THESIS

"The Doctrine of Diminished Responsibility in English Criminal Law"

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Ralph H. Lownie
Darwin College.

- ABSTRACT -

This thesis examines the development of the doctrine of diminished responsibility in English criminal law since its introduction by section 2 of the Homicide Act, 1957.

Initially the study considers whether the concept has a sound jurisprudential base and attempts to trace its roots in English law prior to 1957, including the political background to the Act and the drafting of section 2. As it was claimed at its inception that what had been done was to 'adopt and adapt' the doctrine of diminished responsibility then existing in Scotland, the relevant law of Scotland is examined both before and after 1957.

It is the main contention of this thesis that not only has English law adopted and adapted the Scottish doctrine but in the thirty years since, in contradistinction to Scotland, has greatly 'advanced' the doctrine.

A critical examination has been made of the character and scope of the doctrine as set out in the Act and the interpretation given to the elements of the section by the courts over the years under review. This has involved considering in detail all the reported cases together with a comprehensive survey of all the cases in the first five years of the Act and in the period 1980 -1984. Sample files have been examined over a period at the Old Bailey, a shire court and a northern industrial court.

Particular conditions which appear to fall within the doctrine (mental retardation, schizophrenia, epilepsy, etc.) are examined together with ancillary and associated conditions (psychopaths, irresistible impulse, P.M.T. and mercy killing) which have won a place under the section.

A close examination has been made of the changing attitudes of the judiciary to procedural matters and to sentencing. The future of the doctrine in terms of the Penal Code has come under scrutiny as have discernible trends to absorb other defences such as insanity.

ACKNOWLEDGEMENTS

Through the kindness of Professor Nigel Walker of Cambridge, I was able, at an early stage, to peruse an unpublished dissertation by A.M.Plant of the University of California at Berkeley, submitted for the M.A. of that university in 1965. It was entitled "The Criminal Responsibility of the Mentally Ill in England 1100 _ 1843". While none of the material contained therein was directly relevant to this thesis, which has since been more narrowly drawn, I am nevertheless indebited to that work for certain stimulation of thought and treatment of subject.

In Chapter I, I have drawn extensively in relation to the French Neo-Classical School on an unpublished thesis: "The Legal Conception of Criminal Responsibility in view of Modern Theories of Criminology" submitted by Dr. C.B. Porter for the degree of Ph.D in the University of Edinburgh in 1924.

The Doctrine of Diminished Responsibility in English Criminal Law

[Approval Sheet .. ..]
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The Doctrine of Diminished Responsibility in English Criminal Law

Introduction

A. The Problem Stated:

The traditional legal view has always been that a man was either so insane as to be relieved of all responsibility for his criminal acts or sane so that he deserved the supreme penalty. The idea that everyone possessed responsibility as an all or nothing quality made good sense at a time when the law and psychiatry derived from a simpler philosophy but, as J. C. Bucknill was to point out, in the middle of last century:

> "In Nature, we find no such sharply defined classification...But nature herself must bend to the laws of man! and a dozen farmers and shopkeepers are compelled to divide the world of mind into two parts; and, on the most awful and momentous occasion on a question of the life or death of a fellow creature, to discern what the most scientific often fail to do, the exact position therein of a particular instance."[1]

Are there only two possible conditions in relation to the human mind? The Royal Commission on Capital Punishment,1949-1953, has commented:

> "Mental abnormalities vary infinitely in their nature and intensity and in the extent to which it affects the behaviour of the patient and his capacity to conduct himself like a normal person. It follows that the extent to which a mentally abnormal person should be considered less responsible for his actions varies equally widely"[2].

Practical experience teaches us that the normal person can be held accountable and that the totally abnormal person - the obviously insane person - can be deemed not responsible. Practical experience also

teaches us however - and psychology and psychiatry confirm this -. that there are gradations of normality and that it is difficult in some cases to draw a dividing line – for the purposes of the law – between normality and abnormality. What Professor Jerome Hall calls "this black and white business (which)... say some psychiatrists, flies in the face of the known facts – the intermediate greys, the hardly perceptible differences forming an unbroken continuum between the ideal extremes".[3]

Few would suggest that anyone suffering from any mental abnormality, however slight, ought on that ground, to be wholly exempt from responsibility under the criminal law. but the recognition that there is an intermediate stage between the denial of all responsibility and the attribution of full responsibility does not constitute an abandonment of the primary distinction. It therefore becomes necessary for the law to provide a method of determining what kind and degree of mental abnormality should entitle offenders to be so exempted; and also to decide what account should be taken of lesser degrees of mental abnormality

There is another aspect to all this. Until 1957, murder was unique, not only in being the only crime in practice punishable by death; but also unique in being the only common crime for which the penalty was fixed. For all other offences (with the exception of Treason and Piracy) the judge had power to suit the punishment to the gravity of the offence. That the law should proscribe a uniform sentence for a particular crime implies that that crime is of uniform culpability even in the least blameworthy circumstances yet must still be so great as to merit that sentence. But no single class of offence varies so greatly, both in character and culpability, as the class comprising those who fall within the comprehensive common law definition of murder. Men - women -

children. . The feeble-minded and the mercy-killers. The pitiable and the hot-blooded. For none of these did the law make provision.

Clearly the introduction of a middle course between sanity and insanity would enhance precision in this branch of the law. Under a system of law based on personal responsibility it is vital to make some distinction between rationality and irrationality and to take account of those mental deviations which affect the emotional and volitional processes of human personality and yet are not covered by the concepts of insanity or mental deficiency

There is a danger too, that in the absence of such a doctrine, juries faced with an all or nothing decision on an indictment in which they feel it is morally inappropriate to convict, will openly or covertly, by the use of legalistic facades, find the accused guilty of a lesser offence, because of 'purported' absence of 'specific intent'; or simply defy the legal formalities, and fly in the face of the evidence and the legal definitions and quite arbitarily bring in a finding of guilt on a lesser charge because they can find no other way to recognise the role of the mentally abnormal, at the time of the offence. Worse still, they can be tempted, merely and perversely, to acquit.

B. The Homicide Act,1957:

Just such a legal Via media, and styled 'diminished responsibility' was introduced into English criminal law by section 2 of the Homicide Act of 1957.[4]

Thirty years have elapsed since the Act received the Royal Assent on 21st.March 1957. Has it fulfilled the function that Parliament envisaged for it, always bearing in mind the changes which have taken

place in the criminal process in that period ? Two Mental Health Acts, a new insanity plea and the abolition of the death penalty[5] And has it a future? This thesis, which will be historical, comparative, critical and analytic in its approach, will examine these questions from a juristic and pragmatic standpoint[6].

Initially this study will consider whether the concept has a sound philosophical base and attempt to trace its development in English law prior to 1957. The political background to the Homicide Act and the introduction of section 2 will be considered. Then, as section 2 was claimed to be at its inception, an 'adoption and adaption' of the doctrine of diminished responsibility then existing in Scots law, the law of Scotland will be examined and comparisons drawn with current English practice.

The main thrust of the study will be directed to a critical examination of the character and scope of the doctrine as set out in the Act and the interpretation given to the elements of the section by the courts over the years under review. To this end, all the reported cases in England have been considered in detail. In addition, all section 2 cases which occurred in the first five years of the Act and those arising in the five years between 1980 and 1984 have been examined. Many are not noted publicly save in newspaper reports but the assistance of the Director of Public Prosecutions staff and of members of the Home Office has ensured completeness. With the co-operation of the staff of the Lord Chancellor's Department and the courts concerned, the court working files and papers relating to 'diminished responsibility cases' that have been heard at the Central Criminal Court (an urban court), Maidstone Crown Court (Shires) and Newcastle Crown Court (Northern industrial) have been

examined in greater detail. The original office file for the drafting of the Homicide Act has been examined at the office of the First Parliamentary Counsel, as has the Home Office file on the same topic. Policy files in use at the Home Office have also been seen. On particular topics, members of the higher judiciary have been approached, as have leading members of the Bar engaged in criminal work. The office of the Crown Agent, Scotland, has provided valuable comment on the working of the doctrine in Scotland in recent years and the Statistical branch of the Scottish Home Dept has supplemented this information. Practical experience in the criminal courts of England and Scotland has been drawn on. Visits have been paid to Broadmoor and to Grendon Underwood.

Particular conditions which appear to fall within the doctrine (mental retardation, schizophrenia, epilepsy, etc.) will be examined to assess their role in practice in terms of section 2 together with ancilliary and associated conditions which have won a place under the section.

A close examination will be made of the changing attitudes of the judiciary to those subjects over which they have most control – procedural matters and the all-important subject of sentencing.

To assist in our assessment of the success of the doctrine after thirty years, a glance sideways will be taken at the progress made by the doctrine over that period in Scotland and under the guise of infanticide in England and a brief look at what has happened to other mental abnormalities, such as 'insanity', in the face of section 2. A glance forward will be made to see what is waiting 'in the wings' for the doctrine.

In discussing the ways of reasoning employed in the courts we

have tried to take into account not only the explicit logic and rationes decidendi of the various principles and decisions, but also the implicit reasons, sociological, ethical or even personal, for their adoption and the underlying attitudes they reveal.

An analyis and evaluation will be made to assess the success of the doctrine in practical terms and to ascertain whether or not a smooth development of the doctrine has ensued in the hands of the English legal establishment.

As it is clear that English law deliberately chose and closely modelled section 2 on the common law doctrine of diminished responsibility in Scots law, the progress of both systems over the period since 1957 on this topic has been a central concern in this thesis. It is contended that Scots law has become moribund whereas English law has not only 'adopted and adapted' the doctrine of diminished responsibility from Scots law, in terms of the original claim — but in the thirty years has greatly 'advanced' it, notably: in relation to psychopaths and 'irresistible inpulse' and in the realm of sentencing.

It is further contended that the doctrine is in good heart (and hands) and that English criminal law could profit from a more comprehensive doctrine of diminished responsibility, an extended doctrine which would be 'general' in application and would embrace all conditions where criminal responsibility could properly be held to be diminished by reason of impaired mental or physical capacity or by reason of age. It is easily attainable and well within sight.

FOOTNOTES

Introduction

1. John Charles Bucknill, Unsoundness of Mind in Relation to Criminal Acts. p. 113

2. Report of the Royal Commission on Capital Punishment 1949-53. (Chairman: Ernest Gowers) para 281. Hereinafter known as the 'Gowers' Report'

3. Jerome Hall, Principles of Criminal Law, p. 461

4. 5 & 6 Eliz. II, c 11

5. Mental Health Act, 1959. 7 & 8 Eliz. II, c, 72

   The Criminal Procedure (Insanity) Act, 1964. 12 & 13 Eliz. II, c. 84

   The Murder (Abolition of Death Penalty,) 1965, 13 & 14 Eliz. II, c. 71

   The Mental Health Act, 1983. c. 20

6. It is worth recalling the words of Mr Justice Wendell Holmes: "Take the fundamental question, what constitutes the law ? You find some text writers telling you that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English Courts are likely to do in fact"

   Oliver Wendell Holmes "The Path of the Law", (1897) 10 Harv. L. R. 457 at p. 461.

PART 1

Quondam

Chapter I

A Jurisprudential Basis

The Royal Commission on Capital Punishment, conscious of the Scottish doctrine of diminished responsibility and the status of the equivalent doctrine on the Continent of Europe, suggested in their Report, that the concept raised for them fundamental issues of jurisprudence, particularly where it was to be considered in relation to its 'general application'.[1] They did not specify what those issues were. nor are those issues identified by the commentators on the Commission's Report.[2] The general approach among commentators seems to have been the pragmatic one - it had appeared to work in Scotland and it did not occur to them to seek theoretical foundations to bolster feasibility or to search for abstract reasons for its success. It is easy to understand this attitude in the emotion of the time. The doctrine was merely accepted by everyone as another possible candidate to be incorporated into, and to enhance, the substantive criminal law of England, as had so many other aspects of

Scottish criminal law before this – and a forerunner of many to follow.[3]

The Home Secretary (Major Lloyd-George), was even more outspoken when the Homicide Bill was introduced into the House of Commons and, without elaborating on this aspect and with no authority behind him, deemed it to have no jurisprudencial base whatsoever[4] – but for parliamentary purposes this was of no consequence.

The loudest voice raised in protest was that of Richard F. Sparks, then of Cambridge, in 1964.[5] Dr Sparks claimed that he found himself unable to reconcile section 2 "with our usual moral and legal principles: since according to these it is never appropriate to base mere mitigation of punishment on mental incapacity".

Sparks' approach in his article is sound enough for he works forward from traditional views of the meaning of 'liability' and 'capacity'. His theme is that, while he is prepared to accept, what is to him, the strange nomenclature of section 2 and that a verdict of manslaughter is substituted (providing for mitigation of punishment) if the accused's mental capacity to control his conduct so as to conform to the law is "substantially impaired" by mental disorder; his considered view must be quite simply that either a person could have helped breaking the law , or he could not have helped it:

> "If we believe that the offender could have helped committing his crime, despite some mental impairment, there would surely be nothing unfair in punishing him in the normal way. On the other hand, if we believe that a mentally impaired person could ***not***, on that account, have helped breaking the law we should, according to our principles, excuse him ***completely*** from blame or punishment (properly so-called), though perhaps taking steps to see that he does not cause harm in the future. In neither case is there any reason merely to ***reduce*** his punishment".[6]

It is submitted that despite these negative assertions, there is a sound theoretical basis for a doctrine of diminished responsibility.

Our first reflection might be: are we not merely modifying the concept of full responsibility in the light of modern scientific knowledge and the present day perception of moral blameworthiness? As Sir Norwood East has commented – "Psychiatry has advanced sufficiently to justify the acceptance of the principle of modified culpability in convicted offenders suffering from a recognised minor mental abnormality"[8]. And, in any event, the recognition that there could be a differing capacity in individuals to control will and emotion pointing to an intermediate stage between the denial of all responsibility and the attribution of full responsibility does not, of itself, amount to an abandonment of the primary division into responsibility and irresponsibility.

A. The Continental Model

It may well be that the best evidence that the concept of diminished responsibility is well-founded – philosophically and practically – is afforded by the degree of recognition accorded to the doctrine in Germany, Switzerland and other European countries.[9]

Professor Max Grünhut in his comparative study on penal reform in Continental Europe[10] devotes a chapter to the position of the mentally abnormal and draws attention to the fact that it:

> "has become practicable for the law to consider the psychological assertion that there are degrees of responsibility with an intermediate zone between the extremes of the accountable and the absolutely irresponsible".

He goes on:

> "Traditionally; when sentences were being awarded, a poor mental equipment or an underdeveloped character like unusual temptations or very diffficult circumstances, were regarded as factors which diminished personal guilt, although they call for protection against insufficiently controlled antisocial tendencies. This problem played a prominent part in Continental law reform".[11]

He adds: "Most of the recent enactments recognise a state of limited responsibility".[12] He quotes the expressions 'Responsabilité restreinte'

and 'Verminderte Zurechnungsfänigkeit'.[13]

The first of these terms 'limited responsibility' is commonly used synonymously with that of "attenuated responsibility" by members of the Neo-classical or Eclectric School in respect of their theory of that name. This school, which lies between the Classical[14] and the Italian or Positive[15] Schools has extensively modified classical doctrines and rejected any determinist principles but retained the concept of responsibility. The great French jurist Professor Raymonde Saleilles was a member of this School and an ardent supporter of its principles. He devoted considerable space in his published works to them. In his 'Individualization of Punishment'[16] after criticising the Classical System and pointing to its faults, he said:

> "At every point this artificial and abstract construction (i.e.the same punishment for the same crime because the responsibility is the same) runs counter to the facts of life. It sets up abstractions and constructions of a wholly logical and ideal type. While in practice, criminal law must deal with concrete realities. Ultimately, practice must make or mar every system. As a consequence, a Neo-Classical Theory is coming to the front, which without abandoning the Classical position, and while taking its stand upon the same data, is yet proposing to transform and revolutionize the legal structure of the penal code. It is developing apart from the law and even in opposition to it. It is proceeding under the influence of the facts primarily, but also under the inspiration of a new school, properly called, the Eclectic School"[17].

Professor Saleilles mentions Rossi, Ortolan, Garaud, Joly, Le Poittevin and Garçon as other adherents of this School. He adds that the latter two are particularly concerned with a theory within the School under the heading 'Attenuated Responsibility'.

For the Neo-classical School, 'moral liberty' is a fundamental postulate. They have no wish to destroy the old Classical School and so they maintain the basic notions of liberty and responsibility. They define 'liberty' as " the power of standing still in the face of resistance,

which is found in each of us, in the face of an impulsion external or internal". We could term it loosely as 'freewill' The Neo-Classicists appreciate (for "our conscience tells us . . . and we know by experience") that "impulsions and passions are able to obscure this force of resistence, they are able even to annihilate it ..."

So far as responsibility is concerned; this, they say, flows from that sense of 'liberty' and accordingly as individuals vary so responsibility is susceptible of degrees. When you come to punish it is right to take into account these variation which represent the variability in the 'liberty' of the individual. Punishment is diminished according to his responsibility. 'Individualisation is *realised subjectively*'.

It is difficult to furnish a comprehensive definition of 'Attenuated Responsibility' as a theory within the School save to say that its adherents are convinced that there are people capable only of attenuated responsibility. It is pointed out that between absolute integrity of the intellectual faculties and absolute mental alienation there are almost an infinite number of degrees; this being so, it is certainly logical that a corresponding number of degrees must exist between complete responsibility and complete irresponsibility. It is maintained that there are in our midst people possessed of physiological and psychological disabilities which, although not sufficient to nullify responsibility, are nevertheless sufficient to obscure their intelligence, to render their will inactive, and, according to the gravity of this disability, to minimise their responsibility.

The School talks of the variations on 'freewill' being produced by a variety of causes but categorises them as (1) moral causes: which are able to influence the morality of an individual and render his will less

energetic in resisting evil. Education, social environment and the influence of emotion and passion are said to be moral causes. More commonly we have (2) pathological causes, but both are capable of modifying the measure of responsibility

France has in effect had the legislation to implement a form of 'Attenuated Responsibility' in relation to Penal Code offences since 1832 when in the Code of that year[18] it was decreed that the jury, after having decided the question of culpability, must, where their finding is one of guilt, ask themselves if there are any extenuating circumstances in the case. This is a power now shared with the judge who retires with the jury. If so, and their decision is by a simple majority, the punishment must be modified by the judge who must impose a penalty which is of a lesser degree in the tariff scale laid down. For example, when the the only penalty was death, the prisoner could only be sentenced to life imprisonment or given a fixed term of years.

Despite this commendable system the adherents of the theory of Attenuated Responsibility have always felt that their theory goes further than the Code and should be implemented by legislation. They feel, in particular, that the Code fails to introduce the desired degree of flexibility into sentencing; remains rather mathematical in its application and fails to have full regard to the wide range of variation in individuals.

B. <u>The American Position</u>:

In the United States of America, as might be expected, the practice in relation to the mentally abnormal in the courts varies greatly from State to State. Many, clinging to their English Common Law heritage, still abide loyally by the M'Naghten Rules, whilst others modify the Rules

and consider 'irresistible impulse' is also a valid defence. In certain States the 'Durham Decision'(which is in effect the old 'the New Hampshire test)'[19] holds sway. This formula breaks away from the traditional tests and widens the scope of the relationship of various mental illnesses to irresponsibility. While 'Durham' is strictly only applicable to the defence of insanity, it could have far reaching consequences for a middle course approach to criminal responsibility – if carried to its logical conclusions. Simply stated it holds: 'an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect'. Of course there are problems of definition but the scope offered in the field of mental aberration certainly seems to include the psychopath. Yet again, the test recommended in the Model Penal Code of the the American Law Institute[20] may be applied.

Another promising sign is contained in the judgment in The People v. Moran:

> "Feebleness of mind or will, even though not so extreme as to justify a finding that the defendent is irresponsible may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill and may thus be effective to reduce the grade of the offence".[21]

It is not in line however with the famous case of Fisher v. United States in which the Supreme Court – and on rather special facts – held that an accused person "is not entitled to an instruction based on evidence of mental weakness short of legal insanity which would reduce his crime from first to second degree murder".[22]

No State operates a doctrine of diminished responsibility, eo nomine; but a like concept which has a strong following in the United States, and has been adopted in a practical form in certain States, notably California, is based on an idea of 'diminished mental capacity'.[23] The

doctrine is envisaged as covering the whole range of mental abnormality, but is particularly relevant to the defence of diminished responsibility. It is claimed that, under the doctrine, there is a significant simplification in the forms of verdict but not at the expense of fundamental legal rights and principles; that the jury is only concerned with those aspects of the accused's state of mind that bear upon his culpability; it is not required to explore 'medical and pseudo-medical questions' built into such concepts as insanity; but to consider whether, in the light of his behaviour, the surrounding circumstances and the medical evidence, the accused, said to be suffering from, say arterio-sclerosis, was in fact greatly confused about what he was doing and was thus entitled to be acquitted.

The doctrine has been expounded by a number of jurists, but most notably by Professor Herbert Fingarette,[24] who uses a related concept of 'context of origin' to clarify his views. These views, he contends, are really nothing more than "an elaboration of deeply rooted and entirely reasonable commonsense intuitions".

He sets these out as follows:

> "A person's mind may be deranged in ways that make him unable to conduct himself rationally with respect to some standard. If so, he is not responsible in his conduct with respect to that standard. If, when we look to the context in which this irrationality had its origin, we find that he became irrational in this way through no fault of his own, he should not be held responsible at all for his conduct in respect of that standard. Therefore he cannot be in that respect culpable"

He goes on:

> "If he was culpable with respect to the origin of this condition of diminished mental capacity, then he cannot totally escape responsibility and culpability for his offending conduct. In the latter case, the specific kind and degree of ultimate culpability will depend systematically, on the way in which his originating culpability is related to the impaired state of mind, to the resulting offending act and to the relevant standards".[25]

Professor Fingarette makes the shrewd observation:

> "diminished mental capacity ***always*** by definition, affects the

> nature and degree of guilt and responsibility; but abnormality of mind, of itself, and no matter how grave, need not have this effect. If there is to be non-responsibility or diminished responsibility, it is necessary that the abnormality have a certain specifiable and essential role in the allegedly criminal conduct".[26]

The concept of diminished mental capacity is thus, according to Fingarette, designed to link a specific mental abnormality in a legally relevant way to some essential mental component of crime. He instances the case of a person who periodically suffers from states of schizophrenic confusion yet who commits a crime during a period of remission when he is quite free from any attack of his psychotic confusion; or again, when the particular kind of diminished mental capacity – some form of mental confusion about a state of affairs – could equally spring from psychosis. It could have its legally relevant origin in voluntary self-intoxication and yet again in the non-culpable taking of an improper dosage of insulin.[27]

Fingarette's conclusions, based on an examination of the leading Californian case, The People v. Wolfe,[28] and the literature that the case generated, are that:

> "the diminished responsibility defence is an acknowledgement that the powers of rationality were not adequate to "reflect meaningfully and maturely" enough upon the purport of the act if there was to be that extra "quantum of moral turpitude", that extra "heinousness" which distinguishes murder from manslaughter. The irrationality of mind out of which the intent arose precluded a rational awareness of the gravity of criminality of such an intent".[29]

Again, in his view, diminished responsibility implies that the accused did have sufficient rationality to grasp the criminal purport of his conduct up to a point though not in its full significance. This reflects precisely, and confirms, in his view, the practical distinction we do want to make when we hold a mentally disturbed person culpable for manslaughter but not for murder. "We intuitively appreciate his lesser

culpability".[30]

A further development has been the appearance in some States[31] of an alternative verdict of "guilty but mentally ill" open to a jury when an accused has put forward the defence of insanity and that jury are satisfied that he is guilty of the offence charged and was not insane at the time of commission of the offence, yet was mentally ill at that time. The finding is not exculpatory and sentence follows but the psychiatric options are, of course, open. This is very close to a doctrine of diminished responsibility.

In passing, reference might also be made to the 'extreme emotional disturbance doctrine' promulgated in the Model Penal Code and now adopted in several States, notably: New York. The Code defines manslaughter as:

> "homicide which would otherwise be murder [but] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be".[32]

C. The English Stand:

(i) A Rational Basis:

When we approach the task of seeking a satisfactory theoretical basis for an intermediate verdict it is convenient to adopt, as a first stage, that a good synonym for the term 'individual responsibility' within the scope of the criminal law is 'accountability'[33]. This is not unreasonable when one considers that the 'responsible' meant originally 'liable to be called to answer a charge'[34]

The rules regarding responsibility in fact, rest almost entirely

on moral ideas of praise and blame.[35] There is a tendency to adopt a moral attitude and to apportion blame which is inherent in all of us, that it is applied to the criminal law is not a matter of logical necessity or of the definition of crime, but it is a matter of fact and of social policy for it represents the moral outlook of the community. It inflicts punishment where the moral outlook considers punishment to be appropriate, bearing in mind always the exception in which responsibility is ascribed independently of moral guilt in cases of strict liability.

To exercise this morality must depend upon a belief in freedom. It is commonly said that men are responsible only for what they do of their own free will. In other words, they should not be called to account for what they do unintentionally, or during a period of insanity or under certain forms of duress. It follows that free will is a fundamental basis for individual accountability. There are two approaches regarding freedom of the human will – determinism and indeterminism (sometimes called 'libertarianism').

