sure, they would simply murder him.[10] So he set out to shoot the Prime Minister. Killing Drummond was a mistake - M'Naghten apparently thought he was shooting at Peel.

The modern psychiatrist has little difficulty in discerning the classic symptoms of paranoid schizophrenia in the statements of M'Naghten.[11] That he had understood what he was doing, and had premeditated the assassination

attempt, was clearly established at trial, but the jury acquitted him on the basis of his paranoid delusions, and found him legally insane. There was something of an uproar. Queen Victoria, who had herself been shot at by an 18-year-old barman named Oxford in 1840, was greatly angered (Oxford, too, had been acquitted on the ground of insanity). Government officials, it seemed, were fair game, so long as the accused could demonstrate the holding of outrageous beliefs. The London Times published a derisive poem on the M'Naghten verdict,[12] and the House of Lords demanded of the judges of the Supreme Court of Judicature a response to numerous pointed questions on the breadth and effect of the doctrine of insanity in English law. In the midst of the furore over the verdict of acquittal, it was generally overlooked that M'Naghten, like Oxford before him, would not go free; under the Criminal Lunatics Act, passed in 1800, he was destined to spend the rest of his days in an asylum until such time as Her Majesty's pleasure was known.

Lord Chief Justice Tindal, who had been so impressed by the evidence of M'Naghten's paranoid delusions at trial that he had "practically directed a verdict for acquittal",[13] responded to their Lordships questions by propounding a test which focused narrowly on cognition. The accused would be exculpated on the basis of what he knew, whether he understood his own actions and their probable results, and whether he knew such actions were "wrong", if he did understand them. The accused might have a defence if, for example, he believed he was cutting daisies instead of hacking at people with an axe, or if he knew he was attacking people but believed himself to be in a situation which the law would recognize as justifying self-defence. The key to non-culpability was delusion, but only those delusions which encouraged beliefs which, if true, would ground a defence in law, were exculpatory. Thus, if an

accused suffered under the delusion that his victim "had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."[14] It was not that the accused possessed a sick mind, prone to delusions, that provided an excuse. The sick mind had to create the right kinds of mistaken beliefs.

Far from providing a theory of what amounted, in law, to a defective mind, the "M'Naghten rules" were really simply an embodiment of the traditional common law notion of mistake. Mistake of fact, brought on by disease of the mind, would excuse the mad defendant, just as a mistake of fact could excuse the sane one. The apparent innovation of the M'Naghten rules was in making a specific variety of mistake of law exculpatory as well, something that had never been accepted in relation to sane individuals, who were presumed conclusively to know the law whether they actually did or not. If a person suffered from such a defect of reason or disease of the mind as to deprive him of the understanding that his actions were "wrong", then, too, the law would provide an excuse.

Here, the text becomes confusing. Chief Justice Tindal emphasizes, throughout, that factual delusions would certainly not excuse someone who subjectively knew he was breaking the law,[15] but the phrase "that he did not know he was doing what was wrong" seemed to indicate that delusions about the law itself <u>would</u> be exculpatory (the term "wrong" seeming to be interchangeable with "contrary to law"). Was a mere mistake about the state of the law, brought on by delusion, sufficient to ground an excuse, or must the accused have mistaken the true surrounding circumstances for the sort that would have made his deeds objectively legal, whatever his beliefs about the law itself? The latter seems more to have been what was intended.[16] It was

also indicated that those who were not equipped with a sufficient degree of reason to distinguish right from wrong would be excused, this, perhaps, a throwback to the "wild beast" conception of insanity that had once prevailed in English courts to place utter imbeciles and raving lunatics outside of the reach of legal sanction.[17] In that case, the excuse was not based on deluded mistake of circumstances so much as a general incapacity to develop mens rea, by virtue of an absence of higher awareness. Taken as a whole, it was not as clear an answer to their Lordships' questions as it might have been.

Nevertheless, the M'Naghten formulation of the insanity defence has persisted, through numerous incarnations, in the criminal codes of Canada and several American states, and continues as the law in England. Common law courts have struggled over the years to define its terms. What is a "disease of the mind"? What is meant by "nature and quality of an act"? What is "wrong"? In the intervening century and a half, the test has been tinkered with, subtly altered, and partially re-written, yet the general thrust of the doctrine has remained, with its emphasis on cognition, delusions, and mistaken beliefs. Efforts have been made in the United States to discard the M'Naghten rules in favour of more liberal provisions which make some allowance for the emotional and volitional components of the human psyche (as will be discussed in Part III of this essay), but the intuitive and pragmatic appeal of Lord Tindal's response to the Lords continues to influence courts and legislatures throughout the common law world. Indeed, in America, a backlash against the acquittal of would-be assassin John Hinckley Jr. (in eerie parallel to the outcry against M'Naghten's acquittal 140 years earlier) has led to the re-adoption of M'Naghten-style insanity provisions both federally and in some states.[18] Reversion to the M'Naghten formula was endorsed not only by the

American Bar Association (ABA), but by the American Psychiatric Association (APA).[19] In Canada, the latest official reform proposals on the law of insanity, now termed "mental disorder", do much to revise the procedures for the disposition of the accused, once found to be not guilty by reason of disease of the mind, but the basic definition of legal insanity put forward in 1843 remains, as if nothing more suitable can be arrived at.[20]

The existing Canadian version of the M'Naghten standard is embodied by s.16 of the Criminal Code. Subsection 16(1) declares that no person shall be convicted of an offence in respect of an act or omission on his part while that person was insane. The general defence of insanity is augmented by ss.16(3), which creates a defence based on specific delusions suffered by an accused; such a person might be "in other respects sane", but if the delusions create beliefs "in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person", then the accused will not be guilty. This, then, is basically a mistake of fact provision, and is little more than an elaboration on the ruminations of Lord Tindal in the M'Naghten decision; it is seldom invoked, and is, basically, redundant.

The jurisprudence has focused on ss.16(2), and its definition of legal "insanity". In establishing the type of mental abnormality that can ground a defence of insanity, ss.16(2) drops the words "defect of reason" that were employed by Lord Tindal (perhaps they seemed superfluous to the draughter), but adds "natural imbecility" to the flexible concept of "disease of the mind", it being possible to make a distinction between the two. Natural imbecility, as defined by the Ontario Court of Appeal, is a term that embraces congenital defect or natural decay, as distinguished from a mind once normal

which has become diseased. This condition is something more severe than that of feeblemindedness - profound retardation, perhaps, or advanced senility would qualify - and the words "natural imbecility" can by no means be interpreted as creating a defence of stupidity or dimwittedness.[21]

"Disease of the mind" has generally been interpreted liberally by Canadian courts. Almost any psychiatric or physical dysfunction of mental processes has qualified as a disease of the mind at some point, including arteriosclerosis,[22] brain damage,[23] delusions,[24] dissociative states,[25] psychosis such as schizophrenia,[26] psychopathic personality disorder,[27], and, in a recent Ontario case, multiple personality disorder.[28] Mr. Justice Dickson (as he then was), writing for the Supreme Court of Canada in R. v. Cooper,[29] adopted the reasoning of Mr. Justice Dubin in the Ontario Court of Appeal, in holding that a personality disorder could certainly be construed as a "disease of the mind", and continued:

> In summary, one might say 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.[30]

The courts can afford to be liberal in their definition of "disease of the mind", since the suffering of such affliction only propels the accused over the first hurdle; it must then be demonstrated that said disease has robbed the actor of the capacity to understand the nature and quality of his acts, or of the knowledge that his acts were wrong.

Here, s.16 departs from the wording of the M'Naghten rules in a small but significant way. Lord Tindal's judgement stressed knowledge, the wording being "the party accused was labouring 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" [emphasis added].[31] When it comes to the nature and quality of the act, the Criminal Code substitutes the words "incapable of appreciating" [emphasis added] for the word "know". As noted by Robert Schopp, the word "appreciate" can be taken to have a much broader connotation than the more limited requirement for mere knowledge.

> "Appreciate" is sometimes thought to suggest a broader sense of understanding, including affective or emotional aspects of the defendant's personality. Some writers have interpreted "appreciate" as "affective understanding", or "knowledge fused with affect". This interpretation requires that the defendant not only have the cognitive awareness that the act was wrong, but also that the defendant experience the usual or normal affective responses associated with the act.[32]

Yet, while exciting to academics in both Canada and the U.S. (where the word "appreciate" is also employed in several reformulations of the M'Naghten rule, including the American Law Institute's Model Penal Code,[33] the Insanity Reform Defense Act,[34] and the proposals of both the APA and the ABA[35]), the potential of the rewording has barely been exploited. The Supreme Court of Canada seemed on the verge of accepting the broader "affective" definition of "appreciate" in R. v. Cooper[36], in which Mr. Justice Dickson stated the following:

> In contrast to the position in England under the M'Naghten rules, where the words used are "knows the nature and quality of his act", s.16 of the Code uses the phrase "appreciating the nature and quality of an act or omission". The two are not synonymous. The draftsman of the Code, as originally enacted, 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 is in issue [emphasis added].

Quoted in isolation, as it sometimes is,[37] this famous passage may seem to indicate the dawning of a new epoch. Yet Justice Dickson's comments on emotional awareness were tangential to the real point of his argument, that the word "appreciate" extended the requirement of knowledge beyond the mere physical reality of the act being performed, to an awareness of the physical consequences of the act, a much smaller step beyond the limits of the M'Naghten rules as interpreted in England. At issue was whether the appellant, while aware that he was choking a young girl, was nevertheless incapable of understanding that choking would lead to death. This was important, since, in the words of Justice Dickson,

> 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 that act .... Our Code postulates an independent test, requiring a level of understanding of the act which is more than mere knowledge that it is taking place; in short, a capacity to apprehend the nature of the act and its consequences.[38]

As Justice Dickson noted, "this is simply a restatement, specific to the defence of insanity, of the principle that mens rea, or intention as to the consequences of an act, is a requisite element in the commission of a crime."[39] Thus was a possible expansion of the legal concept of insanity into the realm of purely emotional disturbances quickly aborted. Subsequent decisions[40] have continued to emphasize that appreciating the nature and quality of an act requires only an awareness of its physical attributes and consequences.

