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**Mad or Bad**  
Criminal Responsibility and Mental Disorder

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# Summary

This thesis is a comparative analysis of five cases, in which criminal responsibility and mental disorder were in issue. Andrea Yates drowned her five children. John W. Hinckley Jr shot and injured President Ronald Reagan. Kjeldsen raped and assassinated a taxi driver on his way from Calgary to Banff. Mijailo Mijailovic attacked and killed the Swedish minister of foreign affairs Anna Lindh. Sara Svensson followed directions from her pastor, killed his wife, and wounded another person.

The diagnostic criteria of the DSM-IV showed that Hinckley, Yates, Kjeldsen, Mijailovic and Svensson all suffered from mental disorders. The common law tradition excused Hinckley on the account of mental disorder, but convicted Yates and Kjeldsen. Since the presence of mental disorder does not provide for an excuse according to the current Swedish criminal law, Svensson and Mijailovic were both convicted, but Svensson was remanded to a hospital. The new Swedish suggestion wants to implement an exemption of criminal responsibility on the account of mental disorder.

The basis of the criminal laws of Sweden and Canada is the concept of free will. Psychodynamic theory argues that freedom is connected to the absence of mental impairment. Psychodynamic theory provides a justification for the exemption for mentally disturbed on the issue of guilt. The current Swedish criminal system, which assesses guilt regardless of the presence of a mental impairment, is not justifiable, according to the author.

The author claims the DSM-IV should not decide the criminal distinction between madness and badness. Psychiatry deals with treatment, moral philosophy deals with issues of praise and blame. The Aristotelian notion of moral accountability suggests that the test of criminal responsibility should contain one cognitional prong and one volitional element. Consequently, the knowledge based Canadian test of criminal responsibility is not sufficient.

The Swedish new suggestion that adds “serious” to the definition is the best solution, according to the author. The rule contains the elements of volition and cognition as well as excludes people with disorders, where the attachment of blame may result in a desired change within the individual, from the scope of its application.

There are no known cures for mental disorders. Hospitalization is mainly beneficial for offenders suffering from disorders such as depression and schizophrenia, including psychotic features.

Applying the new Swedish suggestion the author suggests that the cases of Yates and Svensson should have resulted in verdicts of not criminally responsible on the account of mental disorder and hospitalization, but leaves the other verdicts intact.

# Preface

Writing my final thesis has been a great journey and a wonderful, but yet difficult experience in my life. It has been an undertaking that I could have not completed without the support and help of a number of important people.

First, I would like to thank my supervisor Helén Örnemark-Hansen for your gentle guidance and for your positive and encouraging spirit.

Thanks also to Professor Ronald Sklar and Professor Patrick Healy from McGill University, Faculty of Law, Montreal, Canada, for introducing me to the Canadian criminal justice system and for encouraging my interest in the discipline of law and psychiatry.

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Thanks to my father, Ingemar Rosengren and his wife Kathrine Rosengren for opening your home and hearts to me. Your generosity and kindness know no limits.

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I especially thank my sister, Ida Rosengren, for sharing your wisdom and knowledge. Your sense of humour, your honesty and your sweetness are invaluable to me. Your courage to re-evaluate the nature of things and concepts is a true inspiration. I learn from you every day.

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*Caroline Rosengren*  
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# Abbreviations

ALI	American Law Institution
C.A.	Canada
CAT	Computerized Axial Tomography
C.C.C.	Canadian Criminal Cases
Circ.	Circuit
C.R.	Criminal Reports
DSM	Diagnostic and Statistic Manual Disorders
EEG	Electroencephalography
GABA	Gamma Amino Butyric Acid
ICD	International Classification of Diseases
NGRI	Not Guilty by Reason of Insanity
NJA	Nytt Juridiskt Arkiv
Ont.	Ontario
Prop.	Proposition
R.	Regina
Sask.	Saskatchewan
S.C.C	Supreme Court of Canada
S.C.R.	Supreme Court Reports
SFS	Svensk Författningssamling
SOU	Statens Offentliga Utredningar
Sup. Ct.	Supreme Court

# 1 Introduction

## 1.1 Background

Andrea Yates was an obedient wife and a nurturing mother. She provided for her five children's education, she baked cakes for their outings and made costumes for their parties. She taught them about the bible and cooked their favourite meals. On the outside, she looked like she was passionately devoted to her husband and children. However, guilt tormented Yates inside. Every time after giving birth, she got nervous, depressed and silent. She believed she was a failure as a mom. She attempted suicide twice after the birth of her fourth child and was committed. In the hospital, she scratched bold spots in her scalp and used her nails to make marks on her legs and arms. She heard voices telling her to get a knife and she had images of a knife. In spite of her severe depression and the scaring images and voices, she was discharged from the hospital. Yates never received any help with the household, because, as a good Christian, she believed it was her duty to take care of the home. Furthermore, due to her husband's reluctance towards the taking of medication, Yates only occasionally received drugs. Yates' family found her husband dominating and controlling. After giving birth to her fifth child, Yates' feelings of guilt and worthlessness persisted. One morning, after her husband left for work, she drowned all her children in the bathtub. This was her punishment, she told the police at the crime scene, for not being a good mother. She believed she was the antichrist herself and that the only thing that could save her children from the clutches of Satan was their death. Yates was found guilty of capital murder.<sup>1</sup> Andrea Yates was bad.

On the 30<sup>th</sup> of March 1981, John W. Hinckley aimed his gun at the President of the United States of America Ronald Reagan and fired six shots. The attempted presidential assassination was a desperate effort by Hinckley to get the attention and respect of Jodie Foster, a Hollywood actress. His obsession with Jodie Foster first started when he saw the movie "Taxi diver", in which she plays a young prostitute. Hinckley watched the movie several times and identified with the main character Travis Bickle, a loner that turns from a destructive life to saving Jodie Foster's character, Iris, from a pimp. Just like Travis, Hinckley had been leading a life with no direction and no financial security. He wanted people to acknowledge and love him as a singer, a poet and a songwriter. He moved from place to place in desperate search for confirmation and acknowledgment. He told his parents about a girlfriend and successful demo tapes, but in reality, he had no structure and no stability. Jodie Foster became his purpose in life. He started writing to her, calling her and hanging out at her dorm at Yale University, where she was studying at the time. Except for his love for Jodie

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<sup>1</sup> Roche, Timothy; "The Yates Odyssey", *Time Magazine*, January 28 2002, <http://www.time.com/time/nation/article/0,8599,195267,00.html>, last viewed 2004-05-10

Foster, Hinckley also had a love for guns and for the sense of empowerment they brought him. With a gun in his hand, he could bring down the most powerful man in the world, the President. For the small cost of purchasing a weapon, he believed he would be on top of the world and that he would gain the respect of his beloved Jodie Foster. All he had to do was to pull the trigger. The jury found him not guilty by reason of insanity (NGRI).<sup>2</sup> John W. Hinckley was mad.

Kjeldsen had asked the female taxi driver about the taxi fare for a trip from Calgary to Banff. Later the same day, the taxi dispatcher arranged for the same taxi driver to pick up Kjeldsen, according to his request, in order to make the trip between the two cities. 40 miles from Calgary, Kjeldsen pulled out a knife and compelled the female taxi driver to stop the car. He forced her to submit to sexual intercourse. He dragged her from the car, picked up a large rock and delivered several blows to her head. He left her lifeless body in the bushes. This was not the first time Kjeldsen was involved in a crime. Prior to his encounter with the taxi driver, he had been a patient at a mental institution following a not guilty verdict by reason of insanity involving charges of rape and attempted murder. A daily pass permitting him to leave the hospital gave him the opportunity to engage in criminal behaviour once again. The police arrested him just a couple of days after the brutal killing and brought him to trial. The jury found him guilty of the charges brought against him.<sup>3</sup> Kjeldsen was bad.

The Swedish minister of foreign affairs, Anna Lindh, went shopping with one of her friends. All of a sudden, a man named Mijailo Mijailovic came up to her and stabbed her several times. The minister did not survive the injuries from the attack. Mijailovic was arrested a couple of weeks later and charged with murder. He was never able to give a motive for killing Anna Lindh. He claimed that he liked her and that he was sad for her death, but that voices in his head prior to the attack had told him to hurt her. The voices were the only explanation for his behaviour. He had been feeling bad for a long time and had occasionally been in treatment. The day of the murder, he had been feeling especially bad, he pointed out. Nevertheless, he had no idea, he claimed, that he would attack anyone until the voices in his head spoke to him. The Supreme Court of Sweden found him guilty of murder and sentenced him to life in prison.<sup>4</sup> Mijailo Mijailovic was bad.

Sara Svensson's main purpose in life was to live according to the bible and in compliance with the will of God. She was part of a religious group, which emphasised obedience and faith in their leaders. She was especially close to one of the pastors of the church and despite their respective marriages, they engaged in an affair. The pastor, Helge Fossmo, was careful in explaining that it was all part of God's plan. He also convinced Svensson that God was

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<sup>2</sup> Caplan, Lincoln; "Annals of Law: The Insanity Defense (The John W. Hinckley Trial)", *The New Yorker*, July 2 1984

<sup>3</sup> Kjeldsen v. R. 24 C.R. (3d) 289, [1981] 2 S.C.R. 617, 64 C.C.C. (2d) 161

<sup>4</sup> The District Court of Stockholm, Sweden, case nr B 6825-03, date of judgment 2004-03-23

calling his wife home. He had had a dream telling him that she would die soon and that he would take a new wife. After a while, Svensson started receiving anonymous text messages on her phone telling her that God had chosen her to kill the wife of the pastor. Svensson doubted the validity of the messages and confided in the pastor. Fossmo explained that God was sending her the messages and that she was not in a position to question. After all, he continued, she had been the one tempting him into the affair and now God wanted her to pay for her sin. She was evil and in need of redemption, according to the pastor. God would give her salvation, but only if she killed his wife, he concluded. Sara was devastated that the pastor turned away from their love, but she believed his words and complied because she wanted God's forgiveness. In reality, the pastor was the one sending the messages, manipulating her into performing the killing. Svensson only found out the truth after carrying out two attacks. She first hit the wife with a hammer and on a later date, shot and injured one person and killed the pastor's wife. The court convicted her of attempted murder and murder, but confined her to treatment in hospital because of a serious mental disturbance.<sup>5</sup> Sara Svensson was mad.

## 1.2 Questions

These five cases have inspired debates about the criminal justice system. The first three cases are from the common law tradition and the last two are from Sweden. Despite their different origin, they all deal with issues of criminal responsibility and mental disorder. Moreover, they illustrate the difficulty of drawing the line between madness and badness. What is the difference between madness and badness? Should there be any difference and if so, where should we draw the line? Why were Yates and Kjeldsen bad? Why was Hinckley mad? Why were Svensson mad and Mijailovic bad? Should it be like that? These are the central questions of this paper.

## 1.3 Purpose

Criminal responsibility and mental disorder is a very hard subject to grasp. The overall purpose of this thesis is to create a better understanding for how the criminal justice system deals with criminal responsibility and mental illness and to start a debate about how we should deal with these issues. I will achieve this purpose by analysing five cases.

First, abnormal psychology and psychiatry will be used to explain the medical diagnoses of the cases. Secondly, I will describe the laws that govern the cases in Sweden and in the Canadian common law tradition. The criminal laws of these countries separate people with mental disorders in different ways. Thirdly, I will explain why the laws of criminal

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<sup>5</sup> The Swedish Court of Appeal, case B 6665-04, date of judgment 2004-11-12

responsibility separate people with mental disorders by exploring, through comparative analysis, the underlying assumptions that the criminal laws in these countries are based upon. The assumptions of guilt and punishment are crucial in understanding the law itself and the outcomes in these specific cases. Lurking behind the question of criminal responsibility is the very foundation of criminal law. The fourth purpose of the paper is to question the assumptions and the outcomes of the examined cases. The issue of criminal responsibility and mental disorder requires a thorough investigation of the law premises for blaming and punishing. Are there any justifications for treating mentally impaired offenders differently within the criminal justice system? If the answer to this question is yes, how can we distinguish between the ones who are mad and the ones who are bad? In this analysis, I will use knowledge from disciplines such as philosophy, psychology and psychiatry in order to try to find the ultimate solution to this problem.

## **1.4 Limitations**

The frame of this thesis consists of the five cases described above. I refer to the cases in the discussion of mental disorders and of the law concerning criminal responsibility and mental disorders. The paper is thus an analysis of these cases. I only use material that promotes a better understanding of the cases. I have excluded other mental disorders and other legal material. I have no access to medical records, which limits my analysis to drawing inference from the information given in the court setting.

This is essentially a legal paper. Therefore, my purpose is not to give a complete picture of how other disciplines deal with this subject, but rather to use relevant knowledge to question and improve the legal system.

## **1.5 Method and material**

The subject of my research has been criminal responsibility and mental disorder. I have engaged in critical investigation of how different legal systems deal with this phenomenon. The paper is a comparison of the Swedish legal system and the common law system in Canada through the analysis of five cases. However, the description of the laws that govern this area of law is only one part of the paper. My research has focused on explaining and criticising the law in order to emanate suggestions on how to regulate this difficult area. The paper is thus not solely descriptive, but also normative. I have not limited myself to law. I have used knowledge from philosophy, psychiatry and psychology. It has been important to me to look for contradictions and to pinpoint problem areas, by comparing the laws in different countries, but also by recognizing different approaches to the problem from different disciplines. My goal has been that these comparisons will shed new light on a highly controversial subject. I hope to inspire a

debate on whether or not we need to reconsider the way we treat mental illness within the criminal justice system.<sup>6</sup>

I have conducted part of my research in Canada, which has been tremendously beneficial. I have had access to both Swedish and Canadian law libraries and have had the fortune of having domestic professors in the country introducing me to the Canadian legal system. I have also turned to libraries specializing in psychology, psychiatry and philosophy. Furthermore, I have used internet-based engines to search for articles and new developments in the area. I have read books and articles in both Swedish and English.

## 1.6 Theory

### 1.6.1 Case studies

Case studies are an important part of legal research. As a research method, they both create and question theories and principles. The method of case studies is suitable to answer questions such as “why” and “in what way”. It constitutes an investigation of a specific phenomenon such as an institution, a person or an event. Through focusing on particular cases, the researcher strives to shed light on contemplating factors that characterise the phenomenon at hand. The cases are important because they illustrate practical problems with theories in disciplines such as philosophy, psychology or law. Interpreting several cases increases the ability to derive abstractions. The researcher tries to develop a general theory, which explains all the cases.<sup>7</sup>

According to the philosophical foundation of the method, there are many perceptions of reality that need interpretation. The purpose of the interpretations is to develop abstractions, concepts, hypotheses and theories. It is not to proclaim the truth, but rather to provide a convincing interpretation. The interpretative case study focuses on using descriptions to support or question theoretical underpinnings. The researcher’s own view of the world will affect the process and the result.<sup>8</sup>

This thesis uses five cases from different legal systems to illustrate differences and similarities in dealing with criminal responsibility and mental disorder. The cases are the basis for creating and questioning the theoretical foundation of criminal law in these legal systems.

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<sup>6</sup> The method is problem and interest based. This approach is different from the rule based approach, where a certain rule is the focus of the paper. Westberg, Peter; “Avhandlingsskrivande och val av forskningsansats- en idé om rättsvetenskaplig öppenhet”, *Festskrift till Per-Olof Bolding*, Stockholm 1992, p. 421-446

<sup>7</sup> Merriam, Sharan; *Fallstudien som forskningsmetod*, Lund 1994, pp. 23-25, p. 57 and p. 167

<sup>8</sup> *ibid* at pp. 30-34, p. 41, p. 43 and p. 53

## 1.6.2 Comparative method

Comparative law includes comparisons between different legal systems for the purpose of establishing similarities and differences. Moreover, it may encompass analysis, explanations and evaluations of the result of the comparison. The purpose may be to reach a common foundation for the legal systems or to find the best solution to a shared problem. Despite many similarities in the way people live across the world, the laws of the nations differ significantly. The societal problems are the same, but the legal solutions vary.<sup>9</sup>

The comparison is the essence of the comparative research. The researcher investigates comparable elements of two or more legal systems within any legal discipline, for instance, criminal law. It is essential that the elements of the different legal systems govern the same aspect. They have to regulate the same societal phenomenon and be designed to solve the same problem. Comparative law uses comparative method and is a specialisation within every legal discipline. The purpose of the method is to increase the level of general understanding for a certain area of the law. Furthermore, it may contribute to future research and development of the law. Difficult problems require thorough investigation and experience. Critical research of foreign legal systems is a great source of knowledge that could contribute to future efforts of legal reformations. Comparative law and method may also be useful in the interpretation of existing regulations and the harmonisation processes.<sup>10</sup>

Comparative research requires knowledge of foreign languages, legal terminology and sources of law. It is important to study the foreign legal system with an open mind and not base the result on false assumptions regarding words, phrases and organisational structure. It is essential to respect the hierarchy of legal sources as well as to acquire knowledge of the foreign legal system as a whole. Insight on the historical, economical and societal structure and development creates a better understanding of the context in which the law has evolved.<sup>11</sup>

Evaluating the result of a comparative analysis is a difficult task. In order to establish which legal system poses the best solution to a problem, one has to recognize that certain values are more important than others are. Furthermore, words such as humanity, equality, proportionality, justice and legality all need further explanations.<sup>12</sup> The purpose of this paper is to recognize the foundations of two legal systems, the Canadian and the Swedish, and with knowledge from philosophy, psychology and psychiatry, question the basic assumptions of criminal responsibility and mental disorder. According to this thesis, the law that survives the questioning according to these disciplines is the best solution to this problem.

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<sup>9</sup> Bogdan, Michael; *Komparativ rättskunskap*, Falköping 1996, pp. 18-22

<sup>10</sup> *ibid* at pp. 22-25, pp. 28-34, pp. 42-44, pp. 51-53 and pp. 57-58

<sup>11</sup> *ibid* at pp. 43-44

<sup>12</sup> *ibid* at pp. 81-84

## 2 Mental disorder

### 2.1 The medical concept of mental disorder

One way of defining abnormality is behaviour caused by mental illness. The term mental illness implies that there is a distinct, identifiable physical process, which leads to specific symptoms. However, there is no medical test, which can prove the existence of a mental illness. The diagnosis consists of labelling a set of symptoms. The label does not refer to a specific physical entity that every person who exhibits these symptoms has. The concept of mental illness thus changes with the time and cultural societies. In order to avoid the difficulties of the medical concept of mental illness, the term mental disorder is more commonly used. A mental disorder is an impairment of the mind that distinguishes the individual with the impairment from “normal” people.<sup>13</sup>

Psychiatry and psychology do not draw a line between madness and badness. The purpose of these disciplines is to identify abnormality and mental disorders in order to treat them.<sup>14</sup> There are different theories on how to distinguish between what is normal and abnormal. The most common theory suggests that behaviours and feelings that are maladaptive are abnormal. These behaviours and feelings justify intervention because they cause people to suffer distress and prevent them from functioning in normal life. They cause physical harm, emotional suffering, interfere with the normal function in daily life or they indicate loss of reality. The predominant theory of abnormality thus refers to maladaptive behaviour and not a disease.<sup>15</sup>

The Diagnostic and Statistic Manual Disorders (DSM), published by the American Psychiatric Association, is the primary instrument with criteria for diagnosing mental disorders in the United States. The DSM has four different editions. The last edition from 1994 describes the symptoms included in every identified disorder. It also emphasizes the importance of the numbers of symptoms present, the severity of the symptoms and for how long they have been present in assessing mental illness. Furthermore, it reflects the opinion that mental illness should be defined in terms of how it affects the person’s well-being and ability to function in society. It thus has incorporated the maladaptive theory of identifying abnormality. The fourth DSM has five axes; (I) Clinical disorders, (II) Personality disorders and mental retardation, (III) General medical conditions, (IV) Psychosocial and

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<sup>13</sup> Nolen-Hoeksema, Susan; *Abnormal Psychology*, third edition, New York 2004, p. 6 and p. 8

<sup>14</sup> Goulett, Harlan. M; *The insanity defence in criminal trials*, St Paul Minnesota 1965, pp. 22-23

<sup>15</sup> Nolen-Hoeksema, supra note 13 at pp. 9-10

environmental problems and (V) Global assessment of functioning. The psychiatrist or psychologist evaluates every patient along each axis.<sup>16</sup> The document is widely accepted in many countries the reference in communicating about mental disorders.<sup>17</sup> The DSM is the main reference in the further discussion.

