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**Cover Page Footnote**
I wish to acknowledge my gratitude to the Fulbright Commission for their continued support during my visit to the U.S.A. and to the Dickinson School of Law, both faculty and students, for providing me with such an excellent and intellectually stimulating working environment. I also wish to express my special thanks to my research assistant Kathleen Harrington whose comments and intellectual support have been of immeasurable value.

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McNaghten Rules OK? The Need for Revision of the Automatism and Insanity Defenses in English Criminal Law

R.D. Mackay*

I. Introduction

There has been a resurgence of interest in the codification of "craziness" both in the United States and in England. Most recent legislative reforms in the United States have followed in the wake of the jury's verdict in the Hinckley case, whilst in England renewed interest in revising the insanity defense has been prompted by a report to the Law Commission on the codification of the criminal law. The purpose of this article is first to briefly review relevant reforms in the United States; second to critically analyze the present legal position in England; third to discuss English reform proposals; and finally to offer some alternatives to revising the automatism and insanity defenses.

Perhaps more than any other area of the criminal law the insanity plea generates heated discussion and debate. This has little to do with the frequency with which the defense is used, which in England is virtually never at all and in the United States only rarely.¹

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The following article is an expanded version of a paper given during the 1986 W.G. Hart Legal Workshop at the Institute of Advanced Legal Studies in London entitled "Craziness and Codification - Revising the Automatism and Insanity Defences," see pp. 109-121 of Criminal Law and Justice (Sweet & Maxwell, England 1987) ed. I.H. Dennis. Much of the expansion resulted from an informal faculty presentation given at the University of Arizona College of Law in February 1987.

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2. CODIFICATION OF THE CRIMINAL LAW: A REPORT TO THE LAW COMMISSION (Law Comm'n No. 143) (1985). The Law Commission was established by the Law Commissions Act 1965 (1965 c.22) "for the purpose of promoting the reform of the law" and consists of a chairman and four other Commissioners appointed by the Lord Chancellor. In the case of this particular report, however, the work was "subcontracted" to four academic lawyers.

3. The Criminal Statistics: England and Wales consistently reveal that the insanity de-
Instead, the discussion tends to be initially based upon the fundamental question of whether it is morally proper to excuse mentally abnormal persons from the penal consequences of their actions, which but for their mental conditions would be adjudged criminal. In short, is the insanity defense essential to the moral integrity of the criminal law?6

II. The United States

Clearly in the United States some states have given a negative answer to this question6 having, mainly in the light of the Hinckley case, decided to abandon the insanity defense and substitute a ‘mens rea’ approach. This is currently the position in Montana,7 Idaho,8 and Utah9 where the state legislatures have enacted provisions rendering evidence of a defendant’s mental condition inadmissible in support of an insanity defense and instead restricting such testimony to the issue of ‘mens rea.’ If the defendant is convicted his mental state must be considered by the court before sentence in order to decide the appropriate form of punishment or disposal. The Supreme Court of Montana in State v. Korell,10 has upheld the constitutionality of this type of measure, although to date the United States Supreme Court has not addressed the issue. Clearly, the ‘mens rea’ approach restricts the acquittal of a mentally ill defendant to “those cases where the defendant at the time of the offense was so seriously mentally ill that he did not have the requisite intent or state of mind required to commit an illegal act.”11 Thus, the mens rea test is simi-

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8. IDAHO CODE, tit. 18 § 207, tit. 19 §§ 714, 1715 (Supp. 1983) (the only verdicts provided for by the statute are guilty or not guilty); see Geis and Meier, Abolition of the Insanity Plea in Idaho: A Case Study, 477 ANNALS 72, 76. “The aim is to distinguish testimony bearing on legal responsibility from that concerned with moral blameworthiness. A defendant will be examined before trial, however, to determine if he is fit to proceed to trial.”


lar to the first limb of the McNaghten Rules and has been criticized as being too restrictive "since in most cases the 'actus reus' and 'mens rea' doctrines and defenses other than insanity will fail to excuse even the craziest defendant." Instead, it is argued that the proper "criteria for excuse is that the actor is nonculpably lacking either reasonable rationality or is compelled."

The Hinckley case has led to a series of alternative measures being enacted in the United States. At least twelve states have passed statutes providing for an alternative verdict of "guilty but mentally ill." This type of measure appears to be designed to offer a compromise to the jury whenever a defendant pleads insanity. He may be found "guilty but mentally ill" provided the judge or jury find "that the defendant (i) is guilty of the offense charged, (ii) was mentally ill at the time of the commission of the offense and (iii) was not legally insane at the time of the commission of the offense." Once this verdict is returned the court can then sentence the defendant in the same way as if an ordinary conviction had been returned and if psychiatric treatment is required then this may follow. However, this new verdict has been strongly criticized as confusing to juries and as a retrograde step in that it may allow for some seriously mentally ill persons to be sent to prison where treatment facilities are inadequate or lacking altogether. In addition, although one of the underlying purposes behind the new verdict was an attempt to reduce the number of persons found "not guilty by reason of insanity," this has not happened since it would appear "that the displacement in disposition is from the guilty to the GBMI population." Despite these and other criticisms this particular measure

13. Id. at 790.
17. There is an inevitable overlap between the definitions contained in the verdicts leading to guilty but mentally ill and not guilty by reason of insanity and it is difficult to see how a jury can truly differentiate between the two, see Fentiman, supra note 16, at 635; Herman & Sor, supra note 16, at 571; Note, Indiana's Guilty But Mentally Ill Statute: Blueprint to Beggile the Jury, 57 Ind. L.J. 639, 639-46 (1982).
has so far survived constitutional challenge and may be on the increase.

Another type of measure in the United States has been the enactment of a new form of insanity defense. This has taken the form of a move away from the volitional tests, especially that originally proposed by the American Law Institute (ALI), towards a tightening of the insanity defense. Ironically, the much criticized McNaghten test has re-emerged as influential. Thus, the federal law was altered by the Insanity Defense Reform Act 1984 which enacts a new test that is something of a cross between McNaghten and the cognitive branch of the ALI by providing a defense if the defendant "as a result of a severe mental disease or defect was unable to appreciate the nature and quality or the wrongfulness of his acts." It is also provided that the burden is upon the defendant to prove his insanity "by clear and convincing evidence."

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20. A recent example of this is to be found in the Court of Appeals of Alaska's decision in Hart v. State, 1985 Ala. Adv. Sh. 482, 702 P.2d 651 (1985), where it was held that the adoption of a new state insanity defense, eliminating irresistible impulse and creating a new verdict of Guilty but Mentally Ill, is not unconstitutional.

21. In 1982, approximately two dozen states were considering the insanity plea. N.Y. Times, June 24, 1982, at D21, col. 1. Also, Press, The Insanity Plea on Trial, NEWSWEEK, May 24, 1982, at 56. Slobogin states . . . at least twelve states have adopted some version of the verdict and perhaps twenty others have considered or are considering similar statutes." Supra note 19, at 496.

22. MODEL PENAL CODE § 4.01 provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."

23. It is worth noting that the ALI test was used in the Hinckley case and resulted in his being found "not guilty by reason of insanity," a verdict which one would have thought is more likely to have been returned under the volitional limb of the test. See P.W. Low, J.C. Jeffries & R.J. Bonnie, supra note 1, at 120-122.

