DANIEL M'NAUGHTEN AND THE DEATH PENALTY

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The English Court of Criminal Appeal has imposed a more restrictive interpretation on the defence of insanity than that which has found favour in Australian and American courts. This variation in the interpretation of the M'Naughten Rules, together with the vast extent of the legal and medical literature on the defence of insanity, are advanced as justifications for the present article, which offers little original thought but in which, with the law student's needs in mind, an attempt is made to bring the main issues into focus.

JURISPRUDENTIAL PROBLEMS of the greatest complexity surround the defence of insanity to a criminal charge. There is no insuperable obstacle to the precise formulation of the law; but the controversial area of any formula and the necessity to apply it to different states of fact create a tense area of disagreement between lawyers, psychiatrists and the general public. Nowhere is the inadequacy of our present theory of the criminal law more manifest.

There are many conflicting pressures. As humanitarians we do not wish to punish as criminals those whose otherwise criminal acts were the products of an insane mind; as lawyers, charged with the working of a system that has as its primary object the maintenance of order, we do not wish to withdraw the deterrent force of the criminal law from those who, though mentally unbalanced, might yet be deterred from crime by the existence of criminal sanctions;[1] as citizens we are aware of the strong public desire for the talionic punishment of anyone who has killed a fellow human being. Nor does the increasing knowledge of the psychiatrist greatly lessen the innate conflict between these three desires. To a considerable extent everyone realizes that, generally speaking, the deliberate killing of a fellow human being is an aberrant, psychologically disturbed action; further insight into the motivations that can lead to this action, though it makes more clear the field of enquiry to those who are prepared to keep in touch with developments in psychiatry, does

[1] The aim of the law in providing the defence of insanity is well stated by Dixon J. in *Porter's* case (1936) 55 C.L.R. 182, 186. "It is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds."

not lessen the demand of the law that the sanctions of the criminal law be preserved, nor the demand of the public that even the mentally disturbed murderer should be punished unless his mental disorder is of such a kind as to pass most obviously out of the field of law and into the field of medicine.

In practice, the defence of insanity is only of relevance in relation to the crime of homicide, though it is occasionally pleaded to other grave crimes where in any event the prolonged segregation of the accused person is inevitable. It is only relevant to homicide because only there is the eventual disposition of the accused person preferable if the defence of insanity succeeds to that which it would be if it fails. Thus the whole problem has become interwoven with the existence of capital punishment, for in the absence of capital punishment this defence would raise much less public interest and much less medico-legal conflict: whether the accused be held for a long time in a mental hospital or in a prison is an entirely different enquiry to whether an accused person should or should not be hanged. In the absence of capital punishment every murder trial where the defence of insanity is raised would not be a potential *cause celèbre.*

Medico-Legal Conflict

The conflict on this subject between lawyers and psychiatrists is intensified by differences of purpose and of terminology. The psychiatrist sees all actions by mentally disturbed persons as symptomatic or indicative of their mental condition, and therefore he looks upon any crime committed by such a person merely as part of the data on which he will build up his decision as to that person's mental condition. The lawyer, on the other hand, by virtue both of his training and practice, focuses his enquiry on the crime and regards other aspects of the life and actions of the accused person as peripheral to the central enquiries of guilt or innocence, imputability or irresponsibility.

The semantic difficulties are even more intense. The term "insanity" is used in a bewildering variety of senses. To the public the nearest synonym is "madness", importing all our inner fears and revulsion towards the completely deranged, raving lunatic. To the psychiatrist the word "insanity" has no meaning in his discipline, although in the medical literature the term insanity is occasionally used as synonymous with certifiability. Psychiatrists classify those subject to mental disorder as psychotics or neurotics or (less confidently) psychopaths, and in terms of the various classifications of mental illness that have been developed; as psychiatrists they

do not generally, and should not ever, use the term insane. Insanity is, strictly speaking, a legal term, covering those forms of mental disorder which involve legal irresponsibility or legal incompetence, or, by reason of its use in certain statutes, authorizing detention of persons coming within the statutory definition. Further, insanity is a legal term varying with the particular facet of legal responsibility which is being investigated. Thus insanity for the purposes of making a will differs from insanity for the purposes of entering into a marriage, differs from insanity for the purposes of entering into a contract, and differs from insanity for the purposes of being unfit to plead to a criminal charge. The term has a different connotation when subsequent to the conviction of a person accused of murder there is a purely medical enquiry as to whether he is insane and therefore should not be hanged. All the above meanings of insanity differ from its connotation when the defence of insanity is raised to a criminal charge. It is insanity in this last sense which is the subject of this article.

The bounds of the medico-legal conflict on the defence of insanity are easily sketched, the details are less clear. Broadly, the lawyer sees the problem as one of responsibility or imputability, the allocation of guilt in terms of a test which does not purport to categorize or analyse varying diminished states of sanity;[2] the psychiatrist sees the problem as one of diagnosis, of assessing the degree of psychological disturbance in the mind of one who has committed a criminal act. If the psychiatrist perceived his function merely as one of diagnosis of a given mental condition without having to draw any conclusions from that diagnosis, and the lawyer were then content to apply that information to the given case, applying a test which did not pretend to bear much relevance to psychological fact, there would be no conflict. Unfortunately, the test which the law has developed for deciding this issue avoids this simple division of functions and imposes on psychiatrists the burden of answering legal questions and on lawyers the burden of phrasing, arguing and directing juries on psychological issues.

Throughout the Anglo-American legal system the M'Naughten Rules form the basis of the defence of insanity. Around these Rules there has grown a wealth of literature, notable more for the recriminatory quality of the conflict between the psychiatrists and psychologists on one hand and the lawyers and philosophers on the other

[2] "The question, 'What are the mental elements of responsibility?' is, and must be, a legal question. It cannot be anything else, for the meaning of responsibility is liability to punishment; and if criminal law does not determine who are to be punished under given circumstances, it determines nothing." Stephen, *History of the Criminal Law of England*, vol. II, at p. 183.

than for any clear enunciation of the fundamental criminological problems involved. As it is neither a purely legal nor a purely medical problem, when looked at solely from the point of view of either discipline there is a temptation to villify the premises and conclusions of the other.

Predominantly, the criminal law has developed its principles round human cognition, the idea of "knowing", which is of the essence of the entire concept of *mens rea.* On the other hand, psychiatry finds its more fruitful enquiry in the question of the ability of an individual to control and to determine his actions; it is interested in volition more than in cognition, finding the processes leading to action less important than the predictability of the action. But the law cannot abandon its development and adhere to the individual insights of psychiatry, for its purposes are much wider than those that guide one charged with the best disposition of an individual case – the law must test the imputability or punishability of a given act rather than the psychological processes that lead to it. As well as dealing with the individual who has committed the criminal act the law functions publicly to achieve public purposes wider than the problems of the particular individual.

Historical Development of the Defence of Insanity

It is premature, however, at this stage to embark on any evaluation of this conflict between law and psychiatry. It would be misleading to attempt this before any investigation of the growth and actual operation of the M'Naughten Rules themselves has been conducted.[3] Certainly, a mere examination of the terms in which the M'Naughten Rules are stated will give no understanding of their actual operation; lacking this knowledge the argument can concern only a phantom. Nor can the M'Naughten Rules be taken as a point of departure for they are themselves the product of a gradual and perhaps pedestrian searching towards truth and can only be understood and should always be interpreted in the light of their evolution.

"Absolute Madness"

As early as the reign of Edward III, "absolute madness" was recognized as a defence to a criminal charge, completely exonerating the accused person. Bracton gave some explanation of what abso-

[3] The comparative method throws light on the operation, potentialities and possible variations of the M'Naughten Rules. It also illustrates the relationship between these rules and other formulations of the defence of insanity. A brief and valuable comparative survey is to be found in Appendix 9 of the *Report of the Royal Commission on Capital Punishment 1949-53,* Cmd. 8932.

lute madness involved, writing: "An insane person is one who does not know what he is doing, and is lacking in mind and reason, and is not far removed from the brutes."[4] Later writers, in particular Coke and Hale, enunciated somewhat similar tests, Hale perceiving the basic difficulty of finding "a mean between a system of hard and fast rules, and one of completely individualised justice", thus foreshadowing the difficulty which we still face of determining the legal responsibility of the mentally abnormal criminal by means of any judge-made yardstick.