Another instrument is the International Classification of Diseases (ICD-10). The ICD contains only the two parts of clinical disorders and personality disorders. In addition, the ICD has global descriptions for every symptom. It gives more flexibility in diagnosing, but it does not have the same precision as the DSM.<sup>18</sup> However, this does not have to be a disadvantage. Usually colleges of the psychiatric profession discuss and agree upon an appropriate treatment for the patient.

It is important to remember that these instruments do not categorize people but the symptoms people experience. It is common that the symptoms of a person can fit into several categories, which results in different diagnoses from different psychiatrists and several labels for the same person in the same diagnosis. The lack of precision in diagnosing has rendered scepticism about the validity of psychiatry. Thomas Szasz, an influential critic of psychiatry, has argued that the whole system of diagnosis is corrupt. According to Szasz, the psychiatric diagnosis is merely a way for people in power to label and dispose people who do not fit in. He suggests that mental disorder is a concept created to suppress alternative ways of behaving and looking at the world. Since mental disorders do not exist, Szasz continues, there is no justification for keeping the system of psychiatric diagnosis.<sup>19</sup>

## 2.2 The mental disorders of the cases

### 2.2.1 Schizophrenia

There are two general types of schizophrenia. In type I schizophrenia, positive symptoms like delusions, hallucinations, disorganized thought and speech, and disorganized or catatonic behaviour are prominent. Negative symptoms, like affective flattening, poverty of speech and the inability to persist at common, goal-oriented tasks are more common in type II schizophrenia. The absence of usual emotional and behavioural responses is particularly noticeable.<sup>20</sup> According to the DSM-IV, a person has to show severe symptoms such as delusions, hallucinations, disorganized speech and behaviour and negative symptoms for at least one month in order to receive a diagnosis of schizophrenia. Additionally, the DSM-IV requires the

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<sup>16</sup> *ibid* at p.116-121

<sup>17</sup> American Psychiatric Association; "Psychiatric Diagnosis and the *Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition)*, DSM-IV, Fact Sheet from September 1997, [http://www.psych.org/public\\_info/dsm.pdf](http://www.psych.org/public_info/dsm.pdf), last viewed 2005-05-05

<sup>18</sup> Ottosson, Jan-Otto; *Psykiatri*, fourth edition, Falköping 1995, pp. 19-20

<sup>19</sup> Nolen-Hoeksema, *supra* note 13 at p. 124

<sup>20</sup> Ottosson, *supra* note 18 at p. 175

continuing presence of some symptoms of the disturbance for at least six months.

The defence psychiatrist claimed that Hinckley's life was full of delusions. A person with a delusion of reference, like Hinckley, believes that he or she is the target of normal situations or comments. Hinckley was convinced that random events like President Reagan waving at a crowd or Jodie Foster's appearance on television were happening just for him. The delusion of reference is a very common type of delusion. Hinckley also showed signs of grandiose delusions. He identified and dressed like the character Travis Bickle in the movie "Taxi driver". He exaggerated his talents and felt he had the ability to become a famous musician and poet, but his strivings lacked direction. In order to find happiness and success, he travelled all over the United States. Thus, he also exhibited some of the negative symptoms of schizophrenia. He lacked structure, had problems holding a job and maintaining relationships. He became more and more socially isolated. Periodically, he also showed signs of flat affect. In the courtroom, he gazed into the empty air and seemed uninterested in everything going on except the testimony of his mother and Jodie Foster.<sup>21</sup>

However, Hinckley never claimed to experience any hallucinations. He did not suggest that voices or visions guided his behaviour.<sup>22</sup> Hallucinations can be auditory or visual and are often bizarre and troubling in a schizophrenic person.<sup>23</sup> Mijailovic told the court that he had heard voices telling him to attack Anna Lindh. He had also previously claimed that he had auditory and visual hallucinations. On his occasional visits to the psychiatric hospital, he had claimed that voices and knocking sounds bothered him. The hallucinations may be signs of schizophrenia. The problem, however, of finding the right diagnosis for Mijailovic's disorder was the absence of continuing symptoms of schizophrenia.<sup>24</sup>

The diagnosis for Mijailovic varied between the experts. One of the psychiatrists concluded that he was suffering from a psychosis without further specification.<sup>25</sup> Psychosis is not a mental disorder. It is a symptom, which can be present in many disorders. A psychotic person lacks the ability to differ between what is real and what is unreal. Perceptions of things, voices and ideas do not really exist. The psychotic person loses touch with reality. One of the most common psychotic disorders is schizophrenia.<sup>26</sup>

Psychosis can also be present in mood disorders such as depression and bipolar disorder. That is why it sometimes can be hard to differentiate between mood disorders and schizophrenia. In addition, mood disorders include many of the positive symptoms of schizophrenia and schizophrenic

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<sup>21</sup> Caplan, *supra* note 2

<sup>22</sup> *ibid*

<sup>23</sup> Nolen-Hoeksema, *supra* note 13 at p. 361-362

<sup>24</sup> The Supreme Court of Sweden, case number B 3454-04, date of judgment 2004-12-02

<sup>25</sup> *ibid*

<sup>26</sup> Nolen-Hoeksema, *supra* note 13 at p. 354

people can show tremendous mood swings. All of this contributes to the difficulty in diagnosing. On one hand, if person only experiences psychotic symptoms during periods of clear depression, the appropriate diagnosis is mood disorder. On the other hand, if the psychotic episodes are present independently of depression or mood swings, the appropriate diagnosis is schizophrenia.<sup>27</sup>

## 2.2.2 Depression

Hinckley is an example of the difficulty in distinguishing between schizophrenia and mood disorders. His mental state was a challenge to diagnose. Doctors spent hundreds of hours interviewing Hinckley without coming to an agreement. One psychiatrist's diagnose was that Hinckley was suffering from both a major depressive disorder and from process schizophrenia.<sup>28</sup>

According to the DSM-IV, a depression includes a variety of emotional, behavioural and cognitive symptoms. Sadness is the most common emotional sign of depression. In addition, a person diagnosed with depression may report a loss of interest or pleasure in usual activities. Depressed people experience a lack of energy and show signs of slow movement. They have a hard time concentrating and making decisions. Changes in sleep and appetite are also common. Furthermore, thoughts of worthlessness, guilt and low self-esteem may be present. These thoughts might also include thoughts of suicide.

Hinckley exhibited some symptoms of depression. He had suicidal thoughts and showed signs of sadness and of sleep and weight disturbance. The psychiatrist for the prosecution was not convinced of the severity of the depressive episodes and concluded that Hinckley suffered from a less severe, but chronic form of depression, dysthymic disorder. According to the DSM-IV, the diagnosis of dysthymia requires the presence of depressive symptoms for at least two years. Hinckley had been in a depressed mood for a long time and had had suicidal thoughts on several occasions. However, delusions constantly occupied his mind. He had lost touch with reality. The psychotic features could be signs of schizophrenia rather than depression, but that is not necessarily the case. There is a subtype of depression, depression with psychotic features, which includes the presence of delusions and hallucinations, according to the DSM-IV. The depression is so severe that the person loses the ability to differentiate between what is real and what is unreal. However, even though abnormal thoughts occupied Hinckley's mind, they did not have to amount to delusions and psychosis. The psychiatrists for the prosecution did not believe that Hinckley had lost touch with reality. He had fixed ideas, fantasies, unrealistic and inappropriate expectations, but no delusions, they concluded.<sup>29</sup>

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<sup>27</sup> *ibid* at p. 357

<sup>28</sup> Caplan, *supra* note 2

<sup>29</sup> *ibid*

Another special type of depression is postpartum depression. Depression with postpartum onset is the appropriate diagnosis when the delivery of a child triggers a depressive episode in a woman.<sup>30</sup> Yates tried to commit suicide twice after the birth of her fourth child. She was sad and turned away from the world. On several occasions, she had to receive professional medical care. The psychiatrists diagnosed her with postpartum depression and psychosis. She had talked about visions and voices that guided her actions. She saw knives and heard voices telling her to get a knife. Furthermore, her delusions were powerful and puzzling. She believed she had Satan inside her and that the only way she could get rid of him was to kill her children. She was the one to blame, she explained carefully. According to her, the way she was raising them was evil and they were doomed to perish in the fires of hell. She could not part reality from fiction and her delusional system finally made her kill all her children.<sup>31</sup>

### 2.2.3 Personality disorders

Personality reflects a way of life. It is a complex pattern of intrapersonal thoughts, emotions and behaviour, which has certain consistency and stability. There are many personality theories, which all have different ways of describing the elements of personality and explaining abnormality.<sup>32</sup> DSM-IV recognizes four components of the personality. The four dimensions are cognition, affect, relationships and ability to control impulses. Personality disorders are malfunctions in one or several of these dimensions. The person has a long-standing pattern of maladaptive thoughts, emotions and behaviour that is present from adolescence or early adulthood into adulthood. It is often hard for a psychiatrist to gain all the relevant information for such a long period of time. In addition, a person who meets the diagnostic criteria for one personality disorder can often show signs of other personality disorders. The criteria for the various personality disorders overlap a great deal. All of this contributes to the difficulty in providing an accurate diagnosis.<sup>33</sup>

One psychiatrist diagnosed Hinckley with three different types of personality disorders. According to the doctor, he suffered from schizoid personality disorder, narcissistic personality disorder and a mixed personality disorder with, among other things, borderline features.<sup>34</sup> A central feature in the schizoid personality disorder is the lack of any desire to form interpersonal relationships. Poor emotional connection, aloofness and detachment are predominant.<sup>35</sup> A person with narcissistic personality

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<sup>30</sup> Nolen-Hoeksema, supra note 13 at p. 283

<sup>31</sup> Roche, Timothy; "Andrea Yates: More To The Story", *Time Magazine*, March 19 2002, <http://www.time.com/time/nation/article/0,8599,218445,00.html>, last viewed 2005-04-09

<sup>32</sup> Burger, J.M; *Personality*, fourth edition, California U.S. 1997, p 4-6

<sup>33</sup> Nolen-Hoeksema, supra note 13 at p. 402

<sup>34</sup> Caplan, supra note 2

<sup>35</sup> Ottosson, supra note 18 at p. 498

disorder is also shallow in his or her emotions and personal relationships. Additionally, a narcissistic individual acts in a grandiose and dramatic manner. He or she seeks admiration from others and is preoccupied with fantasies of power and success. In the pursuit of success the narcissist demand a lot from people around him or her and he or she ignores the feelings and needs of others.<sup>36</sup> Hinckley did exhibit flat affect and was obsessive in his pursuit of success in love and in the entertainment industry.<sup>37</sup> Periods of grandiose self-importance are also present in borderline personality disorder. However, the self-concept with borderlines is very unstable and periods of self-doubt are very common.<sup>38</sup> Hinckley also exhibited borderline features. His mind alternated between thoughts of suicide and of grandiose identification with Travis Bickle. He turned from ideas of killing himself to an elaborated plan of becoming famous and gaining the love of Jodie Foster through the assassination of the President.<sup>39</sup>

One of the psychiatric evaluations suggested that Mijailovic suffered from a borderline personality disorder with narcissistic features.<sup>40</sup> The characteristics of borderline personality disorder are instability and ambivalence. The interpersonal relationships change from over-idealizing others to despising them. Abandonment and rejection are the greatest fears of borderline personalities. They desperately cling to other people and can react with uncontrollable anger or self-mutilation if they feel rejected. The various signs of borderline personality disorder overlap with some other personality disorders, such as narcissistic personality disorder. Both disorders have periods of grandiose self-importance. Furthermore, the inability to control impulses is present in both disorders.<sup>41</sup> Mijailovic claimed that the attack was without any deliberation. It was an act of impulse, he said.<sup>42</sup>

Impulsivity is also one of the main characteristics of the psychopathic personality disorder. The psychopath has little self-control, low tolerance for frustration and fearlessly seeks thrills and danger. Characteristic of the psychopath is his or her search for pleasure and excitement. He or she is driven by primitive desires and is absorbed by his or her own needs and satisfaction. No restrictions or moral values from his or her culture seem to have any bearing influence. A person with psychopathic personality disorder lives in the moment and is at times very aggressive. The asocial behaviour and restlessness often bring a person with this disorder into conflict with society. A lot of psychopaths engage in criminal activity, but not all criminals are psychopaths. Characteristic of psychopathic personalities is also the inability to feel love, sympathy, guilt or remorse. They have no real concern for other people. The lack of emotional

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<sup>36</sup> Ottosson, supra note 18 at p. 501

<sup>37</sup> Caplan, supra note 2

<sup>38</sup> Nolen-Hoeksema, supra note 13 at p. 415

<sup>39</sup> Reznick, Lawrie; *Evil or Ill? Justifying the insanity defence*, Great Britain 1997, p. 282

<sup>40</sup> supra note 4

<sup>41</sup> Nolen-Hoeksema, supra note 13 at pp. 415-416

<sup>42</sup> supra note 4

competency enables them to participate in the most heinous crimes of humankind. The normal feelings of guilt and empathy, that restrain “normal” people from hurting other people, are not present in the psychopath. The lack of guilt and love is mainly what differentiates the psychopath from other deviants.<sup>43</sup>

However, the distinction between the psychopath and the “normal” individual is not very easy to make for the untrained observer. What makes it so hard to differentiate the psychopath from other people is that all of the negative characteristics are covered up by intelligence, articulate ability, charm and manipulation. The psychopath knows how to conceal his or her asocial behavior. We can therefore also find psychopaths among the highest positions of society. They maintain an outward appearance of superficial social charm, intelligence and competency, but behind the “mask of sanity”, they are callous, cruel and malicious. The main difference between the psychopath and a normal person is that the psychopath can understand the structures of society and can articulate these structures with great skill, whereas they dissociate what they say from what they do. Therefore in 1941, Cleckley suggested the label “semantic dementia” for the disorder.<sup>44</sup> The concept refers to the fact that the psychopath mimics all the features usually present in the healthy human personality, but is unable to really feel. There is an intact mask of normal features, not present in a lot of mental disorders. The individual with psychopathic personality disorder is incapable of feeling empathy or concern for others, even though he or she knows how to express such a concern or feeling by words and actions. To satisfy his or her own needs he or she manipulates and uses other people. When caught in action the psychopath is often able to, through superficial sincerity and charm, convince those he or she has used and harmed of his or her innocence or intention to improve.<sup>45</sup>

The callous crime of Kjeldsen is an example of the disasters psychopaths can create. The five psychiatrists testifying at the trial all agreed that he was suffering from a dangerous psychopathic personality disorder with sexually deviant tendencies. The crime was unprovoked and brutal with no empathy for the victim. He showed no signs of remorse or guilt. However, during the first taxi ride, Kjeldsen behaved completely normal. The female taxi driver

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<sup>43</sup> McCord, William and McCord Joan; *The Psychopath: an essay on the criminal mind*, Princeton New Jersey 1964, pp. 8-17,

Robert D. Hare’s checklist of the psychopathic personality disorder: Glib and superficial charm, grandiose self-worth, need for stimulation or proneness to boredom, pathological lying, coning and manipulateness, lack of remorse, shallow affect, callousness and lack of empathy, parasitic lifestyle, poor behavioral controls, promiscuous sexual behavior, early behavior problems, lack of realistic, long-term goals, impulsivity, irresponsibility, failure to accept responsibility for own, many short-term marital relationships, juvenile delinquency, revocation of condition release, criminal versatility. Look, for instance, at:

[http://www.angelfire.com/zine2/narcissism/psychopathy\\_checklist.html](http://www.angelfire.com/zine2/narcissism/psychopathy_checklist.html), last viewed at 2005-04-12

<sup>44</sup> McCord, supra note 43 at pp. 31-32

<sup>45</sup> Cleckley, Hervey; *The mask of sanity; an attempt to clarify some issues about the so-called psychopathic personality*, St Louis 1955, pp. 423-424 and pp. 437-438 and Hare, Robert D; *Psychopathy: Theory and Research*, New York 1970, pp. 5-6

had no reason to refuse picking him up a second time. The mask of sanity came off 40 miles outside of Calgary.<sup>46</sup>

Guilt and anxiety tormented Svensson. Her only purpose in life was to please God and her lover and spiritual leader, but she felt she failed constantly. One of the psychiatrists concluded that Svensson suffered from a dependant personality disorder.<sup>47</sup> Dependent personalities have a deep need for guidance. They search for praise, blame, conformation, critique and even punishment. The need for love and care is so strong that persons with dependant personality disorders deny their own thoughts and feelings in order to stay in a close relationship. Rejection and abandonment are worse than exploitation and abuse. They search for dominating partners and they lack creativity, self-assertion and the ability to make decisions.<sup>48</sup> Fossmo manipulated and took advantage of Svensson. The thing she feared the most was rejection from him and from God. She would rather kill than lose the relationship with the pastor, even when he disrespected her. Another psychiatric evaluation of her condition included a diagnosis of psychosis with religious delusions and anxiousness. She had lost touch with reality and found herself in a world of shame, guilt and redemption controlled by the pastor.<sup>49</sup>

## 2.2.4 Posttraumatic stress disorder

After the crime, Svensson developed a posttraumatic stress disorder, according to the psychiatrists. The traumatic events of the crime, the lies and manipulation produced serious emotional reactions. The deaths and injuries of her victims created intense fear and feelings of helplessness and terror.<sup>50</sup> Stress is a normal reaction to a crisis, but persistent stress for over a month indicates the presence of a posttraumatic stress disorder, according to the DSM-IV. Furthermore, the person has to show signs of disassociation, which is characterized as an inability to remember parts of the trauma or continuous avoidance of everything connected to the event. Reliving the trauma through nightmares, illusions and hallucinations is a common symptom of the disorder. Due to the exhausting and persisting stress, the individual with posttraumatic stress disorder shows a decreased interest in pursuing emotional relationships and withdraws from human contact. Irritability, rage and aggressiveness may also occur.<sup>51</sup>

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<sup>46</sup> supra note 3

<sup>47</sup> supra note 5

<sup>48</sup> Nolen-Hoeksema, supra note 13 at p. 425

<sup>49</sup> supra note 5

<sup>50</sup> *ibid*

<sup>51</sup> Ottosson, supra note 18 at p. 441

## 2.3 The causes for mental disorders

Different theories suggest different causes for mental disorders. Biological theories claim that mental disorders have biological underpinnings such as genetic factors and structural and functional abnormalities of the brain. Sociologists focus on age, gender, historical context, and cross-cultural differences. Psychological perspectives emphasize the importance of the dynamics of early and close relationships. The caregiver of the child plays a vital role in the development of mental disorders, according to the theory.