The accused may also be exculpated if incapable of knowing - and here s.16 retains the use of "know" - that an act is "wrong". Until very recently, Canadian courts, in line with English jurisprudence, interpreted "wrong" to mean "illegal". Thus an accused was entitled to an excuse only if he did not know, and further was in such a state that he could not know (it must be remembered that s.16 stresses the capacity to know, rather than actual knowledge) that his actions were contrary to law. A deluded belief that the given acts, while illegal, were nevertheless morally acceptable according to the standards of reasonable people would do nothing to provide an excuse, as was stressed by Justice Martland in R. v. Schwartz.[41]

The Supreme Court of Canada has since reversed its position. Taking his cue from the vigorous dissent of Mr. Justice Dickson in Schwartz (with whom not only Justices Spence and Beetz, but also Chief Justice Laskin, concurred), Chief Justice Lamer has ruled in R. v. Chaulk[42] that the word "wrong" as used in ss.16(2) should be interpreted to mean "immoral". This does not mean that the subjective morality of the accused, or his ability to emotionally appreciate the morality of society at large, has any bearing on the legal sanity of the accused. Rather, it is whether the accused was "incapable of knowing that the act is wrong according to the moral standards of society",[43] in which case knowledge of illegality would not deprive the accused of a defence. Once again, delusions are discussed as the basis of exculpation, Chief Justice Lamer stating that

> an accused, charged with murder, could argue that while she consciously and voluntarily did the act of killing, and while she desired to bring about the death of the victim, she did so because her mental condition was such that she honestly believed that the victim was evil incarnate and would destroy the earth if the accused did not kill him. In such a case, the insanity claim is manifested not as a denial of actus

> reus or mens rea, but rather as a defence in the nature of an excuse or a justification.[44]

In his dissent in Schwartz, Justice Dickson mooted the possibility that an accused could be excused if he believed himself commanded by God, whose moral authority could only be assumed to outweigh that of the criminal law.[45] Such a situation actually occurred in the 1991 case of R. v. Landry,[46] in which the accused believed himself to be on a divine mission to kill Satan; the Supreme Court directed he should be acquitted of murder for being incapable of appreciating the wrongness of his acts.

The rule in Chaulk thus creates a narrow variety of excusable mens rea by fusing the mistake of fact elements of the insanity defence with the principles of excuse and justification that are also embodied in the section of the Criminal Code dealing with duress, necessity, and self-defence, as those are applied to sane individuals. In so doing, the reinterpretation of the word "wrong" merely accomplishes what ss.16(3) was aiming at, anyway, albeit that the defence under ss.16(2) would now be somewhat broader if ss.16(3) is interpreted to provide only for delusions as to circumstances that would provide an excuse or justification at law (there being no defence of duress, and arguably none of necessity, for the case of murder). An innovation, perhaps, but hardly a revolution. For in spite of warped and delusional perceptions of the surrounding circumstances, the accused is still required to be reasonable, to react to his beliefs in the way that a sane person would, given that they were true. Astoundingly, the law equates the impact of psychotic illness with the effect that mere misinformation has on the reasoning of the sane.

Insanity, then, remains very much a mens rea based defence, the elements of criminal intent being refuted or excused in much the same way as they would be within defences of mistake or excuse as employed by the sane. Always, cognitive awareness is the key. The sociopath, though suffering from a recognized disease of the mind, will not be able to point to the delusions necessary to ground a defence - sociopathy is a personality disorder based mainly in the emotional responses to the world at large and its taboos. The clinically depressed individual will receive no mercy on account of his distorted perceptions of the desirability of, say, killing his wife and loved ones; he may honestly believe that they are better off dead, and may not be emotionally equipped to understand, any more, why society places such value on human life, but he knows what he is doing. Certain personality and affective disorders, like depression, may be of such an impact on the workings of the mind that specific elements of an offence - such as planning and deliberation - are refuted in the specific instance,[47] but this gives many severe mental disorders no more effect, in law, than intoxication. It is one thing to find that, given the defendant's mental state, he probably did not pre-plan a murder - quite another to exculpate him of any wrongdoing on the basis of dysfunctional mental processes.

Even the presence of delusional mental states will fail to exculpate if the requisite sort of delusions are not present. In R. v. Abbey,[48] for example, the accused, who was caught importing cocaine into the country, was afflicted with a disease known as hypomania. He believed, on this account, that he was in receipt of power from a mysterious external force that protected him from punishment, but also compelled him to commit the criminal act; in his own mind he was nothing more than a device in the employ of the

manipulating force. This did not deprive him of a cognitive understanding of his actions or their illegality, and so he was convicted. That there was something terribly awry in his mental processing of the facts at his disposal could have no legal effect; even the seriously ill are expected to behave lawfully, or at least morally, if somewhere in their tortured minds lies an awareness of what they are doing and of what the outside world, however incomprehensible it may seem to them, identifies as lawful and moral.

Perhaps today, someone like Abbey could be excused if the external force of his delusions was identified as the hand of God. But what if it is the hand of the Devil? Could the accused argue that his actions were based on the deluded belief that he was under the duress of the threat of hellfire, and thus his actions were not immoral by the standards of reasonable people? What, then, if the accused believed <u>himself</u> to be the Devil, whose job it was to torment and destroy? And what, to return to the example of M'Naghten himself, if the accused is simply terrified by paranoid convictions of persecution and harassment, certain that only blood and gunfire can put an end to his torment?

Such beliefs, if true, would not amount to an excuse or justification; the same person, unless in the very midst of physical assault, is expected to avail himself of legal alternatives when he perceives a threat (see the <u>Criminal Code</u>, s.34, "Self-defence against unprovoked assault"). The sane person alerts the media and resorts to the courts if harassed by government officials and their operatives, or pays the consequences. He does not get away with shooting the Prime Minister. Do we convict the likes of M'Naghten because they refused to explore the legal alternatives, or failed to restrain themselves when lawyers and reporters proved unwilling to help? Do we conduct

a precise analysis of their deluded beliefs, to see if they perceived themselves in situations that sane people would agree amounted to duress, or necessitated self-defence? Such is arguably the thrust of the law as it stands today.

Excuse and justification are carefully defined concepts, at law. They have been limited to apply to a narrow range of circumstances. Unless there is some expansion of their application in the context of insanity, the law will continue to treat the deranged as if they are only distinguishable from the sane by the beliefs that they hold. The sane person, shipwrecked and lost at sea, is not excused if he gives in to starvation and eats the cabin boy. Neither, it would seem, is the decision of the madman to be treated as qualitatively different simply because he was deluded enough to believe, in the midst of his everyday surroundings, that he was lost at sea in a lifeboat, starving, and the fellow across the street was out there with him.

In Murder and Madness, a study of the case histories of psychotic killers by Donald T. Lunde, appears the following excerpt from the trial of Daniel M'Naghten; the defence psychiatrist (then referred to as an "alienist") is under cross-examination.

| | |
|---|---|
| Prosecutor: | Do you consider a person labouring under a morbid delusion to be of unsound mind? |
| Doctor: | I do. |
| Prosecutor: | Do you think insanity may exist without any morbid delusion? |
| Doctor: | Yes, a person may be imbecile ... [also] a person may be of unsound mind, yet able to manage the usual affairs of life. |
| Prosecutor: | May insanity exist with a moral perception of right and wrong? |

| | |
|---|---|
| Doctor: | Yes, it is very common. |
| Prosecutor: | A person may have a delusion, and know murder to be a crime? |
| Doctor: | If there existed antecedent symptoms, I should consider the murder to be an overt act, the crowning piece of [M'Naghten's] insanity. But if he had stolen a 10 pound note, it would not have tallied with his delusion. |
| Prosecutor: | But suppose he had stolen the note from one of his persecutors? [Court reporter's note: "Dr. Monro's answer was not heard owing to the laughter which followed the Solicitor General's observation.][49] |

Suppose he had stolen money from his imagined persecutors, perhaps as a way of striking back. Does persecution exonerate theft? Does it justify murder? If not, then the impulse of the legal mind is to inquire as to why delusions of persecution should do any more for the mad than a well-founded belief would do for the sane. M'Naghten knew what he was doing, and he knew his actions to be contrary to law. He believed himself hounded, felt threatened, and took action. Was he capable of knowing his actions were wrong? A clever prosecutor could argue, plausibly, that the circumstances as he perceived them would not, had they been real, have provided a sane person with an excuse or justification. He could characterize M'Naghten's actions as revenge, and remind the court of the strict legal definition of self-defence. M'Naghten was acquitted in 1843, but he could well be convicted today, even under the latest variation of the legal rules that are so closely associated with his name.

## Part II: Psychiatric and Neurobiological Approaches

To the psychiatrist, the M'Naghten rules, in all their permutations, represent an obsolete overestimate of the power of reason in the governance of human behaviour, generated in an era that had never heard of Freud, knew nothing of the unconscious, and had barely begun to realize the various levels of mental functioning which together produce conscious decision-making. It is well and good for the lawyer to counter that the legal definition of insanity seeks not to identify who is mentally ill, per se, but rather who is morally culpable by virtue of having freely decided to commit wrongful acts; but the psychiatrist wonders why the lawyer's conception of free will should be premised so narrowly upon the possession of accurate knowledge. There is much, much more at work in the human psyche than mere cognitive awareness. A correct appreciation of right from wrong, as society would have it, may or may not have significance in the choices of a diseased mind within a given set of perceived circumstances. What the psychiatric sciences indicate is that the more disturbed the thought processes of the individual, the less that knowledge and appreciation of circumstances and social mores can be counted upon to matter.

Nowhere is the dissonance between legal doctrine and the theories of modern psychiatry displayed more graphically than in the criminal justice system's response to those afflicted with multiple personality disorder. Traditional, common-sense conceptions of the mind and its inner workings fall to pieces when confronted with the sufferers of this incredible pathology (which is not, contrary to common belief, any form of schizophrenia), and traditional legal doctrines - designed on the basis of these intuitive conceptions - lose much of their relevance. Analysis of the shattered

consciousness of the true multiple personality takes one beyond the point at which legal dogma and the lawyerly appreciation of human behaviour bears any relationship to reality.

Psychiatrists identify multiple personality disorder (MPD) as the most severe variety of dissociative disorder, "dissociation" being (basically) a disturbance of consciousness within which the actor is mentally disconnected from his own actions and thoughts, or from reality itself. Amnesiatic states are classified as dissociative, and so are hallucinations in which the actor hears voices which implore certain deeds or express given thoughts. Flashbacks, such as those suffered by combat veterans who slip in and out of reality, experiencing traumatic events as if they are happening in the present, are also dissociative in nature. Generally, dissociative states are a reaction to severe psychological trauma - for example, perhaps as much as 97% of those diagnosed with MPD have suffered from severe, ongoing child abuse.[50] Dissociation is thus a form of post traumatic stress disorder.

As a reaction to intensely traumatic experiences, the human mind has the capacity to insulate itself from unpleasant memories, with amnesia, and sometimes takes the additional step of creating distinct personalities within itself, each of which is designed to cope with certain knowledge or handle specific situations. The "core personality" - the original individual, with all the thoughts and experiences accumulated up to the point of fragmentation - almost literally goes into hiding within the consciousness, while other personalities experience segments of the person's existence. The memories and feelings associated with the life experiences of the alternate personalities may or may not be communicated to the core personality, and to each other; a personality within the multitude may experience the inner mind as a series of

individual rooms, between which are connecting doors which sometimes open, and sometimes do not, producing a sporadic flow of information. A given personality may not itself feel as if it has lived through the events of which it has learned, but it may "watch" them as they happen, or "hear" about them second-hand in communication with the others.

Amazingly, each personality possesses not only its own unique memories, and social relationships, but also abilities, physical characteristics, age, and even gender. An old woman may share space in the collective consciousness with a young man. One personality may know how to drive a car, while the others do not, creating dangerous situations when a non-driver surfaces to find himself at the wheel of an automobile. Some may speak languages unknown to the others. The personalities will have verifiably distinct vision (some will be near-sighted, some not), heartbeats, stamina, and will test at different IQ levels. Neurological exams with electroencephalograms will even reveal entirely distinct patterns of brain activity as the different personalities come to the fore. Within the sufferer of MPD there may be as few as two, or as many as one hundred or more, unique personalities,[51] each of which will identify itself by a different name.