In general terms, philosophical determinism is often defined as the view that everything that happens in the Universe is determined by antecedent causes. It can take many forms. Quite naturally it is a view (although in a modified form) that appeals to psychiatrists who as biological scientists use scientific methods of observation and analysis in their work. It is however a sterile concept so far as the law is concerned; yet is not without its adherents[36] among jurists, particularly those who consider punishment and its aims outdated. In its most extreme form conduct ceases to be blameworthy and there is no sense in punishment. Accordingly criminal law has no purpose and can be discarded.

Indeterminism on the other hand is the doctrine which proceeds

from the premise that the human will is essentially free. A person does something freely because he wants to do it: i.e. he has choice – and this implies that he has the ability/capacity and the opportunity to act otherwise than he did, if he wants. In practice, we observe that normal human beings are capable of controlling their behaviour, are able to perceive the difference between right and wrong and are able to act in accordance with their social obligations and with the law: i.e. he is capable of choice.

Once indeterminism is accepted as a point of departure in regard to the freedom of the human will, it follows that the criminal law does have a purpose and that punishment is justified. Criminal law is not only an instrument for social defence but above all it is an instrument for social retribution. This is not to say that criminal law does not have other objectives as well, such as deterrence and rehabilition.

The retributive theory is not, of course, the narrow theory of vengeance but rather the doctrine that the wrong done by the prisoner can be negated only by the inflicting of the appropriate punishment – for a past act. The community, as a whole, places emphasis on the retributive theory, at least where certain crimes are concerned; a feeling of outrage demands satisfaction.

The other theories, utilitarian in nature, are those of reform, prevention and deterence. All find their justification in the future in the good that will be produced as a result of the punishment.

There are difficulties about all these theories. No system of law adheres to any one. The usual legal approach to-day is utilitarian in character but even this is not entirely satisfactory and a compromise theory combining the best features of retribution and utility now finds

favour. Thus the law in practice, while it may attempt to show retribution or to deter may yet punish only people whom it regards as guilty of a crime and it moderates its punishment when there are factors present which diminish the criminal's guilt.

We are aware that human society is based on individuals different from each other in a multitude of ways. They may differ in intelligence, in physique, in health. They may vary in their understanding of what is required by law to do or not to do, to reason and to deliberate and to decide what to do, and to control their conduct in the light of such decisions. These variations arise from such mental or psychological state or condition which a man may possess which allows him to evaluate his conduct properly and to act in accordance with such insight.

If we accept that the ability (or mental capacity) to control conduct in some conscious and purposive way when confronted by a series of alternatives does vary from individual to individual and that some people are better equipped than others to be responsible (or accountable) then it is clear that that ability can be observed to vary by 'relative degrees'.

It follows that individual accountability must also vary by degrees and while it is true, that neither of these sets of gradations is capable of strict scientific proof and difficulties of demarcation must arise, this is also true of other defences such as provocation and they do not lose their validity thereby; diminished responsibility is no different.

It is therefore ethically just that effect should be given to this recognised state – in its own right and nomenclature – once it is demonstrated to exist rather than just throw it into the general maw of mitigation.

In the same fashion it could be put forward that there was a perfectly respectable basis for the concept of diminished responsibility if one takes the initial arguement of Dr Sparks and then considers that Dr Sparks has overlooked the fact that, while a person either could or could not have helped breaking the law, it may have been possible, albeit very difficult indeed, for him to avoid so doing.

(ii) The Theory of Excuses.

The new concept of diminished responsibility fits naturally within the existing branch of legal philosophy which concerns itself with 'Excuses'. The search for a theory of Excuses which would account satisfactorily for the range of currently accepted excusing conditions in the criminal law and which is associated with the names of H.L.A.Hart[37] and J.L.Austin.[38]

> Hart has written in Legal Responsibility and Excuses:
> "It is characteristic of our own and all advanced legal systems, that the individual's liability to punishment, at any rate for serious crimes, carrying severe penalties, is made by law to depend on, among other things, certain mental conditions. These conditions can best be expressed in negative form as 'excusing conditions.[39]

There are those excusing conditions which excuse completely — namely: insanity, automatism, duress. There are those which operate at the level of sentencing — either formally or informally. Clearly there are also others which operate between these two levels — that is to say: 'partial excuses'. These would not fit into either of the two already mentioned groups, yet must be reconciled in any comprehensive theory.

Martin Wasik[40] who had done some promising work in this field in recent years has defined 'partial excuses' in these terms:

> Although they do not operate to relieve the defendant of criminal responsibility entirely, they are taken into account by the jury, prior to the verdict. They affect sentence, sometimes drastically, but they also have the important characteristic of

> changing the category of offence with which the defendant is ultimately convicted.[41]

He has in mind, of course, provocation and diminished responsibility.

The answer to the problem posed above, lies according to Wasik, in the relationship which exists betweeen legal and moral ascriptions of responsibility in the context of serious criminal offences. In moral responsibility,[42] he says, there are certainly gradations in the efficiacy of various excuses and it may be that some take a form akin to partial excuses. Wasik introduces the word 'ought' — a moral ought — and points out that the jury are not returning a decision on an abstract question of responsibility, but are finding that it is 'appropriate in law' for them to make that finding; which could include a decision that the accused should be held responsible for a lesser more appropriate offence than the one charged and that his punishment should be affected accordingly.[43]

It cannot be denied that there are substantial theoretial and practical difficulties in adequately developing partial excuses within the criminal law but where the theory has utility is in laying a foundation for an extension of the doctrine of diminished responsibility to be of 'general application'. Thus while it reduces murder to manslaughter at present it would have equal scope in reducing offences from one category to another where the actus reus is the same — e.g. types of assault or they are cognate as with rape and indecent assault. It would indicate to the judge the precise offence the jury thought appropriate and introduce precision into sentencing while stamping the offence with the degree of moral stigma that the jury thought it deserved.

Conclusion:

That while the doctrine may well have been introduced into

English law for political and practical reasons, it can be argued, from first principles, that there is nevertheless a sound and respectable philosophical basis for so doing, whether the doctrine is of limited or general application.

The accord found on the continent of Europe (in practice and in theory) and the acceptance of the concept in certain of the States of the United States demonstates that its adoption into England and Wales was a proper (if belated) course and is an encouragement to further development.

FOOTNOTES

Chapter I

1. Gowers' Report para 413

2. 1957 Crim.L.R. 283; L.J. Vol 106, p 788; M.L.R. 1957 p.382, 1958 p.318/320

3. E.g. Majority verdicts, Advance notice of Alibi

4. 560 H.C Debs (5th.Series) 1154 (Nov. 15, 1956)

5. Richard F Sparks, "Diminished Responsibility in Theory and Practice", (1964) 27 M.L.R. 9

   It is not easy to understand why no academic sought to challenge or comment on so strident an attack. Even the correspondence columns of the Modern Law Review do not contain, in the immediately succeeding issues, any trace of quibbles thereanent, as one might reasonably expect them to do. Perhaps the answer lies in the difficult personality of Dr Sparks – see Obituary in The Times Aug. 23, 1988 where the writer makes the same point.

6. Ibid

7. Ibid p.16

8. Sir Norwood East, Society and the Criminal, p.38

9. See H. Donnedieu de Vabres, Traité de Droit Criminel et de Legislation Pénale Comparée, 3rd. Edn. (Paris) 1947. Austria: Articles 21, section2 and 34, No. 1 Austrian Penal Code. Belguim: Article 71, Penal Code. Italy: Article 89 Italian Penal Code. Spain: Article 9, section 1 Spanish Penal Code. Switzerland: Article 11, Swiss Penal Code. Germany: Article 21 German Penal Code.

10. Max Grünhut, Penal Reform,

11. Ibid at p.438

12. Ibid

13. Ibid

14. Classical School: founded by Beccaria and Benthem.

    Attempted to reform harsh legal system of 18th.Cent.

    More concerned with crime then criminals

    Questioned by the Italians

15. Challenged the concept of freewill. i.e. criminal incapable of doing right

    Notable name: Lombroso

16. Raymond de Saleilles, Individualization of Punishment, p. 61.

see also M. N. Stefanesco, Responsabilite Partielle; J. Grasset, Demifous et Demi responsables.

17. Eclectric: = in effect selecting such doctrines as pleased them in every school.

18. Article 463, Penal Code 1832

See also: Herbert E Boyle, "Extenuating Circumstances in French Law", 18 Jur. R. 259

19. Durham v. United States 214 F. 2d 862 (D, C, Cir. 1954) 741-749

(after 1972 no longer important)

Judge John Doe in State v. Pike (1869), 49 N. H. 399

20. The American Law Institute, "Model Penal Code" s. 4

21. Cited in Gowers Report only as: New York 1928

22. 328 U. S. 463 (October term 1945)

Fisher had a mental age of 11 - was an alcoholic and had syphilis. There was strong evidence of consequential organic disease of the brain.

23. Also referred to as D. O. M. (Disablement of Mind doctrine).

24. Professor of Philosophy, U. of California at Santa Barbara. His daughter, Ann Fingarette Hasse is co-author in some of his work.

25. Fingarette, " Diminished Mental Capacity as a Criminal Law Defence", (1974) 37 M. L. R. 264. Note Professor Stephan J. Morse, "Undiminished Confusion in Diminiished Capacity" (1984) 75 Journal of Cr. Law and Crim. p. 1. See also Arenella, " The Diminished Capacity and Diminished Responsibility Defences", (1977) 77 Col. L. R. 827

26. Ibid at p. 267

27. R. v. Clarke 56 Cr. App. R. 225, R. v. Quick [1973] QB 910

28. 394 P. 2d 959 (1964)

29. Fingarette, Mental Disabilities and Criminal Responsibilitie at p. 274

30. Ibid at p. 275

31. Michagan State Ann. S. 28 1059

32. Section 210. 3(1)(b) (Proposed Official Draft 1962)

33. For example: William Kneale, The Responsibility of Criminals, p7

34. Most writers acknowledge their debt to Professor H. L. A. Hart on this topic. But note correction, material to the intermediate verdict, made by Profesor A. W. B. Simpson in [1966] Crim. L. R. 124 and answered by Hart in Punishment and Responsibility Ch. VIII p. 223.

35. Gerald Gordon, The Criminal Law of Scotland, p. 47

36. Baroness Wootton, Crime and the Criminal Law (and to a lesser extent Professor Sheldon Glueck, Law and Psychiatry)

37. H. L. A. Hart, "Legal Responsibility and Excuses", Part III in Determinism and Freedom in the Age of Modern Science, pp. 81-103

38. J. L. Austin, "A Plea for Excuses" Chapter I in The Philosophy of Action, pp. 19-42

39. Hart, supra at p. 81

40. Martin Wasik, "Partial Excuses in the Criminal law". (1982) 45 Modern L. R. 516

41. Wasik, supra at p. 518

42. Ibid

43. Ibid

Chapter II

The Historical Development of the Concept in English Law

> "If you would know what a thing is you must know how it came to be what it is".[1]

These are the wise words of Lord Cooper – the same Lord Cooper who, as Lord Justice-Clerk, presided over the noted trial of Braithwaite[2] in 1944. He is correct in pointing out that it is not possible to understand properly the modern application of any doctrine of law unless one examines its progress historically and traces how the accepted conceptions upon which it is formed in the earliest recorded period, have been developed and how it has undergone modification to meet the needs of changing social conditions, to accord with the new knowledge available and fresh ethical concepts. The Homicide Act of 1957 and the doctrine of diminished responsibility are no exception.

When one comes to examine the historical development of the treatment of the mentally abnormal within the English criminal law system prior to the M'Naghten Rules[3] the universal view expressed in the literature is that, for practical purposes, nothing of significance occurred before the beginning of the nineteenth century. And for the simple reason

that there was no need for any provision. The incidence of cases involving mental abnormality was, at the time, not great and these were dealt with locally by people with knowledge of the parties involved. The population was small. Many of the mental illnesses now common were then unknown; those linked with alcoholism were not then a problem. The element of self-help within the family circle was strong.

It was only after 1800 that legal medicine began seriously to develop. Social changes prompted an interest in lunacy and the building of asylums as one part of a wider campaign by social reformers[4]. Further attention had been focussed on the topic by a series of prominent trials – Arnold[5] and Ferris[6] in the eighteenth century where the defence was unsuccessful and continued with that of Hadfield[7] and M'Naghten[8] in the nineteenth, where it was. The story is well chronicled in the State Trials series. The grim humour of the time epitomises the efforts of the accused to avoid the death penalty by the defence of insanity in these words: 'Has he need of Indian Hemp administered by our good English doctors or Russian Hemp administered by our good English hangman ?'. It was also a period when important statutes governing the insane were passed.[9]

A The Early English Jurists:

The first serious consideration given to the doctrine of partial responsibility was contained in the writings of Sir Matthew Hale. A treatise - based on those writings - and entitled History of the Pleas of the Crown, devoted a full chapter to 'the defects of ideocy, madness and

lunacy in reference to criminal offences'.[9] It should be remembered that the book was not published until some years after Hale's death and, although partial revision had taken place, one cannot be certain that the views expressed therein were his final considered opinion, but this chapter had enormous influence for the next two centuries.

Sir Matthew had a wide and varied experience on the bench. He was appointed a judge by Cromwell in 1654 and became Lord Chief Justice of King's Bench in 1671; a post that he held until his death in 1676. During his tenure of office he presided over at least two trials for witchcraft.[10] He had a wide range of interests outside the law, particularly in the psychological theories of his times. He had also the usual sound classical education background of his age.

While he was not innovative, he analysed the problem of mental abnormality in even greater detail than had Coke, and carried systemisation further than any of his predecessors with his second and third classes and with his treatment of 'partial insanity'.

Hale dealt firstly with mental deficiency. He recognised not only 'ideocy' but also '<u>fatuitas a nativate</u>' – stupidity from birth and '<u>dementia naturalis</u>' – inborn witlessness.

Hale established his second general category in the light of the medical knowledge of the day and termed it '<u>Dementia accidentalis vel adventitia</u>' - mental incapacity arising from post-natal causes, such as illness (fever or palsy) or accident, injury or shock to the brain which makes the person suffering from it not criminally responsible for acts done by him while it continues. This state could be separately regarded

as total or partial; permanent or temporary.

An important passage reads as follows

> "There is a partial insanity of mind.....; some persons that have a competent use of reason in respect of some subjects, are yet under a particular dementia in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is a condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears or griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons, that are felons of themselves, and others are under a degree of partial insanity when they commit these offences. It is difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes. The best measure that I can think of is this; such a person as labouring under melancholy tempers hath yet ordinarily as great an understanding, as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony...."[11]

It is important for it was the first time a major legal writer had recognised that mental states - 'partial in respect of degree' - slide into one another by an imperceptable series of gradations. Had other jurists taken up the idea a diminished responsibility doctrine might have been developed in England at an early stage. This aspect of 'partial insanity' was ignored however and the scientifically invalid alternative was emphased.

Hale also explained that emotional factors ("excessive fears and grief") might be responsible in partial insanity as well as permanent mental disease - as Coke had pointed out.[12] This acceptance of a broad etiology by both Hale and Coke was rejected, or at least, not appreciated

by subsequent generations of judges, but it pointed the way to a more liberal legal concept not realised in English law until 1957.

B. The Nineteenth Century Trends

We shall have occasion in the later part of this chapter, and in the passage on infanticide, to comment in detail on the reforming movement which was active in relation to the criminal law - and the law of homicide, in particular - during the first half of the nineteenth century. Sufficient to say at this stage that one response of the Government of the day to the pressure exerted upon them was to appoint Criminal Law Commissioners. The Commissioners were required to consider specific aspects of the law and to draft appropriate legislation and thereafter, to report at intervals to Parliament

In a Report[13] published in 1843 and made by Commissioners so appointed (their Seventh), after dealing with the terms of a defence which they had drafted to deal with the position where a prisoner's guilt turned upon the question of insanity, the Law Commissioners had this to say:

> "He (Hale) says "It is difficult to define the indivisible line which divides perfect and partial insanity, but it must rest upon circumstances duly to be weighed and considered both by the judge and jury . . ." It seems to us that the allowing of such a plea of partial incapacity would be not only inconsistent with the general principle of incapacity, but attended with great danger to society".

And again:

> It would be impossible to prescibe any certain test or lay down any certain rule, for distinguishing the degrees of insanity within which such an exemption should be permitted. Lord Hale himself . . .suggested a test; and this would, we are convinced, be one of a most impracticable nature, whether we regard the difficulty of ascertaining the test, viz. the average mental powerss of a boy of the age of fourteen, or a comparision of the mental powers of a person of a partially

> diseased mind, that is of one being partially an idiot or madman with the proposed standard, viz. a mind not at all diseased, but which wants maturity".[14]

The matter is further dealt with in the Report[15] of the Criminal Code Bill Commission, arising from the Royal Commission in respect of Indictable Offences, and published in 1878. On page 18 of the Report we find this passage:

> "It must be borne in mind, that, although insanity is a defence which is applicable to any criminal charge, it is most frequently put forward in trials for murder, and for this offence the law - and we think wisely - awards upon conviction a fixed punishment which the judge has no power to mitigate. In the case of any other offence, if it should appear that the offender was afflicted with some unsoundness of mind, but not to such a degree as to render him irresponsible, . . the judge can apportion the punishment to the degree of criminality, making allowance for the weakened or disordered intellect. But in a case of murder this can only be done by an appeal to the executive; and we are of the opinion that this difficulty cannot be successfully avoided by any definition of insanity which would be both safe and practicable, and that many cases must occur which cannot be satisfactorily dealt with otherwise than by such an appeal".

One of the most active participants in the production of the succession of Reports - in the evidence he proffered, in the drafts he devised and revised - was Sir James Fitzjames Stephen. These were tasks to which he was well suited by temperament and experience. In 1883, then a High Court Judge, he published his 'History of the Criminal Law of England', in three volume'[16]. In Volume II he deals with criminal responsibility at some length and with the relationship of 'Madness to Crime'. He dismisses the earlier law relating to insanity very summarily. Of Coke he says: "he mentions the subject of madness in the most casual and fragmentary manner". While of Hale: "Hale also has a chapter upon it which seems to me to be marked by the ignorance of the age in which it

was written".[17]

With due modest, he goes on: "From the time of Lord Hale to our own, no legal writer of authority had discussed the matter upon its merits[18]....." He then proceeds to do just that.

It is of particular interest that he notes that diseases of the brain may just:

> ".....cause definite intellectual error, and if they do so their legal efffect is that of other innocent mistakes of fact. Far more frequently they affect the will by either destroying altogether, or weakening to a greater or lesser extent, the power of steady calm attention to any train of thought, and especially to general principles, and their relation to particular acts. They may weaken all the mental faculties, so as to reduce life to a dream. They may act like a convulsion fit. They may operate as resistible motives to an act known to be wrong. In other words they may destroy, they may weaken, or they may leave unaffected the power of self control.
>
> The practical inference from this seems to me to be that the law ought to recognise these various effects of madness. It ought, where madness is proved, to allow the jury to return any one of three verdicts: Guilty; *Guilty but his power of self control was diminished by insanity*; Not Guilty on the ground of insanity".[19]

Despite Stephen's words, no action was taken to implement the suggestion until 1957, although it is possible to find a few cases where courts have exercised clemency in respect of the weakness of mind of the convicted person[20]

That the concept was not completely dormant in the English legal mind is possibly evidenced by its emergence in the Criminal Code for Abyssinia,[21] devised during the Second World War,along traditional lines, by the British Military Administration for use in that country on its liberation from Italian control, It is fairly certain that its draftsman (with local assistance) would have been 'a duration only' serving soldier

of the British Army with an English legal background.

Section 16 of the Preface to the Code reads:

> "Our Lord has said in the Gospel that he who knows much shall be punished much, but he who knows little shall be punished little". St Luke XII, 47

This is elaborated in the Second Chapter of the Code where there is set out in detail specific instances where punishment should be reduced. Many of the examples illustrate a converse doctrine of 'ignorance of the law' being an excuse.

> e.g. 14. The countryman who does not live in town, who has not seen with his own eyes how the work is done and completed but only hears by report the law and ordinance of the Government, shall have two-tenths remitted.

but of more interest to us is

> 19. The man who is unable to know properly the edicts and law of the Government by reason of his being mentally deficient through illness or any other cause, shall have seven-tenths remitted.

This is exactly what has been suggested in 1981 by Professor Nigel Walker[22] to get round the criticism that the sentence does not always truly reflect the position of a defendent who has had a finding of diminished responsibility made as against someone who has succeeded with an insanity defence. The former is entitled to be protected by law and not left to the mercy of the sentencer. There have always been provisions in the Italian and French Codes[23] but the Ethiopian Code quoted above provides the closest parallel. Professor Walker suggests, for example: "that diminished responsibility should reduce the permissible prison sentence to one half of that which the court would otherwise impose".

C. Devices invoked to thwart Mandatory Penalty:

A striking feature of the criminal law in England during the Eighteenth Century was the rapid expansion in the number of offences carrying the death penalty. It was never doubted, that in the conditions then prevailing, it was desirable to inflict the punishment of death. Between 1700 and 1820 Parliament increased the number of such offences from about 50 to 220[24] Sir Samuel Romily had occasion to tell the House of Commons - who, after all, were the real culprits " that there was no country on the face of the earth in which there had been so many offences according to the law to be punished with death, as in England".[25] Many of those offences would to-day be considered trivial in the extreme - for example: stealing a turnip.[26] Indeed the criminal law of this period was harsher than it had been in Tudor times. In contrast, during the same period, remarkably few crimes in Scotland carried the supreme penalty.[27]

This escalation was prompted by the growing fears of the governing classes for their lives and property from the new proletariat spawned by the Industrial Revolution, which, more so than elsewhere, had largely destroyed the old pattern of society. This fear was heightened by the reports of the French Revolution into near panic. Detection of crime at this time largely rested on chance - and deterence seemed the only answer. As Kitson Clarke was to write: "What the law lacked in force, it tried to supply in horror"[28]

In all the circumstances it is not surprising that a reforming movement received considerable support despite a parliament adamant in opposition to change. John Howard,[29] Samuel Romilly[30] and Jeremy

Bentham,[31] inspired by the work of Cesare Beccaria,[32] were names in that reforming movement, whose influence, while considerable, was largely indirect. The real reforms were triggered by the attitude of the public at large. Businessmen who declined to prosecute. Witnesses who declined to attend court - at the expense of their recognizances. Juries who declined, either perversely or by the use of subterfuges, to return verdicts which would result in a death sentence.

A recognition of this situation by Parliament - there was a plethora of evidence on this topic before the Criminal Law Commissioners[33] - meant that the 220 had been reduced to 15 by 1837 and these were consolidated over the next twenty years into the traditional four: Murder - Treason - Piracy with violence - Arson in the Royal Dockyard.[34] In practice, from 1860, hanging was restricted to murder alone.

The inflexibility of the criminal law had always been manipulated and mitigated by a system of accorded privileges such as the 'Benefit of Clergy'[35] or by the commonsense and honest actions of prosecutor,judge or jury; and in the last resort, by the exercise of the Royal Prerogative of Mercy. What is interesting to observe is that the same subterfuges which were used to secure a favourable outcome in indictable offences other than homicide (notably:theft) were increasingly used, after 1840, to thwart the mandatory penalty in murder cases where a mental condition not amounting to insanity, required that humane treatment be accorded rather than that the strict letter of the law be carried out.

One important outcome of these praiseworthy endeavours was that, as they prospered, because for practical purposes the rigidity of the

law could be modified and the death penalty nullified, the pace of reform and the urge for new legislation, particularly in relation to mentally abnormal offenders, lost momentum.[36] Changes which might have come in Stephen's time had to wait until the twentieth century

(a) The Prosecutor:

It is always open to the Crown Prosecutor, when considering the evidence initially in any potential prosecution, to choose the lesser charge of manslaughter (or infanticide) rather than murder. The then Director of Public Prosecutions gave evidence to this effect to the Gowers' Commission.[37] On the other hand, the prosecutor cannot fly in the face of the evidence. Indeed there is a further curb - from which the Lord Advocate in Scotland is happily free - in that examining magistrates at the committal stage may commit for murder, whatever the original charge, if the evidence before them , in their opinion, warrants such a course.

At the trial stage, it is always possible for the prosecuting counsel, with the approval of the defence, to indicate to the judge that, subject to the Court's acquiescence, he is prepared to accept a plea to a lesser charge on some or all of the counts on the indictment in return for an admission of guilt. Counsel's motives for so doing may cover a wide spectrum. They may be administrative; to save a long trial or overcome the absence of a vitual witness. They may be prompted by considerations of public policy. They may be prompted by a desire to save a young or timorous witness from having to give evidence. Equally, he may be prompted to secure, what in his eyes, on the facts known to him, would be

a merciful outcome to the case. In his evidence to the Gowers' Commission, Mr Justice Humphrey's told a long and involved story of just such an approach by a prosecutor to Mr Justice Hawkins. It is repeated in Gowers' own book A Life for a Life,[38] with a certain amount of pathos. The case involved the smothering of a child, blind from birth due to syphilis in the mother, by the distressed father and an agreement between the Crown and the judge to call it manslaughter.

(b) The Judge:

It has always been open to a judge to facilitate a particular finding by a jury by framing his directions to them in his summing-up in lenient terms. This was particularly so before the creation of a criminal court of appeal. Notably this occurred where there were strong mitigating circumstances not strictly provided for by law; as where the accused man was clearly mentally abnormal though not within the ambit of the M'Naghten Rules - which provided the exclusive test of responsibility. An example would be the direction on insanity devised by Stephen J. and used by him in R. v. Davis[39] It runs as follows:

> "As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness and wrongness of an action ... may fairly be said to prevent a man from knowing that what he did was wrong ... Both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him ... If you think there was distinct disease caused by drinking, but different from drunkenness, and that by reason thereof he did not know that the act was wrong, you may find a verdict of not guilty on the grounds of insanity".