Biological theories are predominant in explaining schizophrenia. The similarity of symptoms and prevalence of schizophrenia across time and across cultures indicate the importance of biological factors in the development of the disorder. Family, twin and adoption studies have provided evidence that there is a genetic contribution to schizophrenia. Studies have shown that as genetic similarity to a person with schizophrenia increases, an individual's risk of developing schizophrenia increases. However, genetics do not fully explain the disorder. New technique has enabled detailed examination of the brain and showed that some people diagnosed with schizophrenia show structural and functional deficits in specific areas of the brain.<sup>52</sup> A CAT (computerized axial tomography) scan of Hinckley's brain showed abnormal structure in one area of the brain, generally connected to the development of schizophrenia.<sup>53</sup> Other biological theories suggest prenatal and birth complications may damage the brain causing schizophrenia. Moreover, biological theories suggest that a disturbance in the basic attention process may also be a contributor. New research has focused on neurotransmitters such as dopamine, serotonin, GABA (Gamma Amino Butyric Acid) and glutamate.<sup>54</sup>

The link between schizophrenia and biological factors is strong, but psychological factors may increase the relapse in the disorder. Psychological theories suggest that an overwhelming rejection by an infant's mother causes the child to regress to infantile levels of functioning. The child loses its ability to distinguish between what is real and what is unreal. Other psychological theories emphasize that communicating conflicting messages and emotions to children can contribute to the development of schizophrenia. Giving the child mixed messages brings it to distrust its own feelings and perceptions of the world. As a result, the child's view of the own self, of others and the environment becomes distorted. Moreover, stressful events such as overprotective and resentful family members, poverty, unemployment and impoverished neighbourhoods may enforce the symptoms.<sup>55</sup>

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<sup>52</sup> Nolen-Hoeksema, supra note 13 at pp. 372-376

<sup>53</sup> supra note 2

<sup>54</sup> Nolen-Hoeksema, supra note 13 at pp. 376-381

<sup>55</sup> ibid at pp. 381-386 and Lars Lidberg (red.); *Svensk rättspsykiatri- en handbok*, Studentlitteratur, Lund 2000, pp. 188-189

Stressful events also have a bearing influence on the development of depression. Social theories point out that people who have low social status tend to have higher rates of depression. Moreover, people of recent generations living in more industrialized societies have a higher risk of developing depression, according to the theory. The closer environment also plays a vital role in the development of depression. Negative events like the break-up of a relationship, the death of a loved one, the loss of a job, a serious medical illness or living in an unsupportive environment may trigger the disorder, according to the psychological perspective. Depressed people often attribute these negative events to themselves. They disregard external causes and positive events. Their perception of the world, themselves and the future is negative. Furthermore, some psychological theorists conclude that poor interpersonal relationships with other people are the main source of depression. The patterns of unhealthy relationships stem from insecure attachment to the caregiver at an early age. Consequently, the child never develops a positive sense of self that is reasonably independent of others' evaluations. Depressed people therefore feel rejected by others and unconsciously punish themselves with thoughts of worthlessness.<sup>56</sup>

The fact that depression responds to biological treatment suggests that the disorder also has some biological underpinnings. Antidepressant drugs, which generally regulate the levels of neurotransmitters like serotonin and norepinephrine, have had some stabilizing effects. There is also some evidence of structural and functional abnormalities in different parts of the brain as well as irregularities in stress coping mechanisms. Furthermore, hormones seem to have an impact in the development of the disorder. Postpartum depression, for instance, has a direct link to the hormonal imbalance present after giving birth.<sup>57</sup>

Most scholars agree that personality disorders have some psychological cause. In the psychopathic personality disorder, the lack of empathy, lack of feelings of remorse and inability to control current needs and impulses for later gratification are often explained by early childhood rejection. For the unloved child there is no difference between doing right or wrong and, thus, he or she never develops the essential feature of controlling impulses and desires. The unloved child develops antisocial personality disorder, because he or she was never rewarded with affection and as a consequence never felt the threat of losing it.<sup>58</sup>

Even though all people with psychopathic personality disorder have been rejected in some sense, not all rejected children develop antisocial personality disorders.<sup>59</sup> Some researchers have measured EEG (electroencephalography) patterns (electrical activity of the brain) and found some slow wave activity in psychopathic personalities. This suggests that

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<sup>56</sup> *ibid* at pp. 298-307

<sup>57</sup> *ibid* at pp. 291-298

<sup>58</sup> McCord, *supra* note 43 at p. 75-76

<sup>59</sup> *ibid* at p. 84

there might be an additional physical cause for psychopathic behaviour.<sup>60</sup> Another physical component might be an injury in the frontal lobe region of the brain or in the hypothalamus. Injuries in these parts of the brain are namely connected with aggression and antisocial behaviour. Some research suggests that more psychopaths than normal individuals have a history of early brain diseases.<sup>61</sup> Nevertheless, it is important to remember that aggression is also a normal reaction to rejection and does not merely have to have its origin in a defect in parts of the brain.<sup>62</sup>

Hereditary factors can also influence the personality. Hare insists that the best predictor of the antisocial personality disorder in a child is a father who is a psychopath, alcoholic or antisocial.<sup>63</sup> This might suggest that genetic factors play a big part. However, the fact that a lot of antisocial personalities have fathers with antisocial behaviour does not exclude the possibility that this can be entirely caused by his behaviour towards his child rather than by passing on a certain genetic pattern. People with antisocial personality disorders often come from impoverished homes and have experienced parental loss or rejection.<sup>64</sup>

Early relationships are pivotal in developing personality disorders. Psychological theories suggest that personality disorders stem from poor early relationships with caregivers. The psychological perspective emphasizes the essential role of the relationship between the caregiver and the child. For the development of borderline personality disorder, the theories suggest that the caregiver has interrupted the child's individualisation and separation process by encouraging dependence and punishing independence. Consequently, people with borderline personalities never develop a secure self and become extremely reactive to others' perceptions of them.<sup>65</sup> Dependent personalities are also preoccupied with the fear of abandonment and rejection. Psychological theories suggest that the disorders are the result of caregivers withholding nurturance or only giving nurturance in exchange for dependent behaviour. Warm but overprotective parents may also prevent the child from overcoming its fearfulness and dependence. The presence of aggressive or abusive siblings or experiences that make self-doubt increase may contribute to the exaggerated dependency of other people, according to the theories.<sup>66</sup> Schizoid personalities do not depend on relationships with other people. Instead, they turn away from relationships due to emotional deprivation in childhood. The lack of love in early childhood causes the child to perceive relationships as dangerous and consequently turn away from other people and their own feelings.<sup>67</sup> Rejection is a further essential in the development of narcissistic personality disorder. Psychological perspectives believe that narcissistic behaviour is a

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<sup>60</sup> Hare, *supra* note 45 at pp. 30-34

<sup>61</sup> McCord, *supra* note 43 at p. 68

<sup>62</sup> *ibid* at p. 83

<sup>63</sup> Hare, *supra* note 45 at p. 109

<sup>64</sup> McCord, *supra* note 43 at pp. 85-86 and Hare, *supra* note 60 at pp. 101-109

<sup>65</sup> Nolen-Hoeksema, *supra* note 13 at pp. 418-419

<sup>66</sup> *ibid* at p. 426

<sup>67</sup> *ibid* at p. 408

reaction against early rejection and untrustworthy caregivers, which cause the child to turn to itself and indulge in its own self worth. Parents may also enforce the narcissistic behaviour through unrealistic expectations of the child's worth. Overvaluation results in continuing beliefs of uniqueness and superior behaviour.<sup>68</sup>

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<sup>68</sup> *ibid* at pp. 422-423

# 3 Swedish law

## 3.1 Mental disorder and voluntariness

The 1962 Penal Code of Sweden, which is the underpinning of the Swedish criminal system, contains a uniform list of crimes and attempts to cover many aspects of criminal law. The Code encompasses general provisions on crime, specific provisions regarding the major offences as well as different responses to crime, principles governing the assessment of penalties and some basic regulations for existing penal measures.<sup>69</sup> There are various other Acts, which regulate special types of offences.<sup>70</sup>

The Penal Code of Sweden states that a crime is an act defined in a law or in another statutory instrument and for which the law prescribes punishment.<sup>71</sup> According to the principle of legality, only acts and omissions contrary to the law are punishable. If the act or omission does not fall within any category of offences defined by written criminal law, the accused must not be subject to punishment. The principle of legality ensures predictability and enables the citizen to regulate his or her conduct in accordance with the law.<sup>72</sup>

According to Swedish criminal law, a crime consists of a subjective element and an objective element. The objective element requires proof of an unlawful act or omission on the part of the defendant. The accused is criminally responsible for physical acts. States of minds, intentions, decisions and characteristics are not punishable, unless they take the form of acts or omissions.<sup>73</sup> Criminal responsibility for omissions requires a specific obligation to act.<sup>74</sup>

Furthermore, criminal liability demands that the completion of the criminal act or omission is within the control of the accused. The performance has to be the result of a voluntary act or omission, which the accused had the ability to change the course of, not a mere accident. Consequently, acts during sleep and unconsciousness, reflex movements, spasms and convulsions, as well as acts performed under physical force or hypnosis are generally not punishable. Moreover, omissions caused by sleep, weakness, physical numbness or anaesthesia are generally not blameworthy. The issue is whether the accused had the ability to control the behaviour. There is no requirement for the realisation of the nature and quality of the act or of the

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<sup>69</sup> The Swedish Penal Code (1962:700) Part one, two, and three

<sup>70</sup> see for instance The Penal Law on Narcotics (1968:64)

<sup>71</sup> The Swedish Penal Code 1:1

<sup>72</sup> Jareborg, Nils; *Allmän Kriminalrätt*, Uppsala 2001, pp. 57-58

<sup>73</sup> *ibid* at pp. 127-128

<sup>74</sup> *ibid* at p. 187

ability to control. The quality of the act as controllable or not is thus in issue, not the actual control exercised by the accused.<sup>75</sup>

Even if the unlawful act was involuntary, it might still be punishable if the behaviour leading up to the unlawful act was controllable and careless. An epileptic person may thus commit a crime if he or she, prior to a known fit, enters a store full of glass and porcelain and then, during the fit, breaks something. He or she knows that there is a risk of harmful consequences involved in performing the voluntary act of entering a store with glass and porcelain before an epileptic attack and the act is thus blameworthy. Despite the involuntary fit, the prior act leading up to the crime is controllable. In this case, the person has the ability to stay out of the store and prevent the harmful consequence from taking place. Entering the store prior to a known fit involves taking a risk of breaking something in the store.<sup>76</sup>

Life in general includes taking risks, some, which are blameless, and some, which are blameworthy. The court has to objectively evaluate the situation in which the defendant was at the time of the voluntary act and to conclude whether there were good reasons to abstain from the commission in relation to the unwanted consequence. The issue at hand is thus not whether the accused is blameworthy, but rather whether the act itself is careless, given the circumstances in which it took place. The intention of the defendant is irrelevant in this discussion. Standards of due care are the basis in deciding whether there were good reasons to refrain from committing the act or not. However, the evaluation is not solely objective. The social role and general ability of the actor affect the evaluation. The court considers handicaps, education, skills and experience in its determination.<sup>77</sup>

The negation of control generally indicates a lack of subjective intent. This may be the reason why the Swedish Courts generally do not engage in elaborate argumentation of volition, but rather tend to focus on the subjective element of the crime. Moreover, the evaluation of the control and careless risk taken during the commission of the crime may be so self-evident that a discussion seems superfluous.<sup>78</sup> In the cases of Mijailovic and Svensson, for example, the courts did not focus on the issue of volition. The reason for the silence may be that the criminal acts were within the control of the defendants. They both used weapons such as a knife and a gun generally associated with causing severe bodily harm and death. Engaging in their behaviour involved a serious risk in relation to the consequence of death and their respective mental disorders did not give reason for other considerations.<sup>79</sup>

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<sup>75</sup> *ibid* at p. 204 and p. 210

<sup>76</sup> *ibid* at pp. 210-211

<sup>77</sup> *ibid* at p. 216, p. 218 and p. 221, and Nils, Jareborg; *Scraps of Penal Theory*, Uppsala 2002, p. 21-23

<sup>78</sup> Jareborg, *supra* note 72 at p. 203 and p. 208

<sup>79</sup> *supra* note 24 and *supra* note 5

However, in the first attempted murder of the pastor's wife, the Court of Appeal elaborated on the risks involved in the act. The defence claimed that there was never a risk of death since Svensson did not put sufficient strength behind the hammer strikes. The Court of Appeal did not agree with the defence's interpretation of the event. Svensson delivered several blows to the head of the wife, who started to bleed, the Court emphasized. The act included a serious risk of death and only ended because the wife woke up and fended off the attack.<sup>80</sup>

## 3.2 Mental disorder and fault

The subjective element refers to personal responsibility and blame. Swedish law operates with two general culpability levels. Negligence presupposes that the actor did not fully understand what he was doing and deals with blameworthiness due to a lack of sufficient care for standards of reasonable behaviour. The act is punishable because the accused is negligent in relation to a harmful consequence. The accused is blameworthy in the eyes of the law because he or she, despite ability and opportunity, did not care to investigate the potential risk of engaging in the behaviour or, if he or she did, did not care that the behaviour encompassed a risk of harmful consequences. The justification for attributing blame is that the accused ought to have realised certain things about the conduct, or ought to have cared for the risk involved. In the evaluation of whether the offender was negligent, the court shall take personal deficiencies of the defendant into consideration. Age, education, intelligence, experience, hearing, sight, nervous disposition, mental impairment and temporary states such as being scared or confused shall affect the evaluation of the negligence criterion.<sup>81</sup>

Intent, which is the other form of subjective element in Swedish criminal law, does not elaborate on what the accused should have known in a given situation, but puts the defendant's actual perception of the consequences of the act in issue. It is thus the subjective state of mind of the particular accused on trial that the court needs to investigate. There is no specific definition of the intent requirement.<sup>82</sup> The exact scope of its application is still undetermined. The Supreme Court of Sweden has interpreted the intent requirement and concluded that the accused does not have to be sure of the effect of the unlawful act. It is enough that the defendant has been aware of the risk of the consequences and that he or she is ignorant in relation to the outcome.<sup>83</sup> According to the Supreme Court, personal characteristics such as age and mental condition affect the considerations of the subjective element of intent.<sup>84</sup>

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<sup>80</sup> supra note 5

<sup>81</sup> Jareborg, supra note 72 at p. 305 and pp. 320-322 and Jareborg, supra note 77 at p. 49

<sup>82</sup> Holmqvist, Lena, Leijonhufvud, Madeleine, Träskman, Per Ole, Wennberg, Suzanne; *Brottbalken- En kommentar Del 1 (1-12 kap.) Brotten mot person och förmögensbrotten m.m.* Stockholm 2002, p. 1:14

<sup>83</sup> NJA 1985 s 757, NJA 1995 s 448, NJA 1996 s 93

<sup>84</sup> supra note 4

Mental disorder does not necessarily negate the subjective element of the crime. Nevertheless, mental disorder can have a special impact on the subjective criterion. It can, for instance, affect the ability to form intent if the defendant's perception of reality is blurred.<sup>85</sup> In one case, the Swedish Court of Appeal considered a man with bipolar disorder incapable of forming intent at the time of the crime. He had been in state of manic psychosis and believed that he was Jesus Christ. He had rearranged the apartment with candles and glasses on the living room floor. When his wife came home and picked up a candle from the floor, the accused got very upset, forced her to the floor and tried to stab her with a sharp paperknife. Furthermore, he tried to strangle her and beat her in the head with a lamp stand before she managed to escape. The psychiatrist testifying explained that the act was outside the control of the defendant and that his thoughts at the time of the unlawful act were impossible to reconstruct. Since the accused did not seem to be aware of his surroundings and of his behaviour at the time, the court concluded that he did not have the intent required for the crime and thus no crime was committed.<sup>86</sup>

According to Swedish law, the presence of mental disorder does not negate the subjective element of the crime on its own. Mentally impaired people, who still have the ability to form intent, can commit crimes, even though distorted thoughts are creating the intent. However, it may be more difficult to establish intent in a case including mental disorder.<sup>87</sup> According to Mijailovic, the attack on Anna Lindh was an act of impulse. He claimed that the voice in his head told him to attack, but not to kill the minister of foreign affairs. The Supreme Court emphasized that even though the story might be true, the voices in his head did not preclude intent. According to his own statements, he was still aware of his actions, the Supreme Court pointed out. Despite his mental disorder, the Supreme Court concluded, he was able to realize the risk of death from his stabbings.<sup>88</sup> The mental disorder of Svensson did not exclude intent either, according to the court. Her acts were carefully planned and required reflection.<sup>89</sup> The courts convicted both Mijailovic and Svensson of the crimes they were charged with.<sup>90</sup>

### 3.3 Mental disorder as an excuse

In Swedish law, there is no requirement for accountability. Technically, there is no excuse for a mentally impaired person and he or she can thus commit a crime in the meaning of the law. Sometimes, the person might lack the mental element required for the crime, but a distorted mind and perception of reality do not necessarily exclude intent. Mental disorder does

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<sup>85</sup> Prop. 1990/91:58 Supplement 2 p. 449

<sup>86</sup> RH 1985:62

<sup>87</sup> supra note 72 at p. 359

<sup>88</sup> supra note 4

<sup>89</sup> supra note 5

<sup>90</sup> supra note 4 och 5

not provide the accused with any exemption of criminal responsibility. Unless another element of the crime is lacking, the mentally impaired will be guilty of the charged crime, as in the cases of Svensson and Mijailovic.<sup>91</sup> Before the current Penal Code, there was a requirement for accountability. Children under the age of 15 and mentally impaired people were not criminally responsible.<sup>92</sup> In 1962, the new Penal Code changed that order.<sup>93</sup> The justification for dismantling the concept of accountability was that it is not possible to hold anyone morally accountable for his or her actions. In Swedish law, everybody without consideration for mental capacity can thus commit crimes.<sup>94</sup>

The critique of the lack of excuse for people with mental disorders has increased. Before the 1962 Penal Code, the Office of the Swedish Attorney-General was reluctant towards the adoption of the new order and emphasised the importance of an exemption of criminal responsibility for a mentally disturbed defendant and his or her relatives.<sup>95</sup>

Furthermore, over the years, the order has shown to generate some practical problems. One of the problems is that the court has to consider the subjective element for every alleged violation of the Penal Code. It is hard enough to prove the subjective element in a case without the special difficulties of mental disorder involved. Some scholars have even argued that, in the presence of mental disorder, the court does not thoroughly investigate the mental element of the offender. Focus shifts from guilt to appropriate sanction. If the appropriate sanction is forensic psychiatric care, the court tends to neglect the question of intent. There is a conflict of interest. If the court concludes that the accused lacked the mental element required for the offence, there is no guarantee of psychiatric care. Seeing the need for hospitalisation in an immediate future, the court might neglect the evaluation of the past act on charge.<sup>96</sup> In the case of Svensson for instance, the court simply concluded that she was guilty of the crimes she was charged with, without any elaborate argumentation of the question of intent.<sup>97</sup>

Recently, the committee of mental responsibility (Psykansvarskommittén) has suggested the implementation of a special exemption of criminal liability on the account of mental disorder. One of the reasons for reopening the possibility of excusing the mentally impaired, according to the committee, is that guilt would not be required for commitment to a psychiatric hospital. According to the present Penal Code, the court has to establish guilt before continuing on to the question of appropriate sanction and unless the mental condition of the accused amounts to a serious mental

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<sup>91</sup> Jareborg, Nils, Zila Josef; *Straffrättens Påföljdslära*, Stockholm 2000, p. 137-138