24. The test is . . . that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

(1843) 10 Cl and F. at 210; [1843-60] All E.R. 229 at 233.


26. There have been a spate of similar proposals. For example, the American Bar Association and the American Psychiatric Association have both recommended a test based upon a proposal made by Bonnie, the basis of which is that "as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offence." See Bonnie, The Moral Basis of the Insanity Defence, 69 A.B.A. J. 194, 197 (1983).

27. Other states which have altered the burden of proving insanity by placing it upon
Finally, in California the ALI test has been abandoned in favour of an apparently conjunctive McNaghten test which provides that the accused must prove "by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act AND of distinguishing right from wrong at the time of the commission of the offense." Although the test was approved by the electorate after a referendum, the California Supreme Court recently held in People v. Skinner, that the new test must be read in the disjunctive, as creating two distinct and independent limbs upon which an insanity plea may be based. The reasons for this rather remarkable decision appear to be that the court considered first that if the new test was indeed conjunctive then it might be so strict as to be unconstitutional and second that in any event the use of the word "and" instead of "or" was likely to have been the result of a draftsman's error. Similarly, Alaska also repealed the ALI test in 1982 but replaced it with a test which is restricted to the first limb of the McNaghten Rules. The new test provides "In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct." To date, this limited test has survived constitutional challenge.

III. England

A. The Present Law

English law continues to adhere to the McNaghten Rules, the essentials of which are:

that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.
These rules resulted from the adverse public reaction to the jury's verdict of acquittal by reason of insanity of Daniel McNaughten after his trial for the murder of the Prime Minister's private secretary. In many ways, therefore, McNaughten's insanity acquittal, which in turn led to a tightening up of the insanity defense, may be viewed as an earlier but analogous decision to the Hinckley verdict in the United States.

The McNaughten case has, naturally enough, attracted a mass of literature ranging from debate about the proper spelling of his name to the question of whether he was in truth mentally ill or in reality a political activist. A point of controversy which is perhaps a little less well known is the fact that there is not even any degree of certainty as to how many judges concurred in the formulation of the famous rules. However, despite all of this historical uncertainty one thing is clear. The rules themselves have been and continue to be immensely influential in the common law world.

So far as England is concerned, they have remained unchanged


34. G. Williams, Textbook of Criminal Law 643, n.2 (Stevens, London 2nd ed. 1983) states "Daniel McNaughten was acquitted by the jury, before the formulation of the rules now associated with his name; but under those rules he should have been convicted." For a brief judicial analysis of the insanity defense prior to McNaughten see R v. Sullivan [1983] 1 All E.R. 577 at 580 and for detailed historical analysis of pre-McNaughten insanity see Moran, The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800) 19 L. AND Soc'y Rev. 487 (1985); Moran, The Punitive Uses of the Insanity Defence: The Trial for Treason of Edward (Oxford (1840), 9 INT'L. J. OF L. & PSYCHIATRY 171 (1986). In these articles Moran argues that far from representing an enlightened, humanitarian view of criminal responsibility the insanity verdict was developed to serve the prosecution's interests of punishment and incapacitation.


36. R. Moran supra note 33.

37. It is generally assumed that all 15 judges were involved but the House of Lords' record speaks only of 11. Apart from Tindal L.C.J. who delivered the collective ruling and Maule J. who dissented we cannot now be sure who the others were. See, The Judges Responsible for the Rulings in McNaughten's case, 57 AUSTRALIAN L.J. 315 (1983).

since their inception in 1843. To date they have sustained constant criticism including three official reports, each of which has recommended their total abrogation. Not only that, the rules are quite unique as a source of English law. There has been nothing like them before or since. What, it may be asked, gives these rules the power of law in England? They were not adopted by Parliament in any statute and were certainly not the direct product of judicial proceedings, being merely answers given by the judiciary to hypothetical questions. Nonetheless, they have been applied so often and for so long that they unquestionably form a part of the common law of England and must be accepted as such.

In England there has been no recent support for an abolition of the insanity defense. Unlike the position in the United States, however, where the scope and use of the insanity plea has been the subject of trenchant criticism, to some extent the opposite has occurred there. Instead, a primary dissatisfaction in England stems from the fact that the insanity defense is so little used. Two of the most important reasons for the demise of the insanity defense in England have been, first, the introduction in 1957 of a separate diminished responsibility plea which, if successful, reduces murder to manslaughter and, second, the "bizarrely inflexible disposal consequences" following an insanity "acquittal." Because of their sig-

39. They are: First, in 1923 the Atkin Committee on Insanity and Crime (Cmd. 2005) which recommended that the defendant should not be held responsible, "when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist." Second, in The Royal Commission on Capital Punishment (Cmd. 8932) 1953 which suggested that the best course would be to "leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible." Finally, the Butler Report (Cmd. 6244) in 1975 adopts a different approach which is explained at a later stage in this article.

40. The Report of the Committee on Mentally Abnormal Offenders, (Cmd. 6244) at para. 18.10 was clearly of the opinion that the defense ought to be retained and endorsed the Royal Commission on Capital Punishment's (Cmd. 8932 1853) p. 278 reaffirmation of "the ancient and humane principle . . . that if a person was at the time of his unlawful act mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law."

41. See Morris, supra note 6 and also W.J. Winslade and J.W. Ross, The Insanity Plea 20 (1983) where a series of cases, including Hinckley, are reviewed in an attempt to show "how and why the insanity plea defeats justice, discredits psychiatry and enrages the public."

42. The Criminal Statistics of England and Wales referred to above at note 3 confirm that the insanity defense in England is only pleaded successfully each year on one or two occasions. These statistics do not cover cases where the defense is pleaded unsuccessfully. However, it seems highly likely that this figure is also minimal, see, e.g., Mackay, The Role of Psychiatric Reports in the Crown Court Trial Process (Leicester Polytechnic Law School Monographs 1986) where during a two year research study in a busy English criminal court dealing with all indictable cases where defendants had been psychiatrically investigated, not a single insanity plea, successful or unsuccessful, was encountered.


44. There is only one form of disposal which is under section 5 Criminal Procedure (Insanity) Act 1964 (c. 84) and entails indefinite confinement in a special mental hospital. For
nificance, both of these interconnected reasons deserve further consideration.

The English plea of diminished responsibility is contained in section 2(1) of the Homicide Act 1957\(^{45}\) which provides:

> Where a person kills or is a party to the killing of another he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

Although this plea is only available in murder prosecutions its effect has been to reduce the practical importance of the defense of insanity to virtual redundancy. The reasons for this are not hard to find. First, even before the passing of section 2 the insanity defense was rarely relied on outside of murder cases.\(^{46}\) Second, the wording of section 2 is a great deal wider than the McNaghten Rules and encompasses mental conditions which would clearly not fall within the Rules’ confines.\(^{47}\) Finally, and perhaps most important, a manslaughter conviction avoids the mandatory penalty of life imprisonment attached to a murder conviction and gives the judge complete discretion over sentencing,\(^{48}\) including the option of a hospital order.\(^{49}\) In contrast to this, a successful insanity “acquittal” leaves the judge no such discretion but instead brings with it automatic detention in a mental hospital for an unpredictable length of time. Small wonder, therefore, that even before the 1957 Act, the insanity defense was restricted to murder, as the prospect of indefinite commitment to a top security mental hospital was viewed as much less desirable than the normal punishment for all other crimes. It follows, therefore, that in murder cases as of 1957 “there is every incentive for those who represent accused persons to prefer the diminished responsibility to the insanity defence”\(^{50}\) with the result that in some

\(^{45}\) Homicide Act 1957 (5 & 6 Eliz. 2, c. 11).

