THE LEGAL VIEW

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There have been many parliamentary and non-parliamentary commissions and committees whose assigned task it was to examine the position of the defence of insanity in our criminal law. The articles and monographs that have been written on the subject are without number. But it cannot be assumed that as a consequence all the issues have been presented or that they have been satisfactorily settled. The recent appointment of a Canadian Royal Commission[1] bears witness to this, and it is the appointment of that commission and the need which is implicit in its appointment that have prompted the writing of this paper.

A full treatment of the effect to be given to insanity in criminal law would entail consideration of the rules as to fitness to plead, of the actual operation of the remission service, and of the actual treatment of insane convicts and persons acquitted by reason of insanity. The present writer is not qualified to discuss these and other social and legal aspects of insanity which may well be involved, and the content of this paper will therefore be confined to a consideration of the operation of insanity as a defence[2] to a criminal charge. It is proposed to present arguments not only as to why the law should be changed in certain respects, but also as to why some suggested changes which have become well known should not be adopted, and, too, as to why in other respects our law ought not to be changed; i.e., the whole of the law on this question will be examined and either justified or criticized. The only claim to novelty which the present writer can make for the conclusions arrived at and the proposals based upon them is that they all follow from and are tested by a single principle—a principle which, for the writer, establishes the limits of criminal responsibility, so that the rules herein recommended would form a complete and integrated body of law giving full effect in this particular field to a principle which ought to be regarded as fundamental throughout our criminal law.

What is this principle? It flows from the following "definition" of law, or attitude[3] towards law, which some people may not be prepared to adopt. Law, whatever else it may be, and without referring to or dismissing its various origins in religion or other social disciplines, is primarily a social instrument used as a means of social control. As part of this social control, *criminal* law is essentially a method of obtaining desirable social conduct by means of threatening punishment for a breach of a code of action. This being the primary purpose of punishment, it should not be spoken of as "deserved" or "morally necessary" but as "useful" or "effective". Punishment is useful only when it is capable of achieving its purpose, i.e. of obtaining desirable social conduct. Therefore liability to punishment should not arise unless a person (a) was aware of what he was doing, (b) was aware that there was a sanction attached to his act, *and* (c) was capable of controlling his act. If any *one* of these factors was absent, then *prima facie,* punishment is not usefully awarded, for there was no possibility of the criminal law directive being obeyed; but if

the absence of any one of them was due to the person's own default, then punishment is usefully awarded for that default in itself. This, then, is the fundamental principle by which criminal responsibility ought to be determined. We can now examine its application to the responsibility of the sane and the insane, observing what rules should be applied to the sane person and how those rules must be modified in the case of the insane if in each case we are to give equal effect to our fundamental principle.

It may be necessary to state at the outset, before we commence this examination, that at no time is a definition of insanity going to be attempted. In a statement of the rules as to the criminal responsibility of the insane, we are not required to pronounce upon how particular mental diseases will manifest themselves or what will be the conduct or self-control of an insane person. In establishing the liability of *any* person we are only concerned with the three factors mentioned above: ability to know what one is doing, ability to know that there is a command prohibiting the act, and ability to comply with the command. In order to provide a test for the responsibility of the insane, it is sufficient to word the rules in such a manner that there will be no liability if any one of those abilities is absent by reason of the insanity. It can then be left to medical witnesses to bring to bear any changes in medical science when they are called upon to establish what were the particular effects of the accused's insanity or other mental condition. The rules then would not need to be adjusted every time medical knowledge advanced. They can remain fixed, giving effect to a fixed principle of responsibility. Since a fixed rule does not necessarily tie us to one stage in the advance of medical knowledge, it is not a sufficient criticism of the rules we have at present to show merely that they have been in existence for over a hundred years. For the same reason there is no validity in the claim made by some psychiatrists that in some way the test should be geared directly to the changing state of the science, as by the use of a reference to a medical concept, such as "psychotic", in place of any fixed criterion.

It has been repeatedly pointed out by lawyers and judges that in the M'Naghten Rules, our law attempts to define, not insanity, but exemptive insanity; i.e., it delimits the types of insanity which will exempt a person from criminal liability, and it does this by referring to the effects on the acts of a person which a mental condition might have, without referring to any specific type of mental condition. That our law does not presume to lay down tests for insanity is frequently expressed by saying that it defines legal insanity, not medical insanity. This unfortunate manner of expression has led to the misconception that there is a conflict between the legal and medical professions as to the correct definition of insanity, a misconception now given legislative encouragement in the new Canadian Criminal Code.[4] Because this misconception can exist it is customary for most lawyers to turn a deaf ear to all criticisms by the medical profession, saying to themselves that the doctors fail to see for what limited purpose the M'Naghten Rules were designed. This deaf-ear attitude is no longer justified. Informed medical opinion today is not open to the same attack as it was in the last century. Criticism by the medical profession today reveals a real issue between the two professions, namely, which

of the effects of insanity ought to be regarded as exemptive. The principal criticisms quite properly take the form of pointing out: (i) that the M'Naghten Rules fail to provide for all possible effects of insanity upon a person's mind, (ii) that in 1843 insanity was thought to affect only a person's cognition (knowledge of act, knowledge that it is wrong), (iii) that subsequent developments in medical science have established that insanity can also affect a person's conation (ability to control one's actions), and (iv) that the rules should be amended so as to allow consideration to be given to conative defects when determining the criminal liability of an insane person. It is the object of this paper to support the retention of the M'Naghten Rules, extended in this manner, and to do so by showing that such a set of rules adequately contemplates all the possible effects of insanity on a person's behaviour and self-control that are relevant to a determination of criminal responsibility.