<sup>92</sup> Jareborg, Nils; *Straffrättens Ansvarslära*, Uppsala 1994, p. 258

<sup>93</sup> SFS 1962:700

<sup>94</sup> supra note 92 at p. 258-259

<sup>95</sup> Prop. 1962:10 part C p. 97

<sup>96</sup> SOU 2002:3, p. 235-236

<sup>97</sup> supra note 5

disturbance in the meaning of the law, the court cannot guarantee psychiatric care.<sup>98</sup>

Another reason is that theoretically, according to the principle of conformity, the prerequisite for guilt is the capacity and the opportunity to conform one's conduct to the requirements of the law, the committee emphasizes. A person that lacks sufficient knowledge or ability to control his or her behaviour is not blameworthy, according to this principle. The common standards of criminal responsibility are not applicable when distorted thoughts of a mentally disturbed mind give reasons for criminal behaviour. The mentally impaired lack the abilities to understand, perceive and evaluate reality. It would not be just to hold a person lacking these essentials criminally responsible on the same grounds as a person possessing these qualities, the committee points out.<sup>99</sup>

Furthermore, the committee holds that a change of the law would be beneficial in the international context. The committee points out that many countries in Europe and North America all have standards of criminal liability that considers mental disorder. Reinforcing an excuse of criminal liability for the mentally impaired would make the legal co-operation with these countries smoother. Sweden is almost unique in not having a prerequisite for criminal responsibility based on mental illness. In an internationalised and integrated world, the need for a common basis in criminal law is great.<sup>100</sup>

Consequently, the committee suggests the reinforcement of the requirement of accountability. It argues for the creation of a new rule stating that an act shall not result in criminal liability for someone who, due to a serious mental disturbance, a serious mental retardation or a serious state of dementia, lacked the ability to realize the character of the act or to adapt the conduct in compliance with such a realisation.<sup>101</sup>

### **3.4 Mental disorder and diminished responsibility**

The Swedish Penal Code states the difference between murder and manslaughter. According to the law, manslaughter is homicide, which, when considering the circumstances leading up to the crime or for other reasons is less severe.<sup>102</sup> A physically or mentally abused person, who kills his or her abuser, is an example of where the less severe form of homicide may be applicable, even if the act is premeditated. A homicide as part of another crime, an act characterised by particular cruelty, by taking advantage of

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<sup>98</sup> supra note 96 at pp. 235-237

<sup>99</sup> ibid at pp. 230-233

<sup>100</sup> ibid at p. 238

<sup>101</sup> ibid at p. 37

<sup>102</sup> The Swedish Penal Code 3:1 and 3:2

another person's weakness or trust, indicate the applicability of the murder paragraph. Mental instability and acting impulsively or out of concern for someone else are factors supporting the applicability of the manslaughter paragraph.<sup>103</sup>

The act of Mijailovic was an act of impulse guided by internal voices, according to his own statement. The District Court, however, emphasised that Mijailovic put Anna Lindh through physical suffering and mental agony. It also pointed out the ruthlessness and the callousness of the attack, which included seven or eight knife stabs. Mijailovic also had the ability and possibility to reconsider his act, but had chosen not to, the District Court concluded and convicted him of murder and not manslaughter. The Court of Appeal and the Supreme Court did not change this part of the judgement.<sup>104</sup>

The act of Svensson was the result of careful premeditation and deliberation. During a long period, she had reflected on the murder of two people. Despite reluctance and fear, she had carried out the acts accordingly. First, she had unsuccessfully tried to kill the wife of the pastor and although guilt tormented her, she continued with her plans in co-operation with the pastor. She carried out the acts at night in the homes of her victims. Despite the mental disorder of Svensson and the influence from the pastor, the court rejected the applicability of the manslaughter paragraph and convicted Svensson of attempted murder and murder.<sup>105</sup>

### 3.5 Mental disorder and disposition

According to the current criminal system, there is no special excuse available for the mentally impaired. The criminal sanction system is also available for persons with mental disorders.<sup>106</sup> However, special consideration is still possible at the sentencing stage. One of the most important provisions in the Swedish criminal system dealing with mental illness is the prohibition of jail for a person with a serious mental disturbance. If a person engages in criminal behaviour under the influence of a serious mental disturbance, the court must not sentence the defendant to imprisonment.<sup>107</sup> The connection between the disorder and the crime is thus important. The court can often presume the connection if the defendant suffered from a serious mental disturbance at the time of the crime.<sup>108</sup> The law thus exempts the seriously mentally disturbed from serving time in prison. If the court in such a case also considers that neither conditional sentence nor probation nor a fine should be imposed, the defendant is free to go.<sup>109</sup>

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<sup>103</sup> Holmqvist, *et al*, supra note 82 at p. 3:20- 3:22

<sup>104</sup> supra note 4

<sup>105</sup> supra note 5

<sup>106</sup> Jareborg, supra note 91

<sup>107</sup> The Swedish Penal Code 30:6

<sup>108</sup> Prop 1990/91:58, Supplement 2, p. 458

<sup>109</sup> supra note 106

The term mental disturbance corresponds to the medical term mental disorder. The purpose of adding serious to the definition is to legally qualify the mental disorders that deserve special treatment within the criminal justice system. The term is thus legal, not medical. Serious mental disturbances are foremost psychotic states with a distorted perception of reality, including symptoms of delusions, hallucinations and confusion. Serious depressions with suicidal thoughts and some personality disorders with psychotic episodes may also count as serious mental disturbances. The kind of mental disorder the accused suffers from and the severity of the disturbance are used to decide whether the definition is applicable to the case. On one hand, schizophrenia is the type of disorder that normally fits the criteria, unless it is mild. For depression, on the other hand, the case has to be severe in order to be considered a serious mental disturbance. Every case is unique and the court has to consider the kind of disorder that the defendant suffers from as well as the symptoms special to him or her.<sup>110</sup>

If the defendant suffered from a serious mental disturbance at the time of the crime, the law prohibits the court from sentencing the accused to serving time in prison. If the accused suffers from a serious mental disturbance at the time of the trial and if he or she is charged with a crime for which the sanction cannot be limited to a fine, the court may commit the accused to forensic psychiatric care. However, the severity of the crime is not the only thing that determines the appropriate sanction. The court must regard the mental condition and personal circumstances of the accused when deciding whether admission to a psychiatric institution combined with deprivation of liberty and other coercive measures is called for.<sup>111</sup> The sanction of involuntary psychiatric commitment does thus not require causation between the crime and the serious mental impairment. The important thing is that, at the time of the trial, the accused suffers from a serious mental disturbance.<sup>112</sup> However, if the accused also committed the unlawful act under the influence of a serious mental disturbance and there is a risk of relapse of serious criminality due to the mental disturbance, the court may decide that a special release inquiry under the Act of Forensic Psychiatric Care shall be in charge of the discharge of the criminal.<sup>113</sup> The discharge depends on the mental condition of the patient and the risk of continuous criminality of serious kind. There is no specific time, after which the patient has to be released, but the inquiry has to try the matter frequently.<sup>114</sup>

The pivotal question in the case of Mijailovic was whether his mental condition amounted to a serious mental disturbance in the meaning of the law. Psychiatrists portrayed different images of the defendant's condition. On one hand, psychiatrists claimed that Mijailovic showed symptoms of psychosis. He had auditory hallucinations and deviant thoughts and

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<sup>110</sup> Prop 1990/91:58 pp. 86-87

<sup>111</sup> The Swedish Penal Code 31:3

<sup>112</sup> Prop 1990/91:58 pp 461-462

<sup>113</sup> supra note 110

<sup>114</sup> supra note 5

behaviours. On the other hand, some psychiatrists believed he simulated the auditory hallucinations and manipulated his surroundings. They claimed that he suffered from a borderline personality disorder, without psychosis. The Supreme Court concluded, on a balance of probabilities, that Mijailovic did not suffer from any psychotic impairment. However, the Supreme Court recognized the presence of a personality disorder, but it was not severe enough to amount to a serious mental disturbance, not at the time of the crime nor during the course of the trial. The provision containing the prohibition of jail was thus not applicable and the Supreme Court sentenced Mijailovic to life in prison.<sup>115</sup>

The case of Svensson also illustrates the difficulty in reaching a diagnostic agreement. The diagnosis varied from dependent personality disorder with psychotic symptoms to unspecified mental disorder with psychotic and religious delusions. However, although the psychiatrists labelled the defendant's symptoms differently, most of them agreed that Svensson, during the committing of the crimes, was in a psychotic state, which amounted to a serious mental disturbance in the meaning of the law. The influence from the pastor, her dependency and anxiousness created a psychotic state of mind such that she could not part reality from fiction. The law thus prevented the court from sentencing her to imprisonment. Furthermore, after the crime, the truth was too much to handle for Svensson and she developed a posttraumatic stress syndrome with psychotic features, which also amounted to a serious mental disturbance, according to the psychiatrists. The Swedish Court of Appeal agreed with the psychiatric evaluations and due to her mental condition, other personal circumstances and the risk of relapse into criminality of serious kind it remanded Svensson to an institution of psychiatric care and made her discharge subject to a special release inquiry.<sup>116</sup>

The new Swedish suggestion, which argues for the implementation of a test of criminal responsibility on the account of mental disorder, suggests that the special sanction of involuntary psychiatric care should be abolished. According to the suggestion, the civil commitment procedure should determine if hospitalization is called for when the mentally impaired offender is exempted from criminal responsibility. The defendant's need for treatment is conclusive in determining whether detention is required. In situations where the court does not find the exemption of criminal responsibility applicable, the committee points out the importance of still being able to receive treatment in combination with other criminal sanctions such as imprisonment.<sup>117</sup>

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<sup>115</sup> supra note 24

<sup>116</sup> supra note 5

<sup>117</sup> supra note 96 at pp. 252-253

# 4 The Canadian common law tradition

## 4.1 General principles of Canadian law

Canadian law has three sources: the common law, the statute law and the Constitution.<sup>118</sup> The Constitution is the political and legal foundation of the nation. It states that Canada is a federal democracy consisting of ten provinces. The constitutional evolution of Canada spans over centuries. In 1867, the British Parliament passed the Constitution Act, formerly the British North America Act, which was the first major component of the written Canadian Constitution. Generally, the Canadian Constitution establishes and regulates the framework of interaction between the citizens of the country and its government.<sup>119</sup> The Constitution is the supreme law of Canada and any statute or common law rule that is inconsistent with the Constitution is of no force or effect.<sup>120</sup> Furthermore, it creates exclusive jurisdictions for federal and provincial legislation. Canadian criminal law, the law of property and bankruptcy are solely within the jurisdiction of the federal government. Regulation of trade, commerce, health and education within the province is within the sphere of provincial legislative authority.<sup>121</sup> Sometimes the provincial and federal legislative powers overlap. Provincial statutory law only applies to the particular province, in which it was enacted. Statute law is thus an Act of Parliament, of a provincial legislature, or of a similar governmental entity.<sup>122</sup> The Criminal Code of Canada is a federal statute, which applies to all provinces of the country. It declares offences, but also defences like the insanity defence.<sup>123</sup>

Canadian criminal law is part of the Anglo-American common law tradition, whose basis is primarily judicial. Common law is characteristically the explanations and rationalizations of judicial decisions. Judges derive principles from precedents that were developed over hundreds of years and that apply to the facts of the case at hand. Judges in England, America and the British Dominions interpret the law, but also create law. The expression “judge made law” refers to common law because of the predominant role of the judge. One great advantage of the system is its flexibility and elasticity. Common law allows judges to meet new needs with new law and adapt the law to the specific circumstances of the case.<sup>124</sup> However, in consequence,

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<sup>118</sup> Stewart, Hamish; *Evidence A Canadian Casebook*, Canada 2002 p. 7

<sup>119</sup> Chapman, Frederick A.R; *The law and you: a layman's guide to Canadian law*, Toronto 1970, pp. 17-18

<sup>120</sup> Section 52(1) of the Constitution Act, 1982

<sup>121</sup> Section 91 and 92 of the Constitution Act, 1867

<sup>122</sup> *supra* note 118 at p. 118

<sup>123</sup> Stuart, Don and Delisle, Ronald J; *Learning Canadian Criminal Law*, 8<sup>th</sup> edition, Canada 2001, p. 2

<sup>124</sup> *ibid* at p. 16

the common law is not very organized and is fragmented. Judges derive rules and principles from the details of the case. In order to grasp the law, one has to study a great number of cases in the common law systems and even then, it may sometimes be hard to establish exactly what the law is.<sup>125</sup> The law in a common law country is thus a body of decided cases. The law of precedent, which states that cases with similar facts should give equivalent legal consequences, achieves a compromise between the goals of predictability and flexibility. Nevertheless, it is easy for the judge to distinguish an unwanted precedent on its facts and argue for the applicability of new principles.<sup>126</sup> The judge is relatively free in his search for arguments supporting his or her ruling. Scientific knowledge as well as scholars and legal rulings from other common law countries are often cited.<sup>127</sup> The judicial independence is a cornerstone of the Canadian legal system.<sup>128</sup>

There are two types of criminal offences set out in the Criminal Code or other federal legislation. Summary offences are crimes with maximum penalties of fines of less than 2000 dollars or six months in jail or both. Offences prosecuted by indictment are more severe offences, in which the law entitles a jury trial for the accused. A number of serious offences, such as murder, require a judge and a jury to try the case. The jury system in criminal proceedings has its roots in the common law tradition. It ensures the direct participation of the people of a community in the administration of justice.<sup>129</sup>

The life and liberty of the accused, as well as the stigma of a criminal conviction are at stake in a criminal proceeding. The constitution ensures certain rights for the defendant in order to protect the individual from the risk of oppression. The Canadian Charter of Rights and Freedoms, which is a part of Canadian Constitution, states that no person shall be deprived of life, liberty and security except in accordance with principles of fundamental justice.<sup>130</sup> The law, for instance, does not require the accused to give evidence of his or her innocence or to take the witness stand and the prosecution bears the burden of proving guilt beyond reasonable doubt. In the event of breach of the right to a proceeding in accordance with principles of fundamental justice, the Charter provides for the judge in the case to decide upon appropriate remedies.<sup>131</sup> The Charter allows for instance the judge to exclude evidence, which was obtained in a way that violates any right under the Charter, if the admission would bring the administration of justice into disrepute.<sup>132</sup>

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<sup>125</sup> Chapman, *supra* note 119 at p. 16

<sup>126</sup> Stuart and Delise, *supra* note 123 at p. 16

<sup>127</sup> see for instance the case of *Cooper v. R.* (1979), [1980] 1 S.C.R. 1149, 13 C.R. (3d) 97, 51 C.C.C. (2d) 129

<sup>128</sup> *supra* note 119 at pp. 15-16

<sup>129</sup> "A Crime Victim's Guide to the Criminal Justice System", [http://canada.justice.gc.ca/en/ps/voc/guide/sec\\_h.html](http://canada.justice.gc.ca/en/ps/voc/guide/sec_h.html), last viewed 2005-05-10

<sup>130</sup> Section 7 of the Canadian Charter of Rights and Freedoms, 1982

<sup>131</sup> Section 24(1) of the Canadian Charter of Rights and Freedoms, 1982

<sup>132</sup> Section 24(2) of the Canadian Charter of Rights and Freedoms, 1982

The admissibility of evidence is a question of law, according to Canadian law. The issue of guilt is a factual matter. According to the law of criminal procedure, in a trial with a jury, the judge resolves questions of law and the jury determines questions of fact. The jury decides what the facts of the case are and applies the law given by the judge to these facts. However, the jury does not report its factual findings. It simply states whether it has found the accused guilty or not guilty on each charge. Consequently, the Canadian case law does not include reasoning on how the jury reached its verdict. However, it does include explanations and rationalisations of questions of law, such as the admissibility of certain evidence or the propriety of the instructions of law submitted by the judge. Jury instructions encompass the substantive law relevant to the case and are open for public scrutiny. In giving instructions on the law, the judge is often called the gatekeeper, since he or she decides what information is applicable to the case and thus should go to the jury. The general rule is that only legal information relevant to the case should reach the jury. The threshold narrows down the task of the jury and helps it to focus on the issues at hand.<sup>133</sup>

## 4.2 Mental disorder and voluntariness

The Canadian criminal law is thus part of the common law tradition based on the importance of judicial decisions. Judges do not only interpret law, they also create law.<sup>134</sup> Consequently, the judges could have the power of declaring anything that is harmful to the public an offence, although the law may have not previously regarded the act as such. However, this power does not exist in Canadian criminal law. According to the principle of legality, a conviction requires the Criminal Code to recognize the charged offence as a crime prior to the act.<sup>135</sup> Nevertheless, the justifications and excuses derived from common law are still valid.<sup>136</sup>

Criminal liability in the common law tradition requires proof of an act, *actus reus*, on the part of the accused. The accused has to put any thoughts or intentions into action in order to be accountable.<sup>137</sup> Omissions are only punishable if there is a specific obligation to act. The *actus reus* component includes a requirement of volition, which means that the conduct has to be the result of the agent's willpower and not just a reflex. One of the prerequisites of criminal liability is thus that the accused has to have produced the physical ingredient of the crime.<sup>138</sup> In the case *R. v. Lucki*, for example, the car of the accused had skidded over to the wrong side of the road and as a result, he collided with another car, which was operating in the opposite direction. It was not his driving that placed him onto the wrong

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<sup>133</sup> supra note 118 at p. 10

<sup>134</sup> supra note 123 at p. 16

<sup>135</sup> *Frey v. Fedoruk* [1950] S.C.R. 517, 10 C.R. 26, 97 C.C.C. 1

<sup>136</sup> Section 8(3) of the Canadian Criminal Code

<sup>137</sup> supra note 123 at p. 186

<sup>138</sup> *Kilbride v. Lake* [1962] N.Z.L.R. 590 (S.C)

side of the road, but rather the conditions of the road that caused the collision, the Supreme Court emphasized. The act was involuntary and therefore not blameworthy.<sup>139</sup>

Moreover, the voluntary element requires the act to be conscious and within the control of the individual. In *R. v. Parks*, the accused was charged with murder and attempted murder. The night in question, he fell asleep in the living room. A few hours later he got up and drove 23 kilometres to his in-laws' home. Still asleep, he had entered the house, grabbed a knife from the kitchen and gone to the bedroom, where his in-laws were sleeping. He had strangled and inflicted cuts upon his father-in-law, who, despite severe injuries, survived the attack. The mother-in-law was not as fortunate. She died from her wounds because of the repeated stabbing and the brutal beating. The defendant raised the defence of sleepwalking. The medical experts unanimously stated that the accused was sleepwalking and that a person in this state of mind cannot reflect or perform voluntary acts. The Supreme Court agreed and explained that sleepwalking can render an absolute acquittal since it negates the voluntary ingredient of the act requirement.<sup>140</sup>

Sleepwalking is one example of automatism, which means acts that the muscles are doing without any control by the mind. Automatism refers to unconscious acts, convulsions and spasms. They are acts performed during a state of dissociation between the mind and body. There can be several triggers for this state. In *R. v. Rabey*, a young student had been rejected by his great love. He responded by hitting her on the head and choking her. According to the respondent, he had little recollection of the event and a psychiatrist testified that his mind dissociated from his body. The psychiatrist explained that a person in this kind of state might be capable of performing physical acts without awareness of such actions.<sup>141</sup>

Dissociation can be a part of a mental disorder like in multiple personality disorder for instance.<sup>142</sup> As a result, the defence of automatism may be available for a mentally impaired defendant. However, if the insanity defence is available, it prevails. Therefore, if the accused suffers from a mental disorder in the meaning of the law, the defence of automatism is not available. However, mental impairment outside the legal concept of mental disorder may render an acquittal based on automatism and involuntariness. There is thus a distinction between sane and insane automatism.<sup>143</sup>

The distinction between sane and insane automatism is difficult to establish. Generally, if external factors cause the involuntariness it is called sane automatism and if internal factors are involved the insanity defence is

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<sup>139</sup> *R. v. Lucki* (1955), 17 W.W. R. 446 (Sask. Pol. Ct.), partly reproduced by Stuart and Delisle, supra note 123 at pp. 297-298

<sup>140</sup> *R. v. Parks* [1992] 2 S.C.R. 871, 15 C.R. (4<sup>th</sup>) 289, 75 C.C.C. (3d) 287

<sup>141</sup> *Rabey v. R.* [1980] S.C.R. 513, 15 C.R. (3d) 225, 54 C.C.C. (2d) 1

<sup>142</sup> Slovenko, Ralph; *Psychiatry and criminal culpability*, New York 1995, p. 72

<sup>143</sup> Stuart and Delisle, supra note 123 at pp. 852-853

applicable.<sup>144</sup> Nevertheless, when a man stabbed his wife 47 times under an unconscious episode, which only her insulting words caused, the Supreme Court found that the defence of sane automatism should not be available. Even though the wife's words were external, it was not sufficient to entitle a defence of sane automatism. Policy factors and danger factors played a big role in the ruling. The court took the protection of society and the dangerousness of the man under consideration.<sup>145</sup>

Kjeldsen, Andrea and Hinckley were conscious and in control of their bodies. The murders and attempted murder were not the results of spasms or reflexes. Their behaviours were voluntary.<sup>146</sup> Usually, the presence of a mental disorder does not play a big part in determining the act requirement. Since mental disorders affect our mind, they have a larger impact on the requirement of intent, according to Canadian law.<sup>147</sup>

### 4.3 Mental disorder and fault

According to Anglo-American law, a person is guilty of a crime only if a criminal mind accompanies a criminal act. The bad deed and the evil mind, *mens rea*, are necessary components of the constitution of a crime.<sup>148</sup> The crime consists of an outward visible element and an inward mental element.<sup>149</sup> Generally, the mental element refers to the wrongful intention of the accused. It prevents the conviction of those who do not understand or intend the consequences of their acts. Its function in criminal law is to exclude the morally innocent from criminal responsibility. The *mens rea* criterion is subjective in the sense that it tries to assert what was going on in the mind of the accused given his or her personality, the situation and other special circumstances.