For all practical purposes, the one body contains numerous people. Some will be law-abiding, some not; some may get themselves into trouble with authorities, quite unbeknownst to the others, including the core personality sheltered deep inside. From the psychiatric viewpoint, it makes very little sense to view the rest of the multitude as combining with the wrongdoer to form one legally responsible person, nor does it make a great deal of sense to view any individual personality as a fully formed and legally sane person. Each personality represents a fragment of what was once an integrated

consciousness, developing on its own, expressing one facet of the former whole. The balancing between conflicting impulses that is characteristic of normal reasoning is impaired or entirely eradicated, and each fragmentary personality, while fully integrated in its own right, is nevertheless liable to be an archetype of a specific view of life and pattern of behaviour, one aggressive, one passive, one masochistic, one that dominates with violence, and so on. It is as if each of the many moods that the normal mind can experience has been isolated and given a life of its own. In response to stress, threatening situations, or idiosyncratically meaningful cues, a given personality may surface, according to a plan agreed upon with the others, and take over, it being the one best equipped to cope under the circumstances. At other times, the personalities may quarrel, one surfacing as part of a struggle with the others for control of the body. The transition can happen in a fraction of a second.[52]

This is not psychosis. The individual personalities may suffer "pseudo delusions", plain mistakes of fact based on misinformation communicated to them by the others, but they do not suffer psychotic delusions. Each, generally, will be fully aware of his surroundings, his actions, and the difference between right and wrong as society sees it. Is the sufferer of MPD therefore sane?

The criminal law is hard pressed to deal with such a bizarre phenomenon:

> Can the law give recognition to more than one personality per human body? Can the law regard each personality as though it were a different person? Suppose the law were to consider each of the personalities as a distinct legal entity; would it be better to let 10 guilty personalities go free than to punish one innocent personality? Would the doctrine of double jeopardy preclude multiple prosecutions?[53]

Who is on trial when an alternate personality commits a crime? Is it the core personality, the one legally connected with dental records, fingerprints, and so on? Or is it the alter ego? Do the multiple persons represent different defendants, or just different states of one consciousness? Courts, mainly in the United States, have fumbled with these problems.

Multiple personality disorder has rarely been an issue in Canadian criminal trials. In one recent Ontario case, R. v. Volk,[54] the crime in question had actually been committed by the core personality. She was excused on a charge of making false accusations of sexual assault because she believed them to be true; the falsehood had apparently been communicated to her by another personality. The little used ss.16(3) of the Criminal Code was employed, and Ms. Volk was found not guilty by reason of insanity, although the defence had avoided an insanity plea in favour of a defence of honest mistake of fact.

Some American courts have likewise found MPD sufferers legally insane. In the Hawaiian case of State v. Rodriguez,[55] six psychiatrists offered testimony about the existence of various personalities within the accused, and produced different theories as to which one had committed the crime, as well as the mental capacities of each. Hawaii applies a variation of the American Law Institute (ALI) Model Penal Code provisions on insanity, basically a rework of the M'Naghten rules with an additional "volitional component". (The ALI test also exculpates if the accused lacked substantial capacity to conform his behaviour to the requirements of the law.[56]) Rather than working through the test as it might have been applied to each of the personalities, the trial judge simply found that evidence of multiple personality disorder is such overwhelming proof of insanity that he directed a verdict of acquittal, and

did not allow the case to go to the jury. This sensible verdict was, however, overturned on appeal, the Hawaii Supreme Court holding that the existence of MPD does not, in itself, establish legal insanity.

Other American courts, like children obstinately trying to pound square pegs into round holes, have strained to fit MPD defendants into the traditional conceptual framework of criminal responsibility. In Ohio, again applying the ALI standard, the appellate court in State v. Grimsley[57] held that the fact that the core personality was dissociated at the time of the crime did not mean that the crime was committed by someone else, nor did such dissociation amount, on its own, to insanity. The appearance of different personalities, it was decided, was merely a change from one conscious state to another, and the defendant core personality could argue neither automatism nor absence from the crime scene.

> When the evidence fails to establish that the secondary personality was acting either unconsciously or involuntarily, it is immaterial whether the person was in one state of consciousness or another. As long as the personality that is controlling the person's behaviour was conscious, and the actions of that personality were a product of her own volition, an insanity defence is not established.[58]

This verdict was followed in Kirkland v. State,[59] a Georgia Appeals case decided under the ALI standard. Once again, it was stressed that the MPD sufferer was one person (identified as the core personality), and the appearance of other personalities was nothing more significant, at law, than severe mood changes in a normal person. The fact that the core personality was, in effect, unconscious during the crime was dismissed by the court, which stated that "In cases of multiple personality disorder, the court will not parcel criminal accountability out among the various inhabitants of a person's

mind."[60] Thus, if the personality in charge was legally sane during the commission of the crime, then the core personality - the one genuine person in the eyes of the law - shares in the guilt.

Under cognition-based insanity tests, even those with a volitional arm, whatever personality has surfaced is liable to be sane. Such tests, as they have been applied, make no allowance for defective thought processing, nor do they take account of emotional and motivational dysfunction (short of that which renders the accused incapable of controlling his own behaviour, a difficult standard to meet even when the law incorporates it). It does no good to argue that any mind which has shattered itself into distinct pieces and manufactured individual personalities to deal with life and its traumas cannot possibly be healthy enough to have produced sane fragments. The pieces may themselves be disturbed and psychologically pathological, but they are no less sane, at law, than the original personality would have been had it never fragmented.

MPD provides merely the most colourful example of the law's difficulties in coming to grips with dysfunctional mental states. The narrow framework of the M'Naghten rules and their derivatives leave the courts ill-prepared to deal with a whole range of mental abnormalities. Among the unlucky groups without a defence are the mentally retarded, who, while they lack a fully developed appreciation of the significance of social mores, or indeed of the true impact of their behaviour, may nevertheless possess sufficient awareness to be found criminally culpable. In Canada, ss.16(2) of the Criminal Code makes provision for "natural imbecility", but such is, of course, only exculpatory if it deprives the accused of an appreciation of the nature and consequences of his actions, or the ability to tell right from wrong. Mental

retardation is not usually severe enough to qualify for the defence; an accused might have a mental age of eight years, for example, and still be perfectly capable of understanding society's legal and moral prohibitions, at least at a basic level. And, while the retarded may not really "appreciate the nature and quality" of their acts, as that phrase might be more liberally interpreted, they are usually quite capable of realizing what they are doing and what the immediate physical consequences will be - again, at some basic level. They may be wholly incapable of ascribing to their actions the same character or meaning as would the normal adult, but that is nothing to the law.

In R. v. Gillingham, a Newfoundland case, an accused with a mental age of twelve years was convicted of sexual assault, although his sentence was reduced by an Appeal Court which also strongly recommended psychiatric treatment.[61] In R. v. Stevenson,[62] an Ontario court ruled that, in spite of retardation, insanity was a "non-issue" in a trial on a charge of first-degree murder, the trial judge instructing the jury that

> There is no law that says that a person must be bright, or very bright, in order to commit murder. There is no law that says that it has to make sense, or that it was the smart thing to do. There is nothing in the Criminal Code and there is no law that says an accused has to be of a certain mental age.[63]

The Ontario Court of Appeal overturned the judgement, on the basis that more weight should have been given to psychiatric evidence of mental deficiency, short of insanity, which might indicate that the accused did not plan and deliberate murder. The Appeal Court heartily agreed, however, that insanity was a non-issue, and, referring to the passage quoted above, Mr. Justice

Morden said that "no one could argue with the correctness of these statements."[64]

In R. v. Sawchuk,[65] the defence counsel tried a different tack, trying to get his retarded client declared a child under the age of twelve years in the eyes of the law, and thus immune from prosecution owing to the operation of s.13 of the Criminal Code. The argument failed, and an appeal to the Manitoba Court of Appeal[66] made it clear that s.13 referred to chronological age, not mental age, relying on the reasoning in the Supreme Court of Canada decision of Ogg-Moss v. The Queen.[67]

It seems odd that the Criminal Code protects minors below the age of twelve years from criminal sanction, presumably on the basis that their underdeveloped minds lack the capacity for mens rea as it is understood in the adult context, yet the courts can make no similar provision for those whose minds have not kept pace with their bodies. In R. v. Chaulk,[68] Chief Justice Lamer noted the similarity between the insanity defence and the exemption for children below twelve years of age:

> While the state of insanity and the state of childhood cannot be equated, the connection between these two situations for the purpose of criminal law is apparent. What these two situations have in common is that they both indicate that the individual in question does not accord with one of the basic assumptions of our criminal law model: that the accused is a rational autonomous being who is capable of appreciating the nature and quality of an act and of knowing right from wrong.[69]

It seems a short step from this reasoning to include within the ambit of the insanity defence those with the minds of children. Thus far, no such step has been taken.[70]

When one sees a court of justice subject the mentally retarded to the full weight of legal sanction, it is hard to escape the impression that something is sadly askew in the way the law defines exculpatory mental disability. Whatever one's outlook, there must be something to be said for an understanding of the way the mind really works, and while moral and ethical questions of guilt and innocence might not be amenable to purely scientific resolution, neither do they need to be answered in a vacuum.

There has been a wealth of knowledge and persuasive theory amassed in the 148 years since Daniel M'Naghten opened fire on the Tories, opening a gulf between legal dogma and the best available understanding of mental diseases and their effects on normal functioning. When practitioners of scientific disciplines come to court, they feel themselves transported through the past to a darker time when almost nothing but the symptoms of mental disease was properly understood, and are often dismayed to find their appreciation of mental phenomena deemed largely irrelevant. It should, at least, give lawyers pause to realize that those who study the human psyche - those in the best position to know - often view the law as myopic, blinkered, and badly out of step with reality. They take a much different view of what it means to be sane.

Psychiatry looks beyond the possession of accurate knowledge, to the ways in which the diseased mind interprets and responds to the information it receives, the influence of unconscious drives and fears, the ability to connect abstractions with everyday reality, and the emotional meaning that is derived from events, relationships, and the awareness of others. A serious flaw at any level of this complex interaction of mental processes can utterly warp the desires, motivations, and decisions of the individual. Delusions are

but one of an enormous range of possible malfunctions, some of them working at the level of consciousness, some of them influencing conscious thought from deep inside the psyche.

From this perspective, the under-inclusiveness of the M'Naghten formula is emphasized by the realization that most forms of psychopathology have nothing to do with delusional states of mind. Psychological disturbances and disorders are generally classifiable as belonging to three broad categories, the psychoses, the neuroses, and character disorders.[71] Only the psychoses are typically accompanied by delusional beliefs.