We can now proceed with the consideration of the way in which each of the three factors involved in the fundamental principle of criminal responsibility mentioned above is applied in our rules for sane and insane persons. After making such recommendations as are necessary in order to give full effect to each factor, it is proposed to examine some of the suggested alternatives to a set of extended M'Naghten Rules.

I. Knowledge of the act

In the prosecution of a sane person, the Crown is required to prove the *actus reus* (which, for the present discussion, we can take in all cases to have been proven) and the *mens rea;* and one element of the latter is, in all crimes, whether common law or statutory, an intention to do the physical act. An intention to do the act requires, of course, knowledge of the nature of the act being done, so that if the accused was doing an act but thought he was doing nothing or thought he was doing some other[5] act, then he would not have the required *mens rea* and would not be liable. The task of the Crown in establishing this knowledge is in practice assisted by what is not too happily called a presumption of fact, namely, that a person generally knows what he is doing, but it is not a difficult matter for the accused to upset the effect of that "presumption". For the sane person, then, this first factor necessary for criminal liability is embodied in one or more of the rules of *mens rea.*[6]

An insane person who does not have the necessary knowledge of the act done is able to secure his acquittal under the *mens rea* rules if his absence of knowledge was not a result of his insanity, and he will, quite properly, not be detained during Her Majesty's pleasure, for he has not been shown to be a person who by reason of insanity is a danger to the public. If, however, his absence of knowledge of the act was caused[7] by his insanity, then he is not permitted to plead absence of *mens rea,* resulting in a complete acquittal, but is confined to raising a defence under the M'Naghten Rules, with the result of acquittal but indefinite detention. Under the first arm of the M'Naghten Rules, he is relieved of liability in the same manner as he would have been under the *mens rea* rules, for that arm will acquit where the accused by reason of insanity is incapable of appreciating "the nature and quality of the act". It was at one time considered that the words "nature and quality" had an extended

meaning beyond the mere knowledge of the act but authority has now confined those words to that single idea.[8] Whatever the original intention behind them, the present interpretation of the words certainly secures for the insane person the full effect of the first of the three factors which are to be regarded as prerequisites to criminal liability.

II. Knowledge of the sanction

Secondly, punishment is not usefully awarded if the accused, when doing the act, did not know that he was forbidden to do it.

The sane person, however, is not allowed to raise this lack of knowledge as a defence; everyone is presumed (i.e. conclusively) to know the law, or, more realistically, ignorance of the law is no defence. The reason for this rule is not that it would be too difficult for the Crown to establish in every case that the accused knew the law; that could be met by reversing the onus of proof. The sane person will not be heard to say that he did not know the law because it is the duty of every person within the jurisdiction to discover for himself what acts the criminal law prohibits. The denial of this defence, therefore, is intended to place an obligation on all persons to discover the sanction for themselves, and the law thereby seeks to achieve a state of facts wherein the defence would be irrelevant, i.e., wherein all persons would have knowledge of the sanction. As in all cases where the object of the law is to create an obligation to use care or diligence so as to achieve a certain result, and this obligation is enforced by means of a rigid rule disregarding all excuses for the failure to achieve the result, the absolute rule here works more vigorously than is required, resulting in useless or unjust punishment.[9]

A full criticism of this result may be excused on the ground that the principle which is being followed out in this paper, principally for discovering desirable rules for the liability of the insane, is relied upon as being equally valid in the case of the sane person.

A person may use every care in attempting to discover whether his acts are unlawful and yet not know of their illegality until he is convicted for them. If he knew the acts were immoral, we may well be unconcerned, even though on our fundamental principle of responsibility he should not be regarded as liable, for we can say that any person who chooses to commit acts which he knows to be immoral does so at his peril, and if they turn out to be illegal, even if it was impossible for him to discover their illegality, he cannot rely upon our principle of social utility to excuse him. If we come to this conclusion, we will of course be adding a gloss on the social utility principle outlined earlier, but it is a gloss which may be regarded by most people as justified. But now let us assume that we are dealing with one of the increasing number of offences which are unrelated to morals, in which the accused's diligent researches into the law left him in a position of believing that his act was *moral* and lawful. No reason of utility or justice can be shown for holding him guilty. A similar situation, and with similar conclusions, is seen in the case of the person who is convicted under a statute for the doing of an act not wrong in itself committed before he was in a position of being able to know that the statute had been passed.[10] In these two types of case, rigidity of the rule does the law a great disservice.