The state of mind required varies according to the different nature of the crime. Depending on the nature of the crime, the accused has to know, intend or be reckless in relation to the harmful consequence. The subjective element does not elaborate with standards of how a reasonable person would have behaved in a similar situation. The important thing is to establish what the person was aware of when he or she committed the offence. What the accused should have known is irrelevant to the question of intent or recklessness. Nevertheless, the court may infer subjective awareness of the consequences from the actions and words of the accused.<sup>150</sup> Furthermore, it is reasonable to infer that a person intended the natural consequences of the act, according to the Supreme Court of Canada. If a person shoots at another person with a lethal weapon it is a reasonable inference that he or she also

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<sup>144</sup> supra note 141

<sup>145</sup> R. v. Stone [1999] 2 S.C.R. 290, 24 C.R. (5<sup>th</sup>) 1, 134 C.C.C. (3d) 353

<sup>146</sup> supra note 1, 2 and 3

<sup>147</sup> R. v. Abbey 29 C.R. (3d) 193, [1982] 2 S.C.R. 24, 68 C.C.C. (2d) 394

<sup>148</sup> Reznick, Lawrie supra note 39 at p. 15

<sup>149</sup> supra note 123 at p. 345

<sup>150</sup> ibid at p. 350-351

intended death or at least to cause bodily harm. Intention thus connects to the consequences of the crime. In a murder case, for instance, the jury has to establish whether the accused had intended death. In other offences, such as physical abuse, the intention is relevant in relation to causing bodily harm.<sup>151</sup>

Some criminal offences do not require subjective awareness of the risks. Objective negligence is the requirement in for example dangerous driving. The jury has to consider the conduct of the accused instead of the mental state. If the conduct is a marked departure from the standard of a reasonable person in the circumstances, the person is criminally negligent.<sup>152</sup> However, in applying the objective test, the judges of the Supreme Court of Canada have been of different opinions on whether the defendant's perception of the facts is important in determining whether the behaviour was criminally negligent. The defendant's ability to foresee the consequences of his or her behaviour could have an impact on accountability. Nevertheless, in the case of *R. v. Creighton* the Supreme Court reached a majority decision. Factors particular to the accused, short of incapacity, are no longer part of the objective test. The objective test is not concerned with what was actually in the mind of the accused. The fault lies in the failure to direct the mind to a reasonable behaviour in the circumstances. What should have been in the mind of the accused is thus relevant in the application of the test.<sup>153</sup>

In the cases of *Kjeldsen*, *Andrea Yates* and *Hinckley*, the questions of intent and criminal negligence were not the main issues.<sup>154</sup> The presence of a mental disorder, in the form of incapacity, may affect the application of the objective test. However, attempted murder and murder, which the defendants in these cases were charged with, are not crimes requiring criminal negligence. Murder and attempted murder are crimes requiring subjective intent on the part of the offender. On the issue of intent, the judge may admit evidence of mental impairment short of insanity, according to Canadian law, but the essential area of differentiating between the mad and the bad in the common law tradition falls within the area of the use of mental disorder as an excuse.

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<sup>151</sup> *R. v. Ortt* (1969), 6 C.R.N.S. 233, [1970] 1 C.C.C. 233 (Ont. C.A.), partly reproduced by Stuart and Delisle, supra note 123 at p. 359

<sup>152</sup> *R. v. Hundal* [1993] 1 S.C.R. 867, 19 C.R. (4<sup>th</sup>) 169, 79 C.C.C. (3d) 97, partly reproduced by Stuart and Delisle, supra note 123 at p. 350

<sup>153</sup> *R. v. Creighton* [1993] 3 S.C.R. 3, 23 C.R. (4<sup>th</sup>) 189, 83 C.C.C. (3d) 346

<sup>154</sup> supra note 1, 2 and 3

## 4.4 Mental disorder as an excuse

### 4.4.1 The origin and tests of the insanity defence

The common law tradition has continuously made efforts to separate out people who are not responsible for their actions.<sup>155</sup> Over the years, different categories of excuses have gradually developed. One of the most controversial excuses of criminal responsibility is the one of insanity. The defence has evolved from the notion of mental disorder as something evil from the devil in the middle ages, into a separate defence in the 18<sup>th</sup> century. The roots of the insanity defence can be traced back to ancient religious traditions.<sup>156</sup>

The ancient Hebraic law stated that children below a certain age, “idiots” and “lunatics” lacked the ability to differ between good and evil and were thus blameless in the eyes of God and man.<sup>157</sup> In addition, according to the biblical codes, the minor, the “deaf mute” and the “mental defective” were not punishable due to their lack of purpose and free will.<sup>158</sup> Furthermore, in Greek and Roman law, Marcus Aurelius explained that mentally impaired were not punishable, since madness itself was punishment enough.

Christian ethics and Roman jurisprudence were incorporated into the early laws of Anglo-Saxon society and under the influence of Augustinian theology, the notion of a guilty mind, as a prerequisite for criminal responsibility became a cornerstone of English criminal law. In the 13<sup>th</sup> century, a legal scholar named Henry de Bracton argued for the innocence of children and “maniacs”. He believed that neither minors, nor mentally impaired individuals had any will to do harm. “Lunatics” lacked mind and reason and did not comprehend their actions, according to Bracton.<sup>159</sup>

During the early middle ages, there was no need for a particular test for insanity. Until the sixteenth century, the jury did not have the authority to excuse the criminally insane. However, once the authority of special verdicts was granted, the need to control and restrict the power of the jury emerged. Without any control mechanisms, the fear was that twelve good men would distribute their own sense of justice. As a result, the division of power between the judge and the jury evolved. The jury was to decide factual questions and the judge would give instructions on the substance of the law.<sup>160</sup>

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<sup>155</sup> U.S. v. Freeman (1966), 357 F. (2d) 606 (2<sup>nd</sup>. Circ.), partly reproduced by Stuart and Delisle, supra note 123 at pp. 784-785

<sup>156</sup> Slovenko, supra note 142 at pp. 7-8

<sup>157</sup> Maeder, Thomas; *Crime and madness: the origins and evolution of the insanity defense*, United States 1995, p. 3

<sup>158</sup> Slovenko, supra note 142 at p. 7

<sup>159</sup> Maeder, supra note 157 at pp. 3-4

<sup>160</sup> *ibid* at pp. 5-6

In 1724, Edward Arnold shot and injured Lord Thomas Onslow for no substantial reason. Arnold had complained about having Lord Onslow in his belly and accused him of being responsible for afflicting bugs and plagues on his land. Other than that, no one knew why Arnold had decided to purchase a gun and shoot at the Lord. His only defence was insanity. The judge's instruction on insanity in this case is well known<sup>161</sup>. He enunciated to the jury a test for distinguishing between madness and badness, "the wild beast test":

*If he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence yet he could not be guilty of any offence against any law whatsoever: for guilt arises from the mind, and wicked will and intention of the man...//...[I]t is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast.*<sup>162</sup>

Despite his odd character and delusions, the jury convicted Arnold and the judge sentenced him to death. However, Lord Onslow intervened and the death sentence commuted to life in prison.<sup>163</sup>

For the next century, the instructions regarding the insanity defence did not show any particular progression.<sup>164</sup> The wording of the instructions varied, but they were all based on the idea that a person unable to know right from wrong due to a mental disorder was not responsible for his or her actions. Badness was in the mind, according to the criminal theory of the century. If the mind did not know what the body was doing or if the mind could not tell right from wrong, the person was blameless. Knowledge thus became the key element of the insanity defence.<sup>165</sup>

In 1843, a case generated a test of the insanity defence, which is still valid today in many common law countries. The so-called M'Naghten<sup>166</sup> case is one of the best-known cases in the history of the insanity defence. Daniel M'Naghten, the defendant, suffered from delusions of persecution. He believed that the Tories followed and persecuted him wherever he went.<sup>167</sup> He was convinced that they accused him of crimes he never committed and

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<sup>161</sup> *ibid* at pp. 9-10

<sup>162</sup> Mr Justice Tracy's instruction, partly reproduced by Reznek, *supra* note 148 at p. 17 and Maeder, *supra* note 157 at p. 10

<sup>163</sup> Maeder, *supra* note 157 at p. 11

<sup>164</sup> *ibid* at p. 23

<sup>165</sup> *ibid* at p. 7

<sup>166</sup> Different authors use various spellings of the name M'Naghten. Maeder, *supra* note 157 at p. 24

<sup>167</sup> *supra* note 155

that they wanted to murder him. Finally, he had enough and decided to kill Sir Robert Peel, the Prime Minister, in order to get some peace of mind. Consequently, M’Naghten came to London and planned to assassinate the Prime Minister as he came out of his carriage. His intention would have succeeded if not for the fact that Peel had chosen to occupy another carriage for the day. Instead of shooting Peel, M’Naghten shot and fatally killed Drummond, Peel’s popular secretary, who was riding Peel’s carriage that day.<sup>168</sup>

After a lengthy trial, the jury reached the verdict of not guilty by reason of insanity.<sup>169</sup> Even if M’Naghten knew what he was doing and that the act was wrong, the jury did not find him blameworthy of his behaviour. The verdict led to a general public outcry and a demand for changes in the insanity defence. Queen Victoria herself engaged in the fierce protest and the members of the Parliament discussed the matter lively. Finally, the House of Lords summoned fifteen judges to a meeting and asked them several questions regarding the insanity defence.<sup>170</sup> The meeting generated the M’Naghten rule, which is a specific test for the jurors to apply when having the difficult task of distinguishing between the legally sane and the legally insane:

*...[T]o 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 that he was doing what was wrong.<sup>171</sup>*

The M’Naghten rule establishes that exculpation requires the presence of a “disease of the mind”. In addition, the “disease of the mind” has to render the accused, either not knowing the nature and quality of the act or not knowing that what he was doing was wrong. The irony is that according to this rule, the jury would have had to convict M’Naghten. He knew what he was doing and he knew that the act was wrong. The explanation that he did it out of a delusion of fear for his own life would have not been sufficient if the jury had tried M’Naghten according to the rule established in the aftermaths of his case.<sup>172</sup>

The notion that blame and knowledge are connected is the central feature of the M’Naghten rule. A person that can differentiate between right and wrong or knows the nature and quality of the act is criminally responsible. According to the theories behind the rule, mental impairment is something that affects cognition. A few decades into the 19<sup>th</sup> century, a more complex structure of the concept of mental disorder emerged. Sanity was not only the

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<sup>168</sup> Reznick, supra note 39 at p.19

<sup>169</sup> supra note 155

<sup>170</sup> Reznick, supra note 39 at p. 20-21

<sup>171</sup> ibid

<sup>172</sup> ibid at p. 21

ability to think, understand and know, according to the new theories. The presence of a mental disorder also affected the ability to control one's behaviour. As a result, the M'Naghten rule was too narrow and rigid to encompass the new view of the human mind, some psychiatrists and legal scholars argued. The critique and the debate resulted in the amendment of "the irresistible impulse test". The test presumes that an act can be the product of an irresistible and uncontrollable impulse. It states that the agent cannot be responsible for this kind of act since the mind is not directing the behaviour. Volition is thus the key element in the irresistible impulse test.

After the Second World War, the interest and faith in psychiatry and psychology increased in the common law tradition.<sup>173</sup> German and East European practitioners, who had fled the war and settled down in the United States, contributed to the new drive towards understanding and aiding the mentally disturbed. The public welcomed social welfare programs and medical theories of criminal behaviour. Judge Bazelon, appointed judge in the U.S. Court of Appeals for the District of Columbia, was one of the enthusiasts of this medical and social era. He conducted comprehensive research and claimed that the M'Naghten rule demanded more information than the psychiatric profession could supply. Psychiatry did not have the answer to questions on whether the defendant knew what he was doing or if he or she knew that, the act was wrong, Bazelon continued. Since he felt that there was no perfect theory of criminal responsibility, he preferred to broaden the rule of the insanity defence and gave psychiatrists more room to explain the motives and behaviours of the accused. He wanted to approach each defendant as a unique individual.<sup>174</sup> His efforts resulted in the Durham rule:

*An accused is not criminally responsible if his unlawful act was the product of mental disease or defect.*<sup>175</sup>

The rule opened the door for psychiatric evaluation and gave room for a variety of interpretations. Despite efforts to restrict the definition of "mental disease or defect", the rule resulted in an increase of successful insanity pleas in Washington D.C. by over fourteen percent. Finally, even Judge Bazelon realized that the rule was too vague and gave psychiatrists too much power in determining criminal guilt. The District of Columbia abandoned the Durham rule in 1972 and replaced it with a model test of the American Law Institute (ALI), which already had become law in the majority of states in the U.S. The ALI rule is a modified version of the M'Naghten rule and the irresistible impulse amendment.<sup>176</sup> It contains one cognition prong and one volitional element:

*A person is not responsible for criminal conduct if at the time of such conduct as result of mental disease or defect he lacks*

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<sup>173</sup> Goldstein, Abraham S; *The insanity defense*, New Haven and London 1967, pp. 211-212

<sup>174</sup> Maeder, supra note 157 at p. 73 and pp. 80-82

<sup>175</sup> *ibid* at p. 85

<sup>176</sup> *ibid* at p. 87 and pp. 92-96

*substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.*<sup>177</sup>

The John Hinckley trial is an example of the application of the ALI standard. As such, at Hinckley's trial, the question facing the jury was whether Hinckley had a mental disease at the time of the crime that resulted in the absence of the capacity to appreciate the wrongfulness of his behaviour, or in the inability to conform his conduct to the requirements of the law. The forensic psychiatrists testifying agreed on the fact that Hinckley suffered from a mental disease at the time of the unlawful act, but they did not agree on the specific diagnosis. The defence psychiatrist claimed that Hinckley was living isolated in his own delusional world and that he had no ability to appreciate the wrongfulness of his behaviour and was incapable to conform his conduct to the requirements of the law. The prosecution psychiatrist portrayed the picture of a young man with no direction and structure, but denied the presence of any psychotic illness. Despite his fantasies and unrealistic expectations, Hinckley had not lost touch with reality, according to the prosecution. Consequently, the prosecution emphasized, Hinckley had the ability to appreciate the wrongfulness of his conduct and to act in accordance with the law. The jury rejected the suggestions of the prosecution and found Hinckley NGRI on all charges.<sup>178</sup>

The verdict shocked the nation and evoked much public indignation. The day after the verdict, a news station conducted a survey that revealed that three quarters of the surveyed perceived the verdict as unfair. The verdict even seemed to surprise the trial judge, who set a sentencing date, but corrected himself and remanded the defendant to a psychiatric hospital. Hinckley also seemed bewildered by the acquittal. In a letter, which he wrote the day before the verdict, he explained that he had tried to kill the President to impress his beloved and that he was sorry that love had to hurt so much.<sup>179</sup>

The public's negative response stimulated legal reforms to the insanity defence. Many scholars saw the volitional prong of incapability to conform one's conduct to the law as the main reason for the acquittal.<sup>180</sup> As a result, many states in the U.S. went back to versions of the cognition-based M'Naghten test. Texas, where Andrea Yates lived, dropped the element of conforming conduct and reverted to a knowledge-based test. The defence of Andrea Yates thus had to prove that she had a mental illness preventing her from knowing that she committed a crime or that her act was wrong. It was a difficult task since Andrea Yates admitted to the police that she expected the criminal justice system to punish her. She would have had a better

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<sup>177</sup> *ibid* at p. 97

<sup>178</sup> *supra* note 2

<sup>179</sup> *ibid*

<sup>180</sup> Reznek, *supra* note 39 at p. 285

chance of acquittal if the volition prong had remained a part of the insanity defence in the state.<sup>181</sup>

#### 4.4.2 The Canadian test of criminal responsibility

The M’Naghten rule is the single most important rule in the development of the insanity defence in the common law tradition. Despite criticism and various efforts of reconstructing the test of criminal responsibility, the rule is still the foundation of the law governing criminal liability and mental disorder. The Canadian version of the insanity defence derives from the M’Naghten rule. However, in 1991, the Parliament made some editorial changes and abandoned the terminology of “insanity defence” and “disease of the mind” in favour of “test of criminal responsibility” and “mental disorder”. The verdict changed from “not guilty by reason of insanity” to “not criminally responsible on account of mental disorder”. The purpose of the change was to adapt the terminology of the test with current psychiatric language. The Parliament made it clear, that it intended no reformation of the application of the test. The terms of “disease of the mind” in the original M’Naghten rule and “mental disorder” in the new Canadian version are thus interchangeable.<sup>182</sup> Section 16(1) of the Canadian Criminal Code encompasses the modified test of criminal responsibility. Section 16(1) states that:

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

According to the Supreme Court of Canada, the term “disease of the mind”/“mental disorder” is primarily a legal concept. It is a question of law whether the condition the accused suffers from amounts to a “disease of the mind” in the legal context and thus it is within the power of the judge to determine. However, the term has a medical component. The role of psychiatrist is to describe the defendant’s medical condition and consider it from a medical point of view. Medical knowledge forms a part of the evidence on which the final decision rests. The function of the judge is to form an independent conclusion about the defendant’s condition. If the judge determines that the condition explained by the psychiatrist is a mental disorder in the meaning of the law, he leaves the defence with the jury. The task of the jury is to decide whether the accused suffered from a disease of the mind at the time of the unlawful act. This is a question of fact, according to Canadian law.<sup>183</sup> The application of the test of criminal responsibility is