In this case the medical witnesses had testified that the

accused suffered from delirium tremens. The direction was adopted by a number of Stephen's brother judges. It was applied, for example, by Mr Justice Bray in R. v. Fryer,[40] although the circumstances were somewhat different.

Again, the judge could so hedge his directions with technicalities that the jury would be forced into a finding of manslaughter, or indeed, acquit altogether. Professor Jerome Hall has described this process as "a long series of technicalities in which they (the judges) have effectively submerged statutory provisions of capital penalization".[41] This course was often followed in cases which would now fall within the scope of infanticide. After conviction, the judge could still exert his influence. He could stay proceedings. While he was required so to act ex necessitate legis in specified circumstances - insanity, self defence, accidental death, or where a woman prisoner pleaded her pregnancy were the most common instances. He also had a discretion to do so ex arbitrio judicis where he was dissatisfied with the verdict, the evidence was suspicious, or where, although the guilt of the accused was not in doubt, he wished to recommend mercy.

The practice was to sentence the accused to death, with all the solemnity of the black cap, and then immediately tell the condemned man that the sentence would not be carried out until the king had been consulted. It was from this act of 'taking back', using the French verb 'reprendre' that the word 'reprieve' has come to be associated with judicial pardoning. If the judge then backed up the reprieve with a personal recommendation to mercy, as often happened, this was very persuasive and

the prisoner was almost always saved. Frequently a condition was made that the reprieved man should immediately join the army. At a later stage, it was more usual to impose a alternative penalty of 'transportation'.

The coming into force of 'An Act for better preventing the Horrid Crime of Murder'[42] in 1752 added a new dimension. Thereafter, all persons convicted of murder were required to be executed within forty-eight hours unless the execution day fell on a Sunday, when it was postponed until Monday. The change from a space of about two weeks to two days meant that, out of London, with the then existing state of communications, it was almost impossible for anyone to take any action - save the judge.

A further weapon in the hands of a judge arose from what the judiciary liked to call "the solemn mockery". The judges found it very objectionable to pronounce a death sentence where, from their experience, they, and indeed everyone in court except possibly the accused, knew that that sentence would not be carried out. By 'The Judgment of Death Act' of 1823,[43] promoted by Peel in his first year of office, the judges were no longer required to 'pronounce' sentence of death, merely 'record' it, if the circumstances made the prisoner (in felonies other than murder) seem a fit and proper subject to be recommended for the Royal Mercy. From 1837[44] that right was extended to murder cases. In practice, where this course was followed, the King was committed to substituting a lesser penalty. The power was, however, removed by section 2 of the 'Offences against the Person Act'[45] of 1861. - much to the regret of the judiciary.

(c) The Jury:

There is ample statistical evidence, certainly from the nineteenth century,[46] to show that juries mitigated the rigours of the law by acquitting in the face of the clearest evidence of guilt, or again, returning verdicts of "Guilty of Manslaughter" where the evidence before them did not justify such a finding and their proper choice lay between a verdict of murder and acquittal.[47] This was in effect a salve to their conscience where there was a general disapproval of the death penalty or a reluctance to bear the responsibility for another's death. It might also arise from an aversion to seeing it imposed in particular cases.[48]

It was also open to the jury, when returning a verdict of guilty against the accused - if they so wished- to add a recommendation to mercy. They were not required to give reasons and their grounds for such a rider were not often expressedly stated. The Home Office has tried to ascertain and analysis these reasons for the period of the first half of this century.[49] 'Pitiable Circumstances' account for about one-quarter of all cases, while 'mental abnormality' covers about one-tenth[50]. It should be noted that they made their recommendations on their own initiative, the judge making no reference to their right to do so. These recommendations need not, of course, be endorsed by the trial judge,[51] but they had to be passed on to the Home Secretary. It did not bind the latter, but it clearly carried weight with him. While it did not save all those to whom it applied, it was, in the period referred to, acted upon in 74 per cent. of the cases considered

(d) The Home Secretary:

We have seen how the Criminal Code Bill Commissioners in 1878 indicated that there should be reliance on the 'Executive' in murder cases where there was "unsoundness of mind but not to such a degree as to render him irrespossible".[51] The reference is, of course, to the Royal Prerogative of Mercy. This is a power - as old as the principle of jury trial itself - whose origins stem from an absolute discretionary power vested in the sovereign and inherent in the feudal conception of kingship yet has now developed into a power which, though still technically belonging to the monarch, is in reality vested in the Secretary of State for Home Affairs,[52] and is now firmly based on statute.[53]

The exercise of this power can take a number of forms. There can be an 'absolute or free pardon' which "wipes out not only the sentence for the offence, but the conviction and all its consequences and puts the person pardoned in exactly the same position as if he had never been convicted"[54]. This is granted where the Home Secretary is satisfied that a miscarriage of justice has occurred, which has not been, or cannot be, remedied by a criminal appeal court.[55]

Again, the Home Secretary, under these powers, can reduce the quantum of a sentence or other penalty, without changing its character. The reason usually compassion in the light of circumstances affecting the prisoner, but not relating to his personal condition - for example, serious illness in his family. It can also be used administratively where the public interest is no longer served by the prisoner completing his full sentence - for example, he is due to be deported.

The third form is that which has particular reference to our study. This is the power to grant a 'Conditional pardon', where one form of punishment is substituted for another - for example, where a period of life imprisonment is substituted for a death sentence. Its exercise is based on mercy, and in practice has sustained the criminal legal system over at least two centuries in the type of case which now falls within the ambit of infanticide and diminished responsibility.

> Blackstone pointed to this discretion when he said:
> "Law cannot be framed on principles of compassion to guilt; yet justice by the constitution of England is bound to be administered in mercy; this is promised by the King in his Coronation Oath, and it is that act of his government which is the most personal and most entirely his own. The King himself condemns no man; that rugged task he leaves to the courts of justice: the great operation of his sceptre is mercy".[56]

In de Freitas v. Benny, Lord Diplock delivering the report of their Lordships, made this qualification: "Mercy is not the subject of legal rights. It begins where legal rights end[57].

From the middle of the 18th. century until the abolition of hanging, every capital case was reviewed by the Home Secretary - and in Scotland, by the Secretary of State for Scotland[58]. All the circumstances of the case were carefully scrutinised. There need be no question of law or fact to be considered. All the material which was before the original court of trial (including a transcript and the judge's note), any information of a like nature where there had been an appeal. The Home Secretary had the assistance of officials with long experience in such matters. There was access to records of previous cases. The Prison Medical Officer provided a report on the prisoner's mental and physical

condition. There was, of course, a statutory obligation to order a special medical inquiry if there was reason to believe that a prisoner under sentence of death was insane.[59] The matter was dealt with very comprehensively.

It is interesting to note that, in practice, a similar inquiry was undertaken where a lesser degree of mental abnormality was suspected. Lord Devlin[60] has draw attention to a practice common before 1957 where in a case which might now justify diminished responsibility, a defence under the M'Naghten Rules might be advanced to ensure that evidence of mental abnormality be on the record and might reach the Home Secretary, by this indirect means, as counsel had no direct access.

The importance of the part played by the Prerogative of Mercy in the administration of the law relating to murder is demonstrated by the fact that, in the first fifty years of this century, no fewer than 45 per cent. of the persons sentenced to death for that crime were reprieved and their sentences altered[61]

Since the abolition of the Death Penalty, the Home Secretary has still had to exercise his powers in respect of the Channel Islands and the Isle of Man. He has also had to consider those few cases where the accused has omitted to plead either insanity or diminished responsibility or has been unsuccessful, before a jury, with those defences.

Conclusion:

That the seeds of the concept were present in the minds of English jurists from an early stage but failed to germinate, thwarted by,

on the one hand, oppressive law makers, and on the other by a system which readily resorted to subterfuge by juries and administrative action by the Home Secretary to overcome the ensuing severity - and in their success removing the urgency for the introduction of a doctrine.

FOOTNOTES

Chapter II

1. Lord Cooper of Culrose. Scottish Legal Traditions, p. 7
2. (1945) J.C. 55
3. Normally cited as 10 Clark & Finnelly's Reports 200. Actual trial 4 St. (N.S.) 847 and see Annual Register for that year. There are a great many different ways of spelling MacNaughton, indeed Daniel used a great many . The traditional spelling, M'Naghten, (one of two used in the Reports) has been used throughout although modern research suggests that this is the one spelling never adopted by the man himself.

   For practical purposes, the essence of the 'Rules' is contained in a short passage in the 'Answer' given to Question Two and Three: "... to establish a defence on the grounds of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong"
4. As late as 1843, the new Prison Rules directed the attention of the chaplain , and not that of the medical officer, to the 'pecular character and state of mind of each prisoner'
5. (1724) 16 St. Tr. 695
6. (1760) 19 St. Tr. 885
7. (1800) 27 St. Tr. 1281
8. The Criminal Lunatics Act, 1800, 40 Geo. III c. 94

   Lunatics Care & TreatmentAct, 1845, 8 & 9 Vict 100

   Criminal Lunatics Asylum Act, 1860. 23 & 24 Vict., c. 75
9. Sir Matthew Hale, Historia Placitorum Coronæ, (1736) Vol. 1, Ch.. IV p. 30
10. For detailed description of one of these trials: see 6 St. Tr. 676; and also Christopher Hibbert, The Roots of Evil, p. 31
11. Hale supra p. 30
12. 'Sulness, griefe or other accident'
13. I.U.P. series of B.P.P. Vol. 4. Legal Admin. & Criminal Law p. 12

14. Ibid p. 18

15. I. U. P. series of B. P. P. Vol. 6 371 at p. 386

16. Sir James Fitzjames Stephen, History of the Criminal Law of England

17. Ibid p. 150

18. Ibid

19. Ibid at p. 174

20. R. v. Holder, (1911) 7 Cr. App. R. 59 where a girl of 20 in delicate health and highly neurotic stole silver and R. v. McQueen, (1912) 8 Cr. App. R. 89 where the rubric runs "Sentence mitigated in view of the feeblemindedness of appellant"

21. Promulgated August 5th. 1941. English version (original = Amharic) published by Directorate of Army Printing and Stationery Services in Addis Ababa. Replaced in 1957, while Haile Selassie was still on the throne by a new Penal Code based mainly on Swiss Code.

22. Nigel Walker, "Butler and the C. L. R. C. and Others" (1981) Crim. L. R. 598

23. Italian Penal Code of 1889:

    Article 47: If the state of mind indicated in the preceding article (i. e. a state of infirmity of mind as to deprive him of the consciousness of his acts, or of his freedom of action) was such as greatly to diminish responsibility, without, however, excluding it, the punishment prescerbed for the crime committed is to be reduced.

    French Penal Code: see post Chapter III

24. James B. Christoph, Capital Punishment and British Politics, p. 4

25. Hansard: Debates of the House of Commons XV (1810) 366

26. Koestler, Reflections on Hanging, p. 13

27. Hume's Commentaries p. 1 Average in Scotland 30 years to 1797 all offences = 6 per year

28. Kitson Clark, The Making of Victorian England, p. 59

29. John Howard (1726-90) as High Sheriff saw suffering of prisoners. Wrote extensively on subject.

30. Sir Samuel Romilly(1757-1818) as Solicitor-General carried out extensive reform of severer aspects of criminal law.

31. Jeremy Bentham (1748-1832) Barrister and writer on morals and politics. As result of visit to Russia advocated idea of a model prison

32. Cesare Beccaria [Marquis de] (1735-94) Italian jurist and economist. Wrote 'Treatise on Crimes and Punishments as protest against barbarities which disgraced criminal codes of his day.

33. I.U.P Series of B.P.P.- Legal Admin & Criminal Law, Vol I

34. The Treason Act 1351, 25 Edw.III stat 5, c.2

Piracy Act, 1837. 7 ill. iv '1 Vict., c.88.

The Dockyard Protection Act 1772, 12 Geo. III c.24

35. Pollock and Maitland, History of English Law, I p 441 et seq.

36. Green T.H., "The Jury and the English law of Homicide, 1200 - 1600", (1976) 74 Mich.L.R p 452

37. Gowers' Commission Evidence: Mathews. Q. 977-9. see also Report para 24

38. Ernest Gowers, A Life for a Life, p.28

39. (1881) 14 Cox 563

Stephen was a contemporary of Lord Deas the Scottish judge and having regard to his wide interests in law would probably be familiar with the Scottish decisions.

40. 1915) 24 Cox 405

41. Jerome Hall, Theft, Law and Society, p.118

42. 21 Geo.II. cap.37

43. 4 Geo. IV, c.48

44. Central Criminal Court Act, 1837. I Vict., c.77

45. 24 & 25 Vict., c.100

46. Leon Radzinowicz, A History of English Criminal Law, Vol. I, p.92 et seq. See also Douglas Hay, "Crime and Society in 18th.Century England" in Albion's Fatal Tree,

47. Lord Denning told the Gowers' Commission: "in many cases which are in law plainly murder, juries return verdicts on manslaughter, because they do not think the death sentence is appropriate". Minutes of Evidence, p.207(2)

48. A good deal of evidence in this regard was given to the Royal Commission on Capital Punishment in 1864-65 and the Select Committee on Capital Punishment, 1930. Re: the latter see Report, p.VIII

49. Gowers' Commission Report: Table 10 of Appendix 3

50. The figures also show that recommendations were made in 39 per cent of all murder verdicts

51. The judge might refuse to endorse and the Home Secretary to follow it because of factors unknown to the jury – e.g. bad character

52. The Home Secretary is not responsible to Parliament for his decision nor can the matter be raised directly in either House

53. Criminal Law Act 1827. 7 & 8 Geo. IV, c.28, s.13

54. Hay v. Tower Division of London JJ., (1890) 24 Q.B.D. 561

55. A classic example would be the posthumous pardon given to Timothy Evans in 1966, after the trial of Christie and numerous inquiries (although he still seems to have been a party to his wife's killing.)

56. Blackstone, Commentaries Vol.4 p.395

57. (1976) A.C. 239 at p.247

58. In Scotland: From the middle of 18th.Cent. to 1885, the Home Secretary had the duty to administer. 1885 Secretary for Scotland created, duty passed. 1926 Appeal Court created, Secretary of State for Scotland henceforth reviewed Capital cases

59. Now abolished by the Schedule to the Mental Health Act, 1959

60. 1956 Crim.L.R. 686

61. Gowers' Report: para 37

Chapter III

The Concept in Other Guises

While the objective might be achieved in large measure by clandestine means, some aspects can be adequately dealt with in many jurisdictions by existing legal mechanisms.

A. Infanticide:

Parents may kill their children for a variety of reasons; they may be sadistic, child batterers who go too far; mentally abnormal, social inadequates overcome by the problems of their world or they may be 'mercy-killers'. At first sight, it would appear that such action - especially in the case of the mother - was the antithesis of nature yet it is a fairly frequent occurrence - and technically murder.

The law has experienced little difficulty in dealing with the male malefactor, whether the child was born in or out of wedlock. The father of the child victim has always been handled within the existing framework of the criminal law and subject to the general rules of criminal responsibility.

So far as the distaff side was concerned, the commentators have found it convenient to categorise this type of homicide, committed by mothers of their own children of varying ages, though usually while still babies, under the term 'infanticide'[1] and to discuss it in relation to an analogous act 'child destruction'[2] and what became the alternate crime 'concealment of birth'.[3] There is extensive case law and literature, but for the purposes of the present study the discussion will be confined, as far as

possible, to those aspects of the topic which reflect the emergence in English criminal law, for the first time, of legislation to take account of a mental state falling short of insanity, as a factor personal to the actor, which influenced her action in killing and yet did not completely exonerate her from punishment. The first time that legislation utilised the legal device of substituting one named offence for another offence, which did not carry a fixed penalty; this to ameliorate the harshness of existing law where the offence covered a wide spectrum of circumstances.

The earliest view was that such an outrage against society called for the strongest retribution, but then gradually over the years - where for example, the child was born in wedlock - the courts tended to take a less harsh stance. At a time when there was no real understanding of birth control or contraception, there was a realisation that the reason for the killing of a child, where the birth had not been concealed, might be a valid one - economic or related to some physical problem of the child. There was also a realisation that such killings hardly constituted a threat to law and order, confined as they were, within the family and limited in numbers. Again, the extent of the loss to a child, who had hardly existed, did not weigh heavily on the public conscience. Accordingly, the death penalty as a deterrent was not called for.

Of course, the number of cases which would be detected would be small. The opportunity to dispose of a child by way of ' an accident' were infinite - overlaying in particular. And of course, where the existence of the child had been acknowledged, the mother would have the assistance of other members of the family, able and willing to do what was required; a facility normally denied the pregnant single girl. Thus only the most extreme cases would come before the courts and call for the full sanction of the law. It may be significant and indicative of this attitude that the last mother who was

hanged for the death of her child under the age of one year was Rebecca Smith in 1849.[4] She had deliberately poisoned her child, a method which was generally disliked, and there was a suspicion that this was not the only child to be hastened by her to its death. In any event, there were plenty of ways open to a jury, where they thought it appropriate to avoid the death penalty. The criminal process was able to deal with these cases without excessive subterfuge or fuss until they were absorbed by the provisions of the Infanticide Act of 1922.[5]

It was against the suspected killing of bastard children that the law turned its full attention. Fornication and adultery were strongly condemned by the Church and thus called for extreme measures. The pressures on the unmarried mother, finding herself pregnant, possibly as the result of seduction or rape, to conceal the birth and then dispose of the child, were great. There was the question of the loss of her 'good name' with all that that entailed, socially and economically, quite apart from the practical difficulties of continuing her employment, possibly as a living-in domestic, while maintaining her child.[6]

(a) The Old Law:

An Act of 1623[7] reflects the general attitude of the time. While reiterating that the penalty for the murder of a child should be hanging, it specifically provided that concealment of the birth of the child constituted a presumption of guilt of its murder. Blackstone was to comment of this provision that it "savours pretty strongly of severity".[8] It was prompted, of course, by the circumstances which normally attend such confinements and which make conviction difficult. There was normally, in the case of the bastard child, a complete absence of independent witnesses. On the other hand, the Act also required, as an essential element of the crime, that there be proof that the

child had been born alive and had been completely severed from any connection with the mother's body.[9]

This Act was not repealed until 1803. In that year, Lord Ellenborough's Act[10] was passed in an attempt to placate juries and secure convictions, where the evidence warranted them. The Act provided inter alia:[11] that the trials of women charged with the murder of their bastard children "shall proceed and be governed by such and the like rules of evidence and of presumption as are by law used and allowed to take place in respect to other trials for murder". That is to say, it restored the presumption of stillbirth which had been excluded from the trials for murder of mothers of their illegitimate children by the Stuart Act.

It is interesting to look at the situation during the first half of the nineteenth century. Whereas, om the one hand, there was no difficulty in securing verdicts of wilful murder from a jury at the coroner's inquest, where the death of the child had occurred in suspicious circumstances, yet when, however, the mother was in fact charged with its murder, arising out of that sudden death, the jury at the assize court invariably returned a verdict of 'not guilty' to that charge. The position is well illustrated by the statistics given to the Royal Commission on Capital Punishment of 1866 by Henry Avory, then Clerk of Arraigns at the Old Bailey. He reported that there had been 5000 coroners' inquests a year on children under seven years in the middle decades of that century, yet only 39 convictions for child murder between 1849 and 1864. In 34 of those cases the victims were bastard children.[12]

The Minutes of Evidence appended to the Report of the Commission clearly demonstrates that the law had broken down, mainly because lay and professional opinion was out of sympathy with the law, which drew no distinction between the murder by mothers of their infants and other

types of murder. Mr Justice Shee wrote to the Commission of "the utter and hopeless failure of the existing theory of the law of murder as respects infanticide".[13] The jury was not alone in their haste to acquit; Baron Bramwell told the Commission:

> "It is not the fault of the jury that the prisoner is acquitted. The case is withdrawn from them by a contrivance I don't presume to censure, but which certainly prevents them expressing their opinion. I will not say whether it is a right condition of things that the jury should always be told, as they always are, 'There is a possibility of this child not having been born alive, and therefore, though you have medical evidence that it had breathed, and although you have evidence to show that it was improbable that the mother could have inflicted such an injury as it died of during parturition, yet, inasmuch as there is a possibility of it' — which the medical witnesses will never negative — 'therefore you must acquit her of infanticide'[14]".

All this was, of course, an exact parallel with the situation some years earlier when juries had shown an equal reluctance to convict in cases of theft and the forging of bank notes, when these offences carried the death penalty. While all this might, on the one hand reflect on the efficacy of the jury system, it is important also in illustrating that the criminal law, to be enforceable, must be relevant and accord with current public sentiment. It may be necessary in any efficient system of justice to provide on the statute book some mechanism to control yet reflect that public sentiment. In its absence, juries will fly in the face of the oath that they have taken to return a true verdict 'according to the evidence' and return verdicts which are according to their conception of justice tempered with mercy, unhindered by the technicalities of the criminal law'[15]. Grappling with the earlier problem in relation to offences of dishonesty had necessitated a change in the law; so the present difficulties indicated that reform was called for again.

We have already written in another chapter of the 'solemn

mockery' and the subsquent right of judges to merely 'record' the sentence of death. This right was removed by the Offences against the Person Act 1861.[16] Although there was almost no protest or comment at the time of the the passing of the Act, the judges harboured a grievance at this change.[17] Some felt very strongly about it indeed, possibly out of proportion to its importance. The strength of their feeling gave them a reforming zeal which is quite surprising and caused Professor Davis to declare that "if any legislation could be described as above all others the creation of the judges, it is the Infanticide Act,1922".[18]

(b) Reform:

It is curious that when Dr Ryan, a physican and winner of the Fothergillian Gold Medal of the Medical Society of London for an essay on infanticide, wrote in 1861, the book[19] based on his prize winning essay, he made no mention of the condition of the women involved, as a factor in relation to the homicide, other than their physical condition arising out of poverty and malnuitrition - and he was certainly sympathetic to their plight and a critic of the death penalty.

Archibald Alison, the Scottish Institutional writer,[20] had earlier pointed out:

> "Their distress of mind and body deprives them of all judgment and they are delivered by themselves... and sometimes destroying their offspring without being conscious of what they are doing. Accordingly, it is a principle of law, that mere appearance of violence on a child's body are not per se sufficient, unless some circumstance of evidence exist to indicate that the violence was knowingly and intentionally committed; or they are of such a kind as themselves to indicate intentional murder"[21].

While reform was in the air and a wide variety of proposals were being mooted, Sir James F Stephen expressed clearly what must be considered the dominant consideration, although, at that stage, he may

not himself have been clear as to the general lines of the reform desirable. In his evidence to the Royal Commission on Capital Punishment of 1866, he said this:

> "The operation of the criminal law presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman after child-birth is so upset, and in such a hysterical state altogether that it seems to me you cannot deal with her in the same manner as if she was in a regular and proper state of health.[22]

Later he was to write:

> "physical difference between the two sexes affect every part of the human body, from the hair of the head to the sole of the feet, from the size and density of the bones to the texture of the brain and the character of the nervious system... Men are stronger than women in every shape. They have greater muscular and nervious force, greater intellectual force, greater vigour of character"[23].

The incentive to base any reform on a medical model was strong. The greater facilities in relation to forensic science and its acceptance by the courts in the mid-nineteenth century had established a framework in which it had become easy to demonstrate a link between medical evidence and lunacy. This had already enabled juries to acquit even when faced by other overwhelming evidence. The records of the Bethlem Hospital, quoted by Dr Roger Smith,[24] suggest that sometimes there was no medical evidence at all. Again, when the judge had left no room for the jury to acquit, Smith reports that 'local philantropists' (sic) might submit testimony of the insanity of the prisoner to the Home Secretary and the sentence be commuted.[25]

Taylor, writing in 1865,[26] drew attention to the case of Mrs Ryder who was tried for the murder of her two week old child at the Old Bailey in 1856. She had killed the child by placing it in a pan of boiling water. It was pointed out by the defence that there was an absence of motive in the case and that Mrs Ryder was probably in a state of delirium when she carried out the act. The jury acquitted,

finding insanity but of a temporary nature. Taylor calls the malady 'puerperal insanity', points out that it is fairly common and draws a distinction with a separate condition known as 'insanity of pregnancy'. This psychosis could take many forms and could last up to one year following confinement, but was usually of short duration. It was characterised by the absence of any adequate motive or attempt to avoid detection and, as this was contrary to the actions of a normal criminal, the inference could be drawn that the perpetrator must be criminally insane.

All this must be set against a background of the Victorian view that women were passive, and like children, and should be so treated. They had, for example, no rights under the civil law and the criminal law should have regard to this and give it practical expression.

The Commission before whom Stephen had given evidence issued a Report but made no recommendation which directly concerns our study, but what the Report did do was to stimulate a series of attempts to reform the law and introduce new legislation. Notable among these was a Bill[27] sponsored by Russell Gurney (but drafted by Stephen) in 1872 which, while dealing with the law of homicide generally, included a provision to the effect that where a woman murdered her child 'at or soon after birth and while deprived of her ordinary powers of self control by the physical effects of the birth', the trial judge, in his discretion, could sentence the woman to penal servitude for any term not less than five years.