"Wild Beast" Test

The first clear enunciation of a rule emerging from a case took place in 1724 when Arnold was tried for shooting at Lord Onslow,[5] evidence being advanced that he shot pursuant to some delusional beliefs concerning the activities of Lord Onslow. What later became known as the "wild beast" test emerged, Tracy J. directing the jury that "it is not every kind of frantic humor or something unaccountable in a man's actions that points him out to be such a madman as to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."[6]

Already it can be seen how, in their efforts to distinguish between exculpatory and non-exculpatory mental disorders, the judges are relying on the test of knowledge.

"Right and Wrong" Test

In 1760, Lord Ferrers was tried before the House of Lords[7] for murder. In this case a test was enunciated which become known as the "right and wrong" test, it apparently being accepted that "if there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the facts of the offence proved, the judgment of the law must take place."[8] It will be noted that the test turned on the accused's perception of moral wrongness, not legal wrongness, though the two would normally overlap.

Thus, by the end of the eighteenth century there were two different but complementary tests of the imputability of crime to one pleading the defence of insanity – the "wild beast" test, turning on the accused's perception and understanding of the criminal act, and the "right and wrong" test, stressing the accused's appreciation of

[4] *De Legibus* (1640), book 3, folio 100, and book 5, folio 420b.
[5] 16 How. St. Tr. 695.
[6] *ibid.* 765. [7] 19 St. Tr. 886. [8] *ibid.* 947-48.

its moral qualities. These were two of the main strands woven into the M'Naughten Rules.

"Delusion" Test

In the year 1800 a further step was taken towards the formulation of this defence. In that year James Hadfield was charged with high treason for shooting at King George III in the Drury Lane Theatre.[9] Hadfield had previously been severely wounded about the head, and had been confined as a lunatic. He was full of the wildest delusions and in a state of furious mania when he hid himself near the Royal Box; as the King was about to enter he shot twice in his general direction. Neither shot injured the King. It appeared that Hadfield was subject to a delusion under which he was convinced that for the world's salvation it was necessary for him to sacrifice himself; he shot at the King as a means of achieving his own death and thus obeying the divine command. He said that he preferred to be executed for this crime rather than to commit suicide. He was a paranoiac; he undoubtedly knew what he was doing; he undoubtedly knew that it was morally and legally wrong. He thus fitted neither the "wild beast" test nor the "right and wrong" test. He was nevertheless acquitted.

Hadfield's case is significant for the address to the jury by the defence counsel, Erskine – later Lord Erskine, Lord Chancellor – in which he demonstrated understanding of the reasoning processes of the paranoiac. He cast doubt on the plenitude of the tests established in *Arnold's* case and in *Ferrers'* case, arguing that though as the law stood one who was totally deprived of his memory and understanding, who didn't know his own name, who could not communicate with others, nor know where he was, would be exculpated, "no such madman ever existed". He contended that though there are cases where the "human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy", such cases are extremely rare and can present no judicial difficulty. But that "in other cases, reason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety." Such persons, Erskine said, though fitting neither of the existing tests of insanity, are subject to delusions and should have available to them the defence of insanity. He concluded – "delusion, therefore, where there is no frenzy or raving madness is the true character of insanity."[10] Hadfield was acquitted, but not pursuant to any precedent nor any principles of law that have later become established. He owed his acquittal to the jury-

[9] 27 St. Tr. 1281. [10] *ibid.* 1314.

swaying power of Erskine's eloquence; for no subsequent court has accepted Erskine's "delusion where there is no frenzy or raving madness" as constituting a valid defence. This concept has, however, formed a third strand of the weave of the M'Naughten Rules.

Hadfield's case was perhaps the earliest on record of a jury ignoring established and clear rules of law in favour of acquitting an accused for whom they felt considerable sympathy and whose abnormality was clear. Many juries have since followed their example, and this stretching of the law has become a leading characteristic of this defence.

Hadfield's case was important for another reason. It led to special legislation to deal with those who had been excused their crime on the grounds of insanity. Until the Criminal Lunatics Act of 1800, passed shortly after *Hadfield's* case, a person falling within this defence was totally excused his crime and was subject to no legal control. By the 1800 Act it was provided that one in this position should be committed during His Majesty's pleasure to a Criminal Lunatic Asylum.[11]

The M'Naughten Rules

The rules that were enunciated by judges before the House of Lords subsequent to the trial of Daniel M'Naughten have too frequently been construed as legislative pronouncements. They are not such. They can properly be understood only in the light of the above cases and several others of importance which formed the case material in the minds of the judges who formulated the M'Naughten Rules. These Rules are well-known to the student of criminal law, but the case itself and the subsequent judicial pronouncements are best presented for purposes of the more complete discussion of their operation.

In 1843, Daniel M'Naughten, described by the *Times* as "a radical in his politics and inclined to infidelity in his religion, . . . well, but not genteelly dressed", shot and killed Edward Drummond, the private secretary to Sir Robert Peel, mistaking him for Sir Robert Peel himself. M'Naughten was tried for murder before Tindal C.J., Williams and Coleridge JJ. at the Old Bailey. He was acquitted on the ground of insanity. Before and during the trial M'Naughten raved about "the Tories of my native city [Glasgow] who made me do it" and showed other signs of a deep-seated system of delusions. The medical evidence for the defence, which was apparently accepted, was that M'Naughten suffered from a delusion that "car-

[11] Similar provisions are in force throughout the Anglo-American legal system. See, for example, the Victorian Crimes Act 1928, s. 426.

ried him away beyond the power of his own control . . . that he was not capable of exercising any control over acts which had a connection with this delusion; that it was the nature of his disease to go on gradually until it reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms."[12]

The questions left to the jury at the trial of M'Naughten were: "whether at the time the act in question was committed, the prisoner had or had not the use of his understanding so as to know that he was doing a wrong and wicked act, whether the prisoner was sensible, at the time he committed the act, that he violated both the laws of God and man?"

M'Naughten's acquittal[13] caused great public dissatisfaction. The matter was debated in the House of Lords, and the rules of law under which M'Naughten had been acquitted not being clear to the Lords, they addressed to the judges a series of questions the answers to which constitute the widely applied M'Naughten Rules.[14]

The Rules may be paraphrased as follows: there is a presumption of sanity and it lies upon the defence to establish the defence of insanity; "to establish a defence on the grounds 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 or, if he did know it, that he did not know he was doing what was

[12] This diagnosis would appear very similar to the concept of irresistible impulse discussed hereunder.

[13] Until 1883 the form of the verdict following upon a successful defence of insanity was: "Not guilty on the ground of insanity". In that year, at the direct insistence of Queen Victoria, it was by statute changed to the logically self-contradictory "Guilty but insane". Several attempts had previously been made on the life of Queen Victoria, and in 1882 one Roderick Maclean shot at the Queen. When she heard that he had been found not guilty on the ground of insanity her indignation was great, for she insisted that it was impossible for the man not to be guilty as she herself had seen him point the revolver at her and had heard the noise of its discharge. Q.E.D.!

[14] This technique of ascertaining the law is of doubtful authority, constituting an anomaly in the English system of precedent. The point is academic, however, in the light of the later judicial acceptance of the judges' answers. There were then only fifteen judges and the answers were signed by fourteen of them, Maule J. putting in a separate document clearly revealing his reluctance to face these hypothetical issues because he foresaw the difficulties that would follow from doing so. Praiseworthy prevision! It should not be forgotten that the M'Naughten Rules were phrased without reference to the facts of any specific case, though the M'Naughten case itself was doubtless in the forefront of the judges' minds. Their general authoritative force, and applicability to all states of facts, has as yet not been directly passed upon by the House of Lords.

wrong"; that if a man's criminal act be the result of an insane delusion he should be tested as if the facts on which he based that delusion were true.[15]

It will be seen that these rules are a compound of the "wild beast" test, the "right and wrong" test, and the "delusion" test as phrased by Erskine in *Hadfield's* case.

Judicial Interpretation of the M'Naughten Rules

The presumption of sanity created no difficulties of interpretation once it was established that the burden that lay on the defence was the burden of proof in a civil case, the balance of probability, and not the requirement of proof beyond all reasonable doubt.[16]

On the other hand, the phrases "at the time of the committing of the act", "defect of reason, from disease of the mind", "nature and quality of the act", and the word "wrong" were far from clear and have all required careful construction.

"At the time of the committing of the act"

"At the time of the committing of the act" serves to exclude from the ambit of the M'Naughten Rules insanity existing or supervening at other stages of the disposition of a criminal issue.

[15] "The fourth question which your Lordships have proposed to us is this: 'If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?' To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusions exist were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased 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."