The neuroses are the least serious, generally - most of us have them in varying degrees - and psychiatrists believe they usually have their root in oedipal complexes. Obsessive-compulsive behaviour, phobias, and depressions are all the result of neuroses, which, to quote psychiatrist Richard Lasky, are "characterized by the presence of repetitive and stereotypical thoughts, emotions, behaviors, etc. ... these interfere with the neurotic person's freedom to adaptively function in the ever-changing current reality."[72] A neurotic disorder, however severe it becomes (and they can become very severe indeed), is not characterized by a separation from reality, but by an inability to make reasonable decisions in the face of often overwhelming urges, fears, or depressive moods. No appeal to reason has much of an effect on neurotic behaviour. The effect of a neurosis on the sufferer is described evocatively by F.A. Whitlock:

> The man suffering from an obsessional neurosis which compels him repeatedly, however much he realizes the absurdity of the act, to carry out some ritual piece of behaviour is the classic example of an illness in which emotional tension makes all purely intellectual reasoning ineffectual. The patient knows that to wash his hands for the twentieth time within an hour is by normal standards unnecessary, yet if he struggles

> against the compulsion he will experience intolerable anxiety which will be unassuaged until, wearily, he gives in for the twenty-first time in the vain hope that this will at last appease the tormenting emotional conflict within him.[73]

Neuroses are caused by unconscious conflicts, triggered by situations that remind the sufferer of childhood experiences in which the conflict first originated (for example, wishes may conflict with prohibitions).[74] They can only be cured by sometimes protracted psychotherapy, if at all.

The character disorders afflict those whose emotional development has for some reason been stunted. They are characterized by an inability to experience life in the way that normal people do, perhaps in being incapable of falling in love, or caring about anyone, or feeling the warmth of friendship. The sufferer may conceive of himself, or of others, as basically worthless and inanimate objects, or suffer explosive loss of self-control at the slightest provocation, disappointment, or perceived humiliation.[75] The sociopath falls into this category, as do those with antisocial and explosive personalities, as well as many forms of sexually perverse individual. Character disorders are liable to render one not only dangerous, but insensitive to external prohibitions and objectively threatening consequences, including the prospect of punishment. While "some character disorders have a tremendous potential for regressions, and sufferers may deteriorate into psychosis",[76] delusions are not a facet of many of the most serious of these illnesses, including sociopathy.

The psychoses, amongst them most forms of schizophrenia, do often produce the delusions that are the stuff of the M'Naghten rules, including not only mistaken beliefs, but outright hallucinations. Just as important, however, is the way that the ability to reason, to properly perceive and base

decisions upon even accurate information, is impaired. The psychotic sees a different meaning in everyday ideas, has difficulty connecting abstract concepts with concrete events, and attaches idiosyncratic interpretations to words, sounds, or random occurrences. He may find it both significant and threatening that a phone rings nearby, or that a traffic light changes - such may "prove" to the sufferer that he is under surveillance, or about to be attacked. At the same time, the entire thinking process - the flow of information, associations, and decisions which the healthy person takes for granted - may be wholly disrupted. Schizophrenics, for example, suffer from various forms of thought distortion, including "perservation" (a perception that previously appropriate behaviour should be repeated under different circumstances), "thought blocking" (the effect is that reasoning suddenly comes to a complete halt), and "clang associations" (concepts are understood and associated by the way they sound when put into speech, rather than by their meaning).[77] Irrational connections are made, and mere knowledge ceases to be the key to cognitive processing. The psychotic may be able to describe what it is to attack someone, and may be able to quote the Criminal Code, chapter and verse, yet stab a bystander because it was Wednesday, and on Wednesdays people from the city come to pick up the trash, and they wear red jackets, which is an obvious signal that those wearing blue jackets secretly wish to be stabbed. The stabbing will seem right and proper to the psychotic, even if he knows, and may well be able to confirm to an examiner, that assault with a deadly weapon is a serious crime.

A mental disorder that falls within any of the three generic groups may lead to unlawful behaviour, yet, as far as the law is concerned, remain fully the products of free will and therefore punishable. Here, the legal and

psychiatric conceptions of free will are widely disparate. The psychodynamic approach does not necessarily indicate that mental disease eradicates freedom of choice within the individual, but it does point to the ways that psychological disorders channel free will and structure choices. Even with disorders that do not impair cognition or awareness, the dysfunctional elements of the psyche create a tendency to irrational, harmful, and often illegal behaviour, by changing an individual's motivational and emotional make-up. The individual retains the capacity to choose the legal or moral alternative, in the strict sense that he remains conscious, aware, and in control of his actions. But the legal and moral alternatives are perceived in a different way, as a matter of indifference, a set of senseless constraints, or as prohibitions that are less urgent than the need to satisfy insistent internal drives. When normal emotions cease to play a role in decision-making, when the internal balance is lost and normal inhibitions are overwhelmed or altogether absent, the structure of choice is inevitably altered.

Lawyers, courts, and legislators have remained deeply suspicious of the views of psychiatry, perhaps in part because the effects of serious mental illness have not, generally, been experienced by those who draught the laws and sit in judgement. The conclusions of psychodynamic analysis are necessarily counter-intuitive to the normally functioning mind, and it is difficult to believe in, or understand, the difference between "normal" impulses produced by greed, lust, anger or envy, and the motivations of the mentally ill. The law is there to encourage people to control their impulses, and psychiatry is preaching, in a threatening and irritating way, that nothing is as simple as all that, that at some point on the continuum of mental states

(and when, exactly, they cannot say) a line is crossed into a realm of thinking that is qualitatively different. Psychiatric theory, moreover, remains arcane at best, and apparently silly at worst, full of words like "id", "super-ego", and a host of concepts that can seem as full of lunacy as the pathologies it purports to describe. Nor is the science as precise as the legal mind would desire; different practitioners invariably arrive at different diagnoses of given individuals, based on different theories and seemingly subjective evaluations, leading to "battles of the experts" in the courtroom as each side trots out the psychiatrist that best supports its case.

Most troubling is the implication that basic notions of guilt and responsibility, good and evil, are flawed and sometimes irrelevant. Psychiatry can be seen as asserting that there is no such thing as a guilty mind, at least not in the way the concept is understood by lawyers, but only different patterns of behaviour based on different systems of thought. The perception that psychiatric analysis is both morally neutral and deterministic is not quite accurate, but neither is it light years removed from the truth. All in all, it has proved too much for the justice system to swallow whole.

Meanwhile, as legal doctrine has fended off attacks from the psychiatric sciences, another discipline has mounted an assault on the law's most fundamental conceptions of free will and criminal responsibility. Medical science, armed with an expanding array of delicate instruments, has just begun the exploration of the brain and its inner workings, but already the discoveries have been astonishing, and the implications seem clear: the mind and consciousness function in ways never imagined by jurists, and only dimly appreciated by the students of Freudian analysis.

That gross physical abnormality or trauma can impair the workings of the brain, thereby influencing mental states, has, of course, long been appreciated. Nevertheless, the intuitive tendency has been to view the mind and the brain as two different things. The perception persists that consciousness is something metaphysical, almost mystical, a product of the "spirit", producing thoughts and perceptions by means somehow independent of physical reality. Thought is not manifested by any obvious physical process like a beating heart or an expanding chest. It simply seems to happen, somehow.

It is this mind/body dualism that medical science now refutes. Neurobiologists understand consciousness to be nothing more than the product of millions of subtle electrochemical reactions within the various systems of the brain: the mind <u>is</u> what the brain <u>does</u>. Therefore, every state of consciousness, every mood, every thought and memory must be a manifestation of an underlying organic reality. Alter the chemistry, and consciousness will experience a corresponding alteration. Stimulate the right group of neurotransmitters, excite the right systems, neutralize the right chemical inhibitors and patterns of thought will change as predictably as lights that turn on at the flick of a switch. Behaviour, in this view, is not merely influenced by organic and electrochemical processes; it is absolutely determined by them.

Numerous mental diseases have been shown to have their origins in organic and chemical malfunctions within the brain, or at least to have a significant organic component. Schizophrenia, long a puzzle to psychiatrists, now seems to be a biological disorder,[78] the effects of which can be discerned by mechanical monitoring of brain functions. The PET scanner, one of an

increasing inventory of marvellous new machines which are employed by medicine in the examination of the brain,[79] reveals that schizophrenia is often marked by aberrations and reductions in brain activity, as evidenced by diminished glucose metabolism.[80] Depression shows up on PET scans as well, the entire brains of those suffering from bi-polar depressive disorder (sometimes called "manic-depressive disorder") appearing in the PET imagery to be underactive, as if something is preventing normal brain metabolism.[81] Both diseases respond to medication designed to correct organic dysfunction in the brain's neurochemical transmission of brain impulses; depression is often treated, with a great deal of success, by drugs which facilitate greater activity between neurons, research in the 1950s having demonstrated that the illness is often marked by chemical deficiencies which inhibited the ability of these cells to pass the electrical impulses that are the essence of brain activity.[82]

It makes sense that diseases which manifest themselves in organic and biochemical abnormalities may likewise be caused by organic and biochemical factors. Genetic aberration is an obvious culprit. Research into depression has indicated a tendency of this illness to run in families,[83] and twin studies have also produced persuasive evidence of the link between genes and depression.[84] Studies of the Amish population of Pennsylvania, a genetically isolated group, have postulated a connection between depressive illness and the presence of aberrations in certain chromosomes.[85] Twin studies have also indicated genetic links to schizophrenia, various neuroses, and criminal behaviour in general, the suggestion being that even absent any identifiable psychiatric pathology, heredity is somehow contributing to the propensity of individuals to criminal activity.[86] The role of genetics in criminality is,

of course, hotly debated in the literature, and even advocates of the "biological predisposition" school accept that the best available results also indicate the importance of environmental factors in human behaviour.[87] It seems clear, however, that hereditary make-up can influence the sensitive chemistry of the mind in a number of ways, contributing to mental illness and antisocial tendencies.

Natural processes within the body may also produce unfortunate chemical imbalances, affecting mood and self-control, the most famous example here being premenstrual syndrome (PMS), a reaction to hormonal imbalances brought on by menstruation that is linked to increased irritability, tension, depression, fatigue, cravings, impulsivity, and impaired social functioning.[88] The effects of PMS can be countered by progesterone treatments, but often it goes undiagnosed. In extreme cases, it seems to be at the root of violent outbursts, and research, while inconclusive, has indicated that as much as 49% of given female prison populations is composed of women who committed crimes during their premenstrual cycles.[89] The phenomenon is beginning to receive notice in the courts, with varying results, in England, America, and Canada.[90] Women who have given birth are also prone to hormonal changes which many physicians believe are at the root of post-partum depression, a mental disturbance which resembles PMS in its effects and is often associated with infanticide.[91]

Brain chemistry may also be upset by the things that one eats. One food-related disorder is hypoglycemia, low blood sugar brought on, ironically, by the ingestion of too much refined sugar. In cases in which the biochemistry of the body is slightly dysfunctional, the release of insulin, a normal reaction which functions to prevent over-saturation of the blood with

sugars, lowers the blood-glucose level to dangerous levels, producing headaches, nervousness, confusion, hyperactivity, and sometimes violent outbursts.[92] Diabetics may also experience hypoglycemia as a product of insulin overdose. Courts in both the U.S. and the U.K. have pondered the effect of the phenomenon on criminal responsibility.[93] Food allergies and nutritional deficiencies have also been linked to mental disturbances and resultant criminal acts,[94] suggesting that the brain is highly sensitive to both the quality and quantity of the fuel ingested to support its functions.