\(^{46}\) A major reason for its use was to escape the death penalty, but with the passing of the Murder (Abolition of Death Penalty) Act 1965 (c. 71) even this incentive disappeared.

\(^{47}\) For a full analysis of the scope of “abnormality of mind” within diminished responsibility see S. Dell, Murder into Manslaughter: The Diminished Responsibility Defence in Practice 33-40 (Oxford University Press England 1984).

\(^{48}\) See G. Williams, supra note 34, at 692 who gives examples of several cases demonstrating that the range of sentencing includes suspended prison sentences and even probation in appropriate circumstances.

\(^{49}\) Hospital orders are given under sections 37 and 41 of the Mental Health Act 1983 (c. 20). For detailed research into their use in diminished cases, see S. Dell, supra, note 47, at 8-24. The 1983 Criminal Statistics (Cmd. 9349) reveal that out of 69 successful diminished pleas there were 30 hospital orders and eight probation/supervision orders.

\(^{50}\) S. Dell, supra note 47, at 30. In support of this contention the author continues
instances defendants prefer to plead guilty to manslaughter rather than be the subject of a special insanity "acquittal."

This reprehensible state of affairs has also been starkly demonstrated within the defense of automatism which in English criminal law is a plea based on "unconscious involuntary action" and reflects an increasing awareness by the courts of the practical need for a voluntary act before an accused can be convicted of a criminal offense. This particular area of the law continues to cause considerable problems to the English courts. A major source of difficulty has stemmed from the fact that a successful automatism plea may result in an unqualified acquittal. For obvious social defense reasons this has been a source of considerable worry to the courts and in order to restrict the availability of such acquittals, the judiciary has developed a complex body of law built upon the phrase "disease of the mind" within the McNaghten Rules. At the root of this development has been the division of automatism into two types; namely, sane and insane. The basis of this division is that if the defendant's automatic actions are found to have been the result of a disease of the mind then the only defense available is one of insanity with automatic commitment to a mental hospital. If, on the other hand, the defendant's unconscious actions were caused by some condition other than a disease of the mind, then his automatism plea is of the sane variety and will, if successfully pleaded, mean outright or ordinary acquittal.

This dichotomy can be traced to the decision of Devlin J in R. v. Kemp where a wide definition of what constitutes "disease of the mind" was felt to be necessary in order to ensure the compulsory hospitalization, by means of the special verdict, of an accused suffering from arteriosclerosis. Such an approach has since been fully endorsed by the House of Lords in Bratty v. Attorney General for Northern Ireland and more recently in R. v. Sullivan. The facts

Certainly in the present research the contents of the psychiatric reports not infrequently suggested that men pleading guilty to diminished responsibility manslaughter were in fact mad, according to the McNaughten Rules, and for 6 percent of the section 2 sample of 253 men there was actually evidence in the records that one or more of the examining doctors had regarded the defendant as falling within the scope of the McNaughton Rules.


of the latter case were that the defendant was charged with assaulting a friend. At his trial he claimed that the assault had been committed whilst he was in the final stage of recovering from a minor epileptic seizure. The defendant had been a lifelong sufferer of epilepsy and the undisputed medical evidence at the trial supported the fact that the defendant had indeed suffered from such a seizure, the effect of which would have been lack of memory and unconsciousness of what had occurred during the relevant time. The trial judge ruled that epilepsy is a "disease of the mind" and that therefore the defense amounted to one of insane rather than sane automatism. Consequently, if the jury accepted this defense they would be required to return a special verdict of not guilty by reason of insanity. Not unnaturally, the defendant was advised to change his plea to one of guilty and so a conviction was recorded for which he was sentenced to three years' probation with a condition of medical treatment. The accused later appealed on the ground that the trial judge ought to have left the defense of non-insane automatism to the jury. The Court of Appeal and the House of Lords both held that the trial judge had been correct in his ruling and dismissed the appeals. In speaking for a unanimous House of Lords, Lord Diplock was adamant in concluding that the special verdict was appropriate if an offense was committed during or immediately after an epileptic fit whilst the mental faculties of reason, memory and understanding were temporarily suspended. Relying on R. v. Kemp, his Lordship concluded.

The nomenclature adopted by the medical profession may change from time to time; Bratty was tried in 1961. But the meaning of the expression "disease of the mind" as the cause of "a defect of reason" remains unchanged for the purposes of the application of the McNaghten Rules. . . . 'mind' in the McNaghten Rules is used in the ordinary sense of mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of the commission of the act. The purpose of the legislation relating to the defence of insanity . . . has been to protect society against recurrence of the dangerous conduct. The duration of a temporary suspension of mental faculties of

57. [1957] Q.B. 399.
reason, memory and understanding, particularly if, as in the appellant's case, it is recurrent, cannot on any rational ground be relevant to the application by the courts of the McNaghten Rules. It is natural to feel reluctant to attach the label of insanity to a sufferer from psychomotor epilepsy of the kind to which the appellant was subject, even though the expression in the context of a special verdict of not guilty by reason of insanity is a technical one which includes a purely temporary and intermittent suspension of the mental faculties of reason, memory and understanding resulting from the occurrence of an epileptic fit. But the label is contained in the current statute, it has appeared in this statute's predecessors ever since 1800. It does not lie within the power of the courts to alter it. Only Parliament can do that. It has done so twice; it could do so again.

What the case manifestly demonstrates, therefore, is the overwhelming need for statutory change. At the conclusion of his judgment in the Court of Appeal, Lawton LJ claimed that the trial judge's acceptance of a guilty plea was "merciful" and had "enabled justice to be done." Nothing, of course, could be further from the truth. In effect, the appellant had been "forced" to plead guilty to an offense, even though at the time of its commission all concerned accepted that he was not criminally responsible. Such a position is quite untenable and does no credit to the criminal law.

Although Sullivan was not considered an appropriate occasion for exploring possible causes of non-insane automatism, Lord Diplock nevertheless commented that the defense would be available, "... in cases where temporary impairment not being self-induced by consuming drink or drugs, results from some external physical factor such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes." Lord Diplock's dictum makes it clear that in his opinion the paramount requirements of a defense of non-insane automatism are that the impairment is purely temporary and that it is attributable to "some external physical factor." Thus, although Mr. Sullivan's epileptic state satisfied the first of these conditions, it failed to satisfy the second and thus, in law, constituted a disease of the mind within the McNaghten Rules.