[16] In an article in (1943) *Canadian Bar Review* 437, J. V. Barry K.C. (as he then was) observed: "An acquaintance with legal history disposes one to think that had the judges been asked in 1843 where the burden lay of establishing circumstances of necessity or accident when a homicide was proved, they would have answered in similar words, that it must be clearly proved that at the time of committing the act the accused acted in self defence or caused the death by accident. *Woolmington's Case* [1935] A.C. 462 has established with greater eloquence than historical accuracy that Sir Michael Foster (Discourse of Homicide, Foster's *Crown Law*, 3rd Ed., p. 255) and all subsequent text writers were wrong and that where the defence is accident unless the Crown establishes beyond reasonable doubt on the whole of the evidence that the prisoner killed the deceased with malicious intention, the Crown has not made out the case and the prisoner is entitled to an acquittal. In that case, however, it was said that the onus is definitely and exceptionally placed upon the accused to establish the defence of insanity." Many jurisdictions in the United States of America leave the onus of proof of this issue on the prosecution. See the same author's "The Defence of Insanity and the Burden of Proof" (1939) 2 *Res Judicatae* 42.

An accused person may be unfit to plead owing to his psychotic condition or his mental deficiency or his physical infirmity. Unfitness to plead is tested by a jury arraigned for this purpose who decide upon the ability of the accused sufficiently to follow the proceedings and conduct his defence or instruct his counsel. Medical evidence may be heard, but the M'Naughten Rules are quite irrelevant. One found unfit to plead is, in England, committed to Broadmoor. If at any time he recovers sufficiently he may be put on trial; but this is rare. In the English case of *R. v. Roberts*[17] it was held that the general issue – guilt or innocence – may be tried prior to testing the question of the accused's fitness to plead. This unusual procedure is the result of the wide and doubtful interpretation in England of the Criminal Lunatics Act, 1800. This and several other medico-legal problems of considerable significance concerning the procedure of enquiring into fitness to plead and the treatment of those found unfit to plead merit attention, but they are peripheral to our present subject.

It is a moral premise embedded in the Common Law which receives little overt challenge, that we do not desire to hang an insane man. If, therefore, it is alleged or suggested that insanity has supervened after the conviction of the prisoner (or after his commission of the offence, if he be fit to stand trial and is convicted) a Departmental enquiry is held to determine whether or not he is insane. The issue is tested by a panel of psychiatrists who, in England, give a general report on the prisoner's mental condition to the Home Secretary. Again the M'Naughten Rules are inapplicable.

"Defect of reason, from disease of the mind"

"Defect of reason, from disease of the mind" has received surprisingly little interpretation. In *Beard's* case[18] the House of Lords held that "if actual insanity in fact supervenes, as a result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause" and approved the decision in *R. v. Davis*[19] where Stephen J. said: "But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary." In *Davis'*

[17] (1953) 37 Cr. App. R. 86. [18] [1920] A.C. 479.
[19] (1881) 14 Cox C. C. 563.

case delirium tremens was regarded as a sufficient "defect of reason, from disease of the mind" to fall within the defence of insanity.

As a contrast to the widening of the rules to include insane conditions produced by drunkenness, there is authority that mental defect, existing as it does from infancy, though obviously a "defect of reason" does not arise from "disease of the mind", so that an inborn inability to develop intellectually will not allow this defence to a criminal charge.[20] This result is contrary to the jurisprudential aims of the M'Naughten Rules and there can be little opposition to the recommendation in the *Report of the Royal Commission on Capital Punishment,* 1953, that mental defect be included as a "disease of the mind" within the M'Naughten formula and that consequently a mentally deficient person accused of a criminal offence should fall within the M'Naughten Rules provided he can satisfy the jury of the existence of the other conditions for that defence.

In *R. v. Porter,* Dixon J. directed the jury as follows on the meaning of this phrase.[21] "The next thing which I wish to emphasize is that his state of mind must have been one of disease, disorder or disturbance. Mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness, are quite different things from what I have attempted to describe as a state of disease or disorder or mental disturbance arising from some infirmity, temporary or of long standing. . . . That does not mean

[20] *Straffen's* case (1952) 36 Cr. App. R. 132 was an outstanding example of this line of interpretation. Straffen twice found unfit to plead was denied the defence of insanity, his abnormality being essentially one of mental deficiency. The trial judge directed the jury as follows: ". . . ask yourselves whether you are satisfied by the defence that at the time when he did that murder he was insane within the meaning of the criminal law; not that he was feeble-minded; not that he had a lack of moral sense; not that he had no feeling for his victim or her relatives; not that he had no remorse; not that he may be weak in his judgment; not that he fails to appreciate the consequences of his act; but was he insane through a defect of reason caused by disease of the mind, so that either he did not know the nature and quality of his act, or if he did know it, he did not know that it was wrong?"

[21] (1936) 55 C.L.R. 182, 188, 189. To like effect, though put more succinctly, is the direction of Barry J. in *R. v. Brewer* given in the Supreme Court of Victoria on the 21st day of September, 1950 (transcript kindly supplied by the Crown Law Department): "Now, the first thing that you must observe is that, in order to bring the defence of insanity into operation, the accused must be suffering from a disease of the mind. You should not be misled, gentlemen, by the use of that word, into thinking that it means some demonstrable physical deterioration of the organ of the brain. It does not mean anything of the sort. We have got a tendency to think of disease in terms of obvious and unpleasant symptoms of a physical kind, but that is not what the law contemplates in this connection. A mind may be diseased, as the doctors have told you, with no organic change at all, with no change in the brain tissues at all. What you have to be satisfied about is that there is something which you can properly say is a disease in the case of the individual, and not something that is a mere idiosyncrasy, such as a bad temper."

that there must be some physical deterioration of the cells of the brain, some actual change in the material, physical constitution of the mind, as disease ordinarily means when you are dealing with other organs of the body where you can see and feel and appreciate structural changes in fibre, tissue and the like. You are dealing with a very different thing – with the understanding. It does mean that the functions of the understanding are through some cause, whether understandable or not, thrown into derangement or disorder."

Otherwise the interpretation of the phrase "defect of reason, from disease of the mind" has gone by default, the courts accepting medical labelling of various abnormal mental conditions without attempting closely to define "disease" in this context.

"Nature and quality of the act"

Until the case of Codère it was widely believed that "nature and quality" referred to two different aspects of the accused's perception of what he had done. However, in *Codère's* case[22] the Court of Criminal Appeal stressed the indivisibility of the accused's perception of the act, denied that between "nature" and "quality" there lay any difference which would involve the requirement of some moral perception, and established that the whole concept meant merely the accused's appreciation of the physical quality of the act. For example, if it can be established that the accused thought he was chopping the top off a coconut, when in fact he was scalping his wife, he will not have known the nature and quality of this act; but if he knew he was scalping his wife but believed he was doing so because of the force of a thousand demons that stood about him and compelled him to this action, or because he thought this was the only way of achieving the ultimate salvation of the world, he would know the nature and quality of his act in that he perceived its physical quality and no moral issues arise at this stage. He would not be exculpated by this strand of the M'Naughten Rules.

Though this interpretation of "nature and quality" is legally well-settled, it may be that had the judges in 1843 been called upon to define these terms more closely they would have given a different and more natural interpretation to them, requiring that the accused should have some appreciation of the significance or physical dangerousness of his act before he could be said to "know its quality". Such an interpretation would seem more in accord with normal usage and would not render "and quality" mere surplusage.

"Wrong"

A key issue in this defence turns on the interpretation of the word

[22] (1916) 12 Cr. App. R. 21.

"wrong" in the M'Naughten Rules. The interpretation favoured in England is in conflict with that accepted in Australia and that followed by the Supreme Court of the United States of America and most state jurisdictions in that country. It is not hyperbole to argue that on the interpretation given this word will depend the ability of the M'Naughten Rules to work substantial justice.

Hard cases may make bad law but they search out our general principles. Madheart believes his wife is suffering from an incurable and painful disease; believes it is his divine mission to release her to a happier level of existence; hears a God-like voice commanding him to do so; knows that the law forbids him to kill her, but thinks that people generally sympathize with his desire to free her from such pain; and kills her. His wife is quite well and his beliefs are a product of his psychosis, his "disease of the mind". He "knows the nature and quality of his act". Does he know it is "wrong"? Under the present English interpretation of that word he should be denied the defence of insanity, *the issue indeed being withdrawn from the jury*; under the American and Australian interpretation he would fall within the M'Naughten Rules. The interpretation of this word is thus not merely of academic interest.