Chemicals and metallic trace elements in the environment, the by-products of industrial production, have been discussed as the possible determinants of mental states, leading to aggression, instability, and criminal violence. These, too, are usually ingested in food and water, but may also be absorbed through the skin in industrial settings. One biochemist, William Walsh, studied the brain chemistry of prisoners in the Illinois state prison system, and found that violent offenders had high concentrations of lead, cadmium, and iron in their bodies, whereas non-violent offenders, as well as a control group of non-criminals, did not.[95] Insecticides, fertilizers, weedkillers, and the like have been implicated in violent behaviour as well. Richard Restak, one of the more prominent members of the biological school of psychiatric analysis, describes, in The Mind,[96] the case of David Garabedian, a young man employed by a lawn care company, who murdered one of the company's clients on March 29, 1983. The client, one Mrs. Muldoon, came home to find Garabedian urinating on her lawn; when she confronted him, he set upon her with extraordinary viciousness, strangling her and then smashing in her head with large rocks extracted from a nearby retaining wall. The attack was completely out of character, except that in the weeks prior to

the incident David had displayed an increasing tendency to irritability, mood shifts, withdrawal, and sensitivity to noise. He also had strange physical cravings for juice and water, had repeated episodes of abdominal pain, and diarrhea, as well as repeated urges to urinate.

Garabedian was convicted of murder, but a toxicologist and neuroscientist, who consulted on the case, reported his opinion that the violent behaviour was the result of the effects of a chemical present in the lawn products, called Dursban, interacting with neurotransmitters in the brain. The chemical can neutralize the effects of chemical inhibitors, which normally function to control the firing of neurons in the brain, thus permitting sudden emotional stimulation to set off a sort of brain storm, rapid neurological activity out of all proportion to the outside stimulus. To Garabedian, the effect would be the same as if he was suddenly confronted with life-threatening circumstances, a mixture of rage and intense fear that overwhelmed all rationality. Garabedian's other symptoms, exhibited prior to the attack, are also consistent with the effect of the lawn chemical on various systems within the brain.[97]

How many people like David Garabedian now languish in prison? We live in a society drenched in exotic metals and artificial chemicals, the effects of which are often unknown or barely understood. It is difficult to prove, even in a case like that of Garabedian, that neurochemical malfunctioning brought about by pollutants is a <u>decisive</u> factor in criminal aggression, and for every person exposed to such chemicals who lashes out in uncharacteristic rage, there will be others who behaved normally in spite of identical exposure. None of Garabedian's fellow workers had ever been involved in violence.[98] Still, the evidence cannot help make one wonder how much of the

random violence in our society is influenced by the interaction of myriad artificial compounds, which all of us consume every day, with individual, idiosyncratic brain chemistry.

Taken as a whole, the picture that emerges from the findings of neurobiologists is that of a brain that experiences mental disease as a consequence of measurable abnormalities in neurological functioning. Neurological abnormality may be the product of genetics, physical trauma, exposure to chemicals, inherent inability to manufacture certain kinds of biochemical, birth trauma, or a murky combination of all of these factors. Whatever its source, abnormal brain functioning seems to be an important correlate of criminal behaviour, particularly violent behaviour, research indicating that between 50 and 65% of violent offenders have abnormal readings as measured by an electroencephalogram (EEG),[99] and between 50 and 80% of criminal populations have one form or another of brain disorder, including epilepsy, hemispheric dysfunction, and brain trauma.[100] A study of 64 English murderers revealed that, among those who killed for no apparent reason, 73% showed EEG abnormalities.[101]

Studies of sociopathic (or "psychopathic") offenders have produced particularly startling results. Far from being over-stimulated, explosive, or prone to aggressive fits, those diagnosed as sociopathic tend to exhibit a marked pattern of neurological under-arousal. At least one source indicates that sociopaths suffer from deficiencies of sodium and potassium, elements essential for the transfer of electrochemical impulses between neurons.[102] Brain wave abnormalities are not present in all psychopaths, but are exhibited by roughly 50%, still high when compared with the 15% rate exhibited by the healthy population.[103] Among the abnormalities displayed are brain wave

patterns "associated with drowsiness or unalertness, or patterns normally seen only during sleep that are present in psychopaths when awake."[104] The general lethargy in the nervous system seems to make psychopaths inordinately calm, even in situations which create tremendous stress in normal individuals. They can, often, pass lie detector tests while deliberately weaving a tapestry of falsehood,[105] and seem unconcerned by unpleasant stimuli that produce negative reinforcement in others. In laboratory experiments, psychopaths ignore electric shocks, and fail to learn - or rather do not seem to <u>care</u> - that certain responses will produce unpleasant consequences. They do not seem to find them unpleasant:

> Psychopaths are not impervious to conditioning, but the autonomic nervous system that mediates emotional responses, quite sensitive in non-psychopaths, is insensitive in them, especially (but not exclusively) when the conditioning involves anticipating a punishing stimulus like an electric shock, or, by extrapolation, such social punishment as the loss of positive reinforcement accompanying disapproval and the like .... We believe it is correct to conclude that psychopaths are poor pavlovian conditioners for emotional responses, particularly when the motivating stimulus is aversive, or when the conditioning calls for sensitivity to delayed stimuli, or both.[106]

The implication is that psychopaths are neurologically ill-equipped to be deterred by the legal consequences of criminal behaviour. What is more, psychopaths may actually seek the excitement and stimulation connected with criminal behaviour as a means of arousing their chronically under-stimulated nervous systems. It is theorized that, since the psychopath does not, physiologically, receive the full impact of sensations from the environment, he resorts to criminal acts "in order to get the optimal amount of stimulation necessary to keep the cerebral cortex 'satisfied'".[107] They may actually <u>like</u> the electric shocks that they get in clinical experiments designed to test

their responses to aversive stimuli. The desire to seek stimulation may explain why many psychopaths were hyperactive children.[108]

Emotional response is a vital part of socialization. As the personality develops towards maturity, one not only learns, intellectually, that antisocial behaviour creates painful results for others, one also learns to avoid the pain that antisocial behaviour produces for oneself. Like it or not, anxiety, as much as altruism, is a key element of civilized behaviour, and the utter absence of anxiety impedes, perhaps even prevents, the learning of socially appropriate behaviour. Psychopaths, moreover, seem incapable of ordinary positive emotional responses, and know nothing of sympathy, empathy, and caring. Such are empty intellectual constructs to the psychopath, who can no more grasp their true significance than the person born deaf can successfully imagine the sound of the Ode to Joy. There seems to be a link between the inability to feel emotion, and abnormalities in the language processing faculties of the mind. Richard Restak notes that psychopaths respond differently to the connotative aspects of words; if asked to choose which of the words "loving" and "cold" goes with the word "warm", the psychopath will pick "cold".[109] In the words of psychologist Richard Hare,

> The psychopath doesn't make any distinction between neutral and affective words .... this is important when it comes to conscience, which is partly internalized language. If a person says "I shouldn't do something" then that person will actually feel that he shouldn't do it. But a psychopath can say the same thing, "I shouldn't do this", but he doesn't <u>feel</u> that he shouldn't do this. The emotional or affective component of conscience is absent in the psychopath.[110]

One is tempted to conclude that such people are more than insane, or mentally incompetent. They seem to be a different species, not sub-human, but not

entirely human either, simply something else, conscious, soulless, predators in our midst. Conventional concepts of immorality do not seem to suit what they are.

It can be seen, at this point, that the neurobiological sciences are providing an insight into the workings of the mind that goes even farther than psychiatry in challenging the premises of criminal culpability. Taken to its logical extreme, this approach implies that however people behave, and whatever they are capable of doing, they simply are what they are, a product of the organic processes that govern all motivations, perceptions, moods, thoughts, and deeds. Those of us who are well-adjusted and law-abiding can thank our lucky stars that none of the huge array of possible organic and biochemical malfunctions has afflicted our consciousness. The rest, while harmful to society, can hardly be blamed for things that are beyond their control.

The implications of all of this to traditional psychiatry are as yet unclear. On the surface, the biological approach seems to render psychiatric analysis, with its emphasis on traumas, unconscious conflicts, and emotive experiences, largely irrelevant, or indeed wholly misguided. Yet the two disciplines may interact. It does not seem likely that psychiatrists are wrong in identifying life experiences and emotional conflicts as a source of mental illness, and it may be that such phenomena merely demonstrate, from the biological perspective, that the brain responds to the environment with subtle changes in its organic processes. Perhaps stress, trauma, or unconscious conflicts create organic and neurological anomalies that will some day be discernible. Perhaps some abnormalities of neurological functioning are imposed on the brain by <u>itself</u>, and are merely the organic manifestations of

the will, rather than the converse.

Machine it may be, but the mind is a self-motivating machine. It is not always clear, when dealing with mental abnormalities, whether disease affects the consciousness, or consciousness creates the outward symptoms of disease. Are the EEG abnormalities of the violent offender simply the evidence of what the moralists have been saying all along - that this individual is an evil person? Does not a psychiatric categorization like "explosive personality disorder" really describe symptoms more than causes, leaving uncertainty as to whether the illness had its genesis in factors beyond individual control? Do people sometimes make themselves sick? Does such a question even matter - could it be said that the propensity to make oneself diagnosably ill is itself a sickness? Here, a chasm of philosophical uncertainty opens up before would-be draughters of the criminal law. Having digested substantial quantities of medical and psychiatric literature on the mind and its inner workings, one is almost exhausted and confused enough to give in to the idea that the wrongdoer must be ill in some way (and therefore not responsible) or else he would not have chosen to do wrong.

Yet no system of law will ever go that far, nor should it. The findings of the scientists cannot be safely ignored, but neither should the idea of culpability - of evil - be entirely discarded. After all, even the scientists themselves are usually not comfortable in going that far. Richard Restak, in discussing the crimes of serial killers like Ted Bundy (the famous murderer of women who died in Florida's electric chair), John Gacy (who killed young men and buried them under his home), and Donald Harvey (a nurse's aid who murdered 24 patients under his care), has this to say:

> It certainly strains credulity to believe that Harvey, Bundy and Gacy are "sane". But is it possible that

> our conviction that they are insane - according to some as-yet-to-be defined criterion - is nothing more than a comforting form of circular reasoning? No sane person could commit such acts, these men committed them, therefore they are insane? Could this be a way of avoiding value judgements about good and evil? ... Donald Harvey's behaviour seems less a form of insanity than it does an appalling distortion of ordinary human feelings best left to the explanations of theologians and moralists. After all, if we are free to do good, then it seems reasonable to suppose that we are also free to perform acts of extreme wickedness. If the human mind can evolve in the direction of a Mother Theresa, why can it not take a counter-turn and produce a Donald Harvey?[111]

Science can illuminate the insanity debate, but it cannot provide a full resolution. The scientists do not have all the answers.