The distinction between insane and non-insane automatism accepted by Lord Diplock in R. v. Sullivan is neither clear nor satisfactory. Its presence is to a large extent dictated by a conflict between the need for public protection and a natural reluctance to

59. [1983] 1 All E.R. at 582.
60. [1983] 2 All E.R. at 678.
61. Id.
label defendants as legally insane. The dilemma is admirably summed up by Lawton LJ in *R. v. Quick*, where the Court of Appeal was called upon to decide whether a diabetic who had suffered from a hypoglycemic episode should be regarded in law as suffering from a "disease of the mind." Whilst addressing this problem his Lordship remarked:

[Quick] may have been at the material time in a condition of mental disorder manifesting itself in violence. Such manifestation had occurred before and might recur. The difficulty arises as soon as the question is asked whether he should be detained in a mental hospital? No mental hospital would admit a diabetic merely because he had a low blood sugar reaction; and common sense is affronted by the prospect of a diabetic being sent to such a hospital when in most cases the disordered mental condition can be rectified quickly by pushing a lump of sugar or a teaspoonful of glucose into the patient’s mouth.63

In order to ensure, therefore, that common sense should not be affronted, the Court of Appeal ruled that Quick’s mental condition “was not caused by his diabetes but by his use of the insulin prescribed by his doctor. Such malfunctioning of mind as there was, was caused by an external factor and not by a bodily disorder in the nature of a disease which disturbed the working of his mind.”64 It followed that Quick’s defense was one of non-insane rather than insane automatism.

Clearly, the court’s ruling in Quick equates with Lord Diplock’s remark in *R. v. Sullivan* when he referred to non-insane automatism requiring some “external physical factor such as a blow on the head or the administration of an anaesthetic for therapeutic purposes.”65 However, it is by no means certain how this so-called “external factor doctrine” will develop nor how much emphasis should be placed on the word “physical” as a possible means of further restricting the scope of non-insane automatism. Some examples of the difficulties likely to be encountered within this area of the law may be given in order to demonstrate the unsatisfactory nature of the insane/non-insane automatism dichotomy. An obvious and yet not uncommon problem concerns sleepwalking, which prior to *R. v. Sullivan* had been regarded in law as a form of non-insane automatism resulting in some cases in an unqualified acquittal.66 Such a result may now no longer be possible owing to the lack of any external factor in

63. Id. at 352.
64. Id. at 356.
66. For discussion and examples of sleepwalking acquittals see G. WILLIAMS, supra note 34, at 665-666.
cases of somnambulism. In short, sleepwalkers may now risk an insanity verdict or be compelled to plead guilty where formerly the law was benign enough to acquit. A second problem concerns the use of the word “physical” in Lord Diplock’s dictum. For example, in the case of *R. v. Bailey*, decided some ten years after *R. v. Quick*, the defense once again was that of automatism on the part of a diabetic caused by hypoglycemia. The explanation for the hypoglycemia was “failure to take sufficient food following his last dose of insulin.” Apart from the fact that in both Quick and Bailey the diabetes is an “internal” organic disorder which necessitates doses of insulin, the additional difficulty in the latter case is that it was the failure on the accused’s part to take food within a short period after insulin treatment, which was the immediate cause of the hypoglycemia. Such a failure seems unlikely to be regarded as an external “physical” factor, in which case whilst Quick’s condition is not in law a “disease of the mind,” Bailey’s could be so regarded. Although it has to be conceded that in the latter case the issue of insanity was never raised, which again, of course, is understandable if only for the common sense reasons already referred to.

As a final example of the difficulties engendered by the external factor doctrine, reference may be made to a series of Canadian cases dealing with what may be conveniently referred to as psychological blow automatism. The most important decision within this area is that of the Supreme Court of Canada in *Rabey v. R.* where it was held that emotional stress producing automatism, if it was part of “the ordinary stresses and disappointments of life which are the common lot of mankind” could not be regarded as an external factor but must instead “be considered as having its source primarily in the respondent’s psychological or emotional make-up” and hence a “disease of the mind.” On the other hand, “extraordinary external events” of such intensity that they “might reasonably be presumed to affect the average normal person without reference to the subjective make-up of the person exposed to such experience” might constitute cases of non-insane automatism. This distinction has already

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67. *Id.* Williams remarks, “... since the decision in Sullivan... it seems very likely that sleepwalkers will in the future find themselves saddled with an insanity verdict.” *Id.* at 666.


70. [1983] 2 All E.R. at 506.

71. See, e.g., Mackay, *Non-Organic Automatism — Some Recent Developments*, 1980


73. *Id.* at 199.

74. *Id.*

75. *Id.*
been subjected to considerable criticism\textsuperscript{78} and further exemplifies the complexity of the external factor doctrine. However, the need for a "physical" external factor appears to have been tacitly endorsed by Martin JA in the Ontario Court of Appeal when in \textit{R. v. Oakley}\textsuperscript{77} he remarked:

Whether there is any evidence of an external cause of a kind capable of producing non-insane automatism is a question of law. The only factors relied upon by the judge were either emotional stress caused by his being left alone when his parents came . . . to visit his brother, the respondent's financial problems, and the effect of toxic fumes to which the respondent was exposed in his work with fiberglass or a combination of both factors. It is clear that the emotional stress of the kind described was not an external factor sufficient to produce non-insane automatism. . . . The exposure to toxic fumes could be an external cause.\textsuperscript{78}

It is not without interest to note the opening comment of Martin JA's judgment in \textit{R. v. Oakley} when he said; "This appeal raises once again the intractable problem of non-insane automatism."\textsuperscript{79}

The remainder of this article is devoted to proposals which, in part at least, attempt to resolve some of the intractable difficulties discussed in this section.

\section{Existing Revision Proposals}

The most recent proposals in England for revision of the law relating to automatism and insanity are those contained in the \textit{Report of the Committee on Mentally Abnormal Offenders} published in 1975, commonly known as the \textit{Butler Report}.\textsuperscript{80} Fresh impetus to these proposals has now been given by the publication in 1985 of the \textit{Law Commission Report on the Codification of English Criminal Law},\textsuperscript{81} which in turn contains a detailed reconsideration of the original Butler recommendations.\textsuperscript{82} Most English criminal lawyers accept that there is a desperate need for flexibility of disposal after a successful insanity plea. In that respect the Butler proposals which recommend such flexibility\textsuperscript{83} have been welcomed.\textsuperscript{84} But at that point

\begin{thebibliography}{99}
\bibitem{76} See the dissenting opinion of Dickson J in Rabey \textit{v.} The Queen, \textit{id.} at 200 and Mackay, \textit{Non-Organic Automatism, supra} note 71, at 356.
\bibitem{77} (1986) 24 C.C.C.3d 351.
\bibitem{78} \textit{Id.} at 362.
\bibitem{79} \textit{Id.} at 354.
\bibitem{80} Cmd. 6244, chapter 18, 216-240.
\bibitem{81} (Law Comm'n No. 143) H.C. 270.
\bibitem{82} \textit{Id.} at 102-113.
\bibitem{83} The basic recommendations made by Butler relating to disposal are to be found at paras. 18.42-45 and include absolute discharge in appropriate cases as well as placing the individual in the community under supervision with power of "recall" to hospital as required.
\end{thebibliography}
consensus ends. Inevitably of major concern has been the proper scope of any new insanity defense. In this respect the Butler proposals have been, to say the least, controversial. For in recommending a new verdict of "not guilty on evidence of mental disorder," the Butler Report proposed that this verdict should be available not only where mental disorder negatives mens rea but also in all cases where the defendant is shown to be suffering from severe mental illness or severe subnormality.