In delivering the unreserved judgment of the Court of Criminal Appeal (Lord Goddard C.J., Jones and Parker JJ.) in *Windle's* case,[23] Lord Goddard both posed the problem raised by the word "wrong" in the context of the defence of insanity and gave the court's answer to it. He said: "A man may be suffering from a defect of reason, but, if he knows that what he is doing is wrong – and by 'wrong' is meant contrary to law – he is responsible. Counsel for the appellant . . . suggested that the word 'wrong' as it is used in the M'Naughten Rules did not mean contrary to law, but had some qualified meaning, that is to say morally wrong, and that, if a person was in a state of mind through a defect of reason that he thought that what he was doing, although he knew it was wrong in law, was really beneficial or kind, or praiseworthy, that would excuse him."[24]

Lord Goddard rejected this analysis of the defence – "In the opinion of the court, there is no doubt that the word 'wrong' in the M'Naughten Rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might or might not be justified." This is a clear acceptance of the "illegality" test first stated, and even more forcibly, by Lord Brougham in the debates in the House of Lords following the acquittal of Daniel M'Naughten:

[23] (1952) 36 Cr App. R. 85. [24] *ibid.* 89.

"There is only one kind of right and wrong; the right is when you act according to law, and the wrong is when you break it."

It is submitted that there is only slight authority for this interpretation, considerable and weighty authority against it, and that its restrictive quality denies the premises upon which the M'Naughten Rules were built. Nevertheless, it seems unlikely that it can be avoided in England in the absence of statutory amendment or consideration of the issue by the House of Lords.

The High Court of Australia faced this problem in *Stapleton v. The Queen*.[25] In their joint judgment, Dixon C.J., Webb and Kitto JJ. dealt at length with their reasons for refusing to follow *Windle's* case. Their reserved and careful interpretation of this aspect of the M'Naughten Rules – that the accused's criminal liability here depends on his ability to reason about the wrongness of his act with a moderate degree of sense and composure, not merely on his appreciation of its illegality – is in sharp conflict with the opinion of the Court of Criminal Appeal.

Such a disagreement concerning rules propounded in 1843 and applied very frequently throughout the Anglo-American legal systems since that date is less surprising when it is appreciated what scant judicial consideration they have received. Indeed, this particular issue seems to have been expressly raised in England only in *R. v. Codère*[26] where the Court of Criminal Appeal, in a judgment read by Lord Reading C.J. and described with generous meiosis in *Stapleton's* case as "not free from ambiguity", did not effectively resolve the semantic difficulties inherent in asking a jury to decide whether the accused knew at the time of his homicidal act "that what he was doing was wrong".

If it be accepted, as can hardly be denied, that the answers of the judges to the questions asked by the House of Lords in 1843 are to be read in the light of the then existing case-law and not as novel pronouncements of a legislative character, then the High Court's analysis in *Stapleton's* case is compelling and the Court of Criminal Appeal's decision in *Windle's* case demonstrably inaccurate. The High Court's exhaustive examination of the extensive case-law concerning the defence of insanity prior to and at the time of the trial of M'Naughten establishes convincingly that it was morality and not legality which lay as a concept behind the judges' use of "wrong" in the M'Naughten Rules. It is true, of course, that in most instances if a man knows that something is against the law he will also know that it is against the general morality of the community;

[25] (1952) 86 C.L.R. 358. [26] (1916) 12 Cr. App. R. 21.

but there are cases where this is not so and where the difference between these interpretations can be of decisive importance.

In *Stapleton's* case the High Court gave a complete and convincing theoretical justification for the direction of Dixon J. to the jury on this point in *R. v. Porter.*[27] His direction in that case on the whole defence of insanity was a model of precision and deserves more attention than it has yet received from the profession outside Australia. On the issue of the accused's knowledge of the wrongness of his act, Dixon J. said:[28] "The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong."[29] In *Stapleton's* case his interpretation was expressly adopted, and there can be little doubt that it is a more technically accurate formulation of this limb of the M'Naughten Rules than the bare perception by the accused of the illegality of his action accepted in *Windle's* case and capable of being supported only on the basis of the judgment in *R. v. Codère,* which on this point was both obscure and unsupported by authority.

American courts where the M'Naughten Rules are applied, other than those in Tennessee and Texas, prefer to test the accused's knowledge of the morality of his act rather than its legality. The leading American case on this point is *People v. Schmidt*[30] in which Cardozo J. reviewed the history of the M'Naughten Rules and accepted this interpretation of their use of the word "wrong". His judgment in this case is a most distinguished legal and sociological refutation of the interpretation later accepted in *Windle's* case.

The dismembered body of Anna Aumuller had been found in the Hudson River. Schmidt confessed to the killing. In his defence he alleged that in a period of religious ecstasy and exaltation he believed himself to be in the visible presence of God and under the delusion that he was commanded so to do committed this fearful crime. The jury disbelieved him, believed expert evidence that the delusion was

[27] (1936) 55 C.L.R. 182. [28] *ibid.* 189.

[29] "I think that any one would fall within the description in question who was deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he meant to do." Stephen, *History of the Criminal Law,* vol II, at p. 163.

[30] (1915) 216 N.Y. 324.

feigned, and convicted him. The Supreme Court did not interfere with this conclusion, nor grant a new trial on what they held was the trial judge's misdirection to the jury that "wrong" in the M'Naughten Rules means "contrary to the law of the state of New York". The jury had been instructed that even if Schmidt believed in good faith that God had appeared to him and commanded the sacrifice of Anna Aumuller, and this delusion was a result of a defect of reason from disease of the mind, he must nevertheless answer to the law if he knew the nature and quality of the act, and knew it was forbidden by the law of the state. In that the jury found the whole defence to be a sham, the misdirection on this issue, if it were a misdirection, gave no ground for interfering with the verdict. However, concerning this part of the trial judge's direction, Cardozo J., referring to the judges' answers to the Lords subsequent to *M'Naughten's* case said: "The judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong. Whether he would also be responsible if he knew that it was against the law, but did not know it to be morally wrong, is a question that was not considered. In most cases, of course, knowledge that an act is illegal will justify the inference of knowledge that it is wrong. But none the less it is the knowledge of wrong, conceived of as moral wrong, that seems to have been established by that decision as the controlling test. That must certainly have been the test under the older law when the capacity to distinguish between right and wrong imported a capacity to distinguish between good and evil as abstract qualities. There is nothing to justify the belief that the words right and wrong, when they became limited by M'Naughten's case to the right and wrong of the particular act, cast off their meaning as terms of morals, and became terms of pure legality."

Later in his judgment Cardozo J. makes a sociological justification for the interpretation he is supporting: "We must not, however, exaggerate the rigor of the rule by giving the word 'wrong' a strained interpretation, at war with its broad and primary meaning, and least of all, if in so doing, we rob the rule of all relation to the mental health and true capacity of the criminal. The interpretation placed upon the statute by the trial judge may be tested by its consequences. A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the

sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong. If the definition propounded by the trial judge is right, it would be the duty of a jury to hold her responsible for the crime. We find nothing either in the history of the rule, or in its reason and purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent. No jury would be likely to find a defendant responsible in such a case, whatever a judge might tell them. But we cannot bring ourselves to believe that in declining to yield to such a construction of the statute, they would violate the law."

Dr. Charles Mercier, in his *Criminal Responsibility,* strenuously opposed the interpretation later accepted in *Windle's* case, and concluded:[31] "As well might we convict of high treason the general paralytic who claims the crown of England. He knows that the world considers wrong the act that he does. He knows that it is against the law. But he does not know and appreciate the circumstances in which he acts."[32]

Stephen took a similar view to that later adopted in *Stapleton's* case, writing:[33] "The word 'wrong' is ambiguous. . . . It may mean either 'illegal' or 'morally wrong', for there may be such a thing as illegality not involving moral guilt. . . . In Hadfield's case, for instance, knowledge of the illegality of his act was the very reason why he did it. He wanted to be hung for it. He no doubt knew it to be wrong in the sense that he knew that other people would disapprove of it, but he would also have thought, had he thought at all, that if they knew all the facts (as he understood them) they would approve of him, and see that he was sacrificing his own interest for the common good. I could not say that such a person knew that such an act was wrong. His delusion would prevent anything like an act of calm judgment in the character of the act."

In trying Windle, Devlin J. withdrew the case from the jury, ruling that there was no issue of insanity to be left to them as it was common ground that Windle knew the illegality of giving the hundred aspirins to his wife. The Court of Criminal Appeal, in

[31] At p. 193.