The Bill was re-introduced in much the same form in 1874,[28] but with a significant addition. There was now an attempt to have the offence dealt with as manslaughter. Section 29 read as follows:

> "Criminal homicide is manslaughter and not murder...(3) if the person whose death is caused is the child of the person who

> causes it, and if the act by which the death is caused is done whilst such last-mentioned person, though not within the provisions of section 24, is deprived of the power of self control by any disease or state of mind or body produced by bearing the child whose death is caused".

But the Bill failed to become law.

What Stephen was anxious to do was to put the effects of child-bearing on the same footing as other emotions like anger and fear and thus entitle the accused to any indulgence which the law might extend to provocation.

The Criminal Code (Indictable Offences) Bill of 1878,[29] for which Stephen was responsible initially, dealt with infanticide in section 138 and accorded just such mitigating effects of provocation to the effects of child-bearing. In an amendment the following year, section 138 of that Bill provided that a mother who killed her child at or immediately after its birth was to be punished for manslaughter, if she was, at the time, deprived by reason of bodily or mental suffering of the powers of self-control.

It is interesting to note that the draft of a Criminal Code for Jamaica, presented to Parliament in 1877, which had been revised by Stephen, contained a more comprehensive provision. Section 121 stated that:

> "A women who caused the death of her child recently born when she was deprived of the power of self-control by a dis order of mind produced by child-bearing was to be found guilty of manslaughter and not murder"[30].

Section 138 of the 1878 Bill was subsequently dropped from the draft and replaced by other sections which took no account of the effects of child-bearing.

In 1880, a further criminal code,[31] in which Stephen played no part, was introduced by a group of private members. Among its numerous

sections, it was proposed that a woman who intentionally did an unlawful act from which the death of her child resulted, either in the act of birth or immediately thereafter, being at the time deprived of her self-control by reason of physical or mental suffering or distress, should be punished as for manslaughter, and that proof of live-birth was not to be necessary for conviction, the proof of dead-birth being placed on the woman.

After this flurry of activity, little was heard of the topic until 1907, but in the intervening years, the under-lying principle of a medical factor was unobtrusively becoming firmly established. Further movement was generated by an attempt by a private member, Mr George Greenwood, to have the recommendation of the Royal Commission on Capital Punishment of 1866 implemented. His Bill [The Law of Murder(Amendment) Bill][32] proposed inter alia: that no woman was to be indicted for murder for killing her child at birth or within one month thereafter but that a woman who maliciously inflicted serious injury upon her child during that period resulting in death was to be guilty of an indictable offence punishable with penal servitude, imprisonment or detention during H.M. Pleasure.

In May 1909, another Bill - The Child Murder (Recording of Sentence of Death) Bill[33] - was introduced by Lord Alverstone, then Lord Chief Justice, to correct the position of the so-called 'Solemn Mockery'. After Second Reading and in Committee an amendment was moved and accepted that 'if a mother who had not recovered from the effects of childbirth killed her infant, the judge could direct the jury that they might acquit of murder and convict of manslaughter. A further amendment, subsequently withdrawn, moved at this time, was to the effect

that, in addition to the disturbances of childbirth, the judge could, if he considered it a proper course having regard to all the circumstances of the case, grant to the mother the mitigating effects of provocation; that is, to such circumstances as the desertion of the father, expulsion from the family, unemployment, sickness and destitution; and direct a verdict verdict of manslaughter.

This is, of course, exactly what Stephen had advocated. It has relevance for to-day when we consider whether infanticide would not be better dealt with under the aegis of diminished responsibility, its purely medical basis being now largely discredited. In truth the real factors in infanticide are often the stress of having to care for the infant, who may be unwanted or difficult, or arise from personality problems of the mother. As Professor Granville Williams has pointed out[34] these stresses can affect the father as well as the mother, and are not confined to a year after the birth.

The Bill, retitled 'The Child Murder (Trial) Bill[35] did not become law, having failed to secure adequate parliamentary time.

A new Child Murder (Trial) Bill[36] was introduced by Mr Arthur Henderson, Secretary of the Labour Party, in 1922 In principle it resembled the amended Bill of 1909,[33] but with the difference that it simply left it open to the jury to bring in a verdict of manslaughter instead of murder, and did not permit the judge to direct them so to do. The Bill stimulated little debate, and less opposition, in either House save from the Lord Chancellor, Lord Birkenhead. He, himself, drafted an amendment which resulted in the scope of the bill being reduced. It passed into law on the 20th.July 1922, being restricted to England. It had no application to Scotland or Ireland.

The relevant section - section 1(1) reads:

> "where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of a felony, to wit of infanticide and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child"[6]

It will be noted that, whereas in previous attempts - for example, in the Homicide Bill of 1882[31] - the reference had been to a women who had been "deprived of their ordinary powers of self-control". That is to say, there was some assessment of the accused's ability to help doing what she did. With the phrase "the balance of her mind should be disturbed" - a phrase that Lord Birkenhead had deliberately chosen as new and previously undefined by the courts - there was no requirement that it be so disturbed as to affect the woman's "self-control" or "responsibility". There was care too in demonstrating that there existed the same wide choice of sentence as with manslaughter, yet care not to define the crime as manslaughter with any stigma that might carry. Another of Lord Birkenhead's innovations was to limit the dispensation to the "newly-born child". Stephen in his evidence to the Royal Commission had indicated that he did:

> "not know that I should wish to limit the time very nicely because the effect of child-birth upon a woman's nerves lasts for a considerable time in some cases. I would rather have a little indefiniteness in the law than run the risk of an encounter between the law and public sentiment[27].

Matters came to a head in 1927 however, when Talbot, J. sentenced a young woman to death where she was convicted of the murder of her thirty-five day old infant. He had directed the jury that the infant could not be said to be newly-born within the meaning of the Act, after that period. In the ensuing appeal, R.v.O'Donoghue,[37] the court

dismissed the application without calling on the Crown.

The judgment of the Court of Appeal, in effect, restricted the operation of the act to a child less than three weeks old; an extremely narrow scope, which could never have been envisaged when the Act was drafted. Nor was it the fault of the Court of Appeal. In the event, a further Infanticide Bil[38] was introduced in 1936 to remedy this difficulty, promoted by some Labour back-benchers. In the Bill, it was proposed that the exemption should apply to the killling of infants up to the age of eight years. It further provided that there should be a wider definition of the mother's state of mind to include 'distress and despair arising from solicitude for her child or extreme poverty or other causes'. Very similar to the reform mooted by Lord Ashbourne in 1909 of acceding the mitigating operation of provocation to a mother's mental stress. The Bill fell with the Abdication crisis, but probably had little chance of success.

Lord Dawson of Penn, a noted physician, successfully steered a further Bill[39] through parliament in 1938, which on becoming law as the Infanticide Act 1938[40] governs the legal position to-day. For 'newly-born' was substituted the phrase 'being a child under the age of twelve months'. In addition, to make the length of this period plausible, the woman's mental imbalance was to be attributable either to the birth of the child or to the consequent lactation.

It is interesting to note that, unlike a plea of insanity or of diminished responsibility, while it is for the jury to decide - after hearing the medical evidence - whether the balance of her mind was disturbed in the way defined in the Act, they are not required to decide whether it was disturbed to an extent which removed or impaired her

responsibility, or indeed, to decide to what extent it was disturbed. This was not what the draftsman intended.

When however, the mother of a new born child falls outside the limits of the Act, because she murders a child other than the one to whom she gave birth less than twelve months ago: for example, she murders an older child or more usually all her children; then the offence remains murder. To-day the appropriate plea is one of manslaughter on the grounds of diminished responsibility. Normally this is readily accepted. It is common nowadays to find indictments charging murder and infanticide being taken together.[41]

It is indeed anomalous that, having established that the balance of her mind was disturbed and that she was in a disordered state of mind, the accused is neither acquitted nor given the benefit of a special verdict, but convicted of a crime which has been equated with manslaughter. She is made subject to what is, in effect, an intermediate verdict. But this intermediate verdict is of the same nature as that now bestowed on those who seek the benefit of a verdict under the doctrine of diminished responsibility - By way of rationalisation, the doctrine of Diminished Responsibility could well embrace and absorb the crime of Infanticide, as indeed, it always has in Scotland.[42]

B. Extenuating Circumstances:

(a)Introduction:

The doctrine of extenuating circumstances is a fairly modern concept, and is not met with either in Roman Law or in the older European legislation, but at the present time many legal systems in the world operate such a scheme which vests in judges and juries a

discretionary power to modify any harshness which exists in the sentencing process of that jurisdiction. This is particularly true of countries which specify a maximum and minimum sentence for a particular offence. Normally the judge would have power to exercise his discretion in sentencing between those limits. Where there is a system of extenuating circumstances the judge may decrease the penalty below the minimum fixed by law. The question whether there are extenuating circumstances is considered as a separate issue after the verdict on the issue of guilt and it does not modify or change the offence. In effect it is of the nature of 'judicial excuses' which the Legislature has not specifically defined and the appreciation of which it has left to the discretion of the judge and jury as against 'legal excuses' which are collateral facts previously ascertained by the law.[43]

It is not without significance that both Lord Deas in the all important case of H.M.Adv.v.Dingwall[44] and Lord Normand in Kirkwood v. H.M.Adv[45] had occasion to equate the Scottish doctrine of diminished responsibility with 'extenuating circumstances' although it will be noted that the South African doctrine is not tied to any continuing state of mental instability.

Nor should it escape our notice that it allows the jury – as the doctrine of dimininshed responsibility does – to have a certain dispensing power which they may exercise with little restraint from rules of law, and place them in a relatively more important position; possibly compensating a little for their inability to participate in the quantum of the final sentence.

The Gowers' Commission in their Final Conclusions[46] indicated that one of the few proposals which they thought would be successful in

improving the English law of homicide would be to give discretion to the jury to decide in each individual case whether there were present such extenuationg circumstances as to justify the substitution of a lesser sentence for the sentence of death. The Commission in reaching this conclusion had examined the system then existing in Belgium, which is similar to that in France; in the United States of America where it exists in most States but varies in its application and in South Africa.

(b) France:

The essence of the Continental systems is that they circumvent fixed penalties, in the sense of fixed minimums for any particular offence; they do not change the character of the offence. They are not confined to any one offence. In effect, they provide a method of supplementing the ordinary statutory range of legal punishments for any particular offence by a reduced alternative scale applicable if it is held that 'extenuating circumstances' exist.

In France, before the Revolution, courts could impose arbitary penalties for any offence. After 1789 there was a movement against these and the Constitution of 1793 provided that penalties should be proportionate to the offence. As a result the French Penal Code of 1810 laid down a scale of penalties which prescribed a maximum and minimum penalty for all offences save for a few offences which carried the fixed penalty of death or penal servitude. A certain dispensing power in respect of sentencing was granted to the judge but this did not apply to murder. A major innovation occured in 1832 when in the Code of that year[47] it was decreed that the jury, after having decided the question of culpability, must, where their finding is one of guilt, ask themselves

if there are any extenuating circumstances ("circonstances atténuantes")in the case. If so, and their decision is by a simple majority, the punishment is modified by the judge who must impose a penalty which is of a lesser degree. There are statutory tables setting these out. In particular, for example, when the only penalty was death, the prisoner could only be sentenced to life imprisonment and might even be given a fixed term of years. Somewhat surprisingly the jury are not required to give their reasons for so finding.

Since 1941, possibly due to some abuse and scandals, the judges now retire with the jury and the French practice is now for the judges and jury to collaborate on all questions of law, fact, responsibility and punishment.

The scope of the extenuating circumstances is not generally defined but covers the type of case which appeal to jurors: good character, youth, mental abnormality of a lesser degree than insanity, and emotional issues. Discretion is unfettered.

(c) South Africa:

The South African system is comparatively modern, only being adopted in 1935, and, having regard to the English Common Law influence on South African criminal law (its Roman Dutch origins pertain mainly to the civil side) has greater interest for us.

Rather the same sombre situation in court and waste of administrative time in reviewing sentences which prompted the English legislature to introduce the Infanticide Act'[8] in 1922 is reputed to be the reason behind the formulation of the doctrine of ' Extenuating Circumstances' and its incorporation into the criminal law system by

amendment[48] of the Criminal Procedure and Evidence Act[49] of 1917 by the addition of a new section. It is now governed by section 141(2) of the Criminal Procedure Act[50] of 1955 which reads as follows:

> "When the accused is tried upon a charge of murder, the judge shall require the jury to state, if they find the accused guilty of murder, whether, in their opinion, there are extenuating circumstances, and if they state that in their opinion, there are extenuating circumstances, he may require them to specify those circumstances ....."

Section 3299(1) adds a further provisio to the compulsory imposition of the death sentence:

> "... or where the jury, in convicting the accused of murder, expresses, in terms of sub-section(2) of section one hundred and forty-one, the opinion that there are extenuating circumstances . . .the court may impose any sentence other than the death sentence".

Although the South African concept has a statutory origin, no definition[51] has been laid down; that usually accepted is Lansdown's own in R.v. Biyana and others[52] when he said: "an extenuating circumstance is a fact associated with the crime which serves, in the minds of reasonable men, to diminish, morally albeit not legally, the degree of the prisoner's guilt". It will be noted that this is a somewhat loose definition but it is felt that to devise a more precise one would be to limit the proper scope of the provision

Schreiner J. carried out a fairly exhaustive survey of the types of circumstances which would qualify in the case of R.v.Hugo[53] and many of them are all too familiar to practitioners in the courts of the United Kingdom and form a common ground with our study:

> (1) immaturity of mind, as might be seen in youth or persons of retarded mental development;
> 2) degeneracy of mind, as might be seen in extreme old age or in neuropathic or psychopathic persons who are not definitely insane;
> (3) undue influence of a person in authority, though not amounting in law to coerion;
> (4) reason or judgment clouded, e.g. by drink or drugs, though not to the extent that would have direct legal effect: another example of this kind of circumstance is infanticide by a mother still suffering from physical strain with consequent mental

> disturbance arising from birth or lactation;
> (5) distraction of mind not amounting in law to provocation, e.g., the killing of a brutal and unfaithful husband by his wife goaded to desperation; immediate killing of wife by husband provoked by her to sudden fit of loss of control through belief in her confession of unfaithfulness; the supposed worker by witchcraft of grievous evils killed by his aggrieved victim.
> 6) a wrong, but not entirely unreasonable, belief that a fatal attack was to be made;
> (7) minor degree of participation in the crime, e.g. where incomplete knowledge of common purpose existed or where the part played in carrying the crime into effect was a minor one;
> (8) motive of diminished heinousness, as where mother kills child to save it from apprehended dire fate; mercy killings.[54]

It should be borne in mind that the extenuating circumstances are concerned with the perpetrator and not with the act. Generally speaking only such circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime should have any weight at all. The whole question of extenuating circumstances will be treated subjectively and not objectively[55] – indeed it is difficult to envisage any objective factors being a ground for partially excusing the conduct of the accused. The previous record of the convicted person is not usually relevant nor known by the jury.[56] The onus of proving the existence of extenuating circumstances in a murder charge is on the accused, proof on a balance of probability being sufficient.[57]

The judge may direct the jury during the course of his summing-up as to what may be an extenuating circumstance and the jury come to a decision on the evidence they have heard in the course of the trial. Alternatively after the verdict counsel may address the jury, call evidence and the judge direct the jury specifically on this point[58]

It is the practice in South Africa to ask the jury to specify the circumstance or circumstances which they have found to be extenuating. This is done as a safeguard against perverse or unfounded

verdicts. The judge has, in any event, the power to disregard a finding of extenuating circumstances by the jury and to sentence the offender to death,[59] although according to Dr Lansdown, this power has never in fact been exercised.[60] The presence of this power and the requirement to specify any extenuating circumstance exercises a substantial degree of control over this facility.

If there are found to be extenuating circumstances, the judge has complete discretion as to the sentence that he imposes. In general, it is said, a period of 10 – 15 years imprisonment is normal. There is no reason however why it should not be life imprisonment. At the other end of the scale, in "an unusually pathetic 'mercy killing' the sentence might be as short as two years". (sic).[61]

According to Dr Lansdown the doctrine has worked satisfactorily in South Africa, where it has lightened the burden of the judges and allowed them in proper cases to give just and reasonable scope to mercy and sound sense without doing violence to any principle of law or logic. Be it noted that this is done by judicial means and not by executive authority. Lansdown did point out however that there was still scope for the Prerogative of Mercy and that there were many types of cases which can only be dealt with by a reprieve e.g. where the mental abnormality has not been brought out at the trial.[62]

Conclusion:

That 'Infanticide' and 'Extenuating Circumstances' are both examples of statute-based law which allow judge and jury a great degree of dispensing power and demonstrate that power can be entrusted – and has been entrusted in the past with success – to the proper place, the

courts, to deal with particular aspects of the problem of the mentally abnormal offender.

That both Infanticide and Extenuating Circumstances have rightly exercised the Butler and Criminal Law Revision Committees in their thoughts for the future.

Infanticide is already part of English criminal law but contains numerous anomalies which should and could be eliminated if infanticide were incorporated into a more widely drawn doctrine of diminished responsibility, as in Scotland.

Section 2 dispenses with the need for 'Extenuating Circumstances' so-called but the phrase used in South African law defining it as "a fact associated with the crime which serves, in the minds of reasonable men, to diminish, morally albeit not legally, the degree of the prisoner's guilt" perhaps indicates a proper line of development for the doctrine of diminished responsibility in English criminal law in the future .

FOOTNOTES

Chapter III

1. The expression is used here in the widest sense and is not given the technical meaning it assumed under the 1922 and 1938 Acts. It is clearly Roman in origin. The Shorter Oxford Dictionary indicates its first appearance in the English language as 1680.
2. Which did not become a crime in England until 1929 [Infant Preservation Act. 19 & 20 Geo. 5, c. 34]
3. Offences Against the Person Act, 1861. s. 60
4. Gowers Commission para 155. but see A. H. Dymond, The Law on its Trial, p. 97. The last to hang for a child under twelve was in 1899.
5. 12 & 13 Geo. V, c. 18
6. The situation was exacerbated to some extent by a system of burial clubs, then in existence, where for a small fee a mother could make provision for the burial of her forthcoming child in the event of its death. In many instances the 'allowances' paid out by a club far exceeded the cost of burial. A mother could well be enrolled in four or five such clubs in respect of the same child. See William Burke Ryan, Infanticide, Its Law, Prevalence, Prevention and History, p. 21
7. An Act to prevent the destroying and murdering of bastard children. 21 Jac I, c. 27
8. William Blackstone, Commentaries Vol. IV. p. 198
9. The quibble over what constituted – in Coke's phrase – a person in rerum natura was to bedevil this branch of the law for many years and provide a convenient loophole for juries given the standard of medical knowledge then prevailing among judges and juries
10. 42 Geo. III, c. 58. The first of a series of such Acts over the next sixty years
11. Ibid ss. 1 - 4
12. B. P. P., 1866, 21, pp 190, 231 and 235
13. Ibid
14. Ibid 22, pp619-620
15. That juries were ever thus is amply illustrated by the descriptiom of a trial at Ipswich in 1858, presided over by Lord Campbell, given by Ryan (page 72) and an almost

identical trial, The Queen v. Hutty (1953 Victoria Law Reports) before Barry J., described by Norval Morris in 1954 Crim. L. R. 764

16. Chapter II footnote 44

17. Stephen was in favour of the restoration of the judicial recording power. There was a Child Murder(Recording of Sentence of Death) Bill before Parliament in May 1909. See Parl. Debates 195 1178 et seq.

18. D. Seaborne Davies, "Child-killing in English Law", (1937) M. L. R. 203 at p. 220. See also in The Modern Approach to Criminal Law,

19. Ryan supra

20. Archibald Alison, Principles of Criminal Law of Scotland. Re: Institutional Writers see Chapter V post

21. Ibid p. 159

22. B. P. P., 1866, 21, p. 291

23. J. F. Stephen, Liberty, Equality, Fraternity p. 212

24. Roger Smith, Trial by Medicine. p. 148

25. Ibid e. g. Maria Clarke - Suffolk Assizes, 1851

26. A. S. Taylor, The Principles and Practice of Medical Jurisprudence, pp 1121/3

The records of the period show that the Home Secretary's power to authorise release were exercised more with puerperal maniacs than any other group. See Smith supra p. 154

27. B. P. P., 1872, 2, 241 (No. 289)

28. B. P. P., 1874, 2, 365 (No 44)

29. B. P. P., 1877, 61 (No 1893)

30. B. P. P. 1877 61 [No. 1893]

31. B. P. P., 1880, 2, 223 (No 47)

32. B. P. P., 1908, 3, 71 (No 316)

33. B. P. P., 1909, 3, 241 (No 242)

34. Granville Williams, Textbook of Criminal Law, p. 695

35. Parl. Debates (H. L.) 1909 Vol 1 638, 721-8, 957-965

36. Parl. Debates (H. L.) 1922 Vol 5 81

37. (1927) 20 Cr. App. R. 132

38. Bill No 37 - ordered to be printed Nov. 24 1936

39. Bill No 28 [HL] - ordered to be printed Dec. 21 1937

40. 1 & 2 Geo. VI, c. 36

41. There is nothing to prevent the woman being charged with murder but committed for trial for infanticide; or committed

for murder, tried for murder and found guilty of infanticide; or put on trial for murder but have her plea of guilty to infanticide accepted; or she may simply be charged with infanticide in the first place, in which case she normally pleads guilty.

It is interesting to note that in the period from 1976 to 1981 the outcome was always a hospital order or probation order.

42. The Solicitor General for Scotland told the Capital Punishment Commission of 1866 that in Scotland the prosecutor would normally 'restrict the libel' in cases of infanticide. (B. P. P., 1866, 21, p. 439). The Crown Agent (Lionel Gordon) gave the same answer to the Royal Commission on Capital Punishment 1949-53 (Report para 159). Professor Gerald Gordon says "where a mother kills her child in circumstances which would in England amount to Infanticide . . . the crime is strictly murder unless the mother can be shown to be of diminished responsibility; in fact it is always presumed by the Crown that she is of diminished responsibility and such a presumption may apply also in cases which do not fall strictly within the limits of the English legislation. (Criminal Law of Scotland p. 764)

43. Herbert E. Boyle, "Extenuating Circumstances in French Law", 18 Jur. R. 259

44, 1867 Irvine 466

45. 1939 J. C. 36

46. Gowers' Report para 611.

The proposal was greatly criticised, particularly in the House of Lords; Lord Goddard threatened to resign if the recommendation was given legislative effect. There may well be a firm desire in Britain to keep the functions of judge and jury separate

47. Article 463, Penal Code 1832

It was avowedly intended to offset the high rate of acquittals due to the enormity of penalties

48. General Law Amendment Act. Act No. 46 of 1935

49. Act No. 31 of 1917

50. Act No. 56 of 1955

51. The Concise Oxford Dictionary defines the word 'extenuate' as 'lessen seeming magnitude of (guilt, offence) by partial excuse'

52. 1938 E. D. L. 310 at 311

53. 1940 W. L. D. 285

54. Extracted from R. v. Hugo and Gardiner and Lansdown South African Criminal Law, Vol I p. 829

55. R. v. Mkize 1953(2) S. A. 324 (A. D.)

56. R. v. Ndhlovu 1954(1) S.A. 455 (A.D.)

57. R. v. Kubeka 1953(3) S.A. 691 (T)

58. R. v. Malopi 1954(1) S.A. 390 (A.D.)

59. Lansdown: Gowers' Report Appendix 13(b)

60. Ibid para 34

61. Ibid para 35

62. Extract from letter to the Times newspaper published in Newsletter No 39 (April 1957) Penal Reform League of South Africa

Chapter IV

The Homicide Act – 1957

A The Background:

In the period which followed the passing of the Infanticide Act of 1922[1], concern over the existing test of criminal responsibility continued to be expressed and the topic to be debated in academic circles, but any such discussion in England was overshadowed by the controversy over the death penalty for murder. In the event, the concept of diminished responsibility was carried along, during this time, quite unobstrusively, on the ground swell of the campaign for the abolition of capital punishment.

It is difficult, even after so short a period has elapsed, to recall the passion and furore which the 'Hanging Question' raised in the decade following World War Two.[2] The issue had been largely dormant until the Twenties, for it was not a matter which greatly troubled the general public; indeed, the rightness of capital punishment was a tenet held over many centuries and had never seriously been questioned so far as murder was concerned. It was among the politicians mainly that the interest lay and they debated it unemotionally but vigourously.

The establishment on a firm basis of the Labour Party at the beginning of the century, with its noted pacifist wing, gave encouragement that some bolder action on 'the death penalty' might be taken, for their views compared with the two traditional parties were more favourable – but of course, as a party they had limited power, although they did form a minority government in 1923 and 1929.[3] Meanwhile, interest had been

fostered by the formation of two important pressure groups: the Howard League, formed in 1921 from the union of the Howard Association and the Penal Reform League, and the National Council for the Abolition of the Death Penalty, founded by E.Roy Calvert, a Quaker.

When, in 1938, the Conservatives introduced a Criminal Justice Bill for the general revision of criminal procedure. the abolitionists saw their chance and in a free vote in a sparsely attended House of Commons succeeded in having passed a Motion[4] in favour of the abolition of the death penalty. But they did not represent the true view of the Commons, and an attempt to insert an abolitionist clause in the Bill itself was defeated. The outbreak of war in September 1939 resulted in the whole matter being shelved.