To summarize this section, then, the accused may have been in the position of (a) knowing his act to be unlawful, or (b) believing his act to be lawful when in fact he could have discovered the rule of law making it unlawful, or (c) knowing it to be immoral but believing after reasonable research that it was lawful, or (d) reasonably believing it to be moral and lawful. He should be liable in (a) and (b) on our principle of social utility, and in (c) on the gloss on that principle, if acceptable, but in (d) he should not be liable. Our law today achieves the right result in (a), (b) and (c), but not in (d).

The insane person is of necessity treated in a different manner in this regard. The sane person is put on his enquiry as to the content of the law, and in most cases he will be able to discover what the law is, but with the insane person we do not have the same mental processes upon which to rely. It is reasonable, therefore, to allow him to come forward and establish that by reason of his insanity he was unable to appreciate that his act was unlawful. But in the case of a sane person who is unable to discover the illegality of an act which he knows to be immoral we may base his liability on the principle that he then acts at his peril. If we are prepared to hold a sane person liable in those circumstances, ought we not to apply the same principle to the case of an insane person who is prevented by his insanity from knowing the law on the subject but is not prevented from appreciating that his act was immoral?[11] There seems to the writer to be no reason why we should not.

In order to give effect to these conclusions, we would need a rule which would acquit, if insanity prevented knowledge of the unlawfulness of the act, unless the accused nevertheless realized that his act was immoral. Do we have such a rule?

The second arm of the M'Naghten Rules acquits an insane person if his insanity prevented him from appreciating that his act was "wrong". The choice of interpretations of the word "wrong" is not, as frequently supposed, simply between "morally wrong" and "legally wrong", for "morally wrong" is in itself ambiguous and can mean either "subjectively morally wrong", i.e. wrong in the accused's own estimation, or "objectively morally wrong", i.e. known by the accused to be wrong according to the standards of society. Subjective morality has been excluded as the test for "wrong" by a line of decisions[12] which cannot now be doubted, but the British Medical Association, before the recent British Royal Commission on Capital Punishment, recommended[13] that it should be adopted as the only test of "wrong". This recommendation the Commission did not accept, as being "not practicable"; but the objection to the recommendation is not only its impracticality but also the fact that it is contrary to the fundamental principle of criminal liability. The suggestion of the Association, if adopted, would result in a person's being exempted from liability despite the fact that he was fully aware of the existence of a criminal sanction and the fact that he was completely able to make the choice away from his proposed action, merely because, through insanity, he had moral standards sufficiently different from those of the rest of the community to justify his acts in his own eyes. Such a person can have the criminal sanction applied against him "usefully", and the self-justification should be allowed to affect guilt no more in his case

than in that of a sane person. To punish the sane but not the insane in this case is to make the criminal law a machine of moral retribution, and requires the assumption that moral defectives are "bad" if sane but to be pitied if insane.[14]

If we disregard "subjective morality" as being an irrelevant consideration, we are left to choose between "objectively morally wrong" and "legally wrong". Until recently, it had been assumed that authority had established that the word was to be interpreted as "objectively morally wrong", with the gloss that if the accused knew the act was illegal there was a presumption, presumably a conclusive one, that he also knew it was immoral by the community's standards. This interpretation achieves the result stated above to be the desirable one. For a rule which makes knowledge of illegality the primary test, with the proviso that knowledge of immorality will also convict, is the same as the rule making knowledge of immorality the primary test with the proviso that knowledge of illegality is sufficient evidence of that. In effect, the accused is to be convicted if he knew either that it was illegal or that it was immoral.

The latent ambiguity adverted to above in the expression "morally wrong" had induced Lord Goddard C.J., in *R.* v. *Windle*[15], to reject it as the test to be used, but it does not seem that he has done so on any ground other than that he felt subjective morality to be a matter too difficult and dangerous for the law to entertain. It appears to the writer that the effect of the decision is only to prefer one as against the other of the two alternative methods of expressing the same rule, i.e. that knowledge of illegality is the primary test. If the decision is to be regarded as going further and ruling out all relevance of knowledge that the act was objectively morally wrong, then it cannot be supported on the authorities and is undesirable in that it provides too broad a basis for acquittal.[16]

III. Control of the Act

We have seen that the first two of the three factors involved in the principle of criminal responsibility are taken into account satisfactorily in rules applicable to insane persons. It remains to examine the way in which the law can give effect to the third requirement, *viz.*, that the accused should have been capable of controlling his act before he will be regarded as liable to punishment.

