Mental
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and
Criminal
Responsibility

S.J. Hucker C.D. Webster M.H. Ben-Aron

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Foreword

This book grows out of a paradox which is probably incapable of final resolution. Two different conceptions of aberrant human behaviour need to be reconciled; the legal and the psychiatric. Legal man is public man, subject to judgement according to social norms. Mercy and compassion may modify this judgement but cannot alter its fundamental character of placing individual activity within the context of universally applied legal order. Medicine, on the other hand, specifically renounces moral judgement. The physician is expected to deal with friend and enemy, good and bad, without prejudice.

The criminally insane are on the dividing line between these profoundly different responses to wrongdoing, and it is only the compassionate component of the law that allows the entry of the psychiatrist into its deliberations.

The psychiatrically disturbed criminal needs to be defined as a different sort of man in his relation to the social order. This would permit evolution of the different conceptions of wrongdoing held by psychiatrists and by the law. When the criminally insane are defined as not being like other men they cannot be considered subject to the generality of laws governing the actions of other persons.

This book is an examination of the problems generated by this exercise of compassion and its limits. It examines how the law continually defines through discussion the degree to which it will permit mental disorder to qualify its general applicability, and it introduces readers to the issues being discussed and, at the same time, raises new issues which, one hopes, will give new direction to the study of this vital matter.

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Dr. John Dacre of the Ministry of Correctional Services and MET-FORS was the fourth member of our small organizing committee. He not only helped us formulate the idea but did his full share of the administrative and organizational work. John's contribution was very great and much appreciated by us. Dr. Turner, who along with Dr. Weston presents in this volume an excellent comment in Chapter One, was a behind-the-scenes member of our committee. He was never too busy to give advice or to assist us in making arrangements.

Dr. F.H. Lowy, now Dean of Medicine at the University of Toronto, was, as always, most helpful and encouraging from his position as Director of the Institute and Chairman of the Department of Psychiatry. The same may be said of our colleague Professor David Weisstub of Osgoode Hall Law School and the Department of Psychiatry. We would like to thank him for his insightful comments generously given in the light of his previous experience with similar projects.

Except in a very few cases, the actual lectures bear little resemblance to the chapters of this book. Some chapters were written expressly for the book and were not originally presented in lecture form. Other lectures were reorganized and completely reworked. Some contributors wrote on topics unrelated to their lectures. A few of our best contributions to the lecture series came from colleagues who knew from the start that unavoidable obligations might well preclude their writing a formal paper for this book. We are grateful to Professor John Edwards of the University's Faculty of Law, to Professor C. Greenland of McMaster University School of Social Work and to Dr. R. Coulthard of the Institute's Forensic Service, for providing exciting and closely-reasoned papers and in this way helping to ensure the success of the venture as a whole. In a similar way, we should be negligent were we not to ac-

knowledge the help of some of our colleagues in taking responsibility for particular meetings. We refer to Dr. F.A.S. Jensen, Dr. R. Mahabir, Dr. B.T. Butler, Dr. D. Paitich and Dr. D. Byers.

At the Institute and METFORS we have come to appreciate help and support from the Law Reform Commission of Canada. We were honoured to have Mr. Justice DuCros and Judge Edward Houston as commentators for Mr. Justice Arthur Martin's lecture recast here as Chapter Two.

Once the manuscripts were in final form and we, as editors, had read them, they were turned over to Mrs. Diana Ericson. Mrs. Ericson examined each of them thoroughly and quite apart from finding numerous small errors of fact and style, was kind enough to suggest how particular passages could be written to improve clarity and readability. We are most grateful to her for her painstaking and thoughtful work. Three people in particular helped make arrangements and assisted with typing and collation of manuscripts: Mrs. Pam Cook, Ms. Angela Strachan and Ms. Donna Welch.

We are pleased that this book is published by Butterworths. Whitlock's classic, *Criminal Responsibility and Mental Illness*, which provided the impetus for the present volume, was published by the same company. Our thanks are due to Mr. David Hogg, Managing Editor, Academic Division, Butterworths Limited for being so supportive and encouraging; also to Mr. Steve Soloman, our editor, who expertly and patiently guided our manuscript into print.

Introduction

This book had its origin in a series of lectures delivered at the Clarke Institute of Psychiatry during the 1979-80 academic year. Even before the series was completed, it occurred to us that the work of our contributors deserved wider distribution. Whitlock's *Criminal Responsibility and Mental Illness*, although now a classic, is both out of print and out of date and more recent works such as Goldstein's *The Insanity Defence* and Fingarette's *The Meaning of Criminal Insanity* are slanted noticeably in the legal-philosophical direction. There seemed to be a clear need to collect together the perspectives of all the professional disciplines whose specialties intersect in this area. Some, but not all, of the original lectures are reproduced here, but we also invited other colleagues to make submissions especially for the present work.