In 1945, Labour swept back into power with a large majority. The Attlee Government felt under an obligation to bring in a new Criminal Justice Bill, to replace the one lost by the War. In all the circumstances, it might be expected to be a non-party measure. On the capital punishment issue they were strongly divided. The Government found it difficult to support or oppose abolition.[5] They felt that, in the disruptive conditions following the War, with its serious rise in crime, this was not the moment to abandon a sanction which acted in some measure as a deterrent and which was certainly approved of by the vast majority of public opinion. Abolition was also vehemently opposed by an extremely influential, (and predominantly Conserative) Press and by the House of Lords,[6] particularly the Law Lords[7]. The rest of the judiciary was, for the most part, hostile.

The Criminal Justice Bill was re-instated in the Session 1947/48. This allowed time within the life of that parliament to over-ride the veto of the House of Lords should that prove necessary. The strategy

was that the Bill should say nothing about capital punishment and that when it had passed the Committee stage in that form and had come back to the Commons on Report it would be open to the abolitionists to move a new clause inserting abolition in the Bill. On a free vote they might succeed – as indeed, they did. On 15th. April 1948 on the Report stage, Mr Sidney Silverman moved an abolition clause. Mr Chuter Ede, as Home Secretary opposed it. Members of the (Labour) Government had been instructed that either they should support retention of the death penalty in the lobby, or if their conscience did not allow this, then they should abstain in the vote. Other Labour members were free to vote as they wished, as were the Conservatives. The Motion was carried by 245 votes to 222.[8]

It was thought that the House of Lords would accept the Bill back in this form, but under protest. While they were at liberty to reject it, this Bill differed in three respects from other Bills. It had been passed by a House of Commons in defiance of Government advice and was therefore an issue on which it was not easy for the Government to challenge the House of Lords; Opinion polls of the time showed that public opinion was in general against the move and so the great issue of ' Peers versus the People' was not raised and more particularly, the Government (or its members) had a greater interest in the other clauses of the Bill and if the Government insisted on the abolitionist clause, which the Lords refused to pass, then the whole Bill might be held up. These factors gave the Lords courage. The Law and the Church vied with one another in the House of Lords in the vehemence with which they attacked the abolitionist clause. Even the Lord Chancellor (Lord Jowett) was rather half-hearted in his presentation of the Bill and it was clear that his sympathies were opposed to abolition. The vote was lost 181 – 28.[9]

The Government was embarassed and attempted to introduce a compromise Bill after negotiation with all parties, including the abolitionists. This introduced specific categories of capital and non capital murder. It mustered enough support (307 to 209 votes)[10] in the Commons and was sent to the Lords. Just as decisively as before the Lords rejected the amended Bill[11] and the Government saw that if it insisted on pushing the claims of the abolitionists it would not get a Criminal Justice Act[12] at all. In the end, Chuter Ede asked the Commons to remove the offending clause altogether, which they did. The compromise Bill which passed through the Commons was not a good one and it was purely a political expedient to get the Socialist Government out of a quandary: a situation to be strangely paralleled some years later with a Conservative Government when it introduced the Homicide Bill.

B The Royal Commission:

After this debacle, for the remaining years of the Labour administration very little was heard of the question of Capital Punishment. However there was a need for change and some action was called for. More immediately the Labour Government was eager to lower the temperature of the controversy and take it out of the arena of parliamentary politics. In addition, they were anxious to seek some authoritative guidance. A convenient way to do all this was to invoke the aid of a group of disinterested non-parliamentarians. So, on 18th.November 1948, The Home Secretary (Chuter Ede) announced to the House of Commons the setting up of a Royal Commission.[13] At the time neither the membership nor the exact terms of reference were revealed. It was hoped that the Commission could do at leisure what the Government had failed to do in a hurry.[14]

Suitable people were hard to find and it took until the end of

April 1949 to appoint an acceptable chairman, Sir Ernest Gowers,[15] a retired Civil Servant. Also chosen were twelve members of the Commission to assist him. One of the reasons for the delay being that it was necessary to find people whose views on the death penalty had not been publicly stated nor had they been conspicuously identified with either side in the controversy. The members represented fields of activity rather than interests or points of view and they were divided roughly equally between experts and lay views so far as the subject matter was concerned. A criticism was that there was no member who had ever tried a case involving a capital charge.

The Royal Warrant was issued on 4th.May 1949 and set out the Terms of Reference to be:

> "Consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and if so, to what extent and by what means, for how long and under what conditions persons who would otherwise have been liable to suffer capital punishment should be detained, and what changes in the existing law and the prison systen would be required; and to inquire into and take account of the position in those countries whose experience and practice may throw light on these questions".[16]

The Commission was conscientious in its work. Taking a great deal of evidence — mainly orally — but going to great lengths (e.g. newspaper advertisements) to ensure a wide representation of views and to avoid receiving a largely official version — the staple diet of many commissions. They also did a fair amount of visiting, both in the United Kingdom and abroad.

Acting on the direction "to inquire into and take account of the position in those countries whose experience and practice may throw light on these questions"[17] the Commission sent out a questionaire covering the whole field of their inquiry to the Governments of the

countries of the Commonwealth, of eight European countries, of the United States of America and of seven States of that Union. Further they invited experts on legal and penal questions in some of these countries to contribute memoranda of a more general character. Much of this material has been published, either in their Report or as part of the daily proceedings of the Commission.

The Commission considered that their 'Terms of Reference' brought up the important question of the extent to which insanity, mental deficiency or other forms of mental abnormality should be held to negate or diminish criminal responsibility; and as one part of their inquiry, directed their attention to:

> "How far persons charged with murder who are mentally abnormal, but not to such a degree as to justify their being regarded as wholly irresponsible should be excused from undergoing the extreme penalty of death on the ground that they are significantly less responsible for their actions than a normal person — the question of diminished responsibility"[18&19].

To this end they considered the position then existing in Scotland.

C The Scottish Evidence:

The Crown Agent[20] and the Faculty of Advocates[21] had each submitted to the Commission a memorandum tracing the development of the doctrine of Diminished Responsibility in Scotland. A list of recent judicial pronouncemnt[22] involving the doctrine in Scotland came from the Scottish Home Department together with some statistical material. All this factual information provided a useful basis for questioning and for discussion[23]. The Commission took particular note of the Scottish case — H.M.Adv. v. Savage[24] — where, in his charge too the jury Lord Alness said this:

> "It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness;

> that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility – in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied . . . that there must be some form of mental disease"[25].

and the approval given to the statement of the law by Lord Cooper in H.M.Adv. v. Braithwaite[26] that there was a requirement that the jury must find evidence of what he briefly described as "something amounting or approching to partial insanity, and based on mental weakness or aberration".

Practically all the legal and medical witnesses[27] from Scotland paid glowing tribute to 'diminished responsibility' and the Crown Agent, in his memorandum, put it thus:

> "This doctrine, which is firmly established, has, in the view of the Criminal Authorities, worked satisfactorily and has the effect of preventing convictions for murder in the technical sense and consequent sentences of death where the prisoners are abnormal from a mental aspect, and tends greatly to' the side of mercy"[28].

The British Medical Association in their submissions[29] suggested that a jury should be empowered to return a verdict of "guilty with diminished responsibility" if they found that the accused "at the time of the committing of the act was labouring, as a result of disease of the mind, under a defect of reason or a disorder of emotion to such an extent as not to be fully accountable for his actions". They based their proposal, they said, on the Scottish doctrine of diminished responsibility.

There was support in the evidence of a number of well known medical witnesses[30] that the Scottish doctrine should be adopted; but there was, on the other hand, contrary opinion. One of the leading opponents was Sir John Anderson,[31] who thought that it would be

difficult to frame a statutory definition and that, even if this was done, it would not have the Scottish common law tradition behind it, and further, he feared that it might impair the efficacy of the death sentence. Sir John spoke with unique authority for he had served the Home Office both as its chief civil servant and as its minister. In addition, he had a Scottish background having been brought up and educated in that country[32]. Other authoratative opposition came from Sir Norwood East, the Medical Superintendent of Broadmoor Institution, the Medical Officer of Wandsworth Prison and the Royal Medico-Psychological Association.[33]

The Commission Report took four years to complete and the period of their deliberations spanned two general elections and saw a Tory Government take power. The Report's style reflected in clarity and grace the reputation of Sir Ernest in the field of English language.[34]

In the course of the Report the Commission stated that they had given very careful consideration to the proposal that the doctrine of diminished responsibility should be introduced into English law. They agree that the arguments in favour of adopting this course were strong and that "the acceptance of the doctrine of diminished responsibility would undoubtedly bring the law into closer harmony with the facts and enable the courts to avoid passing sentence of death in numerous cases in which it will not be carried out".[35] The objection most strongly put to them, they said, was that the jury would be given too difficult an issue to decide and that they would consistentently tend to err in the direction of undue leniency. While they accepted that Scottish juries might sometimes interpret 'diminished responsibility' in a liberal spirit, it was their opinion that the fact that the doctrine is so generally

agreed to work satisfactorily in Scotland clearly showed that, if it were possible to introduce it in England, there would be no reason to apprehend that juries would find the issue too difficult or would take refuge in it unreasonably.[36]

Then, in a strange passage,[37] they go on to say that the strongest objection which the Commission felt had validity was of a different and more general kind. They pointed out that the doctrine of diminished responsibility in Continental countries was of general application and covered all crimes. "To consider whether the doctrine of diminished responsibility in this wide sense should be adopted in England would take us far beyond our Terms of Reference". On the other hand, they said, the Scottish doctrine is of far narrower scope; it is confined to murder.[38] It is a device to enable the courts to take account of a special category of mitigating circumstances in cases of murder and to avoid passing sentence of death in cases where such circumstances exist. "We do not think that so radical an amendment of the law of England would be justified for this limited purpose".[39]

Thus their official pronouncement became: "Although the Scottish doctrine of 'diminished responsibility' works well in that country, we are unable to recommend its adoption in England".[40]

And an opportunity was lost.

D <u>The Homicide Bill</u>:

Although the Report was presented to the Government in September 1953 it was not immediately made public. Throughout the preceeding summer there had been many questions in the Commons about its non-appearance.[41] The further delay in its publication was a matter

of concern in many quarters and there was a great desire to hear its contents and to debate the issues.[42]

A new parliament met in November 1955 and there had been changes – both in the nature of the parliament and in public opinion. Not only were there new members but many of the young Tory members who had voted for the suspension of the death penalty in 1948 now held positions of power. Disquiet had been caused by a number of prominent cases[43] and there had been a flood of books favourable to the abolitionist cause.[44]

On 10th.November 1955 the Home Secretary (Major Lloyd George) announced in the House of Commons that the Government rejected the insanity and jury discretion recommendations of the Gowers' Commissiom but had noted the Commission's opinion on provocation, constructive malice and suicide pacts. He made no mention of diminished responsibility. He added that the Government would be introducing no amending legislation to the law of murder.[45]

Meanwhile the matter had been taken up by the Inns of Court Conservative and Unionist Society and a committee of that body[45] conducted a searching and thorough inquiry. The committee's report was published in January 1956 under the title: Murder: Some suggestions for the reform of the Law relating to murder in England.[47] It made a valuable contribution to the unremitting discussion.

In the Preface to their report the Society Chairman[48] commented that the committe had been concerned with two aspects; that the law of murder needed investigation and reform irrespective of the issue of the debate on capital punishment and that in the exercise of the prerogative of mercy in cases where unsoundness of mind was present the executive

discretion invoked was subject to neither judicial determination nor effective parliamentary control.[49]

While the committee took oral and written evidence and called on experts such as the Scottish Lord Advocate (W.R.Milligan) and Dr Max Grünhut, they also tried to assess public opinion through the Press and from the public they met in their work as members of parliament or practising barristers. As a result they found that there were a number of points of concern to the general public. One such point was:

> "that in certain cases a person may be convicted as not coming within the strict legal definition of such insanity as willl excuse from crime, and yet may be suffering sufficiently from mental weakness as to cause many conscientious people to think it wrong that he should suffer the death penalty".[50]

Their answer: to incorporate the law of Scotland on this matter into the law of England.

The objection that the concept was entirely alien to English law – as suggested by the Gowers' Commission[51] – and that it would be dangerous to introduce it – they dismissed. They pointed out that it was not novel to provide a special defence that can be pleaded in answer to a charge of a particular crime. It did not escape the committee's notice that there were difficulties in relation to possible penalties but they did not find these unsurmountable.

An objection to which they devoted time was that it would not be easy to define diminished responsibility but their view was that it was not impossible to provide a statutory defence based on Scottish cases, and in particular using the charge to the jury in Braithwaite[26] as a foundation. Nothing daunted, they essayed their own definition in the following terms:

> "Where a person is indicted for murder it shall be lawful for the jury to return a verdict of "murder with diminished responsibility" if it is satisfied that at the time of the offence the person charged, though not insane, was suffering

> from mental weakness or abnormality bordering on insanity to such an extent that his responsibility was substantially diminished".[52]

The report was published at the end of January 1956 and, having regard to its source, must immediately have come to the Government's attention. It could not fail to have considerable influence for the Chairman of the Committee while the report was prepared, Sir Lionel Heald,Q.C., was a former Conservative Attorney-General.

The Government fearing that if they remained obdurate they would be defeated by the abolitionists decided to throw its support behind the Heald recommendations. The Prime Minister (Anthony Eden) then put down a Motion:

> "that this House believes that the death penalty for murder no longer accords with the need or the true interests of a civilised society and calls upon Her Majesty's Government to introduce forthwith legislation for its abolition or its suspension for an experimental period".[53]

It was a political manœuvre in which the Government did not pretend to believe. In November 1955, the Government had been saying that it was not proposed that there be any amendment of the law for it was not necessary. By January (1956) it was proposing just that.

The debate[54] was on 16th.February 1956 with Major Lloyd-George as the main speaker. On a free vote the original motion was lost but an amendment (in the name of Chuter Ede) which proposed the abolition or suspension of capital punishment was carried by 293 to 262. Of course this did not alter the law but it indicated which way the wind was blowing and the Conservative Government was in an extremely embarassing position.

The Government could now either bring in a Bill of its own or allow a Private Member's Bill to go forward. The latter course proved more acceptable in the circumstances and on 23rd.February 1956 Eden

promised government facilities and a free vote for all stages of a 'Death Penalty (Abolition) Bill introduced under the 'Ten Minute Rule' by Mr Sidney Silverman.[55] This Bill passed successively through a Second Reading, Committee Stage and finally a Third Reading on 28th.June 1956 by a majority of 20.[56] As expected, the Bill was defeated in the House of Lords on 10th.July 1956.[57] There had been a two-day debate in which a large number of peers participated. Lord Kilmuir, as Lord Chancellor and Lord Goddard, as Lord Chief Justice were among the speakers.

It was obvious that Silverman's Bill could become law if the Government were to invoke the Parliament Act and after the constitutional interval had lapsed allow the Bill to be reintroduced. It was also now clear that the Conservative Party, both inside and outside Parliament were overwhelmingly opposed to total abolition. The alternative to bring in their own legislation – by way of a compromise – retaining hanging but amending the law of murder. This course would subject the Government to criticism but was the path chosen. Quickly things began to happen behind the scenes. On 11th.July the Lord Chancellor appointed a committee consisting of himself, the Home Secretary, the Secretary of State for Scotland, Attorney-General and The Lord Advocate – The Chief Whip and Solicitor General being coopted members – to consider the possibility of framing a Government measure to amend the law of murder and to restrict thereby the scope of capital punishment. By the 19th. of that month the committee had completed their review and were satisfied that it would be practicable to frame legislation amending the law of murder in a number of ways. These included changes in relation to the type of murder, provocation and the elimination of the doctrine of constructive malice, but the fourth way proposed was:

> "by introducing into English Law the Scottish doctrine of diminished responsibility. The effect of which will be that where the jury are satisfied that the prisoners are satisfied that the prisoner's responsibility was substantially diminished by reason of mental abnormality they will bring in a verdict of manslaughter".[58]

The Cabinet paper[58] discloses that the Lord Chancellor's committee had drafted a definition, before passing the matter to Parliamentary Counsel, in the following terms:

> "It is proposed that in order to establish a defence of diminished responsibility the defence should be required to satisfy the jury of something on the following lines:
> that at the time of the commission of the act which caused the death, the accused
> (a) was suffering from a disease (or disorder) of the mind
> (b) was a defective within the meaning of the Mental Deficiency Act, 1913
> and in consequence thereof was labouring under a defect of reason or disorder of emotion to such an extent that his responsibility was substantially diminished".

Some hint of what was going on appears to have been leaked for the Times published an editorial on 21st.July setting out certain guidelines for the Government under the heading 'A Modified Death Penalty Bill'.[59]

A first draft emanated from the Office of Parliamentary Counsel on 26th.July.[60] The draftsman, J.S. Fiennes called it his "first thoughts" and when he despatched it to the Home Office for comment attached a note in the following terms anent Clause 2:

> "Clause 2 presents a particularly difficult problem. The Scottish doctrine seems to be nowhere very clearly stated; but in view of the Scottish law of insanity diminished responsibility presumably includes a less degree of what would be insanity in English law. If that is right, the last variant in square brackets at the end of subsection (1) is presumably too narrow, but I should like to find something which conveys a clearer meaning than "impair his responsibility". A phrase of this sort in the context of a direction to a jury, given in reference to the evidence in the case, would carry a meaning which it may well not convey when put baldly into an Act".

The clause itself runs:

> "2(1) A person who [feloniously] kills another or is a party to the felonious killing of another, shall not be convicted of murder, if at the time of the felonious act he was suffering from a defect of reason or disorder of the mind or to mental

> defectiveness and of such a nature and degree as substantially and materially to impair his responsibility for his actions [for that act] [to impair his ability to control his conduct]
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) In this section "mental defectiveness" means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by illness or injury".

The side note at this stage was "Defence of impaired responsibility".

A second printed draft appeared on 31st.July.[61] Subsection (1) now read:

> "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 a defect of reason or disorder of emotion due in either case to disease or disorder of the mind or to arrested or incomplete development of the mind (or* to both together), and of such a nature and degree as to produce serious abnormality and substantially diminish his responsibility for his action from want either of understanding or of will".

Subsections (2) and (3) remained as before. Subsection (4) was dropped and the rubric changed to "defence of diminished responsibility". And so it progressed through further printed drafts numbered XLV - L (3), (4), (5), (6) and (7) until it was ready for the Legislation Committee on October 30, 1956. Draft (7) became the initial Bill before Parliament. By this time the sidenote had again been altered to "Persons suffering from diminished responsibility" — a very inelegant phrase.

In the Queen's Speech at the State Opening of the new session of Parliament on 6th. November 1956 it was announced that "the law of Homicide would be amended in the next session".[62] The following day 'The Homicide Bill'[63] was introduced into the House of Commons and read for the first time. As one of its provisions it set out the proposed

English Doctrine of diminished responsibility in the following terms:

> "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".[64]

The Bill's rapid progress in the House of Commons resulted from the imposition of the 'whip' on Conservative members and much bargaining behind the scenes and many who would have voted against it were persuaded to accept a crude compromise on an understanding that it would pass the Upper House without serious amendment. No word of the Bill was allowed to be altered from the original, even where drafting amendments would obviously have improved it, and no regard was paid to the merits of any opinion expressed in the debate.

The Bill was put down for Second Reading by the 15th. of November when it was agreed to without a division.[65] After seven days in Committee stage in the Commoms spread over two and a half month the Bill emerged without amendment despite twenty-three divisions. The House of Commons gave a Third Reading to the Bill on 6th. February by 217 votes to 131.[66] In the Lords – now under the Whips – probably the majority of sitting members would have preferred to throw it out, but times had changed and there were sufficient committed Conservative abolitionists to carry the day. If they could not stop it they could at least accept compromise. In fact at no stage in the proceedings in the Upper House was any attempt made to divide the House and the Bill passed from the Lords on March 19, 1956. The Homicide Bill received the Royal Assent on 21st.March 1957 and its provisions, including those relating to diminished responsibility, became part of the law of England and Wales.

Perhaps the last word goes to Lord Pakenham who, inspired by section 2, described the new Homicide Act of 1957 as "a bastard . . .born out of arrested development . . . by a split personalty".[67]

Conclusion:

That the introduction of the Homicide Act in 1957 was a tactical compromise at a critical stage of the long and emotional political struggle between those who favoured capital punishment and those who did not.

That section 2 was part of that compromise and was promoted by a cabinet secure in the knowledge that the doctrine of diminished responsibility had appeared to work well in Scotland and that the Scottish model was uncontroversial and had some degree of support among their followers.

Accordingly section 2 was drafted to accord as closely as possible with the Scottish doctrine allowing for the transition from common law to statute. Initially this was achieved to a high degree. No thought was given to the lines along which it might develop and it may not have been obvious then, as it is now, that the Scottish doctrine was thereafter to be moribund. Almost as though in the act of spawning another the parent stultified.

FOOTNOTES

Chapter IV

1. 12 & 13 Geo. v, c. 18

2. At the Conservative Annual Conference in Llandudno in October 1956 although debating time was rationed the conference devoted three times as much time to capital punishment as to Cyprus and 10 minutes more than to Suez. 33 motions dealing with capital punishment were tabled for the conference – more than any other subject.

   The B.B.C. presented 16 programmes on the subject in 1955 and 17 in 1956.

3. It did not prevent Ramsay Macdonald setting up a Select Committee on the subject in 1929. The Committee divided on party lines. The Labour majority recommended the total suspension of the death penalty but had no power to do anything about it.

4. The vote was 114 to 89

5. Attlee(Prime Minister); Herbert Morrison (Leader of the House) and Chuter Ede (Home Secretary) had all voted for abolition before the War

6. The conflict with the House of Lords was the recurring theme throughout these years. They were in a position to delay passage of any Bill

7. Prominent among the Law Lords was the Lord Chief Justice, Lord Goddard, who made his maiden speech on the topic

8. 449 H.C. Debates (5th.Series) 1094. (April 14 1948)

   One of the results of this vote was that Chuter Ede immediately announced that all murderers would be reprieved – this without waiting for the House of Lords –an action thought to be unconstitutional and which was subsequently rescinded but not before a number of convicted murders had escaped the rope; including steward James Camb, one of the the first to be convicted although there was no body – he had pushed the girl through a porthole. See Notable British Trials Series: He was released from Wakefield in Sept. 1959.[Times Sept.8,1959.] He was recalled to serve the rest of his life sentence by the Home Secretary when he was sentenced in the High Court in Edinburgh in 1971, under the name of Clarke, for 'lewd and libidinous practices' against three young girls. [Times May 29,1971]

9. 156 H.L.Debs.(5th.Series) 176 (June 2, 1948)

10. 4533 H.C. Debs. (5th.Series) 1411- (July 15, 1948)

11. 157 H.L. Debs. (5th.Series) 1009 - 1074 (July 20,1948)[vote 99 to 19]

12. 11 & 12 Geo. vi, c,58

13. 458 H.C. Debs. (5th.Series) 565 - (November 18, 1948

14. Gower,A life for a Life, p 33

15. Former Permanent Under-Secretary for Mines, Sometime Chairman of the Board of Inland Revenue; Coal Commission; Harlow New Town. Chairman/member of numerous Committees of Inquiry

16. Gowers' Report, p.iii

17. Ibid para 7

18. Gowers' Report para 214

19. The replies in relation to diminished responsibility are set out on pages 413 to 416 of the final Report

20. Royal Commission Proceedings & Minutes of Evidence p.170, App.(d)(8-10)

21. Ibid p.444(14)

22. Gowers' Report, Appendix 8(b)

23. The Commission had two Scottish members; John Mann, Convenor of Lanarkshire County Council and George A. Montgomery,Q.C. Professor of Scots Law in the University of Edinburgh. The Writer attended lectures on Scots Law by Professor Montgomery during part of the relevant period

24. (1923) J.C. 49

25. Ibid at pp 50-51

26. 1945 J.C. 55

27. Royal Commission Proceedings, Cunningham,Q.626; Keith,Q.5193-4; Cooper,Q.5467; Walker,Q.5623; Shaw,Q.58877; Bruce,Q.6064; Henderson,Q.6998.

28. Ibid Gordon,p.167(5)

29. Royal Commission Proceedings and Minutes of Evidence p.318(25)

30. Ibid Hill,p.299(12); Henderson/Yellowlees, Q.7343-8; Carroll, Q.7607

31. Ibid Anderson, Q.4505-6. (Later First Viscount Waverley. 1882-1958)

32. He in fact attended George Watson's in Edinburgh, the same school as Lord Kilmuir.

33. Ibid East, p.512(34); Hopwood, p.353(17-180); Murdoch, Q.2309-11; Royal Medico-Psychological Association, p.476(22-3)

34. Author of Plain Words, A Guide to the use of English, (HMSO London) 1948

35. Gowers' Report para 33

36. Ibid para 412

37. Idid para 413

38. This is not strictly true as will be demonstrated post[ch.13.p.352]

39. Gowers' Report para 413

40. Ibid Summary of Conclusions and Recommendations No. 27

41. e.g. Arthur Greenwood – July 2, 1953 and two other M.Ps

517 H.C. Debs. (5th.Series) 577-8

Brig. Medlicott - July 9, 1953. Same answer

42. In fact the Report was not debated in the House of Lords until December 1953 and in the House of Commons until February 1954

43. Timothy Evans hanged for murder March 9, 1950; Derek Bentley hanged for murder January 27, 1953; J.R.H. Christie handed for murder July 15, 1953; Ruth Ellis hanged for murder July 13, 1955

44. Victor Gollancz, Capital Punishment: The Heart of the Matter; Arthur Koestler, Reflections on Hanging, Gerald Gardiner, Capital Punishment as a Deterrent: and the Alternative,; Sir Ernest Gowers, A Life for a Life?