Where the act was beyond the physical control of the accused he will, in all cases, not be responsible under the criminal law for that act. If he is pushed, against his will, through a window, he is not liable for breaking and entering, quite apart from the existence of any specific intent. If his hand is held by another and used to strike a third person, he is not guilty of assault. These cases are regarded by some writers as explicable on a supposed doctrine of causation, and by others as resulting from one of the several rules as to *mens rea*. Whatever the explanation, the result is a desirable one and is, and ought to be, the same whether the offence is common-law or statutory and, in statutory offences, whether it is one of so-called "absolute prohibition" or not.[17]

Where the act is within the physical control of the accused but altogether beyond his mental control he will likewise be acquitted. Somnambulism, automatism, hypnotism, and, on a slightly different basis, epilepsy, are all examples of this type of defence.

The position is far more difficult where the act is within the accused's physical control but not altogether beyond his mental control, i.e. is within his mental control in the sense only that it is not merely a product of his subconscious mind (somnambulism, automatism) nor a product of another's mind (hypnotism) nor a result of involuntary muscular or nervous action (epilepsy). If the act is a result of the conscious mind of the accused, we can say that it is within his mental control. Liability, we have seen, should depend, *inter alia,* on whether he was able to act in compliance with the directive of the criminal law. The defence that may be argued for in this situation is that though the accused willed the act he was for some reason incapable of exercising his will in any other manner, i.e. that he had an "impulse" or urge to will in this manner, and there was nothing he could do to resist it. Such a proposition may get some apparent support from the contention of the determinist that the fact that the accused did the act is evidence of the fact that he could not avoid doing it. But the law cannot afford to get involved in the unreal argument between determinism and free will. Even if there were a real issue between the two ideas, and even if we were convinced that the correct conclusion was that of determinism, i.e. that whatever a person does he does because he was destined to do it, yet no reason is thereby shown for law to withdraw its sanction. For the continued existence and application of the sanction may well result in achieving the desirable social conduct of others, even though, because of the use of the sanction, that conduct has become predetermined. The determinist's picture, however, is an unreal one and can in no way rob the individual of the ability or the moral duty of acting in accordance with desirable precepts.

On the other hand there is the pathological variety of this defence, that the impulse became so strong that the accused was physically and mentally incapable of controlling it. If these facts could be established, i.e. if the sanction was shown not merely to have failed in this particular case to achieve desirable conduct but to have been *incapable* of achieving it, then on principle there should be no liability. But there is yet no means of establishing that this condition can exist for sane persons, or of distinguishing cases of irresistible impulse from the merely unresisted impulse,[18] and the defence is therefore properly denied. If medical science is ever able to supply us with the proof, and the test, we will need to change our law.

With regard to *insane* irresistible impulse, or, more correctly, insane drives which act upon the mind of the lunatic until the will is overpowered by them, medical science has advanced to a stage where the law can safely provide for this proper defence.

Firstly, as to the existence of the phenomenon. The real reason why our law has not provided for this defence is not that it is regarded as invalid but rather that the existence of the phenomenon has been doubted. Baron Bramwell, one of the principal opponents of reform, said before the 1866 Commission on Capital Punishment[19]: "There may be such a thing, but I vastly disbelieve in it." Today this disbelief is impossible unless one is prepared to agree with Baron Bramwell that ". . . medical men talk a great deal of nonsense". For the opinion of the medical profession appears to be overwhelmingly in favour

of recognition of the phenomenon. The British Medical Association in its evidence before the recent British Royal Commission made the existence of the phenomenon the basis for its submission. The Association's views were repeated in an editorial of the British Medical Journal[20] in which it was stated that medical opinion would seem to be well met by a change in the law such as would provide for this defence. On the basis of the evidence before it, the British Royal Commission reported, "It is well established that there are offenders who know what they are doing and know that it is wrong . . . but are nevertheless so gravely affected by mental disease that they ought not to be held responsible for their actions."[21] In 1923 the Atkin Committee reported: "It was established to our satisfaction that there are cases of mental disorder where the impulse to do a criminal act recurs with increasing force until it is, in fact, uncontrollable."[22] This apparent unanimity is not weakened by the expression of the opinion that "irresistible impulse has no status or meaning in psychiatry".[23] Objection is therein made to the unhappy expression "irresistible impulse", which does not accurately convey what is intended, and to the fact that cases of "irresistible impulse" do not form in themselves a phenomenal category having clinical significance. The latter objection is not a fatal one, for we do not wish to assume that all cases stem from a single mental condition. All that is necessary is that medical science shall establish that persons may, through whatever mental disease or deficiency, be substantially unable to control their conduct in specific situations. As stated above, our rules need only refer to possible consequences of insanity and need involve no assumptions of how those consequences occur or what the nature of a specific mental illness may be.[24]