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<sup>181</sup> Bard, Jennifer S; “Unjust Rules for Insanity”, *The New York Times*, March 13 2002

<sup>182</sup> Stuart and Delisle, supra note 123 at p. 786

<sup>183</sup> Cooper. V. R. (1979), [1980] 1 S.C.R. 1149, 13 C.R. (3d) 97, 51 C.C.C. (2d) 129

thus a classical example of the division of power in the courtroom. The judge resolves questions of law and the jury deals with questions of fact.<sup>184</sup>

The interpretation of the term “mental disorder” or “disease of the mind” is legal. The judge is solely responsible for the decision of whether the condition described is a mental disorder in the meaning of the law and thus raises the question of exemption of criminal responsibility. In the case of *Cooper v. R.*, the Supreme Court of Canada gave the concept the widest possible meaning and saw no point in a limited and narrow interpretation. In the legal context of sec. 16 of the Criminal Code the Supreme Court defined “disease of the mind” to include “any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.” In the *Cooper* case, the accused suffered from a personality disorder, which included schizoid, anti-social and inadequate features. This could constitute a “disease of the mind” in the meaning of the law, the Supreme Court concluded. However, it is not sufficient to merely show the existence of a disease of the mind, the Supreme Court continued. Only when the mental disease is of such intensity that it renders the person incapable to make the distinction between right and wrong, or appreciate the nature and quality of the act, can he or she, be exempted from criminal liability, the Supreme Court emphasized.<sup>185</sup>

In the *Cooper* case, the Supreme Court also interpreted the meaning of the first branch of the insanity defence. It concluded that the word “appreciate” means another level of understanding than the mere knowledge of the fact that the act is taking place. The Supreme Court pointed out that the draftsman of the Criminal Code deliberately abandoned the word “knows” in the original M’Naghten rule in favour of the broader “appreciate”. The purpose of the change was to show that not only cognition, but also emotional and intellectual awareness of the conduct is in issue, the Supreme Court continued. The accused has to apprehend the factors involved in his or her act and possess the mental ability to foresee and measure the consequences of the conduct at the time of its commission. In order to appreciate the nature and quality of the act, the defendant therefore has to comprehend the character of the act and its consequences.<sup>186</sup>

In the case of *Kjeldsen v. R.*, the defence argued that the Court should exempt the accused, who suffered from a psychopathic personality disorder, from criminal responsibility due to an inability to be emotionally aware of the consequences of his conduct. The Supreme Court did not agree with the defence and concluded that, although psychopathic personality could be a “disease of the mind” under the law, the fact that the psychopath lacked the ability to feel for his victim or lacked appropriate empathy, did not mean that he or she could not appreciate the nature and quality of the act. Since the perpetrator understood the physical act and the physical consequences

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<sup>184</sup> Stewart, *supra* note 118

<sup>185</sup> *supra* note 183

<sup>186</sup> *ibid*

flowing from it, the Supreme Court did not find the insanity defence applicable. To appreciate the nature and quality of the act does not require appropriate feelings to accompany the act, the Supreme Court pointed out. In fact, the Supreme Court emphasized, the absence of such feelings is a common characteristic of many repeated and serious criminal offenders.<sup>187</sup>

The second branch of the insanity defence excludes a mentally impaired defendant from criminal responsibility if he or she does not know that the act was wrong. The word “wrong” is ambiguous. Andrea Yates, for instance, knew she was acting outside the law when she drowned her children. However, her mental disorder caused her to believe that the killings were the only way of saving her children from being tormented in the fires of hell. In that sense, she did not believe she acted wrongly.<sup>188</sup> The psychopath, like Kjeldsen, is another example. The psychopath certainly understands that the act is contrary to law, but the act is not contrary to his or her moral values. In that sense, the psychopath does not think that he or she is doing something wrong, according to his or her own moral code. Kjeldsen committed the rape and murder without the feelings of guilt telling him that he did something wrong. There was no sense of guilt, anxiety, or remorse within him to indicate the wrongfulness.<sup>189</sup>

These cases illustrate that there clearly is a difference between understanding that something is against the law and feeling that the conduct is morally wrong. In the case of *R. v. Oommen*, the Supreme Court clarified that the term “wrong” means legally wrong and not morally wrong. The Court explicitly expressed that the insanity defence was not available for the psychopath because he or she is “capable of knowing that his or her acts are wrong in the eyes of society, and despite such knowledge chooses to commit them.”<sup>190</sup>

## 4.5 Mental disorder and diminished responsibility

The insanity defence is a complete excuse. The legally insane person is an innocent person, who is not liable for his or her actions. The law does not attribute the criminal act to the mentally impaired person, who is therefore not criminally responsible for his or her actions. The law excuses the unlawful act and the vicious mind due to the presence of a mental disorder affecting the abilities of the accused in certain ways.<sup>191</sup>

The law does not provide a complete excuse of the act if the mental impairment does not amount to a mental disorder in the meaning of the law.

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<sup>187</sup> supra note 3

<sup>188</sup> supra note 1

<sup>189</sup> supra note 3

<sup>190</sup> *R. v. Oommen* [1994] 2 S.C.R. 507, 30 C.R. (4<sup>th</sup>) 195, 91 C.C.C. (3d) 8

<sup>191</sup> Bavidge, Michael; *Mad or bad?*, Great Britain 1989, p. 27

The doctrine of diminished responsibility, however, says that psychological abnormality short of insanity may partially excuse the behaviour of the accused and render a less severe conviction. According to the doctrine of diminished responsibility, the action prescribed by the law is thus attributable to the person.<sup>192</sup>

In 1957, the Homicide Act introduced into English law a defence based upon the defendant's mental condition, which does not require legal insanity. The doctrine of diminished responsibility in the English law may reduce a murder charge to a manslaughter conviction. Section 2(1) and 2(3) of the Homicide act state that:

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

*(3) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.<sup>193</sup>*

According to Section 2(1) and 2(3), the decision left with the jury is whether to convict the accused of murder or manslaughter. Criminal liability depends on whether the psychological abnormality of the accused diminishes his or her mental responsibility. Diminished mental responsibility results in a manslaughter conviction instead of a murder conviction and thus reduces the criminal responsibility.<sup>194</sup>

Canadian law does not encompass a specific doctrine of diminished responsibility. The judge may however admit evidence of mental disorder short of insanity to negate the specific elements of the crime. A first-degree murder is a "planned and deliberate" homicide. A second-degree murder is a homicide without the requirements of planning and deliberation. The jury may thus reduce a conviction of first-degree murder only if the mental impairment negates the requirement of deliberation and planning. In this context, the words "planned and deliberate" are given their ordinary meaning. Subjective factors personal to the defendant of his or her mental disorder may indicate that the act was impulsive rather than considered, but mental disorder does not necessarily negate the commission of a planned and deliberate homicide. The words do not encompass a requirement of reasonable thinking or rationally motivated decisions. The real question is whether the act was considered or carried out impulsively.<sup>195</sup>

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<sup>192</sup> *ibid*

<sup>193</sup> Bavidge, *supra* note 191 at p. 17

<sup>194</sup> *ibid* at p. 18

<sup>195</sup> *R. v. Jacquard* (1997), 113 C.C.C. (3d) 1 (S.C.C.)

## 4.6 Mental disorder and disposition

Before 1991, the trial judge had no discretion but to order the indefinite detention of an accused found not guilty by reason of insanity. The accused was kept in custody for an unknown length of time and could only be released at the pleasure of the government. However, in May 1991, the Supreme Court declared that the system offended the provisions of the Canadian Charter of Rights and Freedoms. The unequivocal, automatic and indefinite commitment, regardless of the particular circumstances of the individual person concerned, infringed on the rights of the defendant, according to the Supreme Court and as a result, it ordered the Parliament to change the legislation.<sup>196</sup>

The new amendments of the Criminal Code, which came into force in 1992, require each province to establish Review Boards, which typically consist of legal and psychiatric professionals.<sup>197</sup> According to the Canadian Criminal code, the Review Boards have the primary responsibility in determining the appropriate sanction for the accused.<sup>198</sup> The trial judge only has the power to make a temporary disposition of a maximum 90 days, after which the Review Board must oversee the decision. In determining the appropriate disposition, these tribunals need to take into account the protection of the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused. In its decision, it must choose the appropriate sanction, least onerous and least restrictive to the accused.<sup>199</sup>

A verdict of not criminally responsible on the account of mental disorder will result in dispositions ranging from absolute or conditional discharge to detention in custody of a hospital.<sup>200</sup> Absolute discharge is the appropriate sanction according to the law if the accused is not a significant threat to the safety of the public. According to the Supreme Court of Canada, if there are no positive signs of significant threats to the safety of the public, the Review Board or the trial judge must discharge the accused. Conditional discharge enables the accused to live in the community subject only to certain conditions decided by the Review Board or the trial judge. They may require from the accused to report to a hospital, refrain from drugs or alcohol, or stay away from contacting certain people. Detention in a hospital restrains the liberty of the accused even more. He or she has to submit to the rules and regulations of the psychiatric facility. However, the accused does not have to submit to any involuntary treatment. If the person is detained, the Review Board must review the detention every year.<sup>201</sup>

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<sup>196</sup> R. v. Swain (1991), 5 C.R. (4<sup>th</sup>) 253 (S.C.C.)

<sup>197</sup> Section 672.38 and section 672.4 (1) of the Canadian Criminal Code

<sup>198</sup> Verdun-Jones, Simon N; "The insanity Defence in Canada: Setting a New Course", *International Journal of Law and Psychiatry*, Vol. 17, No 2 (1994), p. 178

<sup>199</sup> *ibid* at p. 180

<sup>200</sup> Section 672.54 of the Canadian Criminal Code

<sup>201</sup> Verdun-Jones, *supra* note 198 at p. 178-179

# 5 The criminal man

## 5.1 Freedom of choice

Canadian and Swedish criminal law recognize that the presence of mental disorder may affect the ability to freely choose between right and wrong and should consequently be taken into account in the evaluation of the issue of guilt. However, the countries differ in the extent to which the presence of mental disorder affects the considerations.

According to the criminal systems in the respective countries, the act has to be within the control of the offender in order to be blameworthy. If the body acts without the mind controlling it in the direction of the harmful consequence, the actor is blameless. The issue at hand is thus whether the criminal act can be attached to the defendant. The presence of mental disorder does not have a large influence on the objective criterion in both criminal systems, mostly due to the fact that mental disorder is viewed as a malfunction of the mind and not a disturbance of bodily movements.

According to Canadian and Swedish criminal law, the subjective element of the concept of crime contains two levels. The intent requirement, which is one level of the subjective component, focuses on what was in the mind of the accused at the time of the crime. It does not elaborate with objective standards of due care. If the mental disorder prevents the accused from forming the intent required for the act, the court is able to acquit him or her, according to both systems. However, when it comes to negligence, which is the other level of the subjective criterion, the criminal laws of Sweden and Canada have taken slightly different approaches. Canadian law seems more reluctant to consider the personal characteristics of the offender. Swedish law is open to the possibility that education, handicaps, social status, etc. affect the evaluation.

The basic premise of criminal law in Sweden and Canada is that no criminal responsibility shall be assessed unless there is an evil deed accompanied by a guilty mind. The harmful act has to be carried out voluntarily and with the intent to actually perform the act. An injury does not amount to a crime unless it is accompanied by a vicious mind, according to both legal systems. The underlying assumption is that a human being has, within him or herself, the ability to freely choose his or her actions. The criminal laws of the two countries presupposes that a normal individual has the physical and mental ability to choose between right and wrong and if someone makes a choice to do the wrong thing, it is justifiable to punish him or her. The ability to make free choices, in other words, to have the ability to understand and control one's behaviour, is a prerequisite for criminal responsibility, according to the predominant theory of criminal law in these countries. Insight and control is necessary in having the ability to abstain from committing criminal acts. There is a clear unanimity that an evil deed has to be

consciously carried out to justify public prosecution, conviction and punishment. A harmful act without intent is nothing more than an accident and is therefore not blameworthy.<sup>202</sup>

The theory of criminal law in Sweden presupposes that all men have the ability to freely choose between right and wrong. The presence of a mental disorder rarely affects the evaluation of the objective and subjective elements of crime. A mental impairment may contribute to involuntary actions or to the inability to form intent, but it does not have any further impact on the issue of guilt. Unless the mental disorder results in an uncontrolled act or in the inability to direct the mind, mentally disturbed people can commit crimes just like other people. The evaluations of the elements of crime may be slightly different, but the same general frame applies regardless of the presence of a mental disorder.

The Canadian criminal justice system treats mentally disturbed offenders differently because they, according to the underlying assumptions of the criminal law, lack the ability to rationally choose between right and wrong. In these cases, the offender is exculpated due to the lack of a free will of the mind directing the body. Canadian criminal law provides for an excuse of criminal responsibility on the account of mental disorder. The theory of the criminal man assumes that a distinction between mentally impaired and other people is justifiable due to the difference in ability to make free choices.<sup>203</sup> Which legal system has the right interpretation? Do normal people have free will, something which mentally impaired people lack?

## 5.2 Guilt

The criminal law of ancient Greece treated mentally ill offenders differently within the criminal justice system. The general belief was that mentally impaired people lacked normal reason. The inability to make well-balanced decisions based on a healthy perception of reality, made them not criminally responsible for their actions, according to the criminal law at the time.

Roman law also recognized the need for special considerations in criminal cases including the presence of a mental disorder. However, the concept of mental disorder was more refined in Roman law than in ancient Greece. Roman law distinguished between different kinds of mental impairments. The law exempted the mentally impaired from criminal responsibility and justified the exculpation with reference to the belief that mental disturbance was equal to the lack of free will.<sup>204</sup>

From the Middle Ages and until the 19<sup>th</sup> century, the defence of insanity evolved in the English legal tradition. The possibility of excusing the

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<sup>202</sup> *Kwosek v. State* (1960), 100 N.W 2d 339 and *Jareborg*, supra note 77 at p. 44

<sup>203</sup> *ibid*

<sup>204</sup> supra note 96 at p. 163

accused on the account of mental disorder emerged. In 1843, the M’Naghten case established the test of criminal liability, which is still in force today in many Commonwealth states and countries. Scientific psychiatric research has tried to reform the traditional test, but practical problems and public pressure have reinforced the validity of the rule.<sup>205</sup> The test exempts an accused, who is a mentally impaired person that did not know the nature and quality of the act or did not have the sense that the act was wrong. The test implies that knowledge is a prerequisite for blame. Consequently, people that know what they are doing or are aware that the act being committed is wrong are blameworthy in the eyes of the law.<sup>206</sup> Canadian law has its roots in the English common law tradition. A modernized M’Naghten rule governs the area of criminal responsibility and mental disorder.<sup>207</sup>

Swedish law stems from the continental law tradition, with roots in France. During the Age of Enlightenment, philosophers and social scientists of the continental law tradition posed demands for a more human criminal justice system. The scholars emphasized legality, proportionality and equality. The ability to choose between right and wrong also became the foundation of the continental criminal law. The law attributed guilt to the person choosing to do wrong. The only possibility to redeem the guilt was through punishment. The law exempted individuals who lacked the ability to choose freely between right and wrong from criminal responsibility.<sup>208</sup>

However, in the 19<sup>th</sup> century, the influence of the psychiatric profession increased. Empirical studies of the personality and in the social environment of the criminal resulted in a shift of focus from general criminal liability to the individual preventive measurements. The Italian doctor, Cesare Lombroso, claimed that some people were born criminals and that the adaptation of the punishment to the specifics of the offender was an essential issue. Enrico Ferri, a student of Cesare Lombroso, further developed his master’s theories and argued for the abolishment of exculpation of mentally disturbed offenders. He focused on appropriate measurements such as detention in a mental institution. Franz von Liszt, the founder of the social prong of criminal theory, emphasized the social environment as the most pivotal factor in contributing to criminal behaviour and wanted to keep the excuse of criminal responsibility on account of mental disorder.<sup>209</sup>

The work of the Swedish criminal law professor Johan C.W Thyren, who was an advocate of the social criminal theory movement, had a great impact on the development of Swedish criminal law. In the beginning of the 20<sup>th</sup> century, he published several documents regarding the scope of criminal responsibility. He argued for a medical concept of criminal responsibility and demanded psychiatric care for mentally disturbed offenders. In the

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<sup>205</sup> *ibid* at p. 164

<sup>206</sup> Slovenko, *supra* note 142 at p. 20

<sup>207</sup> Section 16(1) of the Canadian Criminal Code

<sup>208</sup> *supra* note 96 at p. 164

<sup>209</sup> *ibid* at p. 165

1950s, individual preventive measurements gradually became the focus and the importance of the excuse of criminal liability on the account of mental disturbance decreased. With the implementation of the 1962 Penal Code, the sanity requirement of the Swedish criminal law was abolished. The Swedish Penal Code took the position that no one can be held morally accountable for his or her actions. It assumed that the assessment of moral praise and blame was obsolete and that there thus was no justification for distinguishing between sane and mentally disturbed offenders. Nevertheless, this position has resulted in practical difficulties. It is also contrary to the principle of conformity.<sup>210</sup>

The foundation for blame in the criminal laws of Canada and Sweden is guilt. An individual possessing the ability to act in accordance with the law, but chose not to do it is blameworthy, since he or she is a person who did not sufficiently care about the fundamental interest of others or of the society. Criminal responsibility presupposes that the offender foresees and understands the nature, quality and magnitude of the crime. Consequently, according to the principle of conformity, it is not fair to punish those who lack the ability to conform their conduct to the requirements of the law.<sup>211</sup>

Neither Swedish, nor Canadian law is in accordance with the principle of conformity. Swedish criminal law does not encompass an exemption of criminal liability on the account of mental disorder. The law shows a reluctance to take a stand on the issue of guilt and mental disorder. Canada has chosen to include a specific prerequisite of sanity for criminal responsibility. It draws a distinct line between offenders who, due to mental impairment, lack the ability to appreciate the nature and quality of the act or that the act was wrong and the offenders who have this ability. The test of criminal liability is thus knowledge based. The new Swedish suggestion elaborates with standards of knowledge and ability to control one's behaviour. One of the purposes of this new suggestion is to meet the standards encompassed in the principle of conformity. Are there any good reasons for treating mentally impaired offenders differently in the aspect of guilt? Should there be an excuse of criminal responsibility on the account of mental disorder? If so, how should the ultimate test of criminal responsibility be modelled?

### **5.3 Punishment**

Both Canadian and Swedish criminal law provides for the possibility of psychiatric care for mentally impaired offenders. In Canadian criminal law, the finding of a verdict of not criminally responsible on the account of mental disorder is a prerequisite for hospitalization. The trial judge or a Review Board determines whether absolute discharge, conditional discharge or detention in a psychiatric facility is the appropriate disposition.

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<sup>210</sup> *ibid* at pp. 166-167

<sup>211</sup> Jareborg, *supra* note 77 at pp. 44-45, p. 50 and p. 55

Imprisonment is not an option in these cases, according to the Criminal Code of Canada. According to the Swedish Penal Code, the prohibition of jail is applicable if the accused committed the crime under the influence of a serious mental disturbance. The court may commit the accused to forensic psychiatric care even though he or she did not engage in criminal behaviour under the influence of a serious mental disturbance. However, if there is a casual connection between the crime and the disturbance, the court may decide that a special release inquiry under the Act of Forensic Psychiatric Care shall be responsible for the discharge of the criminal.