[32] In his authoritative *Insanity as a Defense in Criminal Law* Weihofen took the same point. Examining the American authorities on this issue he suggested (at p. 42) one unfortunate result of rigidly applying the "illegality" test: "In Tennessee and Texas, it has been held that knowledge of the unlawfulness of the act is sufficient to render a defendant criminally responsible, and that an insane delusion that the deed was commanded by God, though known to be a violation of the temporal law, is no defense. Such a rule seems to hold responsible for crime persons suffering from some of the most dangerous types of mental disorder."

[33] *History of the Criminal Law of England,* vol. II, at p. 167.

interpreting the M'Naughten Rules to allow such a substitution of the judge's for the jury's discretion, is considerably restricting the only virtue customarily claimed for these rules, that is, their flexibility. The minutes of the evidence before the Royal Commission on Capital Punishment make it abundantly clear that the M'Naughten Rules can only be defended, even by their warmest supporters, as techniques whereby practical justice is reached, and not as absolute, precise legal rules. As a rigid, precise definition of a defence to a criminal charge they are woolly, semantically confused, and psychologically immature; as a means whereby juries and not judges work rough justice in a difficult peripheral area of law and morality they are reasonably satisfactory.

"Know"

There is one further word in the M'Naughten Rules which merits, but has not received, extensive medico-legal consideration – "know". Did the accused "know the nature and quality of his act"? Did he "know that it was wrong"? In the interpretation of these phrases the courts have firmly set their face against any acceptance of the essential psychiatric concept of diminished degrees of consciousness. A man in law is either perceptive and appreciative or he is not; thus the word "know" in the M'Naughten Rules has received little separate judicial interpretation, though it is the word with which the psychiatrist finds his greatest difficulty when matching his diagnosis of certain types of accused persons to those rules.[34]

In truth, "consciousness" and "knowing" are not like lights, either off or on; they are like a finely graded scale ranging from death to the extreme awareness of the artist. Indeed, with the electroencephalograph we can even chart certain variations of consciousness, of knowing, between people, and in one person at different times. If you do not happen to awaken fresh, bright and fully perceptive every morning, you will comprehend that "knowing" in the first few moments after sleep is different from "knowing" in the few minutes after breakfast; but the law takes no notice of these differences and interprets "know" in the M'Naughten Rules in a rigid and absolute way: it could hardly not do so when phrasing a formula itself to be applied absolutely and without gradations. In Scotland, with the legal concept of diminished responsibility, such gradations are possible; but if the defence of insanity either applies absolutely or does not, these degrees of knowing, though psychologically true, are legally inapplicable.

[34] Mr. Justice Dixon's direction to the jury in *Porter's* case (1936) 55 C.L.R. 182 is one of the few judicial pronouncements on the significance of this word. In this direction a concept of diminished consciousness was in effect read into the Rules without straining their interpretation.

Daniel M'Naughten and the M'Naughten Rules

Two more problems of interpretation under the M'Naughten Rules remain to be considered – the problem of insane delusions and the possible inclusion of irresistible impulses within the M'Naughten Rules; but the aspects so far discussed are those under which the whole issue of insanity as a defence to a criminal charge is currently fought.

Before considering these two more peripheral issues and leaving Daniel M'Naughten himself, one interesting anomaly deserves mention. The judges gave their answers to the House of Lords within a year after Daniel M'Naughten had been found not guilty on the grounds of insanity, and expressed their opinion of the law with complete certainty. Three of these judges had been involved in the trial of M'Naughten and none dissented from its conclusion, yet if the evidence at the trial be perused it is perfectly clear that Daniel M'Naughten himself did not fall within the Rules. He was paranoid and certifiably insane, but when he shot Edward Drummond, though he mistook him for Sir Robert Peel, he certainly "knew the nature and quality of the act" and certainly "knew that what he was doing was wrong" within the English interpretation of that phrase. This is of great significance, for it will be affirmed that what value the M'Naughten Rules have they have because they are not applied in their strictness but are liberally and generously interpreted by juries who are moved emotionally to favouring a given criminal, and only strictly interpreted as against one whom it is clearly their desire to see hanged.

The M'Naughten Rules were phrased at a time when the concept of monomania, of a possible single aspect of mental derangement in the mind, the rest of the mind remaining whole and effective, was held. They were made at a time when phrenology was regarded as a valuable science. Both the concept of monomania and the validity and value of phrenology have been exploded, and it is surprising that the Rules work as well as they do in the light of the tremendous changes that have taken place in our psychological knowledge since 1843. The reason for this is, it is suggested, that the judges were wise in eschewing in their statement of the Rules any attempt to set up psychological or psychiatric classification; throughout, the Rules are turned towards responsibility and punishability in a legal and social sense and not towards the analysis of any different mental states.

It is not intended to argue from this that the developments in psychological knowledge should be excluded from such problems as determining an appropriate defence of insanity; all that is sug-

gested is that the rules concerning responsibility for criminal actions should give space for the operation of our current knowledge on the individual's mental make-up but should never attempt to include any supposed categorical insights into the mind of man. The rules concerning the defence of insanity and the developing insights concerning the human mind pursue parallel paths and cannot move along the same path for they are dealing with totally different aspects of social organization.

Insane Delusions

On their face the M'Naughten Rules encompass a person who is labouring under a partial delusion only, and who is not in other respects insane. The criminal responsibility of such a person is to be judged as if the facts were as his delusion leads him to believe them to be. It was believed, in 1843, that a person could labour under a partial delusion, a delusion concerning one particular subject or activity, and yet be "not in other respects insane". When the best psychological knowledge of the time included this idea of monomania the judges could not be blamed for making room for it. Nevertheless, the difficulty is that no such person as envisaged in this part of the M'Naughten Rules exists. The rule, therefore, can logically now have no application to any criminal and, indeed, I can find no English or Australian case in which it has been expressly applied. It is hard to see how it could be applied, for it is submitted that anyone who would be exculpated under the terms of this part of the rules (presuming such a person to exist) would also be exculpated under the earlier provisions of the M'Naughten Rules, and the insane delusion provisions would thus be redundant. An example will perhaps make this clear.

Labouring under the insane delusion that he is the properly appointed hangman, a man hangs another person whom he believes it is his official duty to hang. Under the insane delusion provisions of the M'Naughten Rules the defence of insanity would presumably succeed. But the accused would also fall within the defence of insanity which is outside this part of the M'Naughten Rules, because, though he knows the nature and quality of his act, he cannot he said to know that it is "wrong" under whatever interpretation the word "wrong" is given. For this case, then, the insane delusion test is unnecessary.

For some years I have been challenging classes in criminal law to make up an example, however fanciful, of a case falling within the insane delusion test, and yet not falling within the other parts of the M'Naughten Rules. So far they have not succeeded. The insane

delusion test does indeed sit unhappily beside the other tests enunciated in the M'Naughten Rules and it is possible that the judges were still swayed by the rhetoric of Erskine in *Hadfield's* case. It seems that they intended the insane delusion test as being supplemental to, and not an integral part of, the main tests they enunciated; but it is a supplement that can have no application because of the phrasing of the earlier tests. Lacking psychological truth and legal applicability there is little to recommend it.

Irresistible Impulses

It has been suggested that the concept of "irresistible impulse" could be used to introject into the defence of insanity some element of volition to balance the concentration in the M'Naughten Rules on cognition. This, it is argued, would allow greater flexibility to the defence and permit a better balancing of the conflicting medico-legal public interests expressed in it.

That there is such a phenomenon as an irresistible impulse should not be denied. Dr. Lindesay Neustatter in his *Psychological Disorder and Crime* gives an excellent autobiographical account of such an impulse. Coming round from an anaesthetic he struggled violently and swore freely; at this time he was trying hard, but ineffectually, to explain to those with whom he was fighting that he appreciated that he was in a state of ether intoxication and regretted his actions. The more he tried to explain, the more violent his struggles and language became. He concludes: "I therefore knew the nature and quality of my acts, and that they were wrong, yet I clearly had no vestige of control over them, and it would be quite absurd to say I was responsible for my behaviour."[35]

One possessed of a sub-epileptic condition, denied food for twelve hours, given two or three glasses of beer to drink, and then slightly annoyed may immediately and inevitably become violently aggressive. This pattern may be revealed by his previous actions and by the electroencephalograph. With such a person, exceptional though he may be, it would be possible publicly to demonstrate an irresistible impulse – to take him into court in such a condition that upon being spoken to severely by the judge he would, despite the obvious consequences and the policeman at his elbow, and if not restrained, attack the judge – or at any rate, the prosecutor.