Secondly, as to the ability to discern between the irresistible and the unresisted. The great fear in recognizing this defence has been the possibility of its abuse. Lord Goddard C.J. rhetorically asks: "Who is to judge whether the impulse is irresistible or not?",[25] inferring that the word of the accused would be the only evidence available apart from the inference to be drawn from the commission of the act itself. A great deal of needless confusion has resulted from a refusal by the opponents of the defence to recognize that it is confined to cases resulting from insanity. The Atkin Committee's recommendation of the defence explicitly pointed to the danger of its use in any but insanity cases, and the proposal by the British Medical Association of its addition to the M'Naghten Rules expressly so limits it, and yet Sir Norwood East, for example, in examining these two recommendations rejects them on the ground that ". . . the introduction of the irresistible impulse [defence], unless associated with mental disease, would be a very dangerous adventure".[26] Clearly, in every case in which the new defence was pleaded, the onus would be on the accused to establish both a *pre-existing* insanity and the fact that that insanity resulted in the act being uncontrollable. Proof of the former could be secured in the same manner in which it is at present for the existing defences. Proof of the latter would be supplied by circumstantial inference from the facts: (a) that the type of insanity established was one of the relatively few which are well known to be likely to result in uncontrollable actions, and (b) that in its origin

and in its prior manifestations it is seen to be a particular mental condition likely to result in the particular act's being uncontrollable in the circumstances in which it was committed. In addition there would be the testimony of the accused, if competent, and possibly of independent witnesses, whose evidence of the manner of the commission of the act and the accused's behaviour at the time could substantiate or rebut the inference drawn from the medical evidence.

Those who would still object to the defence, on the ground that this type of evidence could not easily survive the maltreatment it would receive under the usual courtroom adversary rules, if they are really desirous of admitting the defence at all, have only to accept one of the several novel suggestions for securing this evidence and presenting it to the judge or the jury.[27] Another method of decreasing the likelihood of abuse would be to increase the burden of proof upon the accused. It has been suggested that the accused be required to prove beyond reasonable doubt that the act was in fact uncontrollable.[28] But this seems to place too great a burden on the accused, for it is only his own testimony, if available, that will be direct evidence on the question. The medical evidence and the evidence of such witnesses of the crime as there might have been will merely establish that his story was likely to be true, not that it necessarily was so. If any increase in burden of proof is to be laid on the accused, it should be with respect to the fact that the uncontrollable nature of the act (established on a balance of probabilities) was *due* to the mental disease.

A reasonable objection to this solution is that the jury would be faced with deciding the issues on varying degrees of satisfaction, and that the judge would have difficulty in so directing them. But already the judge and jury discharge this duty satisfactorily in civil cases where particular issues are required to be proved beyond reasonable doubt, or, which is more difficult, to a degree half way between the civil and criminal degrees, while other issues in the same case remain to be established merely on the balance of probabilities. Similarly in criminal trials, the burden of proof on the prosecution with regard to the commission of the offence, and on the accused with regard to the raising of a certain type of statutory defence or a defence under the M'Naghten Rules, are different and yet may coexist in the same case.[29] Moreover, if this safeguard of increasing the burden is felt to be necessary, it is far more desirable that the jury and judge be inconvenienced than that a valid and necessary defence be denied.

As a result of the foregoing discussion of the three elements of the fundamental principle of common responsibility and the way in which they ought to be reflected in rules concerned with the conduct of sane and insane persons, it can be seen that the existing rules adequately cover the conduct of sane persons, with the one exception of the unknowable law making the moral act a crime, and the conduct of insane persons, with the one exception of what we might call "irresistible impulse".

IV. Arguments against change

It has been argued that a change in the law is unnecessary in order to achieve the desired result indicated above with regard to insane persons, for

the defence is already achieved by either (a) the existing law, (b) the judge, (c) the jury, or (d) the executive.

(a) It can without great difficulty be demonstrated that when the judges gave their answers as contained in the M'Naghten Rules they intended them to have reference only to the specific type of insanity with which the case and the questions were concerned, i.e. delusional insanity, thereby accounting for the emphasis on cognitive defects and the absence of reference to conative defects. But it is now too late to argue that we are entitled to look outside the Rules for these further defences. Authority has confined us to the Rules, and if the defence is not found therein it will have to come by legislation.[30]

It is also said that the proposed defence is contained within the Rules as they exist at present,[31] but though this argument may have academic attraction it is inconsistent with well-established authority and is unlikely now to be successful.

(b) Even though a judge is no longer able to direct a jury on the law as if the Rules contained implicitly the "irresistible impulse" defence, yet several judges gave evidence before the British Royal Commission that in cases of real insanity not covered by the Rules, they either omit all reference to the Rules and the limitations set by them on the possible defences, or instruct the jury on the application of the law to the facts in such a manner that it is made to fall under one of the existing Rules. This practice can hardly be said to take the place of a defence expressed in a statute, for its availability would depend upon the chance of the accused's having such a judge to try his case, and, too, the fact that the judge did not act in this manner would not be grounds on which the accused could appeal. The right to appeal when effectively denied a defence would seem to be fundamental.

(c) The jury, it is contended, will see to it in the proper case that the law as contained in the Rules is not applied, and will therefore acquit an accused who at present does not properly have a *legal defence*.[32] It is well known that juries do at times disregard the directions of the judge, but there is no evidence that they do so only in proper cases,[33] or even in every proper case. Even if it could be established that the desired defence is in effect given by the jury, it is being obtained at the price of encouraging perversity among juries and disrespect for the law which can do more harm than would the operation of the proposed statutory defence.