45. 545 .C. Debs. (5th.Series) 219-220 (November 10, 1955)

46. One member was Mr. Victor Durand,Q.C., with whom the writer had a opportunity to discuss the Report; of which no copy was traced at the British Library or Conservative Party Central Office

47. Sir Lionel Heald (Chairman), Murder: Some suggestions for the reform of the Law relating to murder in Englan

48. Ibid p.3. (Mr J.E.S Simon)

49. Ibid

50. Ibid p.6

51. Gowers' Report para 413

52. Sir Lionel Heald, Murder supra, p.19

53. The Motion was also in the name of the Leader of the House, The Attorney-General and the Secretary of State for Scotland. (The Times Feb.10, 1956) [Parl. papers ?]

54. 548 H.C. Debs.(5th.Series) 2544 - 2664 (February 16, 1956)

55. 549 H.C.Debs.(5th.Series) 578 (February 23, 1956)

56. 555 H.C. Debs.(5th.Series) 718-844 (June 28, 1956)

57. 198 H.L. Debs.563-842 (July 9 & 10, 1956)

58. Cabinet Paper [56] 186 dated July 19, 1956

In the House of Lords on March 7th. 1957, Lord Kilmuir used these words: "When I made up my mind that the Scottish doctrine of diminished responsibility could be introduced into English law". 202 H.L.Debs (5th.Series) 358 (Mar.7, 1957)

59. The Times, July 21, 1956, p. 7 col. 2

60. XLV - L (1), July 26, 1956. Handwritten

61. XLV - L (2), July 31, 1956. Printed

62. 560 H.C.Debs.(5th.Series) 18 (November 6, 1956)

63. Ibid 118 (November 7, 1956). Bill No. 4 of 1956

64. as Clause 2(1)

65. 560 H.C.Debs. (5th.Series) 1144-1259 (Nov.15, 1956)

66. 564 H.C.Debs. (5th.Series) 566 (Feb.6, 1957)

67. The Times, February 2, 1957, p.11, col.3.

At the time the Act was known among members of the Bar (according to L.Blom-Cooper) as the 'Reggie-cide Act' from the major part played in its passing by Sir Reginald Manningham-Buller, the Attorney General (Later Lord Chancellor as Viscount Dilhorne)

Chapter V

The Development of the Doctrine of Diminished Responsibility in Scottish Criminal law

At the Second Reading of the Homicide Bill on 15th.November 1956 the Attorney General made the observation that "What we have done is to adopt and adapt the Scottish law of diminished responsibility in cases which do not amount to insanity[1]."

That this was the clear intention has emerged in numerous passages in Chapter IV, but that they succeeded is equally clear. As early as 13th. August 1956 Fiennes the draftsman was writing to Sir Andrew Innes of the Scottish Home Dept: "I understand that the revised version of diminished responsibility is thought to be as near as one can expect to make it"[2]. On 7th September, Gibson the senior Scottish Draftsman was writing to Fiennes and quoting the Crown Agent in the following terms: "I think that probably the definition of diminished responsibility in Clause 2 is as near the Scottish decisions as possible"[3].

A. The Character of Scots Law:

It is essential to our understanding of the development of the doctrine in that country to turn aside and look briefly at the characteristics of Scottish criminal law. Fundamentally the criminal law of Scotland has remained based on the common law throughout its history. Lord Cooper put it thus to the Gowers' Commission:

> "The great dividing line between the law of crime in Scotland and the law of crime in England is that the former is to the

> extemt of 99 per cent common law. The law of crime in England is to the extent – you can put in a percentage – statute law"[4].

There is no criminal code nor has there been the statutory consolidation of the graver crimes such as occurred in England. For example: the seven Criminal Law Consolidation Acts of 1861 and the substantial number since.

Sir Thomas Taylor, the late Principal, and sometime Professor of Law, of the University of Aberdeen, writing in this century expressed it succintly:

> "Apart from legislation, the sources of the criminal law are to be found in the practices of the criminal courts influenced to some extent by the civil and canon law and mediated through the institutional writers and the justiciary reports"[5].

B. The Civil and Canon law:

The reception of Roman law into Scotland first achieved significance for the practise of the law, on the establishment of the Court of Session as the College of Justice in 1532. The Romanising influences had of course long been at work through ecclesiastical lawyers. The position was consolidated during a period of Restatement which is associated with the Natural Law School and the publication of Stair's Institutes in 1681. There was a third period, known as the 'Classical period' in the second half of the eighteenth century when the Natural law influences were replaced by a rational, historical and comparative outlook inspired by Montesquieu, Hume and Adam Smith.

While the Universities of St Andrews, Glasgow and Aberdeen all gave instruction in civil law [and in canon law prior to the Reformation] their influence was minimal. The great factor was the 'awareness of Europe' among the Scottish legal fraternity. The standard

of instruction at the great European universities attracted the Scots. Their historical links were with Europe and they were,in any event, largely barred from Oxford and Cambridge on religious grounds. So it was as students at Padua and Paris and later at the universities of the Netherlands, notably Leyden and Utrecht that they learnt their law[6]. And in so doing they must have become aware of the concept of diminished responsibility which was well known to medieval writers[7].

The Continental influence is clearly seen in the comments of Lord Macmillian regarding the Scottish lawyers of the seventeenth and eighteenth centuries which he made in Stewart'Exrx. v. L.M.S:

> "From their sojourn in Holland the aspirants to practice in the Parliament House brought back with them not only the principles which they had imbibed from the masters of the Roman-Dutch law, but also the treatises with which the law schools of the Dutch universities were so prolific. No Scots lawyer's library was complete in those days which did not contain the works of Grotius, Vinnius, the Voets, Heineccius and other learned civilians. Collections of decisions of the Scottish judges were few and inaccessible, and the Court of Session, with its predilection for principle rather than precedent, heard many arguments adorned with citations of the Roman law and its Dutch commentators"[8].

C. The Institutional Writers:

Judicial precedent as a binding authority is a relatively recent idea in the history of Scots Law. In the eighteenth century and before, advocates fortified their argument with copious citations from the only source they knew – 'the foreign doctors' (Matthaeus, Carpzouius, Heineccius). With time the legal treatise (or 'Institutes' in the Roman law sense e.g. Gaius) of certain Scottish authors displaced the continental writers and came to be regarded as of high authority in their own right. Such men came to be known as 'Institutional Writers'. There is no fixed definition of what constitutes such a writer or even

at what stage he joins that hallowed band although it is generally assumed that it is not during his lifetime. Of course the field of expertise will vary. Not all Institutional Writers carried their authority over from civil to criminal law although they might write on both subjects. Thus the work of Craig, Stair and Bankton, brilliant as it was, does not concern us. For us, Mackenzie, Erskine, Hume, Bell, and Allison all have something pertinent to say.

The earliest period of Scottish Criminal law offers little material from which any confidant conclusion can be drawn concerning mental abnormality.

Mackenzie:

The first conscious expression of a doctrine of diminished responsibility which can be traced to Scottish jurists is contained in a treatise by Sir George Mackenzie of Rosehaugh,[9] 'A Discourse upon the Laws and Customs of Scotland in Matters Criminal'. This work was completed in 1674, within a few years of Hale's Historia Placitorum Coronae, and was to become the manual of the criminal law of Scotland for one hundred and thirty years'[10]. In his many publications, Mackenzie displayed an understanding of the legal problems created by mental abnormality far in advance of his predecessors'[11].

Sir George was a complex character. A scholar and a humanist; he was known, on the one hand, as "the flower of the wit of Scotland" for his writings on morals, religion, heraldry and history as well as jurisprudence. On the other hand, he is more usually known as 'the Bluidy Mackenzie' for his zeal in persecuting the Covenanters and for his part in the notorious witch trials of the period in which torture played a conspicuous part'[13]. Hale, of course, also took part in at least two

witch trials'[14].

It should be noted that Mackenzie was one of those who had studied on the continent; indeed, several of the passages in the treatise quoted supra are an almost exact translation from Matthaeus' De Criminibus'[15] of 1644; and the Dutch influence on his work is very apparent.

Equally, it could be said that Mackenzie, as a contemporary of Hale, and like him a practitioner with experience of his subject, could not fail to be aware of the same influences which were moulding the Englishman's thoughts. One of the forms of 'partial insanity' which occupied Hale was also considered by Mackenzie in great detail. They were both concerned with the same depressive and anxiety states, but in the end Mackenzie took an opposite view of the correct mode of disposal of such cases.

A strong humanitarian impulse was reflected by his observation that the "mentally abnormal are excused by their own misfortune and abundantly punished by their own fury". Again, he observed "the law commiserates so far their condition that it expostulates with such as would pursue them for a cryme". Equally humanitarian was his attempt to refute the notion that church discipline required punishment of the transgressions even of the mentally afflicted,. He pointed out that it was "against Christian charity to add afflication to the afflicted". He also advanced the argument that the spectacle of a madman being punished would not act as a deterrent to crime. Even the clear recognition of the deterrent theory of punishment was introduced by the observation that to punish such a person "were to endanger his soul"[16] – the theological element always managing to

intrude.

Mackenzie made the same distinction between idiocy (fatuity) and mental illness that had arisen early in both the common law of England and Scotland. He consistently labelled mental illness as 'furiosity' and found the distinction that the law made between 'fatuity' and 'furiosity' as "very remarkable" and based his system of analysis upon it[17].

In his treatise, Sir George dealt at some length with what he called 'Continued furiosity' and exceptions to the presumption of its existence, particularly where there was some use of reason. Under such circumstances, he said, one must "presume that the offence was committed in the lucid interval". He then made the following observation:

> "Possibly that judge would not be much mistaken who would remit something of the ordinary punishment in all crimes committed, even where the lucid intervals are clearly proved: for where madness has once disordered the judgment, and more where it recurs often, it cannot but leave some weakness, and make a man an unfit judge of what he ought to do"[18].

It is a short step to his final proposition which has become known as his 'Rule of Proportions'. It is merely an extension of the definition of 'furiosity' in terms which make it absolute in degree. The English experience had been a broadening of the absolutism of the 'Wild Beast' theory into a cognitive concept of mental abnormality. In Scotland the harsh effect of the absolute standard were mitigated by Mackenzie's argument for a rule of proportions. It was stated thus:

> "It may be argued that since the law grants a total impunity to such as are absolutely furious therefore it should by the rule of proportions lessen or moderate the punishments of such, as though they are not absolutely mad yet are Hypochondrick and Melancholy to such a degree that it clouds their reason: qui sesum aliquem habent sed diminutum"[19]

It is an important proposition for it recognises that there are

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imperceptable graduations from one stage of insanity to another; graduations that are frequently of degree rather than kind and which merge into each other. But further, it recognises that there is an obligation on the part of the law to deal, not only with the clear cases of criminal responsibility and irresponsibility, but, with the intermediate cases as well. A challenge which English law was over long in accepting.

The comparison between the rule of proportions and the doctrine of diminished responsibility cannot be pushed to the point where they merge. It will, for example, be noted that the rule was not limited to murder and that there was no mention that the crime would be reduced to culpable homicide where the facts would otherwise amount to murder, but both represent a mitigation of punishment which in turn reflect a humane and more liberal outlook on the part of the law.

The mental states included within the rule of proportions indicate that the concept had a high degree of medico-legal utility. In this, the rule again invites favourable comparison with diminished responsibility. Both concepts meet a defect in the law in that they provide a means whereby mental abnormalities based upon emotional factors are not excluded from the framework of criminal law and medical reference. Mackenzie's rule included "such, as though they are not absolutely mad, yet are hypochondrick and melancholy to such a degree that it clouds their reason"[20]. That is to say, they were persons whose senses or powers of perception and apperception were diminished. This idea alone brings the rule of proportions and doctrine of diminished responsibility together in spirit and phraseology.

Both doctrines also cover mental abnormality tested in

cognitive terms. The Rule included those persons whose criminal act indicated some use of reason (such as would be implied by an act of resentment or revenge) but not that degree amounting to normal mental function. Makenzie puts it in these words: "Such as shew any acts of resentment or revenge in the wrong they do, may be punished with some degree of severity since they show some degree of judgment"[21].

The area of cognitive defect embraced by the Mackenzie Rule was naturally large since only 'absolute' furiosity constituted a complete defence. The corresponding area within the doctrine of diminished responsibility is smaller of course, due to the knowledge test now prevailing as a defence. Nonetheless, there remains a similarity in kind – if not degree – between the two concepts.

That Mackenzie's views on 'partial insanity' had limited effect over the next two centuries rests to a large extent with the man himself. The object of punishment in those early days was primarily retribution, so that any interference with the sense of revenge expected (and savoured) by the general public did not find favour. The accused person had to suffer the full penalty – any lesser punishment would not have appeased the wrath of the populous at the heinousness of the crime. Mackenzie was suggesting that punishment be modified without explaining that the quality of the act was seriously to be questioned where the accused suffered from mental illness. Part of the blame may also lie with Hume and Alison. Neither found Mackenzie's propositions acceptable; indeed, they went to some lengths to ensure that the accepted view was that there were only two classes of pannel[22] – the sane and the insane.

One must also bear in mind the absence of medical knowledge

of the brain and its disorders at this time, and a court, charged with the protection of society, was not willing to show too much compassion towards the prisoner for fear of being accused of emotionalism.

There are however two important cases of this period in the records, Somerville[23] and Spence[24], which have an important bearing on the development of this aspect of the law, and which have been largely overlooked by subsequent writers. Both are cases in which the pannel had a history of mental abnormality and conduct – but neither could be said to be 'absolutely' furious.

Somerville was an officer in the Town Guard of Edinburgh. In the year 1704 he shot a soldier of that Guard, one of a party sent to detain him. At the trial there was a great deal of evidence regarding his conduct over a period of three or four months prior to the killing, including evidence of threats. According to Hume at the end of the trial "the jury returned a special and awkward verdict which had the effect of saving the pannel's life". What they did was to impose a levy of 300 merks by way of compensation to the widow and her child and a further 10 merks fine to the Fisc. In addition, he was detained until released by a magistrate acting on a doctor's certificate. This decision did not accord with a finding of insanity and it must be deemed to be Mackenzie's Rule of Proportions in operation, and the first clear example of the doctrine of diminished responsibility.

The facts in Robert Spence's case reflect the similarity of eighteenth century cases with those of a later century. The pannel and the deceased lived on separate floors in the same building. One evening in 1747, dressed in his nightshirt, Spence knocked on the door of the victim's room. On it being opened, he rushed in muttering strange cries

and striking the woman on the head with a hatchet, killing her. He then ran off. There was a history of his wandering and of disorderly conduct. The jury found the pannel "furious at the time that he committed the said murder but to what degree of furosity they could not determine". From all this it is clear that degrees of 'furiousity' were countenanced by the court. Obviously, if 'absolutely furious' then the jury's task was at an end; but if merely 'furious' then enquiry had to be made to establish whether his furiousity was sufficient to deprive him totally of his reason and understanding. Surely this was an attempt to put the Rule of Proportion into practice.

Spence was not imprisoned but passed over into the custody of his friends. The fact that he was not incarcerated shows that the Rule of Proportions could be taken to the point where punishment was no longer involved. It also showed that there was a latitude of judicial discretion as wide as the practical commonsense which gave rise to it and which was expressed in the idea of 'diminished punishment' — in other words, a rule of proportions.

These cases demonstrate too that the court was very close to ennunciating a doctrine of diminished responsibility eo nomine. Had there been suitable cases following closely on the heels of Somerville and Spence it is doubtful whether it would have been necessary to wait until Dingwall[25] in 1867 before the emergence of the doctrine as we know it to-day. It could be said that Lord Deas did not spring something new upon the world.

What these cases also demonstrate is that Sir George Mackenzie was not being completely ignored in this period, and that he was more than just an isolated opinion in the first half of the

eighteenth century and that his Rule of Proportions was recognised, if not called that. On the other hand we may assume from the fact that the courts had to rely on executive power that the Rule of Proportions was never as widely known among members of the Bench as the doctrine of diminished responsibility later became.

The cases also demonstate that it had been recognised by commonsense that this type of case deserved something less drastic as punishment than the full penalty of the law where 'absolute' furiousity (constituting a full defence) was absent.

Erskine:

John Erskine[26], Professor of Scots Law in the University of Edinburgh, writing just seven years after Spence's case put the matter boldly and simply, by saying that: "lesser degrees of fatuity which only darken reason will not afford a total defence though they save from the poena ordinaria[27]". Nineteen years later in his main work,'Institute of the Law of Scotland he added "furiousity" to this category[28]. The use of the word "total" in "total defence" supports the view that not only was a concept of diminished responsibility being held theoretically but that a doctrine of diminished responsibility was being put into practice.

It must be conceded that while Erskine was admitting the existence of a doctrine and focussing attention upon the moderation of punishment, he was not linking it with a reduction in the quality of the crime.

Hume:

We have already indicated that Baron David Hume[29], a successor in Erskine's Chair, was not greatly enamoured of Mackenzie's Rule of Proportions nor did he in fact approve of the course adopted in

the case of Somerville. In his Commentaries on the Law of Scotland respecting Crimes, published in 1797, while dealing with mental abnormality generally he said this:

> ". . . as to the inferior degrees of derangement, or natural weakness of intellect, which do not amount to madness and for which there can be no rule in law: the relief of these must be sought either in the discretion of the prosecutor, who may restrict his libel to an ordinary pain, or in the course of application to the King for mercy".

He then added:

> "Yet I find that in one case, that of Somerville, though perhaps not to be approved of as a precedent, a middle course was taken, by absolving the pannel from all corporal pain, but decreeing for a fine to the fisc, and asythment to the widow and children of the deceased"[30].

He did say however that there was a wide power of judicial discretion in Scots law which often resulted in mitigation of punishment, especially in capital cases. The earliest example of this practice quoted by Hume is that of Robert Bonthorn[31], a case of assault by a smuggler on a revenue officer, in which the jury found "that the intellects of the pannel are most remarkably weak, irregular and confused, and therefore recommend him to the mercy of the court".

Hume also approved of the Exercise of Mercy in cases of weak intellect even where the jury had not specifically made any recommendation to mercy. The cases quoted in support of this proposition[32] include Alexander Campbell (1809); Susan Tinny (1816) and two older cases: Robert Thomson (1739) and Agnes Crockat (1756). From this we may draw the inference that there was a use of a 'verdict with recommendation' following on a practice of exercising mercy in cases of weak intellect. In Bell's Notes to Hume[33] which appeared in 1844 there is a statement that "In offences inferring arbitary pains, weakness of intellect is a relevant plea to use in mitigation[34]". The cases cited William Braid (1835) and Thomas Henderson (1835) are given by name only

without fuller citation or details yet were said by Lord Justice-General Normand in Kirkwood v. H.M.Adv.[35] to be the origin of the doctrine of diminished responsibility.

Alison:

Archibald Alison[36] who wrote two important works, Principles of the Criminal Law of Scotland in 1832 and Practice of the Criminal law of Scotland in the following year, hesitently acknowledged the lessening of responsibility but he was too close to Hume to be able to unfetter his mind of the requirement of absolute alienation of reason. He was able to comment however, when dealing with the treatment of those with diminished responsibility: "In such cases there is a mixture of guilt and misfortune; for the former he should be severely punished, for the latter the extreme penalty should be remitted"[37].

At the time the liberal exercise of the Royal Prerogative of Mercy permitted the court to adopt a strict interpretation of the kind of insanity which excused the pannel. It may be that this – as in England –is a further factor which delayed the true launching of the doctrine.

Alison certainly thought that the Royal Prerogative was the proper course in capital cases. According to him: "If it appears from the evidence that the pannel, though partially deranged, was not so much so as to relieve him entirely from punishment, the proper course is to find him guilty; but, on account of the infirmity of mind, which he could not control, recommend him to the Royal Mercy"[38].

The liberalism displayed by a jury could take many forms; not only would they recommend to the Royal Mercy at the suggestion of the judge or on their own initiative but they were wont to apply their own construction to the directions of the judge or indeed to fly in the face

of that advice and acquit. Hume records cases where, in his opinion, the jury should have convicted and left matters to the Royal Mercy – but did not do so. We may take it that, as the eighteenth century passed, the Rule of Proportions gradually faded until only the Royal Prerogative of Mercy and judicial discretion were left of it at the end of the century. At the same time we must bear in mind that the cognitive concept had entered the law in relation to insanity and had gradually developed into the 'knowledge' test. There may well be a correlation for the Knowledge test tended to cover the same kind of case that the old Rule of Proportions had embraced.

D. The Nineteenth Century Cases:

In two reported cases in the mid-nineteenth century the jury were more or less directed in terms of Allison to bring in a recommendation on the grounds of the accused's weak intellect.' One such case was that of James Denny Scott,[39] where the presiding judge (Lord Cockburn) told the jury that "a conviction, though obstructed in its result by a recommendation, was the safest for the public, and the least opposed to the truth of the case". In almost similar vein, Lord Cowan in John M'Fayden,[40] said that "the safest verdict would probably be one of guilty, accompanied by such recommendation as the undoubted weakness of the pannel's intellect might appear to them to justify." . In both cases the jury accepted the direction.

It is but a short step from the action taken in the cases quoted above to the situation where the judge asks the jury to bring in a finding of culpable homicide in place of a murder verdict with a recommendation to mercy. In the first place, it obviated any risk that the

recommendation might be rejected. Again, it left the disposal of the prisoner in the hands of the judge who could impose what he considered to be the suitable sentence, giving what weight he thought proper to the accused's mental state.

Just such a situation came before Lord Deas while he was at Aberdeen on the Northern Circuit with Lord Neaves. The date 19th. September 1867. This occurred in the case of Alexander Dingwall, known in the Reports as H.M.Adv. v. Dingwall[25]. Conventional wisdom has it that this case was the first ennuciation of the doctrine of diminished responsibility in Scots law and it is normally cited as such. Of course it did not appear under that name at that time. We cannot be sure of his motives or whether the reasons cited in the preceding paragraph played any part but we can be certain that the judicial climate was favourable.

Dingwall, a man of 45 years of age and a proprietor of estates in Aberdeenshire, was indicted for the murder of his wife Grace, whom he had stabbed once only with a carving knife. From this injury she died about a fortnight later[41]. There was no evidence that he was ever other than kind to her and there was nothing to indicate premeditation. At most, he may have been irritated by the fact that his wife had hidden a bottle of whisky which he had brought home with him. It was not in dispute that he was habitually and "irreclaimably" addicted to drinking and he had certainly been drinking heavily during the previous evening – some eleven glasses of whisky between 4 p.m. and midnight, but then it was 'Hogmanay' (New Year's Eve). Indeed, he did have a history of attacks of delirium tremens and this coupled with possible epilepsy and sunstroke in India, had resulted in Dingwall being regarded as 'peculiar' but not such as to warrant him being 'certified'. A special defence had been lodged on

his behalf to the effect that, at the time of the alleged act, the accused was insane.

Lord Deas delivered the charge to the jury[42] – the judges often sat in pairs – and he began by dispensing with the types of insanity not relevant to the case: idiotry, furiosity, total deprivation of reason and insane delusions. Had the panel been acting under an insane delusion, the defence would have been complete but as there was no attempt to prove any delusion his Lordship thought that the simplest way of stating the law would be to say that:

> "...if the jury believed that the prisoner, when he committed the act, had sufficient mental capacity to know, and did know, that the act was contrary to law, and punishable by law, it would be their duty to convict him".

This was better than asking the jury:

> "to consider whether the accused knew right from wrong; for an assassin might believe it was morally right to kill his victim, and yet be responsible to the law, and punishable accordingly".

This case had the distinction of eight medical witnesses all agreeing that the panel was sane and the evidence of the panel's insanity coming from non-medical witnesses.

The very special circumstances of the case allowed Lord Deas to put another question to the jury:

> "...whether the offence was anything short of murder ... It was very difficult for the law to recognise it as anything else. On the other hand, however, he could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence".

The question had been asked – the unveiling had at last taken place – and from that point onwards the quality of the act was never left unexamined.

Lord Deas went on:

> "The chief circumstances for their consideration with this in mind were:
> 1st. the unpremeditated and sudden nature of the attack;
> 2nd. the prisoner's habitual kindness to his wife; of which there could be no doubt, when drink did not interfere;
> 3rd. there was only one stab or blow; this while not perhaps like what an insane would have done was favourable for the

> prisoner in other respects;
> 4th. the prisoner appeared not only to have been peculiar in his mental constitutionn, but to have had his mind weakened by successive attacks of disease. It seemed highly probable that he had had a stroke of the sun in India and that his subsequent fits were of an epileptic nature. There could be no doubt that he had had repeated attacks of delirium tremens, and if weakness of mind could be an element in any case in the question between murder and culpable homicide, it seemed difficult to exclude that element here".

The judge told the jury that he had given the question anxious consideration and had come to the conclusion that the element was not inadmissible:

> "Culpable homicide, in our law and practice, included what in some countries was called 'murder with extenuating circumstances'. Sometimes the crime of culpable homicide approachedd the very verge of murder; and sometimes it was a very minor offence. The state of mind of a prisoner might, be an extenuating circumstance, although not such as to warrant an acquittal on grounds of insanity; and he could not therefore exclude it from the consideration of the jury here, along with the whole other circumstances, in making up their minds whether, if responsible to the law at all, the prisoner was to be held guilty of murder or of culpable homicide"[43]

The jury took only half an hour to agree upon the course put so clearly before them by Lord Deas. They returned a verdict of culpable homicide and Dingwall was sentenced to ten years penal servitude.