Quen begins by reviewing the historical groundwork essential for an understanding of the current legal tests. Through his paper we come to appreciate that law often acts as a spur to medicine. We also come to realize that, not only does the phrasing of the key tests change from time to time, but so do the meanings which underlie the tests. He concludes his paper by drawing attention to the need to re-examine our theories, practices and assumptions. The second part of Chapter One, written by Weston and Turner, is directed to that end. The authors draw from their experiences gained over recent years as members of committees established to study the insanity defence and the legal, moral and practical problems which flow from it.

If the chapter by Quen, Weston and Turner does not completely convince the reader that no stable, permanent solution is possible to the matter of the insanity defence, Mr. Justice Martin's definitive account will probably prove sufficiently persuasive. He reminds us that such terms as "disease of the mind" are not static but change and expand as medical knowledge of mental disorder increases. No serious student of the insanity defence can afford to be in ignorance of the M'Naghten Rule and variations from it. Since our comprehension of the key terms alters with time and circumstance, it is imperative that we understand the modern-day cases which force such change upon us.

Dickens goes further and argues that the insanity defence cannot be appreciated without some knowledge of the ethical, social and philosophical issues which lie beneath the law itself. He does not deal only with the abstract issues. In a major section of his essay he reaches into his own scholarship in order to consider the age at which a child may be held responsible for his actions and gives us an up-to-date view of this matter by examining intended and actual consequences of "mental disability" law as it applies to juveniles.

Gold, in the first part of the following chapter, tackles the issue of intoxication and its effect on the capacity to form intent. Here the idea that the insanity defence as a whole can be best illuminated by considering particular issues, is carried a step further. Specific intent is, however, a difficult concept in the abstract. Gold brings it down to earth by considering several cases where the accused was allegedly intoxicated at the time of committing the offence. The author challenges psychiatrists and other mental health workers to state just exactly what they might be able to contribute to the criminal proceedings in cases where capacity to form intent is the major legal issue. Hill, in the second part of this chapter, takes up this offer and shows that, although there are definite limitations to the usefulness of psychiatric testimony on issues involving drunkenness, the clinical approach can indeed inform the court on matters which are beyond the ken of the lay person.

This line of argument is extended in Chapter Five where Sir Martin Roth seeks to demonstrate that current scientific thinking, especially from the areas of psychiatry and neurology, can help explain such puzzling phenomena as automatism. He also takes issue with the now familiar claim that psychiatrists and other mental health workers are altogether unable to predict future dangerous behaviour.

It should be clear that we, as editors, have taken some care to arrange that our contributors bring out the tension between law and medicine. It is our belief that intellectual and practical advances are most likely to occur when that level of tension is fairly high. Chapter Six by McGee, Atcheson and Orchard is based on that principle. Here, our authors put aside the academic and philosophical niceties and come to grips with the everyday issues which concern both lawyers and forensic psychiatrists. The debate is carried back and forth on such matters as the "battle of the experts," "psychiatrist shopping," and "the hired gun" image of some forensic psychiatrists.

Emerging on the psychiatric side of the dialogue is Tanay. This author works with a firm grasp of psychoanalytic theory and attempts to make sense of irrational behaviour within the context of the court and the legal system as a whole. He implies that, despite the breadth of scholarship on the subject of insanity, man's most primitive urge for vengeance is often inadequately considered. Throughout his chapter he draws on his own clinical material to show the inequities and, at times, the absurdities of legal decision-making.

Quinsey, in Chapter Eight opens more or less where Tanay leaves off. In a provocative contribution he suggests that, despite the seemingly interminable discussion about the nature of criminal insanity, the actual results of all this scholarship and argument may have but slight effect upon the actual lives of individual mentally disordered offenders. For him the "real issues" are: How can these persons be treated and how do we know when they are safe to be released?

Treatment and release are the topics considered by Glasberg and Wayne. In what can be considered to be an exploratory, descriptive study the authors provide a careful longitudinal review of seven cases. They follow the lives of individuals who had previously been found "not guilty by reason of insanity" from the incident which precipitated their indeterminate detention, through their progress in treatment and finally their rehabilitation and reintegration back into the community, free of any legal restrictions.

The final chapter widens the scope of the book by introducing a literary perspective. Here, M.S. Webster examines a single work by the Russian novelist, Dostoevsky. *Crime and Punishment* explores the concepts of guilt, freedom of choice, madness and responsibility from a layman's viewpoint. The widespread and enduring popularity of this masterpiece of fiction reflects the importance and fascination of these themes not just to scholars but to all members of society.