It has never been contended that an irresistible impulse could render an act involuntary in the same sense that the act of a somnambulist or of one in an epileptic seizure is involuntary and not

[35] *Psychological Disorder and Crime*, W. Lindesay Neustatter, Christopher Johnson, London, 1953, at p. 27.

his act in the eyes of the criminal law. If this were so, irresistible impulse would fall outside the defence of insanity and become an allegation that the *actus reus,* which must be voluntary to be subject to criminal sanction, had not been performed.

The phrase "irresistible impulse" imports many logical difficulties for to the determinist any impulse which was not in fact resisted was for that person in those circumstances irresistible, while to the adherent of free-will the phrase is anathema. Yet as there is virtually no philosophical support for either absolute determinism or free-will, there may be room for the operation of this concept. But how is it to be expressed?

Its simplest formulation is to define as irresistible a criminal impulse that would not have been resisted had the actor known that detection and apprehension was inevitable. It is conceivable that a person may know the nature and quality of the criminal act he is committing, know that it is wrong, and yet be unable to resist it even though he appreciates the inevitability of detection and earnestly desires not to commit the offence. Such a person should surely fall within the defence of insanity. On its present formulation, however, this defence would be denied to him.

Subsequent to the trial and conviction of Ronald True,[36] a Committee on Insanity and Crime under the Chairmanship of Lord Atkin enquired into this and kindred issues in the defence of insanity. In 1924 this committee recommended[37] that the law should be widened to allow the defence of insanity where the accused though otherwise not meeting the requirement of the M'Naughten Rules could not owing to disease of the mind[38] resist the impulse to commit the offence. This recommendation was opposed by ten of the twelve judges of the King's Bench Division whose opinion on it was subsequently given. It has found favour in neither the English courts nor the legislature. Indeed, in *R. v. Kopsch,*[39] Lord Hewart L.C.J. referred to the "fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive. It is not yet part of the criminal law, and it is to be hoped that the time is far distant when it will be made so."

Though firmly rejected in England, the defence of irresistible impulse, where the other conditions of the M'Naughten Rules have

[36] (1922) 16 Cr. App. R. 164. [37] Cmd. 2005.

[38] The Atkin Committee made clear this requirement of disease of the mind in any legislative acceptance of the defence of irresistible impulse, writing: "No doubt general lack of control would be relevant to the question whether the lack of control in the particular case was due to mental disorder or to a mere vicious propensity."

[39] (1925) 19 Cr. App R. 50.

not been satisfied, has been accepted by the Supreme Court of the United States and by a large minority of the American State jurisdictions. The three Australian States that have codified their criminal law – Queensland, Western Australia and Tasmania – have all written irresistible impulse into the defence of insanity. It is also accepted in South Africa.[40] Further, this defence forms a part of most Continental Criminal Codes, for example, the German and Swiss.

In his *History of the Criminal Law*[41] Stephen argued that the M'Naughten Rules, if properly interpreted, were already sufficiently broad to include the irresistible impulse doctrine. The Atkin Committee disagreed with this, believing legislative modification of the defence to be necessary if this doctrine were to be applied. In 1936, the High Court of Australia in *Sodeman v. The King*[42] carefully discussed this question and the whole doctrine of irresistible impulse.

Sodeman confessed to the killing of four young girls over a period of five years. In each case Sodeman had seized his victim by the throat until she became unconscious. He had then pulled the child's clothes up from the lower part of the body, thrusting some of the material into the child's mouth, and then tied this material into her mouth with the belt of her frock or other part of the clothing. In three cases he also tied the feet together. It was unlikely that he had sexual intercourse with any of the children.

The defence of insanity was raised. There was a history of insanity in Sodeman's family. Three medical witnesses, two being Government Medical Officers, gave evidence that at the time of each killing Sodeman did not know the nature and quality of his act, and did not know that it was wrong. The Crown called no medical evidence in rebuttal. Nevertheless, possibly because of the horror of Sodeman's offences, he was convicted and sentenced to death.

Leave to appeal to the High Court of Australia was sought. Unfortunately only four of the Justices of the High Court were available to hear the application and, as they were equally divided, leave to appeal was refused. The Privy Council later refused leave to appeal[43] and Sodeman was hanged. A subsequent autopsy revealed that his brain was congested and showed an early leptomeningitis with excess cerebro-spinal fluid.

But the interest of the case, apart from the light it throws on the operation of the M'Naughten Rules, lies in the discussion by the

[40] *R. v. Hay*, 16 Cape of Good Hope Reports (Supreme Court) 290.
[41] Vol. II, at pp. 167-8.
[42] (1936) 55 C.L.R. 192.
[43] [1936] 2 All E.R. 1138.

High Court of the allegation that the trial judge erroneously directed the jury in failing to instruct them that a disease of the mind which deprives the accused of all capacity to control his otherwise criminal action constitutes a valid defence on the ground of insanity. Latham C.J. and Stark J., who were of the opinion that leave to appeal should be refused, held that the High Court should not depart from the English authorities on this issue. They agreed that the existence of an overwhelmingly strong impulse might be evidence of the existence of a disease of the mind which might, in the words of Latham C.J., "have the effect of destroying or preventing the knowledge of the nature and quality of the act done or knowledge that the act is wrong. In such a case insanity is established by reason of the latter feature of the case and not by reason of the uncontrollable impulse *per se.*"[44]

Dixon and Evatt JJ., who, in separate judgments, favoured allowing the application for leave to appeal on the ground of the inadequacy of the trial judge's direction to the jury, were prepared to push this exculpatory value of the proof of the existence of an irresistible impulse still further. Thus, Dixon J. said: "It is always recognized that overpowering obsession arising from mental infirmity provides strong reason for inferring the requisite lack of capacity to know that an act is wrong or to understand its nature and quality."[45] The force of this line of defence is increased if the interpretation that the Australian courts have put on the word "wrong" is kept in mind, and this was well illustrated by the further dictum of Dixon J. in *Sodeman's* case that "in general it may be correctly said that, if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing that what he does is wrong."[46]

Evatt J. was prepared to go further towards accepting this defence and Stephen's suggestion that the doctrine of irresistible impulse already falls within the M'Naughten Rules and does not require statutory introduction. He held that, at the least, "it is quite obvious that proof of the existence of disease causing such impulse may at least afford evidence in proof of the existence of such a defect of reasoning as may cause the absence of knowledge necessary for establishing the defence of insanity under the rule in *M'Naughten's case.* For this reason it was wrong for the trial Judge to suggest and emphasize an antithesis between diseases of the mind leading to irresistible impulse and the conditions described in *M'Naughten's case,* for the latter might not only accompany, but

[44] (1936) 55 C.L.R. 192, 204. [45] *ibid.* 222. [46] *ibid.* 215.

even be inferred from, a disease of the mind, producing an irresistible impulse. It is quite out of accord with modern research in psychology to assert an absolute gap between cognition and conation."[47]

When the case came before the Privy Council, their Lordships (who included Isaacs J.), though conceding the possible value of proof of the existence of an irresistible impulse as indicating an inability to know the nature and quality of the act or to know that it was wrong, were reluctant to depart from the English authorities on this issue, and to risk establishing different standards of law in England and the Dominions. Leave to appeal was refused.

In the result it would appear that proof of the existence of an uncontrollable impulse will not *per se* constitute a valid defence to a criminal charge but it may assist the accused in bringing his case within the bounds of the M'Naughten Rules; it will assist more in Australia than in England because of the wider interpretation of the M'Naughten Rules in Australia.

Possibly the difficulty of distinguishing between an irresistible or uncontrollable impulse and one which was merely not resisted or controlled is the factor that has inhibited the courts from too readily accepting this defence, for there can be little utility in preserving the deterrent sanctions of the criminal law where they can, by definition, have no force.

Possibly, also, the law's concentration on the cognitive aspects of the mind, particularly in its formulation of *mens rea* generally, makes it reluctant to consider affective or conative diminutions of responsibility despite their psychological significance.

The recent Royal Commission on Capital Punishment recommended that the defence of insanity should be available to one who was "incapable of preventing himself from committing the crime".[48] Whatever the difficulties of proof that such an innovation would create there is little to be said against the justice of its adoption.[49] Further, juries are already required to find facts in a complex area of medico-legal practice when they apply the M'Naughten Rules and requiring them to find one more fact, such as the accused's capacity to prevent himself from committing the crime, would not

[47] *ibid.* 227.

[48] Cmd. 8932 at 276.