## Part III: Changing the Rules

If the M'Naghten formula is unsatisfactory in light of scientific explications of the determinants of human behaviour, what, then, shall we do? The criminal law cannot give in to determinism and amorality - it might just as well cease to exist - nor can the premise that people possess free will, and should in general be held responsible for their actions, be abandoned. The human mind does have the capacity to shape its own destiny, and it simply cannot be accepted that everything we are and do is determined inalterably by forces and circumstances beyond our control. Nevertheless, the will can become warped and impaired by disease, and what the law must develop is a standard that takes account of the inappropriate and antisocial choices that the mind becomes capable of making when afflicted with the full range of organic and psychiatric illnesses. What is lacking in M'Naghten is an appreciation that defects in the decision-making process are the hallmark of most mental

illness, not delusions and lack of basic awareness. The legal conception of free will, obsessed as it is with knowledge and awareness, is at odds with the unfortunate realities of diseased mental functioning because it takes no account of the way the mind really works, the complex (almost unthinkably complex) stages in the production of normal conscious thought, and the factors, both psychological and organic, that can set the process awry. Robert Schopp, in his recent cut at the problem, feels free will at law should be premised on psychological self-regulatory capacity:

> In short, on this conception of free will, a person's will is free when the psychological abilities that constitute the cognitively mediated self-regulated capacity are free of impairment, and hence the person is capable of directing his behavior in light of applicable norms, circumstances, and anticipated consequences through the processes of cognitive self-regulation that are available to the unimpaired adult.[112]

This is an idea that merits application, but difficulties arise in trying to design a statutory provision that sets an appropriate standard. Not everyone with psychological impairments can be excused, such that the mere existence of a diagnosable mental illness becomes exculpatory. What level of impairment should constitute mental disability at law? Which mental faculties should the law consider relevant?

Existing legislative and jurisprudential alternatives provide little guidance, as most are, in their own way, as misguided as M'Naghten. The principal rival to the M'Naghten standard in North America is provided by the American Law Institute's Model Penal Code, and the reader will immediately discern a familiar ring to the ALI provision:

> Section 4.01. Mental Disease of Defect Excluding Responsibility.
>
> 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 of his conduct or to conform his conduct to the requirements of the law.[113]

"Lacks substantial capacity to appreciate the criminality of his conduct" is a concept not far removed from "incapacity to appreciate the nature and quality of an act, or of knowing that it is wrong", although the modifying word "substantial" allows the trier of fact to take account of disabilities that amount to something less than a total impairment of awareness. The main innovation of the ALI codification is the criterion of incapacity to conform one's conduct to the requirements of the law, which incorporates a volitional component into the legal definition of mental disability.

This "volitional prong" is a matter of intense controversy in the United States, where both the American Psychiatric Association and the American Bar Association recommended its abandonment,[114] a recommendation given effect in the federal Insanity Reform Defense Act that was passed in the midst of the post-Hinckley backlash.[115] In effect, it is nothing more than a restatement of the notion of "irresistible impulse", an idea that has dogged common law jurisprudence since the early nineteenth century.[116]

The allowance for incapacity to conform one's behaviour to the requirements of the law is meant to ameliorate the emphasis on cognitive awareness by recognizing, too, that mental disease is often characterized by motivational and volitional distortions. The problem, even if one settles upon a formulation such as "substantial incapacity" rather than "irresistible impulse", is in defining when the urges brought about by mental abnormality

are truly beyond the ability of the actor to control. There may be cases - David Garabedian's, for example - when abnormalities in mental functioning produce violent emotions and virtually autonomic responses that are genuinely beyond conscious moderation. Perhaps a bizarre case like that of R. v. Abbey,[117] in which the actor honestly believes himself to be the implement of an outside force, could qualify. In the main, however, mental illnesses impacts on volition by altering the mind's motivational structure, producing abnormal desires, not, strictly speaking, irresistible urges. The psychopath, the sufferer of profound depression, even the schizophrenic, all retain an ability to choose alternative courses of action, feel they are in control of themselves, and may or may not moderate their behaviour in the given instance according to the likelihood of being caught and punished by the law. Proving the contrary is often next-to-impossible, especially in the face of a sceptical judiciary. The Anglo-Canadian tradition is to regard the assertion of irresistible impulses with the utmost suspicion:

> The law says to men who say they are afflicted with irresistible impulses: "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." No man has a right under our law to come before a jury and say to them, "I did it at that", and then say, "now acquit me".[118]

This seems, and is, harsh, but even the most liberal commentators accept that there is almost no way to distinguish between impulses that were impossible to resist, and impulses that were simply not resisted. The American Psychiatric Association, in its Statement on the Insanity Defense, noted in an evocative phrase that "the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk".[119] This, perhaps, need not be fatal. It is often the business of courts to draw

fine distinctions, and if courts can decide when alcohol rendered an assailant incapable of specific intent, or when a tortfeasor failed to exercise reasonable care, then perhaps it is not too much to ask them to determine when a person had crossed the line between voluntary abandonment of restraint and actual inability to be restrained. The more cogent argument in opposition to equating mental disability with volitional incapacity is made by Herbert Fingarette:

> The Model Penal Code test misidentifies the capacity that should properly be at issue. The test calls for "substantial lack of capacity to conform conduct to the requirements of law". However, it is quite typical that even the obviously mentally disabled offender is capable of purposely conforming to the law. But even the individual who could purposely conform if he so willed is unable, because of the irrational condition of his mind, to form his will rationally.[120]

As long as incapacity to conform to the law is conceived of as a sort of conscious automatism, the problem is not that the law asks the trier of fact to draw a line where none can be drawn, so much as that it asks the line be drawn in the wrong place.

Another oft-discussed alternative to the M'Naghten formula is the "Durham Rule", drawn from the District of Columbia case of Durham v. United States (1954),[121] which itself adopted a rule of law first applied in New Hampshire over 120 years ago.[122] Rather than attempt to draw fine distinctions between the states of mind produced by mental aberration, Judge Bazelon of the United States Court of Appeals for the District of Columbia opted for the astonishingly simple assertion that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect".[123] During its limited lifespan,[124] this "product rule"

proved difficult and idiosyncratic in its application. The aim was apparently to burst out of the confines of the M'Naghten criteria and allow consideration of a broad range of psychological impairments and the ways they influence behaviour.[125] In its own way, the Durham rule was groping towards the conception of mental disability as defective process, and was meant to allow the law to consider a broad range of relevant psychiatric theory.[126] In that sense it was an admirable effort.

But the standard was vague, and prone to varying interpretations. The act, to be guiltless, must be the product of mental illness - does this mean purely the product, or merely that mental abnormality is a contributing factor? On its bare wording, the test seems to proceed from the false premise that the disease, and not the individual, commits the crime, almost as if mental illness was to be equated with demonic possession - is that what was intended? In that case, would an individual who retained some self-control in spite of the illness be innocent, or would the defendant have to show a complete absence of self, or self-control (an irresistible impulse perhaps?), in order to bring himself within the defence? Critics have noted that the Durham rule "was not a rule at all";[127] in essence, it simply asked the jury to acquit when it felt that the individual was too sick to be responsible, without giving any guidance as to what sorts of sickness, or what degree, the law considered relevant. This put a powerful burden on the jury (which was virtually tasked with draughting the law itself), and is said to have increased the reliance upon expert testimony, to the point that psychiatrists, rather than courts, were determining the outcome of cases.[128] In all, the Durham formulation proved to be a well-intentioned but unsatisfactory experiment.

If the ALI standard misses the point, and the Durham rule lacked any sort of point at all, then is there something better to be culled from the academic literature? There is certainly no shortage of proposals - no single topic in the criminal law is discussed, debated, and philosophically dissected more voluminously. At least one author, dissatisfied with all the confusion and ambiguity, has advocated that the special defence of insanity be abolished altogether in favour of a return to traditional mens rea principles. Norval Morris, in Madness and the Criminal Law,[129] argues that mental illness should only exculpate the actor if he failed to develop the requisite intent, without worrying about why that intent was developed.[130] In effect, this would produce an outcome rather like that which would emanate from an application of the M'Naghten formula if the second clause, about understanding that an action was wrong, was deleted. Morris does not see why mental illness should have any more of an exculpatory effect than "blindness, deafness, drunkenness, ... retardation, linguistic difficulties, or, if it could be established, hypnotic control".[131] Either one intended the criminal act, or one did not.

Taken to its logical extreme, this philosophy would seem to require that the law abandon its other special defences of duress, necessity, and self-defence as well. In situations involving any of these excuses to criminal conduct, it is never an issue that the accused lacked the requisite mens rea for the offence, as defined by the Criminal Code; nevertheless, a further inquiry into why the intent was formed is appropriate in special circumstances. With the insanity defence, certain kinds of diseased mind are excused from criminal responsibility because they have been altered, rendered so different from the norm that the formulation of criminal intent cannot be explained according to the usual notions of moral weakness and wicked

disregard of values that were both understood and appreciated. In the words of Fingarette, there is no mens rea, because there is no mens,[132] which is just another way of saying that a mind sufficiently deprived of its ordinary faculties, and hence its capacity for free will, is, legally, no mind at all. There is nothing to punish, or deter, nothing upon which to visit moral outrage.

But what amounts to "no mens"? It seems plain, at this point, that the legal standard of insanity ought to focus on dysfunctional mental process as a whole, rather than look to particular symptoms of dysfunction, such as delusions or impulses too strong to resist. The problem is in deciding which of the many elements of decision-making, conscious and unconscious, rational and emotional, to include in the conception of process.

Robert Schopp feels the law should concentrate on the capacity for rational thought, the ability to connect abstractions with reality, associate ideas and information, and employ knowledge in a reasonable fashion, as opposed to merely storing it.[133] Thus, Schopp would still focus on cognition, just as Lord Tindal did in 1843, but on the cognitive process in its totality, rather than mere cognitive awareness, and the possession of accurate knowledge. The insanity standard he develops covers almost half a page of fine print,[134] but basically it equates insanity with an incapacity to think rationally, to engage in what Schopp calls "practical reasoning".[135]

This would excuse schizophrenics, among others. But what of those who suffer from emotional and affective disorders? Schopp believes, with some apparent regret, that nothing can be done for them within the defence of insanity, believing the defence should be applied only to those whose choices were skewed by cognitive impairment. The insanity defence, he says,

"exculpates defendants because their acts cannot be attributed to them as competent practical reasoners, not because the choice they faced as practical reasoners was unusually difficult."[136] He discusses the hypothetical case of "George", a profoundly depressed nurse in a cardiac ward, who simply "lies down in an empty room instead of monitoring the equipment he is supposed to",[137] leaving a heart monitor unattended while a patient dies. George, he concludes, is guilty, and then notes:

> Some critics will object that it would be unreasonable, unfair, or just plain futile to subject George to criminal punishment. They may well be right.[138]

In that case, we can hope and expect that the court will respond with mitigation or suspension of sentence, perhaps probation.[139] But George cannot be mentally disabled.

This approach requires that the law ignore what we now know to be true, that the ability to experience normal emotional responses to outside events is a crucial element of what the lay-person calls "rational" behaviour. The mind is not a passionless computer; it takes more than an effective processing of accurate information to produce normal, appropriate behaviour. Rather than rely on the good sense of the court when it comes time to impose sentence, perhaps the legal formulation of mental disability should include some provision for the emotional and effective disorders which skew human choices just as surely as irrational thought processes.