Legal punishment includes intentional infliction of suffering onto the convicted. Punishing is the response to wrongdoing by the offender and the expression of blame within the criminal justice system. According to criminal law theory, legal punishment is a type of control that only the state imposes. Since punishment includes control, infliction of pain and restriction of liberty on the offender, the court must not impose punishment upon an accused unless the court has established that he or she has committed the crime charged with.<sup>212</sup> A mentally impaired offender who passes the test of criminal responsibility according to Canadian criminal law must therefore not be subject to regular sanctions. He or she is blameless in the eyes of the law and consequently no punishment should be imposed. On the contrary, according to Swedish law, mentally disturbed individuals are not exempted from criminal liability. Individuals suffering from severe mental disorders can thus commit crimes, according to Swedish law. Consequently, they may be subject to criminal sanctions. However, the law provides the court with the possibility to take the mental state and the specific needs of the defendant into account.

Swedish law presupposes that mentally disturbed offenders need psychiatric care. This is also true for the new Swedish suggestion. Canadian law also justifies the detention in a psychiatric facility with the specific needs of a mentally impaired defendant. Even though the laws elaborate with different rules and regulations, they both emphasize that psychiatric care is the best solution for a mentally impaired accused. Does hospitalization provide the cure for mental disorders? Is detention what the mentally impaired offenders need?

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<sup>212</sup> Jareborg, Nils; *Essays in Criminal Law*, Helsingborg 1988, pp. 76-77

# 6 Psychiatric, psychological and philosophical theories

## 6.1 Psychodynamic theory

The foundation of criminal law, based on the notion of free will and the ability to make rational choices, is of course very vulnerable. Psychodynamics question the human ability to exercise free will, which criminal law is founded on. Sigmund Freud, the founder of psychoanalytical theory, which is a part of psychodynamic theory, claimed that what we call free will is merely a conscious rationalization of a set of unconsciously determined processes. He demonstrated his thesis by pointing out the phenomenon of slip of the tongue, forgetting and trains of association. The choices we make, our will and the acts we conduct are not based on the free will, but rather are a result of rigid processes in the unconscious. These processes are as determined as any other physiological process in the human body, according to Freud.<sup>213</sup>

In the *State v. Sikora*, Dr Galen, a psychiatrist and psychoanalyst with a special interest in psychodynamic theory, explained that every human being is a product of his genes and his environment. The reaction of an accused to special circumstances has to be seen in the light of his special life story. What we think are conscious choices and the exercise of free will, are really unconscious forces from within that dictate the individual's behaviour without him or her being able to alter it. The unconscious motivations have to be a part of the judgment of the human behaviour in the sense that if the deed was produced by unconscious forces rather than conscious motivations there was no real intention or *mens rea* in the traditional sense, according to Dr Galen. Limited or no criminal liability would be sufficient in a case where the conduct is a product of uncontrollable forces rather than an exercise of free will. There is, in a sense, no real choice for an individual that in the interpretation of his life long history was predetermined to act in a certain way. The Court was reluctant to accept this argument made by Dr Galen. It was only admitted for the purpose of sentencing and not for the determination of guilt. The Court interpreted Dr Galen's testimony as being a threat to the very base of the criminal law and thus not admissible.<sup>214</sup>

Determinism, which is the basis of psychodynamic theory, refers to the complex interaction between casual factors creating a specific result in a given individual. According to the theory a person is the product of hereditary and environmental, internal and external, past and present,

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<sup>213</sup> *State v. Sikora* (1965), 210 A. 2d 193 (N.J. Sup. Ct.)

<sup>214</sup> *ibid*

conscious and unconscious influence.<sup>215</sup> Determinism may at first glance seem incompatible with the concept of free will, which was why the Court excluded the evidence of Dr Galen on the issue of guilt. However, even psychodynamic psychologists have to work with the assumption that we have some kind of free will. Otherwise it would be useless to even try to change the conduct of a mentally impaired person. If everything we do is predetermined there would be no point in conducting psychoanalysis and therapy. It would be pointless to expect to change the conduct and attitude of the patient.<sup>216</sup> However, the psychodynamic theory and research has its own approach to the concept of free will. Dynamic psychology has developed a theory which unites the psychological determinism and the ability to choose differently through therapy.<sup>217</sup>

Psychoanalytic and psychodynamic theory divides the self into three different parts. The id is an unconscious part of the personality that contains instinctual forces that are aggressive, selfish, and seek immediate gratification. It is easy to see that if these forces are not kept under control the interests of other people would be harmed. To adjust the id, the superego develops in early childhood through an internalization process of the discipline of parents and the laws and restrictions of society. The superego and the id come together in the ego that is largely conscious. The task of the ego is to satisfy the drives of the id, taken into account the man made laws and other restrictions from the superego. According to psychodynamics, the personality develops deterministically through a complex interaction between on the one hand the id, the ego, the superego and on the other hand experiences, biological drives, cultural pressure, the milieu in which the individual is raised etc. In the healthy person the interrelationship between the various parts of the personality and with the environment is harmonious. One consequence of having a harmonious personality is feeling a sense of freedom, i.e. feeling like you have a choice and something to say about your life. The healthy individual feels free and is in a sense really free to make his or her choices. Freedom connotes feelings of well-being, of self-esteem, of confidence and of inner satisfaction.<sup>218</sup>

In a person with a mental disorder, the interaction between the different parts of the self and the environment is imbalanced. Anxiety, irrational doubt, inhibitions and restrictions paralyze both choice and action. The mentally impaired person does not possess the same flexibility of adaptation and is not free in the same sense as a healthy individual.<sup>219</sup> Personality disorders are, according to psychodynamic theory, disturbances in one or several parts of the self. The schizoid personalities have weaknesses in the ego and the superego. The lack of strength in these parts of the personality

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<sup>215</sup> Knight, Robert P; "Determinism, 'Freedom', and Psychotherapy", *Psychiatry*, (1946), pp. 251-259

<sup>216</sup> Katz, Wilber G; "Responsibility and Freedom", *Journal of Education*, Vol. 5, No. 3 (1953), pp. 274-75

<sup>217</sup> Knight, supra note 215

<sup>218</sup> *ibid*

<sup>219</sup> *ibid*

results in a blurred perception of the distinction between the self and the outer world. Antisocial, borderline and narcissistic personalities have the ability to make a correct evaluation of reality. However, the superego has not developed thoroughly which allows the drives of the id to take over without any strains. As a result, they show no compassion, care and loyalty, and engage in asocial behaviour without any sense of guilt. They think very highly of themselves and lack constructive self criticism. Furthermore, they exhibit disturbances in the part of the ego that during childhood internalizes the laws and restrictions of society. On the contrary, the ego of dependent personalities is normally developed. However, the abnormal strength of the superego produces feelings of guilt and shame in combination with insecurity and exaggerated self criticism.<sup>220</sup>

Psychodynamic theory focuses on the development of personality disorders. Nevertheless, it also claims that schizophrenia and depression are the result of a disruption in the development of the personality. Schizophrenia is, according to this theory, the product of a harsh and unloving mother. The lack of love causes the child to regress to infantile levels of functioning and the ego thus never develops the ability to distinguish between what is real and what is unreal. The ego of a depressed person is also impaired, according to this theory. The individual suffering from depression lacks a strong and positive sense of self and has an ego made up of other people's evaluations. Consequently, the depressed person constantly strives to be perfect in exchange for love. He or she turns the anger of rejection inward and into blame of the own self.<sup>221</sup>

According to the psychodynamic theory only healthy people experience free will and the ability to choose. A healthy balance between the various parts of the personality, created deterministically, results in a harmonious person feeling free and in a sense being free. Since the mentally impaired have not developed a balanced interaction between the id, the ego and the superego, they do not experience free will and are thus not free in the same sense.<sup>222</sup>

## 6.2 Moral Responsibility

There are many ways of defining responsibility. In one sense, the term refers to a certain virtue characterizing an individual. A responsible person is in this sense reliable and conscientious. In another sense, the term indicates the undertaking of specified obligations. An employment with responsibilities thus includes duties on part of the employee. Furthermore, in some contexts, the term responsibility refers to nothing more than causality. In this paper responsibility means accountability. A person, who is responsible in this sense, is answerable or liable for his or her actions.<sup>223</sup>

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<sup>220</sup> Ottosson, supra note 18 at pp. 509-510

<sup>221</sup> Noelen-Hoeksema, supra note 13 at p. 303 and p. 381

<sup>222</sup> Knight, supra note 215

<sup>223</sup> Bavidge, supra note 191 at p. 35

Criminal responsibility and moral responsibility are not the same things. In the previous chapters I have described criminal liability, which refers to the accountability ascribed by the law. In this chapter, I discuss moral responsibility, which includes the assessment of praise or blame to behaviour and/or dispositional traits of character.<sup>224</sup> Criminal responsibility should always require a foundation of moral accountability, but the opposite is not necessary.<sup>225</sup>

Blameworthy behaviour, according to Aristotelian theory, is immoral behaviour. Aristotle claims that there are two types of immoral conduct. The first type of behaviour he calls wickedness, which is a deliberate or wilful evil act. The wicked agent intends to cause harm. The morally weak agent, which is the other form of immoral agent, knows that he is not acting in the right way, but does it anyway due to some desire or emotion.<sup>226</sup>

According to Aristotle, only certain individuals qualify as moral agents, namely those who possess the capacity for decisions. Central to Aristotle's notion of responsibility is that only voluntary actions can result in praise or blame. The prerequisite for moral accountability is, according to Aristotle, that the agent is able to control his or her behaviour and that the agent is aware of what he or she is doing. Consequently, people are not morally accountable for involuntary actions. Actions are involuntary when they are performed under compulsion or as the result of ignorance. Compulsion occurs when the act is not within the control of the agent's will. A person who is overwhelmed by a powerful emotion and loses control over his or her behaviour should not be blamed for his or her actions. The individual is excused because he or she did not have the ability to remain in control of his or her impulses, according to Aristotle. Ignorance is the definition of an agent not knowing that the act is wrong. The individual is blameless because he or she lacked the ability to appreciate the harmfulness of his or her conduct.<sup>227</sup> In such a manner, the presence of a mental disorder is relevant for exculpation if it causes the person to be ignorant of the true nature of his or her act or if it compels the agent to act in a certain way. The person is blameless due to his or her incapacity of self-governance or self-control.<sup>228</sup>

Aristotle thus recognizes two situations when the assessment of responsibility is not appropriate. However, Aristotle does not further explain

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<sup>224</sup> Eshleman, Andrew, "Moral Responsibility", *The Stanford Encyclopedia of Philosophy* (Fall 2004 Edition), Edward N. Zalta (ed.), at <http://plato.stanford.edu/archives/fall2004/entries/moral-responsibility/>, last viewed 2005-05-23

<sup>225</sup> Jareborg, supra note 212, at pp. 25-26

<sup>226</sup> Milo, Ronald D; "Amorality", *Mind*, New Series, Vol.92, No. 386. (Oct 1983), at <http://links.jstor.org/sici?sici=0026-4423%28198310%292%3A92%3A368%3C481%3AA%3E2.0.CO%3B2-N>, pp. 481-487, last viewed 2005-04-15

<sup>227</sup> Reznek supra note 39 at pp. 43-46, p. 73 and p. 75

<sup>228</sup> Bjorklund, Pamela; "'There but for the grace of God': moral responsibility and mental illness", *Nursing Philosophy*, 5, (2004), p. 194

the concept of appropriateness in his notion of moral responsibility, which has resulted in two competing interpretations. The merit based interpretation claims that the reaction of praise and blame is appropriate because the agent deserves such a response. Merit based theorists are often forfeiters of the notion of free will. Consequently, a mentally impaired agent is excused on the account of his or her disorder if it renders him or her incapable of making free choices. A person lacking the capacity for making free decisions does thus not deserve blame. According to the consequentialist view, praise or blame is appropriate if, and only if, it results in desired change in the individual or in his or her behaviour. The assessment of moral responsibility serves the purpose of trying to accomplish something within the individual irrespectively of whether free will or determined factors caused the behaviour. As a result, an individual unimproved by the assessment of moral responsibility is blameless.<sup>229</sup>

Reznek notes that the essential components of exemptions from moral responsibility originate in the writings of Aristotle. He emphasizes that good people who only do harm due to ignorance or loss of ability to control the act should be excused. However, the exculpation of mentally deviant offenders should go further than the theory of Aristotle, according to Reznek. He distinguishes between good characters and bad characters and claims that only bad characters deserve to be morally accountable. If a good person temporarily changes into a bad person and commits an offence the good character is not responsible for the evil act. A good person who acted out of character should be excused, Reznek emphasizes. Furthermore, it would not render improvement within such an individual to attach any blame to his or her person, Reznek continues, since the person is already of good character. Reznek thus justifies the exculpation of mentally impaired offenders with both merit based and consequentialist arguments. However, he does recognize that the presence of some mental disorders, especially psychopathic personality disorder, should not exempt from moral responsibility.<sup>230</sup>

Bjorklund agrees with Reznek that the psychopath should not be excused on the account of his or her mental impairment. She claims that assessing moral responsibility is essential for most mental disorders, but especially psychopathic personality disorders. External praise or blame is important for therapeutic progress, she emphasizes. Without the force of blame the psychopathic individual cannot experience regret for his or her actions and make reparation to his or her victims. The real issue in the assessment of moral responsibility, according to Bjorklund, is whether it is helpful to the agent. Her arguments are thus consequentialist based. The appraisal is part of effort in improving the mentally impaired offender. Taking moral responsibility involves developing integrity and a secure sense of self that would not have otherwise evolved spontaneously. Despite the present inability of the mentally deviant individual to fully control his or her

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<sup>229</sup> supra note 224

<sup>230</sup> Reznek, supra note 39 at pp. 233-245

behaviour, the assessment of moral responsibility is an essential component in the achievement of health.<sup>231</sup>

## 6.3 The “cure” for mental disorders

There are no known cures for mental disorders. However, medications and various kinds of therapies have proven to be efficient in alleviating the symptoms of the mental disorders and in restoring people’s quality of life. A person diagnosed with a major mental disorder usually receives treatment including a combination of medication, psychotherapy, life style changes and supportive counseling. Some people benefit from psychotherapy alone. Other people experience tremendous relief from medication. Researchers are not able to predict why some people respond to a specific kind of treatment and not others.<sup>232</sup>

In the treatment for schizophrenia, antipsychotic medication is pivotal. It reduces the symptoms of the disorder and allows the person to function more appropriately. Antipsychotic drugs contribute to a substantial improvement in the large majority of schizophrenic people. It reduces psychotic symptoms such as delusions and hallucinations. Nevertheless, the effects of antipsychotic drugs are not solely positive. Side effects such as fatigue, muscular stiffness and cramps, increased salivation, weight gain, decreased sexual interest, sweating and depressive episodes may occur. For some people the side effects are mild and decrease with time, but for other people they are severe and unbearable.<sup>233</sup> Moreover, the drugs have no bearing impact on the negative symptoms of schizophrenia. A holistic approach on the treatment of schizophrenia therefore calls for additional measurements. Studies show that providing medication along with psychotherapy and family therapy can significantly reduce the risk of relapse into schizophrenia.<sup>234</sup>

Antidepressant treatments are divided into somatic and psychosocial measurements. Somatic treatment consists of antidepressant medication, ECT (electroconvulsive therapy) and light therapy. Psychosocial measurements include dynamic, cognitive and interpersonal therapy. Generally, while the antidepressant drugs have a significant impact on the symptoms, psychotherapy improves communication skills and social adaptation.<sup>235</sup> The choice of appropriate measurements depends on the nature, recurrence and severity of the depression. Studies have shown that

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<sup>231</sup> Bjorklund, supra note 227 at pp. 198-200

<sup>232</sup> “Treatments for Mental Disorders”, Fact sheet by BC Partners for Mental Health and Addictions Information, at

[http://www.heretohelp.bc.ca/publications/factsheets/treatment\\_mental.pdf](http://www.heretohelp.bc.ca/publications/factsheets/treatment_mental.pdf), last viewed 2005-05-20 and Belfrage, Henrik; “Meta-analys av studier kring behandlingseffekter”, *Nordisk Tidsskrift for Kriminalvidenskab*, (1997) p. 306

<sup>233</sup> Ottoson, supra note 18 at pp. 190-199

<sup>234</sup> Noelen-Hoeksema, supra note 13 at p. 391

<sup>235</sup> Ottoson, supra note 18 at pp. 268-290

depressed people usually respond best to a combination of drugs and psychotherapy. In addition, the patient's perception of the characteristics and causes of the depression as well as the patient's view on the attractiveness of the different forms of treatment influence the outcome.<sup>236</sup>

Antidepressant and antipsychotic drugs have also been found to have some positive effects on people with borderline personality disorders in controlling impulsivity and reducing unreal perceptual experiences. Psychotherapy is important in creating a positive sense of self and in learning appropriate assertiveness skills for close relationships. However, the treatment of a person who suffers from a borderline personality disorder poses a great challenge for the therapist. The therapist has to be honest and straightforward in order to avoid misunderstandings. Clients who have borderline personality disorders are reluctant to trust anyone and are hypersensitive to signs of rejection. They rapidly move from effusive praise and idealization to harsh and aggressive criticism. The therapist must set boundaries, especially when it comes to the aggressive conduct. Changes in the behaviour of borderline personalities are very slow and they seldom stay in therapy.<sup>237</sup>

Generally, the maladaptive behaviour of personality disorders is very difficult to change for various reasons. People define themselves by their personalities and are reluctant to change. The consistency of behavioural patterns lies in the nature and concept of personality. Personality is something that takes form during childhood, remains constant through adulthood and is an essential part of a person's self-conception. Therefore, people with personality disorders rarely seek treatment unless they are under increased stress or pressure in their life.

People with narcissistic personality disorder, for instance, do not tend to seek treatment at all. They are reluctant to admit any weakness of their own and usually blame relational interaction difficulties on others. According to the narcissist, asking for help is demeaning. If ever, a person with narcissistic personality disorder engages in psychotherapy due to a major life crisis.<sup>238</sup> In therapy, a great responsibility lies with the therapist. The therapist has to break through the defence mechanisms of the narcissist and help the patient to acknowledge his or her defects. Confrontations need to be clear, direct, firm and repetitive. Therefore, long-term therapy is essential in creating a healthy sense of the self, based on reality and not fear. It takes time to dismantle the image of perfection and indestructibility. Unfortunately, the narcissist seldom remains in therapy once the acute crisis has been resolved.<sup>239</sup>

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<sup>236</sup> Noelen-Hoeksema, supra note 13 at p. 321

<sup>237</sup> Noelen-Hoeksema, supra note 13 at pp. 419-420

<sup>238</sup> *ibid* at p. 423

<sup>239</sup> "Should we call them human: Treatment options", at <http://www.angelfire.com/ego/narcissism/treatment.html>, last viewed 2005-05-24

People with schizoid personality disorders are also reluctant to seek treatment. They withdraw from other people and find it difficult to establish and maintain social relationships. The therapist has to respect the boundaries of the client and slowly try to create secure, supportive and stable interaction. At the same time, the therapist has to confront any negative behaviour. Despite some success in group therapy and psychotherapy focusing on increasing the client's awareness of his or her own feelings as well as improving social skills, people with schizoid personality disorders rarely change.<sup>240</sup>

Dependent personalities are very interested in forming relationships with other people and have no problem showing up for therapy sessions. They are needy and fear rejection and loneliness intensively. In order to lead a meaningful and productive life, the person with dependent personality disorder needs to overcome anxiety and become more independent. The therapist should gently encourage the client to assume responsibility for his or her own recovery and teach assertiveness skills.<sup>241</sup> As with all personality disorders, medication should be avoided unless the patient is diagnosed with another mental disorder in conjunction with the personality disorder.<sup>242</sup>

The most difficult mental disorder to treat is probably the psychopathic personality disorder. No treatment so far has been efficient in reducing the emotional, mental and physical impact of the disorder. The literature is flooded with theoretical suggestions, but nothing really seems to work in reality. Some positive experiments have been carried out in trying to adapt young children with psychopathic features, but the same success has been absent with adult psychopaths. Milieu therapy, therapeutic communities and group therapy have been among the most common suggestions. The treatments suggested often focus on trying to create the positive and negative feelings connected with emotional bonds. The purpose is to increase the anxiety level and create emotional attachment.<sup>243</sup> Persistency, reward and punishment are all key elements in the treatment of the psychopath. In theory, the faster the reaction comes after the behaviour, the more likely it is that the psychopath will understand the advantages and the disadvantages of his or her behaviour.<sup>244</sup>

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<sup>240</sup> Ottoson, supra note 18 at p. 499 and p. 511

<sup>241</sup> supra note 13 at p. 426

<sup>242</sup> <http://psychcentral.com/disorders/sx13t.htm>

<sup>243</sup> McCord, supra note 43 at p. 162 and Hare, Robert D and Schalling, D (editors); *Psychopathic Behaviour: Approaches to Research*, New York 1978, pp. 353-354

<sup>244</sup> Hare, supra note 45 at pp. 111-112 and Lidberg, supra note 55 at p. 217

## 7 Analysis: The best solution?

The concept of free will constitutes an essential part of the foundation of the criminal laws of Sweden and Canada. The criminal justice system of the two countries presupposes that human beings have the ability to choose between right and wrong behaviour and that people who choose the wrong conduct are blameworthy and deserve punishment.