(d) The final avenue by which it is said that the proposed defence already operates is the discretion placed in the executive, by way of the royal prerogative, and exercised in connection with the remission service. It is appreciated that the executive operates in these matters in accordance with settled principles and after full psychiatric reports have been obtained, and it may well be that as a result of this practice very few persons are in fact punished whom we would consider not criminally responsible. The necessity of the practice is, however, to be deprecated. Not only does the practice place a heavy burden upon the executive, but it is, moreover, inconsistent with the traditional principles of our law, in that it takes the adjudication of a defence out of the

hands of the jury and leaves it to be determined by the exercise of a discretion not designed for that purpose.

It seems to the writer that these four arguments, whether taken individually or all together, fail to detract from the desirability of adding to the M'Naghten Rules a further rule to provide for the defence of insane "irresistible impulse".[34]

V. Alternative suggestions

There is a body of opinion which is in general agreement with the proposition that the M'Naghten Rules as they exist at present are inadequate, but which is not content with the mere addition of the further rule suggested above. The proposals which are made in place of the addition of such a rule uniformly reject the M'Naghten Rules in their entirety, but as to the rule which should be substituted for them the proposals fall into two distinct groups.

(a) One type of proposed rule is that guilt should never attach to a person who is insane, or, as some prefer, "psychotic", so that certifiability would automatically result in an acquittal. This suggestion seems to arise from a general attitude of pity towards the mentally afflicted, or at least from a feeling that treatment and not punishment is the humane and necessary thing. But a proper question to ask is: can punishment ever be usefully threatened or awarded to an insane person? Insofar as such a person is capable of reacting to the appreciation of a sanction being attached to a criminal act, which is so in many cases, the punishment is usefully threatened and awarded, and liability should go according to this ability and not according to the existence or non-existence of certifiability. If the criminal sanction is taken away from the acts of such persons, then the criminal law is failing to obtain desirable social conduct on occasions when, *ex hypothesi,* it could have. To regard criminal punishment solely as moral retribution is to deny it a great area of usefulness.

This same objection to certifiability as a test of exemption from punishment may perhaps be put in another way by saying that the proposed test ignores the desirability of establishing a causal connection between the commission of the crime and the insanity which is raised as a defence. The necessity of establishing such a connection appears to be fundamental.[35]

A second objection that could be raised to this test is that it would not be sufficiently broad to include many persons whom we would wish to regard as not responsible, many of whom would be acquitted today under the M'Naghten Rules. A person does not have to be certifiable in order that he qualify for a defence under the Rules or the extended Rules.

The fact that the test of certifiability would be at times too lenient and at times too harsh indicates that it is geared to a concept which is not relevant. Certifiability, regarded by itself and not taking into account its consequences, does not enter into the fundamental principle of criminal liability. Moreover, the very concept is subject to every fluctuation of medical opinion on the subject, and criminal liability ought not to be so variable, but determinable by reference to a fixed factual test flowing from a constant principle of social utility. The M'Naghten Rules, if extended, would constitute such a factual test.

It is to be noted that the proponents of the "certifiability" test are predominantly doctors or psychiatrists, whose chief concern is the treatment of the patient. This preoccupation with the question of treatment as against the question of criminal responsibility has led to the untenable suggestion that insanity should not be raised as a defence at all, i.e. that the question should not be one to be thrown around a courtroom but should be discussed calmly in a professional atmosphere and the results of the discussion communicated to the judge for the purpose of deciding on the treatment and institution best suited to the prisoner's needs. Though commendable in certain respects, this suggestion completely ignores the legal necessity of establishing either guilt or innocence, not only for the social and moral satisfaction of the accused and his relatives, but also for the determination of the many legal consequences that can flow from guilt or innocence.

(b) The second type of rule proposed in place of the M'Naghten Rules is that the question of whether the mental condition of the accused ought to relieve him of responsibility should be left to the jury, unhampered by rules. This has the attraction of individualization, but we ought not to be led into accepting it by the argument before the Britissh Royal Commission[36] that where the life of an accused person is at stake, yardsticks are too rigid. Such a view argues against all rules, including, for example, the rules containing the law of murder. Moreover, the M'Naghten Rules, especially if extended as suggested, are individualized sufficiently for any case that might arise. For, if the facts show the existence of the appreciation and control required by the extended rules, there is no reason why the criminal sanction should not be applied.

An argument against the adoption of this second suggested alternative is that, though the opinion of the common man is desirable on the question of responsibility, it ought not to be taken solely at a time when, as a juryman, he is likely to be so emotionally affected by the particulars of an individual case that he is not even an efficient fact-finder, let alone an impartial assessor of responsibility.