[49] If narrow interpretations are placed upon "nature and quality" and "wrong" there is overwhelming need for the statutory introduction of some concept of irresistible impulse. If wider interpretations are allowed, the need for the inclusion of this concept is not so great; but even in these circumstances a desire to keep theory and practice in some degree of accord would support its adoption.

unduly increase their already extremely onerous burden; ascertaining the ability of one with a diseased mind to know certain facts concerning his actions is quite as difficult as ascertaining his ability to control those actions. Above all, such a development would bring the defence of insanity more into line with our increasing psychological understanding of the function and dysfunction of the mind and the clearly established fact that mental disease is characterized more by conative, affective, emotional disorder than by a mere lessening of the capacity for cognition.[50]

It is, perhaps, not widely appreciated that we already allow a lessening of criminal responsibility for intentional killings done pursuant to an affective condition. It is not completely true to say, as did Latham C.J. in *Sodeman's* case, that "neither extreme anger in itself nor uncontrollable impulse in itself is a defence in law."[51] In one way extreme anger is already a defence. The defence of provocation by which an intentional voluntary killing is reduced from murder to manslaughter is just such a defence. We allow exculpative effect to a brief madness induced by an act, but deny it to a brief or protracted madness induced by mental disease. It is only the too early crystallization of the defence of insanity that prevented some such development in respect of irresistible impulse.

Operation of the M'Naughten Rules

So far we have been defining and analysing the defence of insanity. It is now necessary to consider how in fact the M'Naughten Rules operate in their social setting. In attempting this we pass out of the realm of case law into an area of speculation and contention.

It is the function of the trial judge to direct the jury in terms of the M'Naughten Rules as they have been interpreted in subsequent cases; it is the function of the jury to consider whether the particu-

[50] In *Parsons v State* (1887) 81 Ala. 577, the Supreme Court of Alabama stressed this unfortunate discordance between the M'Naughten Rules and the facts of mental illness; "In the present state of our law . . . we are confronted with this practical difficulty which itself demonstrates the defects of the rule. The courts, in effect, charge the juries, as matter of law, that no such mental disease exists as that often testified to by medical writers, superintendents of insane hospitals, and other experts; that there can be, as matter of scientific fact, no cerebral defect, congenital or acquired, which destroys the patient's power of self-control,—his liberty of will and action,—provided only he retains a mental consciousness of right and wrong. The experts are immediately put under oath, and tell the juries just the contrary, as matter of evidence; asserting that no one of ordinary intelligence can spend an hour in the wards of an insane asylum without discovering such cases, and in fact that the whole management of such asylums presupposes a knowledge of right and wrong on the part of their inmates." It merits note that this was written over sixty-five years ago.

[51] (1936) 55 C.L.R. 192, 205.

lar accused person's mental condition falls within or outside those Rules; it is the function of the psychiatrist to give expert evidence on his diagnosis of the accused's mental condition, and he will usually be asked to give his opinions on the questions whether the accused at the time of the killing "knew the nature and quality of the act" and "knew that it was wrong".[52]

The jury will find the assessment of the psychiatric evidence a problem passing beyond their normal range of knowledge and experience. To this difficulty we will return. The psychiatrist, however, faces problems of an entirely different order. He will be asked to apply his information concerning the accused, built up around a psychology perceptive of the importance of the unconscious and the force of emotional motivations, to a legal defence resistant to accepting the existence of either of these springs of human conduct and using tests from which they are excluded. Many psychiatrists perceive the essential and inevitable difference between legal and medical standards for testing this problem of responsibility but nevertheless find overwhelming difficulty in translating psychological assessments into the prescribed legal framework. They find also that this task is complicated by the conditions in the arena in which they must give their evidence. In the result, there is a well-established medical belief that the law has failed to adapt itself in this sphere to the considerable psychiatric knowledge that has been developed and substantiated since 1843. The doctors do not ask that the law should endeavour to incorporate every exuberance of the research psychiatrist, but merely that it should allow a frame of reference of such psychiatric understanding as is common ground to all psychiatrists, whether Freudians, Adlerians, Jungians, Neo-Thomists, or eclectics. All neurologists, psychiatrists, and psychologists accept certain basic principles which do not easily find expression within the confines of the M'Naughten Rules.

The law has set up a dichotomy – sane or insane – for purposes of this defence, and it compels psychiatrists and juries to conform to this dichotomy and not to seek to argue outside it. Diminished responsibility as contrasted with no responsibility is excluded from English law, though accepted in Scotland and many European countries. The law's approach is thus philosophical and categorical. How would one facing the problem anew and using such of our

[52] Psychiatrists answering these questions are often not fortified in their opinions by a clear understanding of their interpretation and legal significance. A knowledge of the legal analysis of them would facilitate their task. In *R. v. Holmes* [1953] 2 All E.R. 324, the Court of Criminal Appeal held that these two questions could legitimately be put to the psychiatrist giving evidence when a defence of insanity is at issue.

developing scientific methods as are appropriate to this type of problem proceed?

The approach would be empirical. The first questions posed would be "who are these murderers? what types of men and women are they? what are their social backgrounds? what are the precipitants and causes of their crimes?" Only when tentative answers to these questions were available, obtained from careful study of a randomly selected and large number of murderers, would any attempt to classify them be made. As yet, we have never done this and without it a rational and effective answer to the social, political and philosophical issue of how to treat these murderers is logically impossible. We hang much of our best research material.

If the social scientists were allowed to proceed in this way we would come to realize the great difficulty of a dichotomous classification for this purpose.

The psychiatrist is also often perturbed by the common tendency to misunderstand an endeavour to explain a criminal action as an endeavour to excuse or justify it. He is trained to observe and classify mental disorders and is reluctant to make moral judgments concerning acts springing from a disordered mind. It is perhaps this reluctance that has led those who are themselves ready to make moral judgments to project sentimental false standards into the recounting of a psychiatric diagnosis. The competent psychiatrist realizes that the Court, and not he, has the problem of judging between the interests of the offender and those of society and will, if he is wise, never volunteer in Court his opinion of the most appropriate solution of this problem. That his evidence does not advert to this should not induce observers to believe that he has ignored it.

There are further difficulties facing the psychiatrist giving evidence within the confines of the M'Naughten Rules other than those common to all expert witnesses. These were well illustrated in the first case in England in which a physician was called to give evidence when the defence of insanity was pleaded – Lord Ferrers' trial before the House of Lords in 1760. Dr. Munro was called for the defence and was, according to the record, treated by the Crown with "scorn and contumely". He gave as one indication of insanity the existence of "jealousy and suspicion", to which the Crown asked whether it was not true that many who were not lunatics suspect and quarrel without adequate cause. Dr. Munro found himself subject to two difficulties that have beset many of those who later purported to give expert evidence on the defence of insanity – he was called and remunerated by one of the parties, the defence, and as

such immediately held in suspicion as to his professional integrity by the Court before which he appeared; he was cross-examined by the Crown by means of the abstraction of one single indication of insanity that he mentioned, the question being asked whether this indication was not true of all normal people. This last difficulty has proved a challenging one, for it is hard to avoid the force of a cross-examination which infers, albeit erroneously, that the whole is not greater than the sum of the parts. Various symptoms of insanity may be possessed by any one of us, and it is their coexistence, their pattern in the individual, and not their mere isolated existence that is the true indication of insanity.

This line of cross-examination is hard to answer, for it is based on the premise that insanity is a clinical entity. If it were, then the abstraction of any single indication of this entity would have some force; but in that the difference between the normal and abnormal mind is quantitative rather than qualitative, Dr. Munro, and all those who have occupied the position he undertook to fill, find themselves in considerable and unjustifiable difficulty.

Evaluation of the M'Naughten Rules

Stephen devoted a chapter of his *History of the Criminal Law of England* to the "Relation of Madness to Crime"[53] and concluded: "The importance of the whole discussion as to the precise terms in which the legal doctrine on this subject are to be stated may easily be exaggerated so long as the law is administered by juries. I do not believe it possible for a person who has not given long-sustained attention to the subject to enter into the various controversies which relate to it, and the result is that juries do not understand summings up which aim at anything elaborate or novel. The impression made on my mind by hearing many – some most distinguished – judges sum up to juries in cases of insanity, and by watching the juries to whom I have myself summed up on such occasions, is that they care very little for generalities. In my experience they are usually reluctant to convict if they look upon the act itself as upon the whole a mad one, and to acquit if they think it was an ordinary crime. But their decision between madness and crime turns much more upon the particular circumstances of the case and the common meaning of words, than upon the theories, legal or medical, which are put before them. It is questionable to me whether a more elaborate inquiry would produce more substantial justice."