This particular measure is a radical proposal since the new verdict would be available even though the crime could not be shown to have been in any way influenced by the defendant's condition. The rationale behind this approach is expressed in the following terms: "The essence of the formula is that it simply presumes absence of responsibility when it is established that the accused was suffering from a sufficiently severe degree of mental disorder at the time of his act or omission and thus confines argument to a question of fact which psychiatrists can reasonably be expected to answer." The

For detailed argument in favor of these and other Butler proposals, see Griew, Let's Implement Butler on Mental Disorder and Crime C.L.P. 47, at 49 [1984].

See, e.g., Griew, id.; Dell, Wanted an Insanity Defence that Can be Used, 1983 Crim. L. Rev. 431.

Butler Report, supra note 80, at para. 18.18.

Id. at paras. 18.20-25.

The Butler Committee decided not "to equate the definition of severe mental illness with the concept of psychosis" (para. 18.34) but instead proposed the following complex definition at para 18.35.

A mental illness is severe when it has one or more of the following characteristics:

(a) Lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity.

(b) Lasting alteration of mood of such degree as to give rise to delusional appraisal of the patient's situation, his past or his future, or that of others, or to lack of any appraisal.

(c) Delusional beliefs, persecutory, jealous or grandiose.

(d) Abnormal perceptions associated with delusional misinterpretation of events.

(e) Thinking so disordered as to prevent reasonable appraisal of the patient's situation or reasonable communication with others.

The definition of severe subnormality proposed by the Butler Committee equates with that originally enacted in the English Mental Health Act of 1959, namely

. . . a state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation, or will be so incapable when of an age to do so.

This term should not be confused with the replacement expression "severe mental impairment" defined in the Mental Health Act of 1983 as "a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned." This new definition was justly felt by the Codification Team in their Report, supra note 81, at para. 12.8 to be inappropriate in that "exemption from criminal liability on the ground of severe mental handicap ought not to be limited to a case where the handicap is associated with aggressive or irresponsible conduct."

It is described by the Law Commission Codification Team supra note 81, at para. 12.6 as "controversial."

Butler Report, supra note 80, at para. 18.29.
Law Commission Codification Team was clearly ambivalent about this proposal stating that their draft bill could easily be amended to reflect the view that there ought to be some connection between the offense and the disorder. This is clearly the prevalent view in the United States where to date all measures to revise the law since the jury's verdict in Hinckley have been aimed at restricting the scope of the insanity plea and endorsing the need for a causal connection between the defendant's disorder and the alleged offense. Naturally, the prospect of eradicating the need for any such causal link is extremely attractive insofar as it "certainly simplifies the tasks of psychiatric witnesses and the court." However, it should not be forgotten that before this newly proposed special verdict could be returned it would be necessary to prove that the accused was severely mentally ill or subnormal at the time of the alleged offense which would still necessitate a retrospective enquiry into the defendant's mental condition by psychiatrists. More important the Butler Committee did acknowledge that:

it is theoretically possible for a person to be suffering from a severe mental disorder which has in a causal sense nothing to do with the act or omission for which he is being tried; but in practice it is very difficult to imagine a case in which one could be sure of the absence of any such connection.

Undoubtedly this comment goes to the very heart of the problem concerning the proper scope of any new insanity defense. For the crucial question remains as to whether it is appropriate to acquit someone on the grounds of mental disorder if it can be shown that at the time of the alleged offense the accused was suffering from a severe form of mental illness which may have had no bearing on the commission of the offense in question. In this connection the Butler Report's "presumption of irresponsibility" has been criticized as "rather weak" for "Might not a person, though suffering from 'severe mental illness,' nevertheless commit a rational crime? Might it not be demonstrable that he had done so? If so, should he not be convicted?"

The radical nature of this proposal has caused considerable problems in England over the implementation of the Butler

91. THE CODIFICATION TEAM REPORT supra note 81, remarks at para. 12.6
   Some people, however, take the view that it would be wrong in principle that a person should escape conviction if, although severely mentally ill, he has committed a rational crime which was uninfluenced by his illness and for which he ought to be liable to be punished. They believe that the prosecution should be allowed to persuade the jury (if it can) that the offence and the disorder were unconnected . . . . There is undoubtedly force in this point.

92. Id.
93. BUTLER REPORT, supra note 80, at para. 18.29.
recommendations and not, it is felt, without good cause.

Another difficulty which the Butler Report had to grapple with was the interrelationship between automatism and insanity. In this connection their proposals have concentrated upon excluding certain conditions from the definition of mental disorder in order to retain the plea of non-insane automatism. The effect of these proposals would be to restrict the scope of the sane automatism defense to transient states not related to other forms of mental disorder and arising solely as a consequence of (a) the administration, mal-administration or non-administration of alcohol, drugs or other substances or (b) physical injury. Evidence falling within this exception would not lead to a special verdict, but would leave the jury to their normal choice between verdicts of guilty and not guilty. The exception would cover some of the cases in which defences of non-insane automatism or based on the intoxication of the defendant are raised. We make the exception because we think that it would generally be regarded as strange and indeed wrong that a person who has committed a criminal act in a state of confusion following concussion, or when his soft drink has without his knowledge been laced with alcohol which caused him to be so drunk that he did not know what he was doing, or, in the case of a diabetic, when he has failed to take his insulin, should be described as having been mentally disordered and be subject to any power of control by the court, even though not mandatory.95

This approach is supported in part by the Law Commission Codification Team which has recommended that the non-insane automatism defense be limited to cases of purely transient disorders which are not associated with any underlying condition that may cause a similar disorder on another occasion.96 An obvious example of such a transient disorder would be an isolated blow to the head causing concussion. Such a temporary disorder of the mind would undoubtedly continue to qualify as a plea of non-insane automatism and could result in an outright acquittal. By way of contrast, it is readily admitted by the Codification Team that "a diabetic who causes harm in a state of confusion after failing to take his insulin"97 would qualify for the new verdict of not guilty on evidence of mental disorder, the reason being that his diabetes may cause similar episodes of confusion on future occasions.98 The rationale behind this

95. Butler Report, supra note 80, at para. 18.23
97. Id.
approach stems from the use of the term "non-administration" contained in the *Butler Report* which is criticized by the Codification Team in the following manner.