There is, moreover, one consideration which is sufficient in itself to rob the "jury test" of any attraction it might have. Without a fixed criterion to work on, and consequently with little or no assistance from the judge in answering the question of liability or in applying the law to the facts, the jury would be an easy prey to every conceivable argument, no matter how irrelevant, designed to show, or even merely to make the jury feel, that the accused "ought" not to be punished. It would seem that this type of procedure would lend itself to more abuse than that which some people fear would result from the introduction of a defence of insane "irresistible impulse".

If any restriction was to be placed on the type of evidence which could be introduced to assist the jury in determining responsibility, it would have to come in the form of rulings by the judge on its relevance, and this latter question could only be decided after the judge, or a line of decisions, had established what factors create responsibility. As an alternative to a "relevance" policy, or perhaps in addition to it, the judge would in time be called upon to

assist the jury in its treatment of the evidence, and practice would soon establish standardized directions to the jury following very much the line of, or at least fulfilling the same function as, the M'Naghten Rules.[37]

The British Royal Commission, despite the fact that the majority of witnesses before it were opposed to such a step, and the fact that a specific test was admitted to be most desirable if one could be found, recommended the "jury test" of responsibility. For the reasons outlined above, this "test" appears to have no advantage over the M'Naghten Rules but, in fact, to have grave disadvantages.

VI. Conclusions

Having regard to the principle of criminal responsibility set out at the beginning of this paper, the only questions that need be asked, once it is established that the accused committed the act, are whether he knew what he was doing, whether he knew it was wrong, and whether he was able to control his act.

The M'Naghten Rules are limited in their scope, but it is wrong to suggest that they are illogical, self-contradictory, haphazard, or the result of mere historical accident. They are, instead, a full, complete, consistent and intentional expression of the elements of a fundamental principle, with but one limitation. Through ignorance of the possible effects of insanity, the framers of the Rules failed to provide for one of the effects now known to exist, i.e., loss of ability to control one's act. With the addition of a rule to take account of this situation and to allow satisfactory proof of conative effects to affect responsibility, the Rules will become as perfect an embodiment of a principle as any set of rules could be. No greater refinement or individualization is necessary. The alternative tests proposed are seen to be either unrelated to any sound principle of responsibility, or unlikely to achieve results consistent with any principle. Furthermore, the dangers that are said to attend the introduction of an insane "irresistible impulse" defence are seen to be either unreal or easily overcome.

From a theoretical point of view, the introduction of the defence seems justified and necessary. The writer has attempted to deal also with such practical objections as are readily apparent. Any further claims, by opponents of the defence, that the defence just could not work out in practice, are not only hypothetical but also contradicted by the experience of those countries which have adopted the defence.[38].

There seems, in effect, to be no valid reason of principle or practice why the defence should not now be provided.

[1]Under the chairmanship of Hon. J. C. McRuer, Chief Justice of the Ontario High Court.

[2]"Guilty but insane", the verdict still given in England, will here be regarded as being identical in substance to an acquittal, for the significant question is that of responsibility and not the form of the verdict.

[3]The "definition" of law here given is merely the expression of an attitude towards the *phenomenon*, law, and not an attempt to set limits to the meaning of the *word*, "law".

[4]1953-54 (Can.) c. 51, s. 16(2) ". . . a person is insane when . . ." etc. Similarly, the U.S. Supreme Court in *Fisher* v. *U.S.* (1945), 328 U.S. 463, at p. 467 approved of: "Insanity, accord-

ing to the criminal law, is a disease or defect of the mind which renders one incapable to . . ." etc. Cf. the wording of the M'Naghten Rules and nearly all other enactments of them.

[5]The degree and nature of the difference between the two acts which is required before liability is removed is, of course, no simple matter to determine.

[6]The only aspect of *mens rea* here considered is knowledge of the actual physical act done by the accused. Further analysis would be necessary to apply the same reasoning to knowledge of the consequences, and knowledge of surrounding facts, where they are relevant in a particular crime, but it is believed that the results would be the same.

[7]Although the M'Naghten Rules and nearly all statutory enactments of them require the causal connection between the insanity and the absence of knowledge to be established before the rules are applicable, in practice the causal connection is assumed, though no doubt the absence could be relied upon if established.

[8]*R.* v. *Codère* (1916), 12 Cr. App. R. 21.

[9]Examples of other cases are: the absolute rule of vicarious liability in crime, designed to achieve care in the choice and control of servants; the absolute liability in some statutory offences as to knowledge of one or more of the surrounding facts, designed to secure diligence in the discovery of those facts.

[10]Cf. the case of statutory orders, in which the public's inability to know of the existence of an order has been the reason for holding it to be ineffective until publicized, despite the absence in the statute of any requirement of publication. See *Johnson v. Sargant & Sons,* [1918] 1 K.B. 101, and *R. v. Ross,* [1955] 1 W.W.R. 590, [1945] 3 D.L.R. 574 (B.C.).

[11]It may well be that in the usual case in which the defence of insanity is raised, i.e., murder, the problem is not likely to arise, and therefore its solution has little more than academic value; for if an insane person realizes he is killing, and that it is immoral, it is unlikely that he will be unaware of the fact that it is also illegal.