The next case in which 'diminished responsibility' arose was in 1875. That of H.M.Adv. v. Tierney[44]. It is of particular interest because it was the prosecution which put the matter forward and not the defence. No reference was made to Dingwall and the judge (Lord Ardmillan) in his charge to the jury said that he did not find much ground for it in the evidence but that he left the matter to the jury. In the event, the jury convicted of murder with a recommendation to mercy and the accused was subsequently reprieved. It is submitted that this is a further example which demonstrates that the climate of professional opinion was such as to favour reducing murder to culpable homicide where there was

evidence of mental weakness.

Lord Deas was again able to put forward his views when delivering the judgment of the court in a case which came before a bench of judges 'on remit' in 1876, namely: H.M.Adv. v. McLean[45]. The accused was apparently an imbecile, having only recently escaped from a lunatic asylum where he had spent two years, but at the date of the commission of the offence was not legally insane. At the original trial the jury, while finding him guilty, had recommended him to the leniency of the court in respect of his weak intellect The presiding judge (Lord Justice Clerk Moncrieff) 'certified' the case on the question of sentence to the High Court and called for a report from a Commissioner of the Lunacy Board. The report confirmed the verdict of the jury. Lord Deas repeated the view that he had expressed in Dingwall and observed that "diminished responsibility" by weakness of intellect might be taken into account as modifying the character and punishment of the criminal offence. The outcome was a sentence of six months imprisonment, which was a comparatively lenient punishment at that time, even for a charge of theft, aggravated by housebreaking and coupled with three previous convictions.

In a series of other cases, until he left the bench in 1885, after over thirty years' service as a Senator of the College of Justice, Lord Deas directed juries, when appropriate, on the lines he had indicated in Dingwall. Indeed, six of the nine cases in which the doctrine was invoked in the period 1867 to 1882 involved Lord Deas as a major participant.

In H.M.Adv. v. Granger[46], where the panel had been suffering to some extent from *delirium tremens* at the material time, the jury having rejected the defence of insanity, presumably accepted the defence

contention of a disease of the mind induced by drinking as producing aberration short of insanity and brought in a verdict of culpable homicide. Again, when presiding in H.M.Adv. v. Ferguson[47], the plea appears and was successful in a case where the condition was one of feeble intellect coupled with alcoholic fits; there had been a spell in an asylum due to intemperance but the jury was warned that mitigating factors which were evident in Dingwall (kindness and lack of premeditation) were absent.

H.M.Adv. v. Hellen Brown[48] and H.M.Adv. v. Gove[49] are two further murder cases where the plea succeeded before Lord Deas. A period of seven years penal servitude was imposed in the first case for the killing of a two year old illegitimate child by his mother. In Gove the father had killed his son but the report does not disclose any reason for the crime. The sentence here being one of fourteen years penal servitude.

It might be thought that the doctrine emerged and was applied only on those occasions on which Lord Deas was the trial judge. That however was not the case, for we find Lord M^cLaren urging it on the jury in H.M.Adv. v. Smith[50], where the panel was accused of having killed a fellow worker following persecution, and in H.M.Adv. v. Abercrombie[51], where a servant girl was charged with having killed her illegitimate child — and somewhat surprisingly securing an acquittal at the hands of a jury who found grounds for insanity

In the years that followed Lord Deas' retiral, there were a string of cases: e.g. H.M.Adv. v. Margaret Brown,[52] H.M.Adv. v. Kane,[53] H.M.Adv. v. M^cClinton,[54] and H.M.Adv. v. Aitken[55] in which the doctrine in its anonymous form flourished.

It should be noted that in Dingwall Lord Deas did not sit alone. Lord Neaves was with him and must be taken to have concurred in

the charge to the jury, for he participated in the legal argument which had preceeded it; while in McLean[45], the Lord Justice Clerk, and Lords Craighill and Young concurred in the judgment delivered by Lord Deas.

E. The Twentieth Century Cases:

With the coming of the twentieth century, one can trace in the cases an abrupt change of heart on the part of the Scottish judiciary. The favourable approach of the nineteenth century melts and an element of distrust creeps in, even outright criticism. Although the doctrine had by then been in existence almost half a century and one would think respectably established, a more restrictive interpretation begins to make its appearance.

The change springs largely from advances in modern psychiatry which had discovered many abnormal conditions previously unknown and which medical men considered as creating ' a state of diminished responsibility'. There was a reaction by the lawyers to the wilder claims of some psychiatrists and a fear that if they allowed such men to determine the question of diminished responsibility they would find that all criminals would in time be characterised as being of diminished responsibility. Such a result would destroy the doctrine entirely because there would be no norn against which to measure diminution.

Early in the new century the restrictive outlook was already apparent in the first reported case on the doctrine. This was H.M.Adv. v. Aitken[46], a case where the facts were very similar to Smith[50]. Aitken was tried for the murder of his wife, who had been unfaithful to him. A plea of insanity was lodged but the defence asked only for a verdict of culpable homicide based on the accused's mental state and the particular

circumstances of the case; but the judge would not agree. The jury were told that, in the same man neither jealousy nor drink or both combined could make the crime less than murder.

> Lord Stormonth-Darling directed the jury that:
> "the rule of law..... to the effect that there might be a degree of insanity, not sufficient to destroy criminal responsibility, and yet sufficient to modify the quality of the crime, was one which had been undoubtedly received and acted upon within comparatively recent times. But it was a rule which required to be applied with great caution. It could only be applied if a jury were satisfied that there was something amounting to brain disease and, further, only if they were satisfied that the panel had so brooded over his wife's conduct that, apart altogether from the ordinary effct of drink or jealousy or anger, his mind had become morbidly affected, would they be justified in returning a verdict of culpable homicide"[56].

The jury convicted of murder.

The doctrine was however applied a few years later by Lord Justice Clerk Macdonald in H.M.Adv. v. Graham[57]. In this case the panel was charged with the murder of his wife. He pleaded that "he was of unsound mind or in such a state of mental weakness as to make him irresponsible for his actions". The learned judge went out of his way to express his admiration for Lord Deas and he repeated to the jury the various mitigating features which had been put to the jury in Dingwall (i.e. unpremeditated attack, panel kind to his wife, one stab wound and weakening of mind by successive attacks of disease). This was not as strong a case as Dingwall but the jury accepted the opportunity of the doctrine of diminished responsibility. Graham was found guilty of culpable homicide and sentenced to ten years penal servitude.

In H.M.Adv. v. Edmonstone[58], a case tried before Lord Guthrie, the facts bore some similarity to Dingwall, but with a marked difference. The accused had murdered a young lad who was carrying a considerable sum of money to pay wages. The killer had taken other items which he sold and

he had made his escape to England to avoid apprehension which suggests some degree of calculation in his actions. Edmonstone pleaded diminished responsibility on the basis that he suffered from sunstroke and epilepsy. At the trial the judge left the question to the jury, but while stressing the facts of the case warned them that it was not sufficient for the panel merely to establish some mental deterioration; it must be such as, in the circumstances, entitled him to be dealt with unlike other men.

> In his charge Lord Guthrie posed this question for the jury: "If he is not insane.....is he to be taken as other men are..... or are his faculties so enfeebled that while he cannot be exempted from responsibility, his responsibility must be held as diminished by the the enfeeblement of his faculties".

and later

> "Formerly the law knew only two classes of person, those wholly irresponsible and those fully responsible; and apart from murder cases that is the view which is still acted upon in the criminal courts. But in cases of murder, where the unique element of human life comes in, the law rightly or wrongly, is now settled that the jury are entitled, if the evidence warrants it, to deal with a prisoner as in a third class, those who, though responsible, are not fully responsible and who are considered as liable in penalty but not a capital penalty".

and as part of the movement to avoid extending the doctrine in any way unwarranted – he goes on: "This is a recent doctrine, and must, in the public interest, be applied with great care".

Edmonstone was probably, in modern parlance ' a psychopath'. The jury found him guilty of murder.

Before reviewing the reported cases of the nineteen twenties and thirties which form the modern basis of the doctrine of diminished responsibility in Scotland even today, it is necessary to glance at the case of H.M.Adv. v. Higgins[60]. This is a case normally cited with the string of cases which followed Dingwall but only to indicate that there was a element of dissent abroad. For example, it appears in this guise in

Green's Encyclopædia of the Laws of Scotland[61] – the Scottish equivalent of 'Halsbury –'as a footnote to the passage headed 'Weakness of Mind as affecting Degree of Guilt and Punishment" which deals with the doctrine.

Higgins is the only reported case in which a judge has explicitly refused to follow Dingwall, this after fifty years had elapsed since the introduction of the doctrine; and in McLean the sentencing policy was considered by the Justiciary Court in its collegiate capacity, being specially convened for the purpose. That court had specifically approved the principles ennunciated in Dingwall. Higgins is an unsatisfactory case on a number of grounds and one wonders why the learned author of that section of Greens (and other legal works) should give it so much prominence.

It was not disputed that Patrick Higgins had killed his two sons, their bodies not being discovered for some two years. At the trial held on circuit at Linlithgow before Lord Johnson, it was submitted by the defence that the accused was insane at the time - there was a suggestion of epilepsy, suspicion of delirium tremins and evidence of a defective mind. If he was not insane, then that his mental state was so impaired by disease that the charge should be reduced to culpable homicide.

From reading the report it is clear that Lord Johnson allowed emotion to cloud his judgment; e.g. in the charge, he comments: " of all the callous parts of this wicked business, the most callous seems to me to be that this man, for once in his life gave these two poor children a full meal before he induced them to go away with him"[62].

The presiding judge gave a confusing charge[63] to the jury, being in error when he described the diminution of responsibility when he stated that the question was whether the panel was in a mental condition

"which enabled him to know he was perpetuating culpale homicide but did not enable him to know he was committing murder". Again, it is clear that he did not give proper weight to the medical evidence for the defence. As a result, the jury came back and asked two questions which ought to have been dealt with in the course of the charge. If a Court of Criminal Appeal had then been in existence – it was not established until 1926[64] – the conviction would probably have been quashed and the judge would not have been able to attack the doctrine in the way he did.

Strictly his observations were obiter since he considered, on the facts of the case before him, that there was no evidence of any such mental condition.

The learned judge declared that he was unable to accept the proposition, which was subjective by nature, until it had been before a full bench of judges – but what else was McLean. He expressed an ability to understand limited liability in the case of civil obligation but not to be able to comprehend limited responsibility for a criminal act. He could understand irresponsibility but not limited responsibility, responsibility which is yet an inferior grade of responsibility. He concluded with the words:

> "In particular I cannot help feeling that the combination of the idea of defective or impaired or degenerate mental condition with the whole other circumstances of the case is fallacious and really leads either to a groping after temporary insanity or to involve the jury in the assumption of the quality of mercy which resides with the Crown".

The jury returned an unanimous verdict of guilty to murder but added a recommendation to mercy, owing Firstly: to the length of time between the crime and the trial; and Secondly: the want of expert evidence as to Higgins' mental condition at the time he committed the crime. Lord Johnson did not like the form of recommendation suggested and put forward

one of his own, in these terms: " owing to your doubt as to his mental conditionn at the time of the act in respect that there could be no medical evidence relating to that particular line". This was accepted by the jury.

Nor was Lord Johnson a voice crying in the wilderness. Professor A.D. Gibb of Glasgow University, who was the co-editor of many editions of the leading textbook on Scots law felt able to write:

> "Weakness or aberration of mind not amounting to insanity has been held, quite illogically, to reduce the guilt of a person charged with murder to guilt merely of culpable homicide"[65].

And in another of his works, A Preface to Scots Law, he repeats his view that it is illogical and calls it "a blot on our criminal law". In his view, either the mind is affected and the "poor fellow" should not be punished or he is fully responsible. He then adds — in injured tones: "this strange rule however has recently been incorporated in the law of England"[66].

The most important case on diminished responsibility after Dingwall was heard before a judge and jury in the High Court in Edinburgh on May 21st. 1923. The judge was Lord Alness who had only taken his seat on the Bench some seven months before. The other principal figure was John Henry Savage, who was charged with murder. It was alleged that he had cut the throat of a woman with a razor, in a Leith tenement. He thought she was hiding a woman with whom Savage was living. The facts of the case are relatively unimportant but H.M.Adv. v. Savage[67] is a landmark in this branch of the criminal law nevertheless.

Savage pleaded "Not Guilty and further, that, at the time of the act charged, he was insane and not responsibible for his actions". Evidence was led on his behalf that at one time he had received an injury to his head and instances were given of his eccentric conduct. Evidence

was also given that he was a confirmed drunkard and a methylated spirits addict and that he was under the influence of one or both stimulents on the night of the murder.

For the Crown, the medical evidence was to the effect that the panel was sane and that the eccentricities to which the witnesses spoke were the ordinary eccentricities of one who over indulged in alcohol. There was prosecution evidence that on the night in question the accused appeared to be sober (although he did not bother to wash the blood from his hands or clothing) and in his proper senses.

In passing, we may note that this is the first recorded use of the term 'diminished responsibility' to denote the doctrine as such, and that in the course of the trial reference was made to all the cases which have been set out in this chapter, although Lord Alness himself only quoted from Aitken. Even M'Naghten got a mention.

What is important about Savage is that the directions which Lord Alness gave on diminished responsibility have been adopted as the basis of the modern law on the subject independently of its consistency or otherwise with the nineteenth century cases. Further, it silenced the judicial critics who had sided with Lord Johnson (if not Professor Gibbs) and provided a guide for the future, which was a model of clarity.

Lord Alness first told the jury: "... that there may be such a state of mind of a person, short of actual insanity, as may reduce the quality of his act from murder to culpable homicide ...". After this introduction, the learned judge then went on to define the doctrine in a passage which has become the locus classicus on the subject. He said:

> "It is difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full

> responsibility to partial responsibility – in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied ... that there must be some form of mental disease. ... that is the sort of thing that must be proved in order to establish that the crime which would otherwise be murder is only culpable homicide"[68].

The jury took only thirty-five minutes to reach an unanimous verdict of murder as libelled. Savage complained that he had not had a fair trial. There being no appeal court he was told that he could make representations "in the proper quarter". The Executive did not see fit to interfere and the penalty of the law took its course.

Muir v. H.M.Adv.[69] was the first appeal concerning diminished responsibility to come before the Criminal Appeal Court under the 1926 Act. The original case had been heard by the High Court sitting in Dumfries. The panel was charged with the murder of his wife, an axe being used in the killing. Lord Mackenzie did not handle the trial well and in his charge to the jury failed to give a proper direction in respect of murder. Muir was however convicted of murder and sentenced to death.

On appeal a verdict of culpable homicide was substituted and a sentence of penal servitude for life imposed. In the course of the appeal, the Lord Justice General (Lord Clyde) quoted with approval from a charge of Lord Moncrieffe: "was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide?"; and Lord Sands adopted the description of 'partial insanity' which is "that weakness or great peculiarity of mind which the law has recognised as possibly differentiating a case of murder from one of culpable homicide"[70].

In a case to come before the 'whole court' on a question of sentence we turn to that of James Boyd Kirkwood[35]. At the trial, where

Kirkwood was charged with the murder of a woman, the Crown had accepted a plea to culpable homicide on the grounds of diminished responsibility. The presiding judge (the Lord Justice Clerk), after alluding to the horrible circumstances of the crime and to the fact that it was impossible to assess the precise degree of the panel's responsibility, imposed a sentence of penal servitude for life as being the only sentence commensurate with the crime and adequate in the public interest. Kirkwood appealed.

The Lord Justice General (Lord Normand), in delivering the opinion of the court[71] – which dismissed the appeal – took the opportunity to trace the development of the doctrine of diminished responsibility. He accepted the statement of the law as set out by Lord Deas in M^cLean, but went on to suggest that the doctrine is somewhat anomalous. He observed:

> "I think that there is no doubt that the defence of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and if not sane, is not responsible. It is a modern variation of that basic doctrine, justified in each case by medical testimony directed to the special facts of the case. The mental weakness or weakness of responsibility, is regarded by our law as an extenuating circumstance, and it has effect as modifying the character of the crime, or as justifying a moderation of sentence, or both".

No reference appears to have been made to Higgins and this authoritative opinion must be taken as settling the law in regard to 'diminished responsibility' beyond question as part of the criminal law of Scotland.

Another important case which cannot be ignored is that of H.M.Adv. v. Braithwaite[72]. Stanley Braithwaite appeared before Lord Cooper,(then Lord Justice Clerk) and a jury in the High Court in Edinburgh in November 1944. The murder of Braithwaite's wife with a knife was a particularly brutal one and the accused's mental state was in issue.

Lord Cooper described the doctrine in his own words - words which were to be approved in Carraher[73] - thus:

> "Our law does recognise – although it is only latterly that it has done so – that, if he was suffering from some infirmity

> or aberration of mind or impairment of intellect to such an extent as not to be fully accountable for his actions, the result is to reduce the quality of his offence".

He went on:

> "Now I have got to give you the most accurate instruction I can on this delicate question. The Solicitor-General read to you a passage from the charge of the Lord Justice-Clerk in the case of Savage, and I am going to read a sentence or two again, because it seems to me to give as explicit and clear a statement of the sort of thing which you have to look for as I can find. He says: 'It is very difficult to put it in a phrase' – and I respectfully agree – 'but it has been put in this way; that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility – in other words, the prisoner in question must be only partially accountable for his actions' "[74].

After this long extract from Savage, he also quoted from Muir. He completed his charge, before turning to a review of the evidence, in these terms:

> "It will not suffice in law ... merely to show that an accused person has a very short temper, or is unusually excitable or lacking in self-control. The world would be a very convenient place for criminals and a very dangerous place for other people, if that were the law ... (there must be) something amounting or approaching to partial insanity and based on mental weakness or aberration."[75]

The jury by a majority found the panel guilty of murder as libelled, and unanimously strongly recommended him to mercy on account of his youth and early history and war service. The Justiciary report goes on laconically: "the panel was sentenced to death". There is however a postscript: "The sentence was commuted to one of penal servitude for life".

The most important of the major reported decisions, and the last to concern us at this stage, was Carraher v. H.M.Adv[76]. – a full bench case heard in 1946. Involved was a stabbing in Glasgow in which the wrong man may have died. The original trial took place in Glasgow before Lord Russell and a jury in February of that year. The main feature of the

case was that the accused, Patrick Carraher, was said by the defence to have 'a psychopathic personality' – a clinical condition which they said was associated with diminished responsibility and would be aggravated by drink. The Crown contended that this was not so.

Lord Russell gave a long and careful direction on the issue of diminished responsibility, which cannot be faulted. He left the question of diminished responsibility to the jury, but it was rejected and Carraher was found guilty of murder and sentenced to death.

An appeal was lodged and came before the Lord Justice-General (Lord Normand) with Lords Carmont,Janieson,Stevenson and Birnam on the 19th and 20th.March 1946. In the course of his opinion rejecting the appeal – with which the others concurred – Lord Normand detailed the charge which had been given in the court below at some length. He then added: "The plea of diminished responsibility, which ... is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions"[76].

He also commented upon 'psychopathic personality' in relation to the doctrine of diminished responsibility, but more of that under that topic when we come to study the English response to that condition.

Conclusion:

That the factors which generated the doctrine of diminished responsibility in Scotland were very different from those which applied in England, but the awareness of such a concept was present in both countries at identical stages, if in different degrees of intensity. Mackenzie and Hale; Deas and Stephen thought along similar lines. The robustness of thought of both the institutional writers and the Scottish judges coupled

with a freedom of action foreign to their judicial brethren south of the Border was perhaps paramount in development.

It is possible to distinguish three important periods. Prior to Dingwall – Dingwall until the turn of the century – Nineteen Hundred to the end of the Second World War. In this last period are the important cases which constitute diminished responsibility in Scotland as we know it to-day but further, throughout this period we can discern the imposition of restrictions on the natural development of the doctrine, stemming from a fear on the part of the Lords of Justiciary that, with the rapid advances in medicine and psychiatry, control might pass to the medical men.

FOOTNOTES

Chapter V

1. 560 H. C. Debs. (5th. Series) 1254 (Nov. 15, 1956)
2. Letter - Parl. Counsel Office file re: Homicide Bill
3. Letter - same source
4. Gowers' Commission. Minutes of Evidence 18th day, Lord Cooper. 5406
5. Taken from his unpublished lectures and quoted by Professor T. B. Smith in 'Scotland' at p. 117
6. According to Dr. John C. Gardner (Stair Society Publication Vol. 1)(1936) p. 233. Leyden was their favourite. Between 1600 and 1800 some seventeen hundred Scottish students studied at Leyden University. Of these the greater number were composed of students in the latter part of the seventeenth century. Utrecht was another seat of learning for Scottish students. Interrupted by the Napoleonic wars, the Scottish students lost interest when, in consequence, a Code was established and Roman-Dutch law was no longer the main subject studied
7. Dahm was of the opinion that the doctrine was known to the medieval writers (Dahn, G., Das Strafecht Italiens im ausgehenden Mittelalter, p. 235. We also find references among the Dutch jurists; for example: Moorman. "You will find certain persons of whom you can rightly say that they are not absolute normal, but who, in human society, conduct themselves in a way that is not patently unreasonable. Their ability to distinguish between right and wrong is affected although not extinguished. Such persons can commit crimes and they can be punished for it; but in such a case the punishment can be diminished according to the discretion of the judge". [translation from Old Dutch: Verhandeling over de Misdaden, 2nd. Ed. 1770, Inl. 2. 15]
8. 1943 S. C. (H. L.) 19 at p. 38. Voet referred to in the dissenting judgments of Lords Mackay, Wark and Carmont in Sugden v. H. M. Adv. 1934 J. C. 103
9. The name appeared in a variety of spellings; cf. McKenzie's Pleadings in Remarkable Cases in Scotland since 1661. The dominant form 'Mackenzie' will be used in all references hereinafter. Born Dundee 1636, Died London 1691. Aristocratic Episcopalian. M. P. Served as Lord Advocate.
10. Taylor Innes, Contemporary Review, 1871, p. 250 quoted in Lang's Life and Times of Sir George Mackenzie p. 147

11. Mackenzie wrote prolifically. A bibliography has been published by Frederic S. Ferguson, Edinburgh Bibliographical Society Transactions 1936.

    The main legal works were Pleadings in Remarkable Cases in Scotland since 1661 (1672) and The Laws and Customs of Scotland in Matters Criminal, (1678).

12. Those who had signed the National Covenant to show dislike of Laud's liturgy and bishops. Originated in reign of Charles I but became fierce and cruel religious war after the Restoration. Comparisions could be draw with Judge Jeffrey's Bloody Assize of the same period.

13. See Register of the Privy Council of Scotland, 3rd. Series 1661-91, Vol I, 11, 17, 26.

14. 6 St. Tr. (NS) 676

15. Matthaeus, De Criminibus ad lib. XLVII et XLVIII Dig. Commentarius (Amsterdam) 1644, Prolegomena, Cap. II, 6

16. Mackenzie, Law & Customs p. 18

17. Mackenzie, Pleadings Rem. Cases p. 72

18. Mackenzie, Law & Customs p. 16

19. Ibid p. 15

20. Ibid

21. Ibid p. 16

22. The word for an accused from the time of his first appearance in court. [Act of Adjournal Nov. 18, 1695]. Was written at an earlier time as 'pannel'. The modern usage is to spell it 'panel' although this clashes with the use of the same word to indicate the jury. The form in which it appears in the reports is retained.

23. Hume's Commentaries, (2nd. Edn. 1819) p. 41

24. Maclaurin p. 98; Hume ibid p. 38; Alison p. 646

25. (1867) 5 Irvine 466

26 (1695-1768) Advocate, Professor of Scots Law 1737-65. Resigned to write Institutes of the Law of Scotland

27. Erskine Principles (17th. Edn 1886) p. 652

28. Not published until after his death in 1773. Book IV Title 4

29. (1757-1838) Advocate. Professor of Scots Law (for 46 years). Principal Clerk of Session (where he had Sir Walter Scott as a colleague) and 'Baron of Exchequer'. Lord Deas was one of his former students and in a number of cases extolled his virtues.

30. Hume's Commenraries I, Chap. 1

31. (1763) Hume i. 38

32. Hume supra at pp 38, 40 amd 42

33. Benjamin Robert Bell (1810-1886) Advocate. Produced 4th, edition of Hume's Commenarties on the Law of Scotland respecting Crimes in 1844 which included a supplement of some 300 pages.

34. Bell's Notes to Hume p. 5

35. 1939 J.C. 36

36. 1792-1867) Advocate, Advocate-Depute. Subsequently Baronet. It is said (by Professor David Walker) that the fall of the Wellington Government and the collapse of two firms of solicitors who had been steadfast providers of briefs provided the comparative idleness to write: Principles of the Criminal Law of Scotland (1832) and Practice of the Criminal Law of Scotland (1833). Both are severely practical and are based on his experiences in the Crown Office.

37. Alison Principles i, 652

38. Ibid

39. (1835) 1 Irvine 132

40. (1860) 3 Irvine 650

41 Schiffer in 'Mental Disorder and the Criminal Trial Process' poses the question: "What would have been the outcome if M'Naghten had shot the right man and Hadfield the King ?" A more realistic question would have been: "What if Mrs Dingwall had been judged to have died from natural causes ? [on our thesis- nothing, the seeds of the doctrine were already present – but page 471 of the Report reads: "the medical men were agreed that the wound in the chest was the cause of death, but they differed as to whether it was necessarily fatal, one of them being of the opinion that but for the excitement of a quarrel with the nurse, the deceased might possibly have recovered.]