If a disorder of mind occurs because (for example) a medicine is not taken, the true "cause" of the disorder must be the condition giving rise to a need for the medicine. That condition may or may not justify treating the disorder as the occasion for a mental disorder verdict (see next paragraph). The exclusion of any disorder caused by the non-administration of any substance might prevent its being so treated.99

In the next paragraph of its report the Codification Team continues:

We have been unable . . . to distinguish between the different conditions that may cause repeated episodes of disorder. Nor do we think it necessary to do so. There is not, so far as we can see, a satisfactory basis for distinguishing between (say) a brain tumour or cerebral arteriosclerosis on the one hand and diabetes or epilepsy on the other. If any of these conditions causes disorder of the mind (such as an impairment of consciousness) so that the sufferer does an otherwise criminal act without fault, his acquittal of the apparent offence should be "on evidence of mental disorder." Whether a diabetic so affected has failed to seek treatment, or forgotten to take his insulin, or decided not to do so, may affect the court's decision whether to order his discharge or to take some other course. There will not, as in the past, be a mandatory hospital commitment; and the offensive label of "insanity" will no longer be used. So the verdict should not seem preposterous in the way that its present counterpart does.100

At the same time, however, it must be asked whether it is not only "preposterous" but also unduly harsh to label diabetics as mentally disordered. Indeed, the Codification Team seems to concede this by accepting that although the epileptic automaton would continue to qualify for a mental disorder verdict, "By contrast, one who assaults another when in a hypoglycaemic episode of impaired consciousness resulting from insulin treatment"101 would not, but would instead "receive an ordinary acquittal." In order to substantiate this point an illustration is given which states:

There is evidence that D, who suffers from diabetes, had taken insulin on medical advice. This had caused a fall in his blood-sugar level which deprived him of control or awareness of his movements. If D is acquitted, a mental disorder verdict is not

100. Id. at para. 12.14.  
101. Id. at para. 12.16.
appropriate. His "disorder of mind" was caused by the insulin, an "intoxicant" (see s.26(8)(a)).\textsuperscript{109} It was therefore a case of "intoxication" and not of "mental disorder."\textsuperscript{103}

Whilst the reasoning contained in this illustration is questionable,\textsuperscript{104} the purpose behind it is clear. The Codification Team has sought to preserve the distinction between "sane and 'insane' automatism"\textsuperscript{108} and in doing so has endorsed the reasoning referred to in the previous section which would give an insulin taker such as Quick\textsuperscript{106} an unqualified acquittal whilst at the same time labelling a forgetful diabetic like Bailey\textsuperscript{107} as "mentally disordered" and subject to the newly proposed special verdict. This distinction, which was criticized earlier, is so complex and difficult that one is surely justified in questioning both the propriety and the usefulness of its continued existence.\textsuperscript{108}

C. Revision Alternatives — Offering New Directions

A radical solution to the problems mentioned above would be to abolish the distinction between insane and non-insane automatism completely.\textsuperscript{109} Indeed, it is interesting to note that this result has in

\textsuperscript{102} Clause 26(8)(a) of the draft Criminal Code Bill states "'Intoxicant' means alcohol or any other thing which, when taken into the body, may impair awareness or control." Id. at 186. Clearly, therefore, this definition is wide enough to encompass the use of insulin.

\textsuperscript{103} Id. at 223, illustration 38(iv).

\textsuperscript{104} The result favored in illustration 38(iv) seems difficult to support since it cannot be regarded as a pure case of "intoxication" but is instead "a combination of mental disorder and intoxication" within clause 38(1) of the draft bill and as such will inevitably qualify in its own right for the newly proposed mental disorder verdict. It is suggested that this result must follow since once it is accepted, as it is by the Codification Team in para. 12.14 of their report, that the diabetic's hypoglycaemic episode is a form of "mental disorder," then the taking of the insulin cannot prevent the accused's diabetic condition from being classed as an underlying "mental disorder" which manifests itself when combined with an intoxicant: in this case, insulin.

\textsuperscript{105} CODIFICATION TEAM REPORT, supra note 81, at para. 12.16.

\textsuperscript{106} [1973] 3 All E.R. 347.

\textsuperscript{107} [1983] 2 All E.R. 503.

\textsuperscript{108} In an earlier article entitled The Automatism Defence — What Price Rejection? 1983 N.I.L.Q. 81, I concluded at p. 101 "... that there is a need for an automatism defence which, if successful, should result in an unqualified acquittal." I am now no longer convinced that this is necessarily correct and consider it necessary to explore alternative approaches as outlined in the remainder of this paper. Cf. Lederman, supra note 52, at 833-837 who advocates "... eliminating the distinction between non-insane and insane automatism by creating a combined defence for the pleas of insanity and lack of volition."

\textsuperscript{109} The policy factors which have led the English courts to create the distinction between sane and insane automatism do not yet seem to have worried the courts or commentators in the United States. Thus, it is strongly argued there that "... the epileptic in a grand mal whose clonic movements strike and injure another commits no crime; but we need no special defense of insanity to reach that result, well-established actus reus doctrines suffice." N. MORRIS, supra note 6, at 65. See also D. HERMANN, THE INSANITY DEFENCE: PHILOSOPHOICAL, HISTORICAL AND LEGAL PERSPECTIVES 106 (1983); Hashit, The Involuntary Action Defence to Criminal Indictment 11 N. KY. L. REV. 321 (1985); P.H. Robinson, CRIMINAL LAW DEFENCES 267 (1986). I intend to address this phenomenon and other matters pertaining to the use, or more accurately the lack of use, of the automatism plea in the United States on another occasion.
fact been achieved by common law development in Scotland where
the High Court of Justiciary has recently confirmed in *Carmichael
v. Boyle*, that any mental disorder short of insanity can only go
towards mitigation. In that case the accused was acquitted of assault
and breach of the peace having been found by the sheriff to have
been suffering from hypoglycemia at the relevant time. The Crown
appealed and in reversing the sheriff's decision Lord Wheatley, The
Lord Justice Clerk, applied the earlier decision of the court in *H.M.
Advocate v. Cunningham* which contains the following principle:

> Any mental or pathological condition short of insanity — any
question of diminished responsibility owing to any cause, which
does not involve insanity — is relevant only to the question of
mitigating circumstances and sentence.”

Having similarly approved this proposition, Lord Robertson opined:

> If he is not prepared to put forward a special defence of insanity
— with all its consequences — he cannot succeed in obtaining
an acquittal. This is not to say that he might not be able to show
that he was insane at the time by reason of some possibly tempo-
rary mental disease, but it is not open to him to seek to estab-
lish some mental or pathological condition short of insanity and
then to ask for acquittal . . . . Such a condition is relevant only
to the question of mitigating circumstances and sentence.

Clearly, therefore, a diabetic in Scotland who suffers from a hypo-
glycemic episode at the time of the alleged offence must plead guilty
or be found legally insane. The inflexibility and potential injustice of
this approach defies comment and has been roundly
criticized. However, Scotland is not the only jurisdiction which has adopted
this approach.

For example, Zimbabwe has achieved a broadly similar position
by virtue of section 28(1) of its Mental Health Act 1976, which al-

dows for a special verdict to be returned in cases where the accused
was suffering from “any . . . disorder or disability of mind” at the

110. 1985 S.L.T. 399. It is interesting to note that Scotland does not accept the
McNaghten Rules but has instead developed its own insanity defence which is based upon
“proof of total alienation of reason in relation to the act charged as a result of mental illness,
mental disease or defect or unsoundness of mind . . . .” per Lord Justice-Clerk MacDonald in
108, at 89.

111. 1963 S.L.T. 345.

112. *Id.* at 347.

113. *Id.* at 406.

114. For critical comment of Carmichael's case see Patrick, *Diabetic, Drunk and Disor-
dered: The "Dole Dilemmas"?* 1986 J. L. SOC. OF SCOTLAND 72. For detailed general criti-
cism of the Scottish position see Mackay, *The Automatism Defence — What Price Rejection?*
1983 N.I.L.Q. 81, 84-94.