This is a philosophy embraced by Herbert Fingarette, who calls his doctrine of legal insanity "Disability of Mind".[140] The test he develops boils down to the apparently simple question, "Was the defendant incapable of rational conduct in regard to the criminal significance of the conduct?",[141]

but this is a good deal less simple than it seems, since Fingarette's concept of capacity for rational conflict takes twenty pages of text to explain.[142] Rationality, in his view, is the ability to respond to relevant standards, to internalize values - basically, to behave appropriately by reacting to circumstances in a normal way. Affective disorders such as profound depression would thus render the actor incapable of rational behaviour:

> Even an intellectual awareness that such acts are "wrong" might sooner or later cease to play a significant inhibiting role because of the pervasive incapacity to feel that such things really make any difference one way or another.[143]

The psychopath, too, is "irrational", in spite of suffering no cognitive impairment.

> On the other hand, we might find that such a criminal's choice of career is itself routed in deep-seated blindness to the significance of human life, as is reflected in many other ways, directly and indirectly, in the individual's life history. If the facts do show chronic generalized failure to develop human relationships - i.e., a generalized incapacity to respond with feeling to the sufferings, agonies, or death of human beings - then we do indeed have grounds to view the individual as criminally irrational.[144]

In light of the foregoing analysis, this reasoning certainly seems seductive. The law, however, must somehow distinguish between those capable of suppressing normal feelings, and responding with an absence of feeling to human suffering, and those genuinely incapable of normal affective responses. Not anyone who exhibits sustained antisocial tendencies is a true sociopath, and indeed not everyone diagnosed as sociopathic by psychiatrists suffers from any identifiable mental illness or organic deficit - as noted by Gerald Uelmen, the diagnostic criteria employed by the psychiatric profession tend to define the disease in terms of behaviour, not identifiable causes.[145] But if

a psychiatrist or neuroscientist can produce convincing evidence of serious mental malfunctioning, be it PET scans, EEG findings, or comprehensive tests of emotional response in controlled situations, then why shouldn't that evidence be relevant? A good solution here would be to include in the law a "caveat clause", such as that employed in the Model Penal Code's insanity provision, which says:

> As used in this Article, the terms "mental disease or deficit" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[146]

Given that we can accept both intellectual and emotional impairments into the legal definition of mental disability, it remains to define the severity of impairment that should suffice to ground a defence. The choice is between using words such as "incapable" or "incapacity" without modifiers, or employing a more flexible phrase like "substantial incapacity". The latter seems preferable, inasmuch as if the law demands an utter incapacity for normal thought processes and emotional responses, then proof that at some point the actor, while grievously dysfunctional, did exhibit isolated episodes of apparently normal behaviour could be enough to rule out a defence. The concept of "substantial incapacity" is of course somewhat vague, but greater precision is almost impossible.

One final matter merits consideration. The problem of evaluating a defendant's state of mind and attributing criminal liability is exacerbated by the "all or nothing" approach that is so characteristic of Canadian and American insanity formulations. Sometimes, it is difficult to discern the true impact of various mental illnesses upon behaviour, and an afflicted individual, while not wholly disabled by his illness, will not seem wholly

responsible either. Perhaps the law can take account of gradations of culpability, and make allowance for "partial insanity". English law permits a verdict of diminished responsibility[147] in cases in which mental illness short of that required to establish legal insanity under the M'Naghten criteria has nonetheless had some apparent impact upon criminal behaviour. The concept of diminished responsibility (not to be confused with diminished capacity) has its roots in Scottish jurisprudence,[148] and has been applied to almost every conceivable mental affliction, from reactive depression, to chronic anxiety, and premenstrual syndrome,[149] although only in the context of murder, as permitted by statute.[150] It seems a very useful and sensible idea, permitting the law some tolerance for ambiguity, and allowing the trier of fact to seek some middle ground when the effects of mental disease seem important, but not entirely clear, to the point that the defendant can be completely excused. There is no reason, in principle, why the application of diminished responsibility be restricted to cases of murder.

## Part IV: Draft Provision

A legal formulation of mental disability, focusing on defective mental processes, including affective and emotional dysfunctions, while incorporating the principle of diminished responsibility and resisting the labelling of all maladjusted behaviour as necessarily the product of illness, can be created by fusing the various proposals and formulations already discussed. The result is a radical departure from the existing law, but is not out of line with the weight of scientific and philosophical opinion, nor is it a test without a rule that asks the jury to exculpate whenever it feels it should, somehow. It

allows for the consideration of a full range of mental disabilities, from schizophrenia, to psychopathy, mental retardation, and multiple personality disorder, without requiring that a defendant be excused simply by virtue of having a diagnosed psychiatric illness, particularly if that illness is defined according to the propensity for criminal conduct and little else. The proposed provision does contain a sort of "catch-all", in that it calls for exculpation whenever the detrimental effects of gross mental abnormality cannot be separated from the capacity displayed by the accused for the development of criminal intent. This is to make allowance for illnesses, such as multiple personality disorder, which might leave the trier of fact uncertain as to intellectual or emotional impairments, yet convinced that but for the illness, there would have been no anti-social behaviour.

There is no sense in pretending that the draft put forward here eliminates all the uncertainties and philosophical difficulties in assessing criminal responsibility, but it is, perhaps, an improvement on M'Naghten. If not a whole solution, then perhaps it is a good beginning.

Not Guilty by Reason of Mental Disability

1) A person is to be found Not Guilty by Reason of Mental Disability if, because of abnormality of the mind (whether arising from a condition of arrested or retarded development of mind, or any inherent causes, or induced by disease, injury, or organic malfunctioning that was not self-induced), that person was, at the time of the criminal behaviour, substantially incapable of normal rational thought processes, appropriate emotional responses to outside events, or suffering from such a gross abnormality of functioning that the detrimental effects of the dysfunctioning cannot be separated from the displayed capacity for the development of criminal intent.

2) If, in the judgement of the trier of fact, abnormality of mind was a contributing factor towards criminal behaviour, yet did not render the accused wholly irresponsible, a verdict of Diminished Responsibility may be returned, with the result that:

i) a conviction on a charge of murder is reduced to one of manslaughter, or
ii) in respect of crimes other than murder, the sentence will be reduced to one-half of that which would normally be applied.

3) No one is brought within the protection afforded by this provision merely by demonstrating a history of repeated criminal activity or by establishing that, at the time of the offence, one's behaviour was neither rational nor emotionally appropriate.

## ENDNOTES

1. "Man slays 22 in Texas diner", The Toronto Star (17 October 1991) A1 and A19; "Massacre remains a 'jigsaw puzzle'", The Toronto Star (18 October 1991) A1, A28.

2. "Mass shootings", The Toronto Star (17 October 1991) A19.

3. It is common for mass killers to identify given groups in society as architects of their misfortunes. Marc Lepine hated women and feminism, while James Huberty directed his attacks upon Mexican Americans. Animosity towards women may have played a role in George Hennard's killings as well, given that he left behind writings denouncing women as "treacherous female vipers", although he made little attempt to single out women during his rampage. See "Massacre remains a 'jigsaw puzzle'", The Toronto Star (18 October 1991) A1.

4. Ibid.

5. Hunting Humans became the title of a book on mass and serial killers written by E. Layton (Toronto: McClelland and Stewart, 1986).

6. The spelling of "M'Naghten" varies depending upon the source. The one selected for this paper is that which appears in the style of cause of the response to the questions submitted by the House of Lords, M'Naghten's Case [1843 - 60] All E.R. 229 [hereinafter M'Naghten's Case].

7. Ibid. at 233.

8. Criminal Code, R.S.C. 1985, c. C-46.

9. Proposals to Amend the Criminal Law Concerning Mental Disorder (Ottawa: Ministry of Justice, July 1991).

10. M'Naghten's statement to the police is reproduced in D.T. Lunde, Murder and Madness (Stanford: Stanford University Press, 1975) at 114.

11. Ibid.

12. The poem is reproduced in R. Restak, The Mind (New York: Bantam Books, 1988) at 286. It reads:

> Ye People of England! Exult and be glad
> For ye're now at the will of the merciless mad.
> Why say ye that but three authorities reign
> Crown, Commons and Lords? - You omit the insane.
> They're a privileged class whom no statute controls
> And their murderous charter exists in their souls.
> Do they wish to spill blood they have only to play
> A few pranks - get asylums a month and a day.

> Then Heigh! To escape from the mad doctor's keys
> And to pistol or stab whomsoever they please.

13. N.J. Finkel, Therapy & Ethics (New York: Grune & Stratton, 1980) at 121.

14. M'Naghten's Case, supra, note 6 at 234.

15. Lord Tindal states that "we are of the opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, ... he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law." Ibid. at 233.

16. Lord Tindal writes,

> The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act, knew the difference between right and wrong .... If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that everyoine must be taken conclusively to know it, without proof that he does know it. ...the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong [emphasis added].

Ibid. at 233-234.

17. See Lunde, supra, noe 10 at 110-111. Under the "wild beast" test, which was devloped in the thirteenth century under the reign of Edward I, a criminal defendant would be found insane if his mental capabilities were no greater than those of a beast or brute.

18. In 1984, by virture of the Insanity Defense Reform Act, federal law dropped the "volitional prong" of the American Law Institute test that had previously been adopted, leaving only the "cognitive prong" with substantially the same wording as M'Naghten. See "The Insanity Defense Reform Act of 1984" (1989) 7(3) Behavioral Sciences & the Law 403. In California, after years of experimenting with the ALI test, accompanied by concepts such as diminished capacity, Proposition 8 was passed in 1982, mandating a reversion to the M'Naghten test. See R.F. Schopp, Automatism, Insanity and the Psychology of Criminal Responsibility (Cambridge, MA: Cambridge University Press, 1991) at 38.

19. The APA recommended a test that would provide for exculpation of a defendant when "as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct." See APA, "American Psychiatric Association Statement on the Insanity Defense" (1983) 140 Am. J. Psychiatry 681. The ABA test of non-responsibility provided for exculpation of the defendant when "as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct." See Criminal Justice Mental Health Standards (First Text Draft, 1983) 260 at 323, adopted by the ABA House of Delegates in ABA, 2 Standards for Criminal Justice, 2d ed. (1986 Suppl) at chapter 7.

20. Proposals to Amend the Criminal Law Concerning Mental Disorder, supra, note 9.

21. R. v. Cooper (1978), 40 C.C.C. (2d) 145 (Ont. C.A.).

22. R. v. Rabey, [1980] 2 S.C.R. 513.

23. Revelle v. R., [1981] 1 S.C.R. 576.

24. R. v. Abbey, [1982] 2 S.C.R. 24.

25. R. v. Parrenkan, [1974] S.C.R. 449.

26. R. v. Hilton (1977), 34 C.C.C. (2d) 206 (Ont. C.A.).

27. R. v. Simpson (1977), 35 C.C.C. (2d) 337 (Ont. C.A.).

28. R. v. Volk (8 March 1991), (Ont. Prov. Ct.) [unreported].

29. R. v. Cooper (1980), 51 C.C.C. (2d) 129 (S.C.C.) [hereinafter Cooper].

30. Ibid at 144.

31. M'Naghten's Case, supra, note 6.

32. Schopp, supra, note 18 at 32-33.

33. See The American Law Institute, Model Penal Code and Commentaries (Philadelphia, PA: The American Law Institute, 1985), Part I, section 4.01, "Mental Disease or Defect Excluding Responsibility".