S. J. Hucker C. D. Webster M. H. Ben-Aron

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Chapter One Part One

Anglo-American Concepts of Criminal Responsibility: A Brief History*

Jacques M. Quen

Even a superficial review of the history of man's attempts to formulate concepts of criminal responsibility clearly reveals that a number of conflicting issues are involved in the controversy. This essay, therefore, begins from the premise that a knowledge of the historical background is essential for an understanding of the current context in which "insanity" and related legal defences operate.

Ancient Hebrew law¹ recognized that the "deaf mute, an imbecile or a minor" were not responsible for their actions and Aristotle² reasoned that the capacity for choice was critical to the question of moral blameworthiness and that this capacity was lacking in animals, children and insane persons.

Earliest records suggest that the British secular law was one of strict liability. The offender was bound to make material reparation, or retribution, to the extent of the damage he caused. The seriousness of the crime was therefore independent of the intent. However, even under this legal system, the insane were not held responsible for making reparations, the burden of which fell on his family.

In his book *De Legibus et Consuetudinibus Angliae*, Henry Bracton (died 1268) codified and integrated the hitherto separate ecclesiastical law and secular law into a single legal system and reiterated the fundamental common law principle that a crime consists of two necessary in-

^{*}We thank Spectrum Publications, Inc. for allowing us to publish this material which is in some respects similar to an account to be found in Chapter Two, Violence and Responsibility: The Individual, The Family and Society, Robert L. Sadoff, Editor (New York: Spectrum Publications Inc., 1978).

gredients: a criminal act (actus rea) and a criminal intention (mens rea) saving:

We must consider with what mind or with what intent a thing is done . . . in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure intervene, nor is a theft committed except with the intent to steal . . . And this is in accordance with what might be said of the infant or the madman, since the innocence of design protects the one and lack of reason in committing the act excuses the other.³

Subsequently, William Lambarde (1536-1601) expanded on Bracton's view of the necessary mental element by introducing the notions of an "understanding will," freedom of choice and knowledge of good and evil.⁴

By the 17th century, Edward Coke (1552-1634) in his *Institutes of the Laws of England* defined four classes of *non compos mentis* by which a person could not be held responsible for his criminal behaviour:

- 1. An idiot, who from his nativity by a perpetual infirmity is non compos;
- 2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding;
- 3. A lunatic that hath sometime his understanding, and sometimes not, . . . and therefore he is called *non compos mentis* so long as he hath not understanding;
- 4. He that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken. But that kind of non compos mentis shall give no privilege to him or his heirs.⁵

Matthew Hale (1609-1676), one of the most learned of the early commentators on criminal insanity, in his *History of the Pleas of the Crown* published posthumously in 1736, sixty years after his death, recognized "total" and "partial" insanity and suggested that the tests which should decide whether an individual's insanity was severe enough to exonerate him should be whether or not he had "as great an understanding, as ordinarily a child of fourteen years hath."

Hale's choice of the age of fourteen indicated his intention that the concepts of total and partial insanity be interpreted liberally and also to strengthen the role of the jury in determining the level of understanding of the defendant and of the normal fourteen year-old.

In 1724, twelve years before the publication of Hale's treatise, the first of the historically significant insanity trials took place involving Edward Arnold who shot at and wounded Lord Onslow. Evidence was adduced that Arnold, known locally as "Crazy Ned," had complained

frequently that Onslow had bewitched him and at times entered his body to torment him. In his charge to the jury, Justice Tracy instructed that for a man to be acquitted of a serious offence on the grounds of insanity he must be:

totally deprived of his understanding and memory, and does 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

This has been called the "wild beast test," but at that time in England the term "brute" referred to farm animals, and wild beasts in England were rabbits, foxes, deer, badgers, etc. The emphasis was on the lack of intellectual ability and understanding rather than the violently wild. ravenous beast image that the phrase calls to mind today. Arnold was found guilty and sentenced to death but interestingly, Lord Onslow himself, upon his recovery, intervened and the sentence was commuted to life imprisonment.