115. For critical comment, see *Mackay, id.* at 94-97.
time of the alleged offense. Thus, the special verdict has been returned in cases of concussion\textsuperscript{116} and sleepwalking.\textsuperscript{117} However, in their most recent pronouncement on this question the Supreme Court of Zimbabwe in the \textit{State v. Evans}\textsuperscript{118} sought to make a distinction between an automaton and a person who had suffered from a black-out. The facts of the case were that the accused was convicted of culpable homicide after a collision between two trains, one of which had been driven by the accused who claimed to have suffered from a black-out at the time. The magistrates rejected this defense because of lack of evidence but also ruled that, if established, it could only lead to a special verdict. On this latter point the Supreme Court held that the magistrates had “confused cases of automatism with the instant case involving a black-out. On the peculiar facts of the instant case a special verdict . . . would have been wrong.”\textsuperscript{119} The basis of this distinction is that a black-out, where there is no action at all, is somehow different from automatism where the accused, whose mind is disabled by injuries to the head, acts in a state of sane automatism. Whilst the latter will qualify for the special verdict, the former will not. All that can really be said of such reasoning is that although it may have succeeded in extricating the accused from the clutches of the special verdict in this particular case, the distinction in question nevertheless seems every bit as complex and arbitrary as the insane/non-insane automatism dichotomy in English law.

Clearly, the prospect of ridding the law of distinctions of this type is inherently attractive. There is no doubt, however, that the unqualified acquittal resulting from a successful non-insane automatism plea has led to considerable worries on the part of the English courts and was the fundamental reason for the approach taken by the High Court of Justiciary in Scotland.

A possible solution to these problems which has not yet received serious consideration in England would be to widen the scope of any new special verdict to encompass the existing law on automatism. This would not be to deny the existence of automatism as a legal concept as it could continue to be specifically recognized within any new legislative framework. However, such a result could only be achieved by completely altering the scope of any new special verdict as it would now have to accommodate both sane and insane automatism. An obvious problem with this approach is that an unqualified acquittal would no longer be possible after any successful automa-

\textsuperscript{117} S v Ncube 1978 (1) S.A. 1178.
\textsuperscript{118} [1985] L.R.C. (Crim.) 504.
\textsuperscript{119} \textit{Id.} at 516 (per Dumbutshena C.J.).
tism plea. To many English lawyers this might seem like a retrograde step. But, provided the new law allowed for complete flexibility of disposal, as is proposed by the Butler Report, then this would ensure that those automatons whose conditions were merely transitory and who do not require any form of treatment or supervision could be released immediately. This then would be almost tantamount to an outright acquittal. It is interesting to note that this sensible position already exists within the Penal Code of Hawaii which provides not only that involuntary action excludes responsibility but also ensures that any such acquittal is not unqualified but is instead subject to complete flexibility of disposal, including the power to discharge the defendant unconditionally if "he no longer presents a danger to himself or the person or property of others and is not in need of care, supervision, or treatment."

Another major problem with this approach concerns the question of stigma. This point does not appear to have worried those jurisdictions in the United States which have opted for change, since almost without exception the term insanity or some other similar label has continued to figure largely in the special verdict or its alternatives. Of course, since the jury's verdict in Hinckley, the stigma which a successful insanity plea brings with it may be regarded as entirely appropriate in the United States. However, the same is not true in England where it is generally accepted that the sooner we remove the word insanity from our legal vocabulary the better.

120. I, myself, was originally of this opinion, see Mackay supra note 114, at 101.
121. HAWAI'I REV. STAT. § 702-200 (1976).
122. Id. § 704-411. See also the commentary on § 704-400 which at 262 states, Chapter 704 provides for a unified treatment of diseases, disorders, and defects which constitute an excusing condition. The same standards are provided for determining whether the condition of the accused will relieve him of responsibility for his acts — it matters not that the condition is labelled "mental" or "physical" or both. At the same time the Code in subsequent sections of this chapter provides for a flexible disposition of defendants acquitted on the basis of a disease, disorder or defect which excludes responsibility and, therefore, liability. The disposition is tailored to the condition of the accused; if the condition demands custodial commitment, the same will be ordered notwithstanding the fact that the condition is primarily 'physical' rather than 'mental'; if the condition does not demand commitment and conditional release or discharge are appropriate, the same will be ordered notwithstanding the fact that the condition has been labelled 'mental disease or disorder'.
123. Cf. the State of Oregon which since Hinckley has altered the wording of its special verdict from "not responsible" to "guilty except for insanity." See OREGON REV. STAT. § 161.295 (1983).
124. See, e.g., Jones v. United States, 463 U.S. 354 (1982), where during the course of delivering the opinion of the Court Justice Powell remarks at p. 367, note 16, "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect." The initial question of course is whether it is morally proper to stigmatize such an acquittee by retaining highly prejudicial and archaic concepts such as "insanity," "madness," "craziness" or the like.
125. See, e.g., BUTLER REPORT supra note 80, para. 18.18. "... the continued use of the words 'insanity' and 'insane' in the criminal law long after their disappearance from psychiatry and mental health has been a substantial source of difficulty, and we attach importance
Such a move would undoubtedly assist in destigmatizing the special verdict. But to replace "insanity" with the phrase "mental disorder" retains a degree of stigma which still seems unacceptable. As an illustration of this the decision in R. v. Clarke\textsuperscript{126} is useful. In that case the accused's absentmindedness caused by mild depression resulted in an unqualified acquittal for theft on the basis of a simple denial of "mens rea." There seems little doubt that under the Butler Report and the Code provisions, Mrs. Clarke would qualify for the newly proposed mental disorder verdict. There is a clear danger here that Mrs. Clarke, like Mr. Sullivan, the epileptic, might prefer to plead guilty rather than be labelled as "mentally disordered."\textsuperscript{127} Professor Griew counters this problem of stigma by stating:

> What must develop is an appreciation that the expression "mental disorder" in the verdict refers only to an impairment of function at the time of the act, and that the impairment may be of no terrible significance . . . . There will be a job of public education to be done in this connection — including the re-education of the legal profession.\textsuperscript{128}

However, it must be open to considerable doubt whether any degree of public education can have this destigmatizing effect. In addition, the stigma problem becomes even more acute if, as has been suggested, all cases of automatism were to be collapsed into a new special verdict. It is submitted, therefore, that it becomes imperative that a more neutral term be found so that defendants who are mildly depressed or diabetic or who suffer from isolated epileptic fits should not be reluctant to seek a special verdict because of some psychiatric label attached to it, such as "mental disorder."

A tentative proposal for such a revised special verdict could be based upon the following notion: "that the accused be found not to the discontinuance of the use of these words in the criminal law." See also CODIFICATION TEAM REPORT supra note 81, at para. 12.14 "... the offensive label of 'insanity' will no longer be used. So the verdict should not seem preposterous in the way that its present counterpart does."

126. [1972] 1 All E.R. 219. The reasons for Mrs. Clarke's appeal are succinctly put by Ackner L.J. at p. 221 as follows:

> Because the assistant recorder ruled that the defence put forward had to be put forward as a defence of insanity, although the medical evidence was to the effect that it was absurd to call anyone in the appellant's condition insane, defending counsel felt constrained to advise the appellant to alter her plea from not guilty to guilty so as to avoid the disastrous consequences of her defence, as wrongly defined by the assistant recorder, succeeding. Thus the appellant in the case ultimately pleaded guilty solely by reason of the assistant recorder's ruling . . . . The conviction is accordingly quashed.