[12]Notably *R.* v. *Codère* (1916), 12 Cr. App. R. 21.

[13]Referred to in the Commission's report, Cmd. 8932, p. 93.

[14]An interesting half-way position is seen in the interpretation of the rule in the Australian High Court, now to be regarded as settled by *Stapleton* v. *The Queen* (1952), 86 C.L.R. 358, by which the accused is acquitted if robbed by insanity of the ability to appreciate *why* the act is immoral in the eyes of ordinary persons. Mere knowledge of the immorality of the act does not make him guilty; he must also be "bad" in his use of that knowledge.

[15][1952] 2 Q.B. 826.

[16]English trial courts have regarded the decision as effecting this change, and therefore follow it. In *Stapleton* v. *The Queen, supra,* footnote 14, the Australian High Court so regarded the decision but declined to follow it, on the ground of inconsistency with earlier authority. See the full text of the judges' answer to the third question in the *M'Naghten* case, especially: "If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."

[17]A rare example of denial of the defence, though unnecessarily, by reason of the wording of the statute, is *R.* v. *Larsonneur* (1933), 24 Cr. App. R. 74, 97 J.P. 206. Cf. the statement during argument, apparently *per incuriam,* by Lord Goddard C.J. in *Leicester* v. *Pearson,* [1952] 2 All E.R. 71, referred to and adopted by Devlin J. at p. 73, that an "absolute prohibition" reading of the pedestrian-crossing offence would result in convicting the driver of a stationary vehicle pushed into the crossing by a vehicle from behind.

[18]See comments of Sir Norwood East (1952), 20 Med. Leg. J., pp. 15, 16.

[19]B.P.P., 1866, 21.

[20][1953] 2, Oct. 3.

[21]Cmd. 8932, p. 103.

[22]Cmd. 2005, p. 8.

[23]See Dr. G. H. Stevenson (1946), 54 Can. Med. Ass. J., p. 620.

[24]The very fact that the M'Naghten Rules proceed in the manner recommended is made the basis of an attack upon them by Dr. Stevenson in (1947), 25 Can. Bar Rev. 731. His misconceived criticism results from a belief that doctors should be the sole arbiters of responsibility and that the test of responsibility should be in every case the mere existence or non-existence of a psychosis, a test which is criticized *infra.*

[25]Cmd. 8932, p. 95.

[26]*Supra,* footnote 18, at p. 16.

[27]See: (1951), 7 Curr. Leg. Prob. 16; (1947), 25 Can. Bar Rev. 731; (1947), 55 Can. Med. Ass. J. 520; (1949), 106 Amer. J. Psych. 497; [1949] 2 Br. Med. J. 1182.

[28]Meredith (1947), 25 Can. Bar Rev. 251.

[29]See *R.* v. *Carr-Briant* [1943] K.B. 607; *R.* v. *Hobson* (1951), 11 C.R. (Can.) 218. Dixon J. performed the task with equanimity in *R.* v. *Porter* (1933), 55 C.L.R. 182.

[30]Seventeen of the American states have recognized the defence of insane irresistible impulse, without the need for legislation, some by looking outside the Rules, others by reading it into the Rules. Lord Goddard C.J. in *R.* v. *Windle,* [1952] 2 Q.B. 826 emphasizes the exclusive nature of the Rules in our law.

[31]See, e.g., Stephen, History of the Criminal Law, Vol. II, p. 171.

[32]See, e.g., the opinions of several witnesses, including Lord Goddard and Lord Simon, in Cmd. 8932, pp. 82, 83.

[33]There is in fact evidence that Broadmoor and similar institutions house a great many thoroughly sane persons acquitted by perverse juries whose emotions overwhelmed their reason.

[34]It has also been suggested that we need only to wait for the inevitable abolition of the death penalty, for the great need of change to disappear. Admittedly there will then be very little difference, in the treatment of the insane person, between conviction and acquittal by reason of insanity. But the important labels of "guilty" and "innocent" would still be in issue.

[35]Stevenson (1947), 25 Can. Bar Rev. 731.

[36]Cmd. 8932, p. 96.

[37]The recent decision of a U.S. federal circuit court of appeal in *U.S. v. Durham* (1954), 214 F. 2d 862 to jettison the M'Naghten Rules in favour of a jury test of whether the act was a *product* of mental disease, is more helpful. For a general test of causation must inevitably end up as a verbal cloak for unstated principles of responsibility.

[38]The defence has been specifically provided in at least the following countries: Western Australia, Tasmania, Queensland, South Africa, Southern Rhodesia, Malta, seventeen of the American states, Switzerland, Germany, France, Italy, Belgium, Netherlands, Imperialist Russia and the U.S.S.R. Though not specifically provided, the defence is allowed to operate via a general insanity exemption in Norway, Sweden and Denmark, via a jury test of responsibility in New Hampshire, and possibly now in the District of Columbia via a jury test of "causation".