Psychodynamic theory questions the notion of free will and argues that what we perceive as freedom of choice is merely an unconscious rationalization of determined processes. An act is a product of environmental, hereditary, past, present, conscious and unconscious factors within the individual. However, psychodynamic theory does not reject the concept of free will altogether. It proclaims a special notion of free will or at least a concept of self-determination. Psychodynamic therapy encompasses the belief that we do have something to say about our behaviour and actions. Without this assumption, it would be useless to expect any improvement of the client's behaviour. The purpose of psychotherapy is to encourage the client to take responsibility for his or her thoughts and actions. Achieving health is assuming responsibility and gaining a sense of freedom, according to this theory.

Freedom is, according to psychodynamic theory, connected to the absence of mental impairment. A person with a mental disorder can never experience the same freedom in his or her choices. Psychodynamic theory thus provides a justification for separating the mentally disturbed from other offenders within the criminal justice system due to different experience in the freedom of choice. Since freedom of choice is the foundation of criminal law one can argue that psychodynamic theory provides a justification for special considerations for mentally disturbed individuals on the issue of guilt. I therefore find that the current Swedish criminal system, which assesses guilt regardless of the presence of a mental impairment, is not justifiable. It does not exculpate people who, due to a mental disorder, do not have the ability to exercise the freedom of choice. It presupposes that every offender has the same ability to freely choose between right and wrong. It is not in compliance with the psychodynamic theory of free will.

Psychodynamic theory claims that any mental disorder results in impairment in the ability to make free choices. One could therefore argue that the presence of any mental disorder should render a verdict of not criminally responsible. According to this argument, the DSM-IV and psychiatrists would be in charge of the distinction between abnormality and normality as well as the controversial issue of the difference between madness and badness. The Durham rule of District of Columbia came close to such an interpretation. According to the rule, any mental impairment that produced a crime could render a not guilty verdict.

I do not find that there are any good reasons to let the diagnostic criteria of the DSM-IV and the psychiatrists decide the criminal distinction between madness and badness. First, criminal law is based upon a special notion of free will. The important thing, according to the theory behind criminal law in Sweden and in Canada, is that the offender had the ability to prevent the crime from happening. In order to stop the act he or she has to thus be aware of its wrongfulness. There has to be a reason to abstain from the conduct. Furthermore, the agent has to have the ability to control his or her behaviour to the extent that it was possible to avoid the harmful consequence. The offender has to be able to direct the body according to his or her insights and the requirements of the law.

Secondly, the purpose of criminal law is different from the purpose of psychiatry. Psychology and psychiatry justifies different treatment of mentally disturbed people and other people, but does not say anything about the basis for blame. Psychiatry and psychology do not deal with issues of guilt and responsibility. The purpose of psychiatry is to provide the appropriate treatment for the patient, not to pass moral judgements. That is rather a question for the discipline of philosophy. I believe that psychiatry can provide important information relevant to questions of law. However, criminal law is concerned with issues of criminal responsibility and punishment. Criminal law has to take things into account other than the mere question of treatment. Treatment and rehabilitation of the offender is an important thing to consider, but it is not the only thing relevant. In a specific case, the psychologist can provide the information needed to give reasons for the act, to make sense of what happened. Whether or not this explanation should serve as a reason for blaming the conduct or not has to be up to the criminal justice system to decide. I therefore do not recommend the Durham rule. The Durham test of criminal liability gives too much power to the psychiatrist. Explaining behaviour is one thing, attaching blame and responsibility is another.

Moral philosophy deals with issues of praise and blame. The concepts of moral responsibility and criminal responsibility are not interchangeable. However, criminal responsibility should always require a foundation of moral accountability, but the opposite is not necessary. Aristotle suggested that a person who performs an act under compulsion or ignorance is not morally responsible. The merit based theory argues that involuntary acts are blameless in the sense that the person performing the act does not deserve punishment. All mental disorders, which render the person unable to distinguish between right and wrong or result in the inability to control one's behaviour do not deserve blame. Consequently, the knowledge based test of criminal responsibility in section 16(1) of the Canadian Criminal Code derived from the M'Naghten rule, is not enough. It exculpates offenders that act under ignorance, but fail to exempt agents who act under compulsion. The ALI test is a better test of criminal responsibility. It contains one cognition prong and one volitional prong. The offender who, as result of a mental disease or defect, lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the

requirements of the law is blameless. It contains both types of involuntary conduct, according to Aristotle's notion of moral responsibility. According to the merit based theory, the assessment of responsibility is not appropriate in these situations because the agent does not deserve moral blame. The mentally disturbed agent is not responsible if he or she is unable to make rational choices.

The consequentialist view of moral responsibility does not elaborate with the notion of freedom of choice. It serves the purpose of trying to accomplish an improvement within the individual irrespective of whether deterministic factors or the will of the agent caused the behaviour. In this aspect I find that it is questionable whether personality disorders should be exempted from criminal responsibility. My research has shown that boundaries and assuming responsibility are essential parts of the treatment of individuals with personality disorders. The psychopath, for example, needs instant reward and punishment. Anger management and the internalization of control mechanisms are essential parts of the psychotherapy used for individuals with personality disorders. Blame and praise are keys to therapeutic progress.

On the contrary, blame has no effect with psychotic disorders such as for instance schizophrenia. A person suffering from a psychosis will not change with blame. The attachment of praise and blame has no bearing influence on hallucinations and delusions. I therefore conclude that the new Swedish suggestion is the best solution, according to the theories that I have examined. It contains elements of both cognition and control. It is thus in compliance with the Aristotelian notion of ignorance and compulsion, just like the ALI test. However, the Swedish test includes a qualification in the requirement of a serious mental disorder, while the ALI test only requires the presence of a mental disorder. The addition of the term "serious" enables the general exclusion of individuals suffering from personality disorders from the scope of the test. Nevertheless, there is of course no easy distinction between madness and badness and I believe that the court has to look at the specifics of every case.

It should also be noted that the Canadian Supreme Court is reluctant to exempt offenders suffering from psychopathic personality disorders. The Supreme Court of Canada claims that the psychopath understands that his or her acts are contrary to the law. The psychopath thus possesses the ability to appreciate the wrongfulness of his or her conduct and should not be exculpated. However with the addition of the volitional prong it would be harder to refrain from exempting the psychopath, since he or she has a very poor impulse control. I believe that one of the reasons for not adding the volitional prong to the Canadian version is the fear of opening the possibility for the exemption of criminal responsibility on the account of psychopathic personality disorder. However, it is my opinion that the addition of the word "serious" prevents this fear from becoming reality. The Swedish test encompasses the volitional and the cognitional elements from the Aristotelian theory of moral accountability as well as incorporates the

notion of using blame to change the mentally impaired offender. According to the psychological, psychiatric and philosophical theories discussed above, I thus find the new Swedish suggestion to be the best solution.

Despite the fact that there is no known cure for mental disorders, the disciplines of psychiatry and psychology have proven that medication and various kinds of therapies are efficient in providing a relief from the symptoms of mental disorders and in improving the patient's quality of life. Antipsychotic drugs in combination with therapeutic measurements significantly reduce the risk of relapse in schizophrenia and other psychotic disorders. Furthermore, antidepressant medication in conjunction with psychotherapy has proven to lessen the symptoms of depression. There is thus proof that a person suffering from a psychotic disorder or a severe depression will benefit from psychiatric treatment. In these cases I find it justifiable to remand the accused to a psychiatric facility.

While there is documented improvement in the treatment of schizophrenia and depression, the same positive effects are absent with personality disorders. There are a lot of theoretical suggestions, but most scholars acknowledge the difficulty in changing the behaviour of a person suffering from a personality disorder. Long term psychotherapy, including elements of impulsiveness and aggressiveness control, is usually recommended, but there is no evidence that it changes the behaviour of the client. I therefore conclude that hospitalization is generally not called for in cases where the offender suffers from a personality disorder. The ultimate solution, according to me, would be that prisons had the ability and funds to provide for psychotherapy on a regular basis within the prison. It would meet the demands of attaching blame within the criminal justice system and assuming responsibility through psychotherapy. The attachment of blame and the imprisonment would work together with the therapist's effort in on making the person realize the wrongfulness and assuming responsibility. The blame and punishment from the criminal justice system would be an integrated part of the effort to change the conduct of the offender suffering from a personality disorder. Also in this aspect, I find the new Swedish suggestion to be the best solution. It provides the possibility to combine criminal sanctions with therapeutic measurements.

Since there exists no treatment which has proven to be efficient in improving the behaviour of individuals with personality disorders, hospitalization is not justifiable. The absence of efficient measurements would keep the individual suffering from a personality disorder in the psychiatric hospital for several years, perhaps longer than an imprisonment sentence. According to my opinion, it is not fair that individuals suffering from personality disorders should be remanded to institutions that know no efficient way of reducing relapses into destructive behaviour. While the justification for punishment is redemption, the justification for hospitalization is the belief in improvement. Locking up people due to character traits generally connected to the preposition of committing crimes

does not belong to the criminal justice system of a free and democratic society.

My conclusion is that the best solution, according to the theories described above, is to implement a test of criminal responsibility stating that an act shall not result in criminal liability for someone who, due to a serious mental disturbance, a serious mental retardation or a serious state of dementia, lacked the ability to realize the character of the act or to adapt the conduct in compliance with such a realisation. It is my belief that only the people exculpated from criminal responsibility in accordance with the new Swedish suggestion should be hospitalized. Generally, people suffering from personality disorders should neither be excused nor hospitalized. A combination of criminal sanctions and therapeutic measurements is the best solution in those cases.

I will now apply the best solution, i.e. the new Swedish suggestion, to the five cases.

# 8 Conclusion: Mad or bad?

## 8.1 Yates

Andrea Yates was tried under the knowledge based insanity test in Texas, United States. According to the psychiatrists testifying at the trial, Yates suffered from a postpartum depression including psychotic episodes. In her mind, she was a terrible mother. She was convinced that, due to her inability to properly care for her children, they would have to perish in the fires of hell. The only way she could save them from eternal torment was to kill them, she believed. In spite of her deluded perceptions, she knew that her conduct was contrary to the law and as a result, the jury convicted her of murder and sentenced her to life in prison in compliance with the law of Texas.

I suggest that she should have been exempted from criminal liability and remanded to a psychiatric facility. In my opinion, her condition would have amounted to a serious mental disturbance in the meaning of the new Swedish suggestion. Her postpartum depression was severe and included psychotic features. Disturbing images and troubling thoughts crossed her mind frequently. She perceived voices and experienced visions. She became isolated and overwhelmed with the great responsibility of raising five children and caring for her husband to the extent that she could not distinguish between what was real and what was unreal. In order to get relief from her inner torment and frustration, she engaged in self-mutilation and attempted suicide.

I believe that she did realize the character of her act. In fact, she was very well aware of the fact that she killed her children. Yates believed that her children were not developing correctly and that only death would allow them to escape the clutches of Satan. She had failed her children and their death was her punishment, she claimed.

In my opinion, Yates did not have the ability to control her behaviour. She believed that she had committed a deadly sin by failing to raise her children properly. According to her deluded thoughts, she found no other way out of the misery than ending the lives of her children. She firmly believed that there was no alternate way to save her children from the fires of hell.

There are great chances that psychiatric care would improve her condition. Antipsychotic drugs have proven to be efficient in decreasing the presence of delusions and hallucinations. Moreover, antidepressant medication provides a relief from the disorder and allows the person to function more appropriately. The drugs, in combination with psychotherapy in a psychiatric facility, would have been appropriate for Yates.

## 8.2 Hinckley

John W. Hinckley Jr tried to kill the President of the United States in order to impress his beloved Jodie Foster. All the psychiatrists testifying at his trial agreed that Hinckley's thoughts and actions were abnormal and irrational. He lived in a fantasy world in which he was going to be a famous poet and musician with Jodie Foster by his side. The defence psychiatrist claimed that the fantasies amounted to delusions. Hinckley's intense impulses around Jodie Foster and around terminating his own life marked a break from reality, the psychiatrist pointed out. The prosecution denied any presence of psychotic features and portrayed the picture of a lost young man with various types of personality disorders, including preoccupation with fantasies of unlimited success and ideal love. The jury rejected the version of the prosecution and reached the verdict of not guilty by reason of insanity. Consequently, Hinckley was remanded to a psychiatric facility.

I suggest that Hinckley's condition may amount to a serious mental disturbance in accordance with the new Swedish suggestion. According to the diagnosis of the defence psychiatrist Hinckley suffered from schizophrenia. I believe that schizophrenia should generally amount to a serious mental disturbance in the meaning of the law, unless it is a mild form of the disorder. According to the prosecution psychiatrist, Hinckley suffered from schizoid personality disorder, narcissistic personality disorder and a mixed personality disorder with, among other things, borderline features. Personality disorders should generally not amount to a serious mental disorder, according to my conclusions. However, in this case, the prosecution psychiatrist claimed that Hinckley suffered from the personality disorders in conjunction with a dysthymic disorder, which is a chronic form of depression. Hinckley's case shows that the art as well as the severity of the disorder have to be considered in order to reach a fair conclusion. In this case, I find that Hinckley's mental condition amounted to a serious mental disturbance.

I believe that Hinckley realized the nature and consequences of his act. He was well aware that shooting at the President would encompass a significant risk of harming or even killing him. He also understood that society would react to his behaviour and that legal sanctions would follow. Nevertheless, he proceeded with his plan to assassinate the President of the United States. He was hoping that his enormous sacrifice of receiving punishment for his behaviour would attract the attention and respect of his beloved Jodie Foster.

I find the issue of whether Hinckley possessed the ability to control his behaviour more difficult to resolve. The outcome of the Hinckley case is a matter of the aspects one emphasizes. On the one hand, Hinckley carefully planned his act regarding the presidential assassination. He elaborated on different solutions to his problems for a long time. It was not an act of impulse. On the other hand, Hinckley was in the grip of his delusions. He did not possess mechanisms for coping with his frustration. In his mind, the

fame, love and acknowledgement he so desperately searched for, required extreme measures. He was overwhelmed with emotions and frustration and lacked the ability to control his behaviour and thoughts.

### **8.3 Kjeldsen**

The psychiatrists testifying at the trial of Kjeldsen agreed that the defendant suffered from a psychopathic personality disorder. The Supreme Court of Canada was reluctant to exempt Kjeldsen from criminal responsibility since he knew that his actions were legally wrong. I agree with the Supreme Court of Canada that Kjeldsen should be criminally liable for his behaviour. In spite of the fact that psychodynamic theory suggests that people suffering from personality disorders have impairment in various parts of the personality preventing them from experiencing free will, psychopathic personality disorder should generally not amount to a serious mental disturbance in the meaning of the law, in my opinion. I suggest that psychopaths should be held accountable for their actions. The reason for my conclusion is that I believe that blame is a necessary component for therapeutic progress.

The criminal history of Kjeldsen affirms this conclusion. Prior to the rape and assassination of the taxi driver, Kjeldsen was detained in a mental hospital having been found not guilty by reason of insanity upon charges involving rape and attempted murder. A daily pass permitting him to leave the hospital enabled his encounter with the victim. Excusing the behaviour of Kjeldsen and remanding him to a hospital was thus not successful, mainly because psychopaths are extremely hard to treat. They are manipulative and callous. Firm and immediate responses to criminal behaviour are the only ways to progress, both in the therapeutic environment and within the criminal justice system. I therefore conclude that imprisonment in combination with psychotherapy would have been the appropriate measure in the case of Kjeldsen.

### **8.4 Mijailovic**

The psychiatrists testifying at the trial of Mijailovic reached different conclusions regarding the mental condition of the defendant. The difference of opinion was mainly concerned with the presence of psychotic episodes. Some psychiatrists believed that Mijailovic experienced visual and auditory hallucinations. As a result, he did not have the ability to part reality from fiction, they concluded. Other psychiatrists claimed that Mijailovic suffered from a borderline personality disorder with narcissistic features. They pointed out that the alleged voices in Mijailovic head were merely efforts to try to manipulate his surroundings.

The evidence presented supporting a psychotic disorder was not strong enough, according to the Supreme Court of Sweden. It concluded, on a balance of probabilities, that Mijailovic did not suffer from any psychotic impairment. The Supreme Court recognized the presence of a personality disorder, but it was not severe enough to amount to a serious mental disturbance, according to its conclusion.

I agree with the Supreme Court of Sweden that Mijailovic's mental condition should not fall within the scope of the definition of a serious mental disturbance, provided the absence of psychotic features. Blame, assuming responsibility and accepting boundaries are pivotal parts of trying to improve the behaviour of an individual suffering from a personality disorder with impulsive features, such as in the case of Mijailovic. He should neither be excused on the account of mental disorder, nor remanded to a psychiatric facility. I would conclude that the best solution in the case of Mijailovic would be a combination of imprisonment and some form of psychotherapy.

## **8.5 Svensson**

Svensson feared abandonment and rejection. She was willing to do anything to gain the approval of God and that of the pastor of the congregation, including homicide. The diagnosis of Svensson's mental condition varied from dependent personality disorder with psychotic symptoms to unspecified mental disorder with psychotic and religious delusions. However, although the psychiatrists labelled the defendant's symptoms differently, most of them agreed that Svensson, during the committing of the crimes, was in a psychotic state. I believe, just like the District Court and the Court of Appeal, that the psychotic features of her mental disorder were severe enough to amount to a serious mental disturbance. Her dependency and anxiousness created a psychotic state of mind such that she could not separate reality from fiction. The intense, goal oriented and long-term manipulation of the pastor forced her into beliefs amounting to religious delusions. His control of her was so powerful that, in a way, she was no longer in control of her own conduct. She became but a piece of the pastor's murder plans. Even though parts of her realized the wrongfulness of the conduct and felt reluctant to proceed with the killings, she found it impossible to go against what she believed was the will of God. She understood the character of her act but felt forced to proceed. I therefore suggest that she should have been exempted from criminal liability and detained in a psychiatric facility. According to the current Swedish legal system, the possibility of excusing a mentally impaired offender does not exist.

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