127. It should not be thought that the facts leading to the decision in R v. Clarke, id. are a rare occurrence. For example, in research conducted by the present writer at Leicester Crown Court over a two year period there were five cases almost identical to Clarke which resulted in acquittal and three cases where similar defences were unsuccessful. See Mackay, Psychiatric Reports in the Crown Court, 1986 CRIM. L. REV. 217, 220.

128. Griew, supra note 83, at 52.
guilty on account of an aberration of normal mental functioning present at the time of the commission of the alleged offence.” This would have the merit of demedicalizing and depsychiatrizing the new verdict as well as spelling out that the “aberration” was present at the time when the alleged offense was committed. This last point is not unimportant since it would serve as a reminder that the “aberration” in question may have been an isolated and/or transitory impairment of “normal mental functioning” which is no longer present at the time of the trial. In short, an express reference in this newly proposed special verdict that the court is necessarily concerned with an inquiry into a “past” mental condition on the defendant’s part may in its own small way assist in the destigmatization process. For without this express reference there may be a continued tendency to assume that the condition in question is both present and operative at the time of the trial; an assumption which must inevitably be fostered by the wording and inflexible disposal consequences of the special verdict as it presently exists in English law.

Naturally, the precise scope of a defense based upon the notion of “an aberration of normal mental functioning” would have to be carefully considered and inevitably this raises once again the complex question of the proper ambit of any such plea. In this connection, it is submitted that English law should eschew any attempt to expressly include a volitional limb within any new test. Not only because of the difficulty of distinguishing between resistible and irresistible impulses, a task which juries have been required to undertake when considering the English diminished responsibility plea,

129. See, e.g., BUTLER REPORT supra note 39, para. 18.16. The English courts have consistently refused to accept irresistible impulse as a part of the test of insanity within the McNaghten Rules, see, e.g., R v Kopsch, 19 Crim. App. 50 (1925); R v True, 16 Crim. App. 164 (1922); R v Sodeman [1936] 2 All E.R. 1138 (P.C.); Attorney General for South Australia v Brown [1960] A.C. 432, (P.C.).

130. The classic statement on the role of irresistible impulse in diminished responsibility is to be found in the judgment of Lord Parker C.J. in the Court of Criminal Appeal’s decision in R v Byrne [1960] 3 All E.R. 1, where he said:

‘Abnormality of mind’, which has to be contrasted with the time-honoured expression in the McNaghten Rules ‘defect of reason’, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment. The expression ‘mental responsibility for his acts’ points to a consideration of the extent to which the accused’s mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will-power to control his physical acts . . .

Furthermore, in a case where the abnormality of mind is one which affects the accused’s self-control, the step between ‘he did not resist his impulse’ and ‘he could not resist his impulse’ is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori, there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems, which in the present state of medical knowledge are scientifi-
but also because I am far from convinced that any defect of the volition or will should of itself be capable of giving rise to an acquittal, albeit a special one. In this respect, the plea of diminished responsibility, which reduces murder to manslaughter, is a more appropriate vehicle for a consideration of questions surrounding volition and the exercise of will-power than any newly formulated defense giving rise to a special verdict.\textsuperscript{131}

Of course, "the difficult task is to craft a cognitive test for legal insanity that excuses those who are fundamentally irrational without allowing spurious claims to succeed"\textsuperscript{132} as well as a test which can be readily understood by a jury. Whilst the term "aberration of normal mental functioning" could perhaps be adapted in such a way as to encompass the present law or the \textit{Butler} proposals based on the absence of "mens rea," as alternative tests the following are suggestions:

(a) A defendant will be found not guilty on account of an aberration of normal mental functioning present at the time of the commission of the offense if, at that time, he was in a state of automatism or his normal mental functioning was otherwise so aberrant that he failed to appreciate what he was doing and as a result ought to be acquitted.

or

(b) A defendant will be found not guilty on account of an aberration of normal mental functioning present at the time of the commission of the alleged offense if, at that time, he was in a state of automatism or his normal mental functioning was otherwise so aberrant and affected his criminal behaviour to such a substantial degree that he ought to be acquitted.

\textsuperscript{131} It appears to us that the learned judge's direction to the jury that the defense under s 2 of the Act was not available, amounted to a direction that difficulty or even inability of an accused person to exercise will-power to control his physical acts could not amount to such abnormality of mind as substantially impaired his mental responsibility. For the reasons which we have already expressed, we think that this construction of the Act is wrong. Inability to exercise will-power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis in the subsection, is, in our view, sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts, depending on the degree of difficulty, may be. It is for the jury to decide on the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty but on the balance of probabilities, been established and, in the case of difficulty, whether the difficulty is so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts. The direction in the present case thus withdrew from the jury the essential determination of fact which it was their province to decide.

\textsuperscript{132} For examples of this see \textsc{Mackay, The Role of Psychiatric Reports in the Crown Court Trial Process}, 9-10 (Leicester Polytechnic Law School Monograph, England 1986).

\textsuperscript{5} Morse, \textit{supra} note 5, at 811.
Although the second test is wider in scope than the first it is submitted that either would allow for the revised special verdict to be returned only in cases where there was a fundamental lack of or reduction of mental functioning at the time of the alleged offense. In addition, it is submitted that either test would be readily comprehensible to a jury. The reasons for this are threefold. First, neither test is clouded by pseudo-psychiatric concepts. Second, the phrase “normal mental functioning” is one which a jury could readily identify with and which needs no elaboration or explanation. Third, the word “aberration” can be explained to a jury by merely using the dictionary definition, which includes the following, “deviation from normal; mental irregularity; lapse from a sound mental state.”

Thereafter the problem, as in all tests governing criminal responsibility, is one of deciding whether the accused falls within the parameters of the relevant test. In some cases this may be an easy decision for the jury to make whilst in others it may be much more difficult. However, both the suggested tests are an attempt at an uncomplicated approach which should give to the jury clear guidance as to what is required of them.

Finally, a crucial question is whether the rejection of a defense of non-insane automatism which can presently give rise to an unqualified acquittal, is too great a price to pay for the eradication of an illogical and unsatisfactory distinction which continues to plague English criminal law. Whilst it is felt that the benefits to be derived from such a rejection outweigh the advantages of retaining the plea of non-insane automatism: even if this argument proves unsuccessful, it can only be hoped that if and when English Law chooses to revise the McNaghten Rules a primary goal will be to implement a workable new special verdict which defendants will not feel reluctant to seek either because of worry about stigma or through fear of inflexibility of disposal. In short, the old adage, sometimes voiced in English legal circles, that “no one in his right mind pleads insanity” needs to be interred along with the McNaghten Rules the existence of which continue to give it a hollow ring of truth.


THE OXFORD ENGLISH DICTIONARY Vol. I, (Oxford U.P. 1970) includes within its definition of aberration,”... an abnormal state of intellectual faculty; deficiency or partial alienation of reason.”