34. APA, supra, note 19.

35. ABA, supra, note 19.

36. Supra, note 29 at 145.

37. See J.J. Walsh, "The Concepts of Diminished Responsibility and Cumulative Intent" (1991) 33(2) Crim. L.Q. 229 at 239.

38. Cooper, supra, note 29 at 145-146.

39. Ibid at 147.

40. See Kjeldson v. The Queen (1981), 64 C.C.C. (2d) 161 (S.C.C.) and R. v. Landry, [1991] 1 S.C.R. 99 (S.C.C.).

41. R. v. Schwartz (1976), 29 C.C.C. (2d) 1 (S.C.C.).

42. R. v. Chaulk, [1990] 3 S.C.R. 1303 [hereinafter Chaulk].

43. Ibid at 1321.

44. Ibid at 1357.

45. Supra, note 41.

46. Supra, note 40.

47. See R. v. More (1963), 3 C.C.C. 289 (S.C.C.), in which depressive psychosis was established as impairing the ability of the accused to make normal decisions, even in respect of inconsequential matters, thus preventing a finding of planning and deliberation. It is argued by Walsh, supra, note 37, that the proper interpretation of the doctrine on this matter is stated by the Alberta Court of Appeal in R. v. Wright (1979), 48 C.C.C. (2d) 334, in which it is noted that, in the absence of a finding of insanity, evidence of mental state may be relevant to the issue of intent, but that this cannot be based on any showing that the accused lacked the capacity to form the requisite intent, but only for the limited purpose of showing he did not, in fact, form the requisite intent.

48. Supra, note 24.

49. Lunde, supra, note 10 at 116-117.

50. An excellent description of the characteristics and genesis of MPD is distilled from the testimony of expert witnesses in the court's judgement in R. v. Volk, supra, note 28.

51. For a full psychiatric description of MPD, see American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 3rd ed. rev. (Washington, DC: American Psychiatric Association, 1987) section 300.14.

52. Ibid.

53. R. Slavenko, "The Multiple Personality, a Challenge to Legal Concepts", (1989) 17(4) J. Psychiatry & Law 681 at 686.

54. Supra, note 28.

55. (1984), 679 P.2d 615.

56. ALI, supra, note 33.

57. (1982), 444 N.E.2d 1071 (Ohio App.).

58. Ibid.

59. (1983), 304 S.E.2d 571 (Georgia App.).

60. Ibid.

61. R. v. Gillingham (12 March 1985), (Nfld. C.A.) [unreported].

62. (1990), 58 C.C.C. (3d) 464 (Ont. C.A.).

63. Ibid.

64. Ibid.

65. R. v. Sawchuk (6 May 1991), (Man. Q.B.) [unreported].

66. R. v. Sawchuk (24 June 1991), (Man. C.A.) [unreported].

67. (1984), 14 C.C.C. (3d) 116 (S.C.C.); the case dealt with s.43 of the Criminal Code.

68. Chaulk, supra, note 42.

69. Ibid at 1320.

70. American jurisprudence, too, has repeatedly stressed that sub-normal intellect and mental retardation provide no excuse, short of complete imbecility. See Stanley v. State, 454 S.W.2d 79, 248 Ark. 787; State v. Callihan, 242 So.2d 521, 257 La. 298; and Clayton v. State, 226 So.2d 671.

71. See R. Lasky, "The Diagnostic Categories", Evaluation of Criminal Responsibility in Multiple Personality and the Related Dissociative Disorders (Springfield: Charles C. Thomas Publishers, 1982) at 29-31.

72. Ibid. at 29.

73. F.A. Whitlock, Criminal Responsibility and Mental Illness (London: Butterworths, 1963) at 65.

74. Lasky, supra, note 71 at 33.

75. Ibid. at 35.

76. Ibid. at 34.

77. Schopp, supra, note 18 at 185.

78. C.R. Jeffery, "Schizophrenia and Depression", Attacks on the Insanity Defense (Springfield: Charles C. Thomas Publisher, 1985) at 102-103.

79. PET is an acronymn for "positron emission tomography", a process by which the metabolic processes of the brain and shifts in blood flow that accompany brain activity are traced by computer enhanced images of the progress of radioactive isotopes injected into the blood. The isotopes serve as markers which allow the computers to follow the blood and its contents through the tissues of the brain.

80. Restak, supra, note 12 at 303.

81. Ibid. at 176.

82. Ibid at 182-187.

83. Ibid. at 177.

84. Ibid.

85. ibid at 178-179.

86. F.H. Marsh and J. Katz, eds., Biology, Crime, and Ethics (Cincinnatti: Anderson Publishing Co., 1985) at 104-106. See also C. Bartol, Criminal Behavior, a Psycho-Social Approach (Englewood, NJ: Prentice Hall Inc., 1980) at 26-31.

87. Bartol, supra, note 86 at 31.

88. Jeffery, supra, note 78 at 90.

89. Ibid at 90.

90. In England, PMS has been used to reduce what would otherwise be culpability for murder, resulting in convictions for manslaughter, English law providing for a defence of diminished responsibility in murder cases under The Homicide Act of 1957 (5&6 Eliz. 2 c 11), when abnormality of the mind, short of that required for insanity, is established as a mitigating factor. See R. v. Reynolds, [1988] C.L.R. 679 (C.A.). In the United States, PMS was raised in People v. Santos (3 November 1982), No. 1K04622 (Crim. Ct. N.Y.), but the case was settled in a plea bargain. In Nova Scotia, PMS was found not to amount to insanity in R. v. MacDonald (17 December 1988), (N.S.S.C.T.D.), but the jury found that the syndrome had negated the mental elements of murder and substituted a verdict of manslaughter.

91. C. Gardner, "Postpartum Depression Defense: Are mothers getting away with murder?" (1990) 24(3) New Engl. L. Rev. 953 at 967. In England, post-partum depression has long been recognized as a partial defence to murder of children, the Infanticide Act (1&2 Geo. 6 c 36) of 1938 allowing the jury to return a verdict of "infanticide" or "manslaughter" when mothers kill their own babies, provided the murder occurs within one year of birth.

92. Jeffery, supra, note 78 at 93.

93. A celebrated American case was the San Francisco trial of City Supervisor Dan White, who fatally shot Mayor George Moscone and Supervisor Harvey Milk. A defence psychiatrist testified that White's compulsive eating habits, which included the ingestion of candy bars, junk food, and Coca-cola, aggravated a chemical imbalance in the brain. The jury rejected an insanity defence, but White's sentence was reduced. Hypoglycemia became known in the media as the "Twinkie Defence". However, in Louisiana v. Parker (1982), 416 So.2d 545, hypoglycemia was ruled a transient condition, the symptoms of which could not posibly be proved to have existed at the time of the crime. In R. v. Quick, [1973] 3 All E.R. 347 (C.A.), and English court ruled that a severe case of hypoglycemia, brought on by an insulin injection, was not insanity, but its effects could be conceived of as automatism.

94. R. Slovenko, "Forward", in Lasky, supra, note 71 at ix.

95. Jeffery, supra, note 78 at 43.

96. Restak, supra, note 12.

97. Ibid. at 292-295.

98. Ibid. This was a fact which helped secure his conviction.

99. Jeffery, supra, note 78 at 42.

100. Ibid.

101. G. Newman, "Born to Kill", in Marsh & Katz, supra, note 86 at 128.

102. Jeffery, supra, note 78 at 43.

103. J.Q. Wilson and R. Herrnstein, Crime and Human Nature (New York: Simon & Schuster, 1985) at 200.

104. Ibid.

105. Ibid. at 200.

106. Ibid. at 203.

107. Bartol, supra, note 86 at 67.

108. Ibid. at 77.

109. Restak, supra, note 12 at 313.

110. Ibid.

111. Ibid. at 309.

112. Schopp, supra, note 18 at 240.

113. ALI, supra, note 33.

114. Supra, note 19.

115. Supra, note 18.

116. A summary of the history of "irresistible impulse" in common law jurisprudence is contained in N.J. Finkel, Insanity on Trial (New York: Plenum Press, 1988) at 30-33.

117. Supra, note 24.

118. R. v. Creighton (1908), 14 C.C.C. 349 at 350 (Ont. H.C.J.).

119. Supra, note 19.

120. H. Fingarette and A. Fingarette Hasse, Mental Disabilities and Criminal Responsibility (Los Angeles: University of California Press, 1981) at 210.

121. 214 F.2d 862 (D.C. Cir. 1954).

122. See State v. Pike, 49 Natl. 399 (1869).

123. Fingarette, supra, note 120 at 874-875.

124. In 1972, the D.C. Court of Appeals discarded the Durham formula in favour of the ALI test in United States v. Brawner, 417 F.2d 969 (D.C. Cir. 1972).

125. Finkel, supra, note 116 at 37.

126. Judge Bazelon said "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." Quoted in Fingarette, supra, note 120 at 871.

127. Finkel, supra, note 116 at 35.

128. Ibid. at 35-37.

129. N. Morris, Madness and the Criminal Law (Chicago: University of Chicago Press, 1982).

130. Ibid. See, for example, pp.60-61, although the thesis is developed throughout.

131. Ibid.

132. Fingarette, supra, note 120 at 200.

133. Schopp, supra, note 18 at 188-204.

134. Ibid. at 215. Schopp's test is as follows:

> A person is not responsible for criminal conduct if he performed that conduct while suffering major distortion of his cognitive capacities that substantially impaired his ability to decide whether or not to perform that conduct through the process of practical reasoning that is ordinarily available to an adult who does not suffer major cognitive disorder. This requirement is met if and only if the defendant decided to perform the conduct constituting the objective elements of the offense while suffering gross disturbance of his capacity for concept formation, comprehension, reasoning, reality relatedness, or other cognitive processes, and this disorder substantially impaired his ability to engage in the ordinary process of practical reasoning regarding that conduct.

135. Ibid.

136. Ibid. at 207.

137. Ibid. at 206.

138. Ibid. at 207.

139. Ibid. at 210.

140. Fingarette, supra, note 120. See "Exposition of the Basic Disability of Mind Doctrine" at 199-217.

141. Ibid. at 199.

142. Ibid. See "The Concept of Capacity for Rational Conflict in Regard to Law" at 218-239.

143. Ibid. at 220.

144. Ibid. at 237.

145. See G. Uelmen, "The Psychiatrist, the Sociopath, and the Courts: New Lines for an Old Battle" (1980) 14 Loyola L.A. L. Rev. 1.

146. ALI, supra, note 33.

147. The Homicide Act, 1957 (5&6 Eliz. 2 c 11).

148. See J.R. Hamilton, "Psychiatric Aspects of Homicide" (1988) 28(1) Med. Sci. Law 26 at 28.

149. Ibid.

150. Section 2 of The Homicide Act reads,

> Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind, or any inherent causes, or 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.