The next major insanity trial of importance was that of James Hadfield in 1800. A veteran of the Franco-British Wars of the 1790s, he had sustained severe brain damage as a result of wounds and was discharged from the army because of insanity. He developed the delusion that God would destroy the world but that he could prevent this by sacrificing his own life. Believing that suicide was a mortal sin, he decided to attempt to kill the king, knowing that attempted regicide was punishable by death. Hadfield's defence counsel, Thomas Erskine, a brilliant young lawyer who later became Lord Chancellor of England, set out to supplant the legal definition of "total insanity" that the prosecution attorney had described. As if unaware that Hale had suggested the understanding of a fourteen year-old as the criterion, Erskine informed the jury that if "total insanity" implied "such a state of prostrated intellect as not to know his name, nor his condition, nor his relation to others . . . then no such madness ever existed in the world." He added that in his experience with the insane:

they have not only had the most perfect knowledge and recollection of all relations they have stood in towards others and of the act and circumstances of their lives, but have in general been remarkable for their subtlety and acuteness. . . . Delusion where there is no frenzy or raving madness, is the true character of insanity; . . . I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the immediate offspring of disease.8

In discussing what should be done with Hadfield following his acquittal, the trial judge, Lord Kenyon, stated:

The prisoner, for his own sake, and for the sake of society at large, must not be discharged; for this is a case which concerns every man of every station, from the king upon the throne to the beggar at the gate; people of both sexes and of all ages may, in an unfortunate frantic hour, fall a sacrifice to this man, who is not under the guidance of sound reason; and therefore it is absolutely necessary for the safety of society that he should be properly disposed of, all mercy and humanity being shown to this most unfortunate creature.9

It is interesting to note that up to the time of this significant trial, there is nothing to indicate that medical men were ever consulted with respect to the legal pronouncements on insanity. Bracton, Lambarde, Coke, Hale, Erskine and Kenyon make no reference to any particular physician or medical work. In fact, it was not until after Hadfield's trial that the first book in English concerned specifically with legal insanity appeared containing the plea that medical evidence should be called in all criminal cases if there was any question of insanity. ¹⁰ At least until 1800, the insanity defence was nurtured and grown in purely legal soil without the input of medical thought.

In 1840, Edward Oxford was acquitted, on the ground of insanity, of attempting to assassinate Queen Victoria. In his charge to the jury, Chief Justice Denman instructed:

If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the act that he was committing.¹¹

Essentially Denman was philosophically in line with the reasoning on insanity adduced at Hadfield's trial. It is also interesting to note the introduction of the notion of irresistible impulse, which was to reappear subsequently.

Probably the most well known of the classic insanity trials of the 19th century was that of the Scottish wood-turner, Daniel M'Naghten, who in 1843 fatally shot Edward Drummond, private secretary to the English Prime Minister, Robert Peel. 12 Possibly arising from an attempt to make sense of an irrational act, it has been widely believed that it was Peel himself who was the intended victim. However, there is no good documented evidence that this was the case. M'Naghten's own statement on arraignment explicitly restricted his delusion to:

the Tories in my native city have compelled me to do this. They follow me and persecute me wherever I go, and have entirely destroyed my piece of mind. They followed me to France, into Scotland and all over England . . . they have accused me of crimes of which I am not guilty; in fact, they wish to murder me.

Unanimous medical evidence of M'Naghten's insanity, and other symptoms, at the trial support the inference that the shooting was probably the result of a psychotic idea of reference. His acquittal, however, raised such a public outcry that the House of Lords called upon the fifteen judges of the Oueen's Bench to clarify the legal position regarding the criminal responsibility of the insane. Five questions were asked, none of them specifically mentioning M'Naghten's trial, although they did refer to issues which had been raised in response to its outcome. The Law Lords combined two of the questions and responded with four answers. That which is generally referred to as the "M'Naghten Rule" states that to acquit an individual of a crime:

It must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that what he was doing was wrong. 13

There was general concern over the judges' answers as it was felt that the meaning of the words "know" and "wrong" were unclear. British and American psychiatrists protested that their asylums were filled with people who knew the difference between right and wrong but who were unquestionably not morally responsible for their insane behaviour, and dissatisfaction with the M'Naghten Rule gradually increased as time passed.

The judges' responses represented a remarkably simplistic and regressive interpretation of the way English common law on the subject of insanity had evolved. While it is possible that they had adequate knowledge of the precedents, they may well have been influenced, as have many subsequent judicial pronouncements, by current public policy considerations. At the time, England was in a state of internal turmoil and crisis which must have appeared much more imminently threatening than they do today. In 1840, Oxford's attempted assassination of the Oueen almost succeeded and the near assassin was exonerated on the grounds of insanity. Now an important public figure had been killed and his murderer acquitted. The London Times newspaper of the period reflects an atmosphere suggesting that the entire social, political, economic, and moral structure of the country was disintegrating.

By the 1860s the M'Naghten Rule was solidly entrenched in the English common law and appeared to be well on the way to similar acceptance by the American courts. Nevertheless, at least two highly influential individuals were not content with the situation: the physi-