Stephen wrote this in 1883: the passage of seventy years has

[53] Vol. II, at p. 124.

only stressed its truth. Juries test "hangability" rather than any medical or legal concepts of responsibility; their freedom of decision is restrained and not precisely limited by the M'Naughten Rules. Further, it is submitted that, while we adhere to capital punishment, the elastic test of madness applied by juries around the M'Naughten Rules is preferable to the rigid and categorical operation of any formula purporting to be capable of application to the widely diverse cases which push us to decide these frequently conflicting medico-legal-public issues. If we must hang the sane murderer and do not wish to hang the insane murderer then there is no form of words which can rigidly and at the same time justly distinguish sanity from insanity for this purpose.

This does not mean that the form of the test in which juries are to be instructed is not important. It clearly is. All that is implied and is worth keeping in mind is that the jury will be swayed by many factors, emotional and intellectual, other than the judge's direction to them on the M'Naughten Rules. If the M'Naughten Rules were strictly applied very few murderers indeed would fall within them because disturbances of cognition are not the leading characteristics of psychotic conditions.

The psychiatrist giving evidence on this issue is perplexed by the fact that though the M'Naughten Rules are rigidly formulated and interpreted they are generously and widely applied by the courts. The judge and jury both seek more information from the expert witness than the terms of the law would apparently allow and around questions like "Did the accused know that what he was doing was wrong?" the psychiatrist must supply information dealing not only with this question, however interpreted, but much else concerning the accused's mental condition and motivations.

If the law seeks to achieve justice by stretching the meaning of the test it applies, it is unfair that the psychiatrist should be called upon to bear so much of the burden of this sophistry. It accords neither with his Hippocratic oath nor with his oath as an expert witness. "To allow a physician to give evidence to show that a man who is legally responsible is not morally responsible is admitting evidence which can have no other effect than to persuade juries to break the law."[54]

If, then, the M'Naughten Rules work substantial justice it is because juries are prepared to stretch them. That they do stretch them can be demonstrated.

A not infrequent homicide is the killing of a young child by its mother owing to a disturbance of her mind precipitated or induced

[54] Stephen, *History of the Criminal Law of England,* vol. II, at p. 128.

by the processes of parturition or lactation. For many years juries, when constrained by the force of evidence of such killings to find the homicide had been committed, freely allowed the defence of insanity to succeed. Many such mothers, though allowed this defence, did not fall within the precise terms of the M'Naughten Rules however interpreted. Human sympathy on the part of the bench, the prosecution and the jury stretched the M'Naughten Rules to cover this situation. Eventually, the futility and cruelty of indicting for murder in these circumstances, and the inadequacy of the M'Naughten Rules as an exculpatory technique, led to the Infanticide Act 1938 in England. Similar statutes are to be found throughout the Anglo-American legal system.[55] Thus the persistent stretching of the M'Naughten Rules in these circumstances and the unwillingness of anyone to see a conviction for murder led to legislation widening the defence of insanity, permitting a conviction for infanticide punishable within the wide discretion of the judge as if it were a manslaughter, and bringing the law into accord with practice. That the M'Naughten Rules were previously misapplied and stretched by the jury's sympathy cannot be denied.

Likewise, at the other end of the scale, juries are extremely reluctant to allow the defence of insanity to succeed when the killing has been particularly outrageous and has profoundly stirred their own and the public's rage. The cases of Heath, Haig, and particularly Griffiths,[56] come to mind as recent well-known English examples of juries refusing the protection of the M'Naughten Rules to those who probably would have been allowed that protection had the circumstances of their killing or killings been less revolting.[57]

In *Graham v. People,*[58] the Supreme Court of Colorado, in reversing the conviction of a schizophrenic of 25 years standing, said: "The verdict is incomprehensible, save upon the supposition that the brutal character of the killing so aroused the passion and prejudice of jurors as to cause them to overlook or disregard the Court's instruction." *Sodeman's* case, previously discussed, is a similar example. It may be surmised that the thought "he's better hanged and out of the way" is closer to the minds of the jury than

[55] Crimes Act 1949 (Victoria) s. 4.

[56] All three are reported in the Notable British Trial Series.

[57] The cases of Rivett and probably Straffen are similar examples. See the note of *Rivett's* case in (1950) 13 Modern Law Review 372. Rivett was a certifiable schizophrenic. The validity of his defence of insanity was supported by the testimony of three psychiatrists, two of whom were Prison Medical Officers of wide experience not noted for their easy espousal of this defence. No medical evidence was called for the prosecution. Rivett was convicted. The Court of Criminal Appeal refused to disturb the jury's verdict. Rivett was hanged.

[58] (1934) 95 Colorado 544.

the technical direction on the M'Naughten Rules they have received from the trial judge.

It can therefore be confidently affirmed that M'Naughten Rules are an elastic test, stretched or not in accordance with the jury's feeling of the "madness" of the accused and their degree of detestation of his actions. If no logical and convincing motive for the killing is adduced, if medical evidence of mental disturbance supports the defence, and if the crime is not one that induces their deepest opprobrium, juries will tend to apply the M'Naughten Rules with a benevolent width – otherwise they will not.

This varying application of the M'Naughten Rules, given further flexibility by a subsequent extra-judicial enquiry into the mental condition of the accused prior to the execution of the sentence passed upon him if the defence of insanity is denied him, is generally regarded as more likely to meet the ends of justice than any endeavour to formulate a psychologically satisfactory test of the responsibility of the mentally disturbed for their crimes. With this proposition it is hard to disagree, and the conclusion that the M'Naughten Rules work substantial justice because they are not applied is compelling. But substantial justice is not enough in such an important area of the criminal law; at least we must never rest content with it.

Greater justice will be achieved by juries than by precise rules of law only if we let the cases go to the juries. The narrow and historically doubtful interpretation given to the word "wrong" in the M'Naughten Rules in *Windle's* case, and accepted in English practice, is tending to withdraw this issue from the jury (as it did in *Windle's* case itself where Devlin J. ruled that in that it was agreed that the accused knew that his act was against the law the defence of insanity could not be considered by the jury). If this tendency is not reversed the M'Naughten Rules will be a positive instrument of injustice.

Similarly, the M'Naughten Rules will achieve greater justice if they give more room to the jury to hear, in the trial and from the judge, material of psychological significance. The reports of the Atkin Committee in 1924 and of the Gowers Royal Commission in 1953 both recommend the introduction of some concept of irresistible impulse into the defence of insanity. This, it is submitted, would adapt the M'Naughten Rules somewhat more towards encompassing the facts of mental disorder and would permit more significant psychiatric information to reach the jury directly and through the trial judge than is now possible.

Finally, the inclusion of mental defect within the phrase "defect

of reason, from disease of the mind" is likewise compelling on grounds of justice and psychological truth.

If it is true that only the exceptionally intellectually well-equipped juryman is able to understand a direction by the trial judge based on the M'Naughten Rules, it might be argued that modifications of their content are futile. This is not so. Their interpretation is of vital practical importance because it will condition the trial judge's approach to the whole issue and therefore the real content of the trial.

One last aspect of the jury's function requires consideration. The Gowers Royal Commission recommended that the jury should be responsible for determining whether the death penalty should or should not be imposed in any given case. This recommendation takes us far outside the confines of the defence of insanity, but if it were accepted the M'Naughten formula would become of very much less significance; the information available to the jury on the accused's mental conditions would be only one part of the totality of evidence of his environment, inheritance, circumstances, personality and background that the defence would adduce as extenuating circumstances. In the result it is submitted that only those guilty of the most repulsive murders would hang.

The hangman has skulked about in the background of our discussion of the M'Naughten Rules. It is the death penalty which prevents any concept of diminished responsibility, short of both full responsibility and exculpation, being acceptable. It is capital punishment which creates the pressure for legal degrees of murder, with death being the punishment only for murder in the first degree, despite the overwhelming difficulty of phrasing such distinctions. In the absence of the death penalty the problem of the defence of insanity is not a complex one; whilst we atavistically retain that punishment it is submitted that the M'Naughten Rules modified and interpreted to incorporate some elements of irresistible impulse, to include mental defect, and with a wide meaning given to "wrong" are the best solution to this traditional medico-legal conflict. The best means of lessening the conflict is, then, to encourage both medical and legal writers on the subject to drop their contentious tone and to urge lawyers and doctors to appreciate the different perspectives from which they see the problem and the essential value of both points of view.