42. 1867) 5 Irv. at pp 479 - 480

43. Ibid

44. (1875) 3 Coup. 152

45. (1876) 3 Coup. 334

46. (1878) 4 Coup. 86

47. (1881) 4 Coup. 552

48. (1882) 4 Coup. 596

49. (1882) 4 Coup. 598

50. (1893) 1 Adam 34

51. (1896) 2 Adam 163

52. (1886) 1 White 93

53. (1892) 3 White 386

54. (1902) 4 Adam 1

55. (1902) 4 Adam 88

56. Ibid at p. 94

57. (1906) 5 Adam 212

58. 1909 2 S.L.T. 223

59. Ibid at p. 224

60. (1913) 7 Adam 229; 1914 J.C. 1

The facts of the case are particularly horrifying. See Sidney Smith, Mostly Murder, chapter 2

61. 1928 edition, Volume 5, p. 59, para 135

The passage is headed "Weakness of Mind as affecting Degree of Guilty and Punishmment", not as might be expected a reference to diminished resposibility. The Faculty Digest of Justiciary Cases for 1868-1925 does not use the term either. It has a section headed 'Abnormal State of Mind Falling Short of Insanity' but this includes two cases of intoxication as well as those cases on what is now called diminished responsibility. The phrase was certainly used by the judges from about 1909 onwards and received the official accolade in H.M. Adv. v. Savage in 1923. On the other hand as long ago as 1835 in the case of William Braid, briefly mentioned in Bell's Notes to Hume (p. 5), we find that a doctor was directed to examine the panel "to show that the state of his mind had diminished his responsibility, although it did not take it entirely away". So the phrase is at least as old as that.

62. 1914 J.C. 1 at p. 3

63. Ibid

64. Criminal Appeal (Scotland) Act; 16 & 17 Geo. V., c. 15

It is an interesting parallel that an appeal court was instituted as a result of a notorious case of mistaken identity. In this case: Oscar Slater. (pace: Adolf Beck)

Note: The House of Lords has no criminal jurisdiction in respect of Scotland

65 Gloag W.M. and R. Candlish Henderson; Introduction to the Law of Scotland at p. 671

66. Gibb, A.D. A Preface to Scots Law at p. 148

67. 1923 J.C. 49

68. Loc. cit. at p. 50

69. 1933 J.C. 46

70. Ibid at pp 48-49

71. 1939 J.C. 36

72. Ibid at p. 40

73. 1945 J.C. 55

74. 1946 J.C. 108

75. 1945 J.C. 55 at pp 56-57

76. Ibid

77. 1946 J.C. 108 at p. 118

PART 2

The Present Operation of the Doctrine in English Criminal Law

Chapter VI

Section 2

When the Homicide Act of 1957 passed into law it introduced into English criminal law several new concepts. The distinction between Capital murder and Non-capital murder, diminished responsibility, suicide pacts. Within the idea of diminished responsibility itself, there arose 'abnormality of mind', 'substantial impairment', 'mental responsibility'. These were terms which the Act did not itself define, were not defined elsewhere in the criminal law nor had they been previously the subject of judicial comment. While the civil law is largely the province of the lawyers, criminal law involves a large body of untrained laymen — namely jurors. Criminal law is essentially practical, and requires that the terms used be precisely defined and readily understood by such persons.

A. The Initial Approach to Section 2:

Alhough the drafting of the Homicide Act was completed in a matter of months it must not be thought that its contents were foisted unawares on an unprepared judiciary. From the outset the Lord Chief Justice (Lord Goddard) was asked for his comments and further was requested to ascertain the views of his brother judges on specific points. Before publication they were shown a final print. Indeed the fact that they had agreed a draft shown to them was used by the

Attorney-General and the Lord Chancellor to avoid discussing a subsequent alternate draft favoured by the Home Office and Sir Frank Newsam. Few in fact did express detailed views on the topics under discussion – Hallett, Byrne, Devlin and Donovan – their contribution was in marked contrast to the medical fraternity who were voluble to a degree[1]

In one of the early trials in which the defence of diminished responsibility was raised – that of John Francis Spriggs[2] at Birmingham Assizes in December 1957 – the question of interpretation of section 2 by a jury arose. Spriggs had been charged with capital murder. It was alleged that he had returned, with a revolver, to a public house from which he had earlier been ejected for the 'crime' of trying to remove a beer tap label. He knocked on the door and when the barman answered it, he is said to have shot him four times from very close range – twice in the back. The trial judge (Mr Justice Austen Jones) in summing-up merely read out the section to the jury (he also allowed them to take to the jury room copies of the terms of the section, which he had had prepared). He told the jury that it was for them to decide whether or not the accused was suffering from such abnormality of mind as to substantially impair his mental responsibility. He then reviewed the evidence on that issue. Spriggs was found guilty of capital murder and sentenced to death. He appealed.

Before the Court of Criminal Appeal,[3] one of the grounds of appeal was that the judge had "failed to give to the jury any or any sufficient direction as to the meaning of the expression 'abnormality ofmind' or 'mental responsibility' in section 2(1) of the Act of 1957".

The appeal came before Lord Goddard C.J., sitting with Hilbery

and Salmon JJ. Lord Goddard gave the judgment of the Court in which the appeal was dismissed. After narrating the facts of the case and the actions of the trial judge in handing a copy of the section to the jury, he said: "Let me say at once that he was quite right, and no one suggests otherwise, to leave that question to the jury".[4] But later he was to say:

> "When Parliament has defined a particular state of things; as they have here what is to amount to diminished responsibility, it is not for the judges to re-define or to attempt to define the question. The definition has been laid down by Parliament and it is a question then for the jury"[5].

In a further passage he reiterates the same point:

> "So [here] it seems to the court that all that a judge can do is to read the section to the jury and say: 'that is what Parliament has said amounts to diminished responsibility and justify a verdict of manslaughter and not a verdict of murder'. I do not know any better way of instructing the jury on this very difficult point than saying: 'That is what Parliament has said. Those are the tests you have to apply'".[6]

It might be thought that this was a curious finding. If this view had always been taken of what should not be explained to a jury then the law reports would lack many precedents on the meaning of statutorily defined crimes and many trial judges have habitually been acting in a way in which they should not act. Parliament has defined many states of things which judges have thought ought to be explained so that juries may know what Parliament really meant.

An application was made for the Attorney General's fiat to appeal to the House of Lords but this was refused. Questions were asked in the House of Commons by Birmingham members,[7] but the Attorney General refused to reconsider his decision. Finally a petition was sent to the Home Secretary and Spriggs was reprieved just three days before the proposed date of his execution. A sentence of Life imprisonment was substituted.[8]

The Jury also took with them a copy of section 2 of the Homicide Act when they retired to consider their verdict in the case of Bernard Walden at Sheffield Assizes as late as the year 1960 when many trials involving diminished responsibility had already been held and concluded. Walden had been indicted for capital murder. In a fit of jealous temper Walden shot a young woman sectretary and her twenty year old boy friend in an office at the College where he was a lecturer. There was never any dispute that Walden had caused the deaths but the defence submitted that a finding of diminished responsibility was justified. The prosecution had called witnesses to testify that they could not detect any signs of the chronic paranoid development of which the defence psychiatrist had spoken – and the matter was left to the jury.

During his summing up the trial judge, Mr Justice Paull, handed to the jury copies of section 2. He did however add a few words of explaination, largely based on Braithwaite[9] – but in a very restrictive form which would reduce the defence to something barely distinguishable from the defence of insanity – He thought he was on sure ground for he had taken the theme of quoting from Scottish cases from Lord Goddard. The jury duly convicted Walden of both murders.

In an application for leave to appeal[10] against his conviction, it was asserted on Walden's behalf that the judge had misdirected the jury by attempting to redefine that which Parliament had already defined in section 2(1) of the Homicide Act, and that by misconstruing the section, he had tried to tell the jury what he thought the sub-section really meant, though that was a matter entirely for the jury. The judge should merely have read the exact terms of the sub-section to the jury

and left them to decide its meaning. That was the principle laid down in Spriggs[9]. The judge was not entitled to do more than call the jury's attentionn to the exact words of the section and leave them to say whether upon the evidence they were satisfied that the case came within the section, and it followed that if the judge said anything whatever to the jury by way of explanation or illustration (as he did in this case). that was a misdirection.

The application was heard by Mr Justice Hilbery, who had sat in Spriggs, and was dismissed. Clearly the court was unhappy about the consequences which would logically flow from Spriggs as advanced by counsel for Walden. Indeed, at one stage in the course of the argument, Hilbery J. is reported to have said "Suppose the jury ask what they are to understand by abnormality of mind. If the judge cannot tell them, we are getting very near to trial by doctor"[11]. It was necessary therefore to resile from the extreme position which had been adopted and to give some further interpretation of Spriggs, and this was done in the following terms:

> ". . . . it is sufficient direction if the judge draws the attention of the jury to the exact terms of the section, that does not mean that it is a misdirection if he points out to the jury the sort of things which they should look for in order to decide the question . . .."[12]

Hall Williams'[13] has put forward the theory that a possible explanation for these rather confusing developments and the clear abdication of their responsibility by the judges to assist the jury as to the meaning and scope of the new defence is that at the time when the defence of diminished responsibility was introduced into English law there was a very real danger that the judges might, by their own interpretation of the words of the section, so alter or modify the scope of the defence as to defeat Parliament's purpose. Indeed the prospect

of another judicial muddle similar to that over the M'Naghten Rules was by no means remote. Lord Goddard in Spriggs[9] had averted this danger by telling the courts that it was no concern of the judge to interfere in this matter.

The learned Chief Justice of the Bahamas (Sir Guy Henderson) invoked Walden[10] when he presided over the trial of Elvan Rose and another in the Supreme Court of those islands in May 1960. He was correct to do so as the law stood at that time. Rose had stabbed an overseer while trying to escape from Fox Hill Prison. The whole trial turned on the question of diminished responsibility. The Chief Justice in his summing-up, following Paull J., merely read the section of the relevant Act[14] (which was in the same terms as section 2 of the English Act). After explaining the burden of proof, the trial judge then read a passage from the summing-up of Mr Justice Paull in Walden which had received the approval of the Court of Criminal Appeal in England. The Jury returned a verdict of guilty to murder and Rose was sentenced to death. He appealed.

By the time that Rose's appeal was heard by the Privy Council[15] in February 1961 there had been a further decision in the English courts which radically altered the law. This arose in the appeal[16] that followed the conviction of Patrick Joseph Byrne at Birmingham Assizes on March 24 1960 of the murder of a young woman in a hostel. Byrne had strangled the girl and then mutilated the body. The only defence put forward was, that in killing his victim, the appellant was suffering from diminished responsibility as defined in section 2. The appeal court made a number of authoritative pronouncements regarding the future interpretation of section 2 which will be dealt with in detail later in

this chapter in respect of individual elements of section 2. Sufficient to say at this stage, that in the light of Byrne, Rose had his murder conviction set aside and his death sentence quashed. A conviction for manslaughter carrying a period of life imprisonment was substituted.

The Court of Criminal Appeal finally disposed of the practice of merely reading section 2 of the Act to the Jury when they considered the appeal of Victor John Terry[17] in May 1861. Terry had been convicted in March at Sussex Assizes of capital murder and sentenced to death. The killing had arisen in the course of a raid on a bank. The defence was two-fold; that the gun had gone off by accident and/or alternatively, that the accused was suffering from diminished responsibility. In his summing-up, the trial judge (Stable J.) quoted without explanation, the words of section 2 of the Homicide Act, 1957. He made little effort to review the medical evidence in detail. The appeal court had this to say:

> "In the opinion of this court, ever since the case of Rose v. R., a case in the Privy Council, it is not sufficient merely to refer to the words of the section. That decision of the Privy Council refers with approval to the interpretation that this court put upon the section in Bryne, and in the light of that interpretation it seems to this court that it would no longer be proper merely to put the section before the jury, but that a proper explanation of the terms as interpretated in Bryne ought to be put before the jury"[18].

The court on this occasion was composed of Lord Parker sitting with Mr Justice Ashworth and Mr Justice Lawton. Despite these strictures the appeal was dismissed with the comment that the court could "find no ground on which to interfere".

Notwithstanding Lord Parker's clear directive in Terry, given with the authority of the Lord Chief Justice, we find Paull J.(who had been the trial judge in Walden) while sitting at the Central Criminal Court in April 1963 choosing to follow the earlier rather than the more

recent line of authorities. He had before him Diego Gomez who had stabbed his wife to death in the previous February. The sole issue at the trial was whether or not Gomez's mental responsibility could be said to be substantially impaired. In directing the jury, Mr Justice Paull said: "My view of this section (section 2) is that it is for the jury to say what it means. They can use their brains just as well as I can use mine on this section". He then read it out verbatim. He also used part of the direction he had used in Walden which had subsequently been approved. then, just before they retired to consider their verdict, he added: "Of course. a great deal must depend upon how you think of the meaning of this section"[19].

In the appeal[20] which followed conviction, Lord Parker, had this to say of the judge's actions:

> "In the opinion of this court, it is now too late to do what was done when this Act first came into force, namely, to read out the section to the jury, telling them it was for them to decide its meaning. That was the course taken in one of the earliest cases: Spriggs. It has long been held that that is insufficient"[21].

and again:

> "This court is quite clear that, having regard to the recent cases, in particular Byrne, which was approved in Rose and Terry, the proper course is to tell the jury what in law the section means, what are the ingredients in that section and then to direct them on the evidence"[22]

The reports do not reveal any further back-sliding by Her Majesty's Judges and the proper practices must now be considered to be firmly established.

B. The Legal Terms Defined:

What are the elements which make up the section? - the section as printed, of course, reads seriatim:

> "2. -(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 . . ."

(a) Abnormality of Mind:

It is clear that the real limiting factor in section 2 is the term 'abnormality of mind' and the use made of the provision must turn largely on the meaning to be attached to that phrase.

We have seen how in the early cases the judges did little to assist the jury in understanding section 2 and left them to struggle with the ipsissima verba of the statute. This was particularly so in Spriggs[3].

At the original trial, counsel for the prosecution had stressed in his speech to the jury that 'abnornality of mind' in section 2(1) of the Act was limited to deficiency in intellect and could not include the various types of mental condition from which the appellant had suffered for a long time. It was also put by the prosecution that the Spriggs had a high intelligence quotient and could not therefore be suffering from an abnormality of mind. Before the court of appeal, it was submitted on behalf of the appellant that the jury should have been directed that it is not right to equate 'mind' with 'intellect' which is only one of the functions of the mind.

In an aside for which he later apologised, Lord Goddard, perhaps with a view to excusing the lower court judge, remarked: "This doctrine has been borrowed from the law of Scotland. Their Lordships of the Judiciary (sic) have always had difficulty in explaining it to the jury". He did however go on in the body of the judgment of the court to quote at length from the charge to the jury given by Lord Cooper in

Braithwaite[9]. He went on:

> "... You are to consider 'whether he has abnormality of mind' - and how you are to define that I do not know because it is very difficult to say what is a normal person, where is the norm - 'whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury'. If you can find any of these matters in the evidence, then you will find a verdict of manslaughter and not a verdict of murder".[23]

Mr Justice Paull had taken note of Lord Goddard's comments on the Scottish origins of the doctrine, and in Walden'[5] he directed the jury in the following terms:

> "There are some cases, you may think, where a man has nearly got to that condition but not quite, where he is wandering on the borderline between being insane and sane, where you may say to yourself, 'Well, really, it may be he is not insane, but he is on the borderline, poor fellow, he is not really responsible for what he has done'. Now, you may think, and it is entirely a matter for you, that is what is meant by those words in the Act of Parliament, 'such abnormality . . . as substantially impairs his mental responsibility'. In other words, he is not really responsible for what he has done. His responsibility, if not wholly gone, has been impaired . . ."[24]

The matter was put beyond doubt in the considered judgment of the Court of Criminal Appeal in Byrne'[6], where the Lord Chief Justice said this:

> ". . .' Abnormality of mind', which has to be contrasted with the time-honoured expression in the M'Naughten Rules 'defect of reason' means a state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment."[25]

The Privy Council accepted this interpretation of 'abnormality of mind' as authorative and correct when they adjudicated in Rose'[5], but they added rather cautiously that they would not however consider that the Court of Criminal Appeal in Byrne was intending to lay down that in every case the jury must necessarily be directed that the test is always to be the borderline of insanity. There may be cases in which the

abnormality of mind relied upon cannot readily be related to any of the generally recognised types of 'insanity'. If, however, insanity is to be taken into consideration, as undoubtedly will usually be the case, the word must be used in its broad popular sense. It cannot too often be emphasised, they said, that there is no formula that can safely be used in every case – the direction to the jury must always be related to the particular evidence that has been given and there may be cases where the words 'borderline' and 'insanity' might not be helpful.

In the appeal which arose out of the case of John Samuel Seers[26] who was convicted by a majority of the murder of his wife by a jury at the Crown Court at Stafford in June 1982, the question of a direction which linked diminished responsibility with insanity was raised.

Seers had stabbed his estranged wife. The Prosecution accepted that Seers was suffering from a chronic reactive depression but disputed its severity. As Mr Justice Griffiths said, in reading the judgment of the court on the appeal which Seers lodged:

> "The learned judge, no doubt basing himself upon a passage in the judgment of this court in Byrne directed the jury that the test to be applied to determine whether the appellant was suffering from diminished responsibility was whether he could be described in popular language as partially insane or on the borderline of insanity. This was the only test propounded by the judge and he repeated it in various passages of his summing-up"[27]

The judge indicated that the Court had considered the decisions in Rose'[5] and in Byrne'[6] and he added: "We do not think that in a case such as this dealing with a depressive illness it is appropriate to direct a jury solely in terms of partial or borderline insanity. Indeed, we doubt if it is a helpful test in such a case"[28]. On the direction that the jury had been given they were bound to convict of murder, yet in the view of the appeal court there was evidence that would have

justified a jury in returning a verdict of manslaughter, and so they allowed the appeal and substituted a conviction for manslaughter.

In their evidence to the Butler Committee, the judges readily admitted that, despite Byrne, 'abnormality of mind' was an extremely imprecise phrase, even as limited by the parentheses. But there the matter remains

(b) Whether arising from a condition of Arrested or Retarded Development or Inherent causes or induced by Disease or Injury:

From the outset it was intended that the defence of diminished responsibility should be available only where the accused either was suffering from a disease or disorder of the mind or was a mental defective within the meaning of the Mental Deficiency Act 1913[29]. It was particularly important that the second category should be included since the Gowers' Commission[30] had recommended that the certifiable mental defective should never be subject to the death penalty.

The problem with the mental defective is that there may be no mental disease, merely being naturally of low intelligence. But the tests for certification as a mental defective, in so far as they go beyond the basic requirement of 'arrested or incomplete development of mind' are directed to seeing whether the defective ought to be confined or subject to supervision. They are in terms of 'inability to guard against commom physical dangers', or 'incapacity to manage themselves or their affairs' and 'their own protection or the protection of others'. These tests were not appropriate in the present context. Moreover, they draw a distinction between the person suffering from a disease of the mind and the defective, since the former has a defence if it is shown

that his responsibility is diminished - without more, whereas in the case of the latter it has to be shown both that his responsibility was diminished and that he was certifiable. There is no requirement in Scots law that a mental defective should be certifiable in order to take advantage of the defence of diminished responsibility.

The draftsman was conscious that as the defence was being introduced by statute, the judge in directing the jury would have nothing to go on except the actual words of the statute, the test should be the same for both categories and yet this part of the defence does not depend (or not wholly) on medical evidence.

Finally, at a meeting in the Lord Chancellor's Room on 15th, October 1956, at which the Attorney-General, Solicitor General and the Lord Advocate were present together with the Permanent Secretaries of the relevant departments, Mr Fiennes was directed "to try and adapt the terms of the Mental Deficency Act 1913"[31].

The result, the words at the heading of this sub-paragraph. The passage in the Act had read "a condition of arrested or incomplete development of mind existing from birth or from an early age whether arising from inherent causes or induced by disease or injury"[32]. The Act had been the outcome of the Report of the Royal Commission on the Care and Control of the Feebleminded which had sat under Lord Radnor[33]. The definition which was set out in the Report had been based on advice the Commission had received from the medical organisations who gave extensive evidence to them. For reasons which are not clear but may be linked to more modern and precise nomenclature the draftsman substituted "retarded" for "incomplete. What he did make clear (in a letter to the Attorney-General) was that the intention was not that

"arrested and incomplete development" be treated as an inherent cause but that the Act would regard it as a product.

What is curious is that no one seems to have mentioned the 1927 Act. This particular section had been amended by the Mental Deficiency Act of 1927[34] where the words: "existing from birth or from an early age" had been replace by "existing before the age of eighteen years". The revised definition then included cases of mental defect arising from encephalitis, meningitis or other diseases and was no longer limited to congenital or very early cases. The draftsman of the 1957 Act chose not to include the requirement that the condition should have existed before the age of eighteen years. Nowhere does he explain his reason for this course but it may be because to do so would have exclude conditions which were classified by psychiatrists as 'mental defectiveness'.

(c) Substantially

This is not an element that has caused a great deal of trouble. As might be expected, there is dicta in Byrne'[6] which clarifies its meaning:

> "assuming that the jury are satisfied on the balance of probabilities that the accused was suffering from "abnormality of mind" from one of the causes specified in the parenthesis of the subsection, the crucial question nevertheless arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing ?
>
> This is a question of degree and essentially one for the jury, Medical evidence is, of course, relevant, but the question involves a decision not merely whether there was some impairment of the mental responsibility of the accused for his acts, but whether such impairment can properly be called "substantially", a matter upon which juries may quite legitimately differ from the doctors"[35].

The passage quoted above was however subject to review in the

appeal of Derek William LLoyd[36] heard before Mr Justice Edmund Davies, Mr Justice Atkinson and Mr Justice Lyell in November 1965.

LLoyd had strangled his wife in the early hours of New Year's Day. 1965, and on March 16th. 1966 at Birmingham Assizes he was convicted of murder and sentenced by Mr Justice Ashworth to Imprisonment for life. The evidence in relation to his mental state was given by two doctors called by the defence, who said, in terms, that the accused was abnormal, his abnormality being due to mental illness. The first of these, Dr Angus, who was the Prison Medical Officer at Birmingham, classified the illness as 'reactive recurrent depression'. In his view LLoyd's mental responsibility was, at the material time impaired by that abnormality to some extent, but he could not go as far as to say it was diminished to any 'substantial' degree.

A Dr. Conlan, a Consultant in psychiatry in Birmingham, identified the problem as 'depressive illness' and said that such illnesss affected his mental responsibility to a degree; he said that it was not as low as minimal, but on the other hand, he said, it was not substantial.

> In dealing with the word 'substantial' the trial judge said this: "this word substantial, members of the jury, I am not going to try to find a parallel substantial. You are the judges, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale, substantial does not mean trival or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence: was it substantially impaired ?"[37]

He then went on to quote the passage from Byrne supra.

Before the appeal court the appellant's counsel urged that "substantial" must mean more than trival. That as the doctors, with one

voice, had said that the impairment here was not minimal, was not trival, therefore the defence of diminished responsibility was made out. The Court did not accept that contention. It was clear, they said, that the word "substantially" had been inserted in the Act with a view to carrying some meaning. In particular, the Court held that they were unable to see that the direction given to the jury on the meaning of the word could validly be criticised. As that was the only point raised - the appeal was dismissed.

In the judgment, delivered by Mr Justice Edmund Davies, reference was made to an earlier decision of that court, namely: Simcox.[38] In that case, they said, the direction given was, for all substantial (sic) purposes indistinguishable from that in Lloyd, although the words employed were not identical. It was remarked that that case (Simcox)was not reported. In fact, while it had not been reported in that series of reports, it had appeared in the Criminal Law Review of May 1964[39] under "Case and Comment" and there is no reason why it should not have come to the attention of the original trial judge Mr. Justice Ashworth.

The facts of Simcox are not disclosed in the Review nor in the appeal judgment as reported. It appears that four doctors gave evidence that the accused was suffering from 'paranoid personality'. All four agreed that this amounted to abnormality of mind arising from inherent causes. None was prepared to say that Simcox' mental responsibility was substantially impaired. They used expressions such as: "the impairment was moderate" or "that it was harder for him to control his actions". In his summing-up the judge included a direction on the word 'substantial'. After retiring the jury convicted Simcox of capital

murder. An appeal was lodged.

The direction given by the trial judge was in the following terms:

> "'The real thing you may think here is this word 'substantially', and we will come to it in a moment. Neither doctor called for the defence obviously liked the word, and it may be so, but that is the word in the Act of Parliament, that is the word you have got to use, and I expect you will not have as much difficulty as some people might have. There is no scientific precise test. That cannot be and never can in human conduct, otherwise we should not need juries or anybody, and if you will allow me to say so, I think you should look at it in a broad common sense way and ask yourselves, having heard what the doctors have said, having made up your minds about it, knowing what this man did, knowing the whole story, "Do you think looking at it broadly as common sense people there was a substantial impairment of his mental responsibility in what he did?" If the answer to that is yes, then you find him not guilty, but guilty of manslaughter. If the answer to that is no, there may be some impairment, but we do not think it was substantial, we do not think it was something which really made any great difference, although it may have made it harder to control himself, to refrain from crime; then you will find him guilty as he is charged in the only charge to this indictment"[40].

The Court of Appeal found no grounds for criticising the judge's way of dealing with the word 'substantial'. They were however less happy with the last sentence of the direction, which they thought, would not by itself have been sufficient direction on the question of self-control. However the judge made it clear in other passages that in order for the defence to succeed it was not necessary that there should be a total inability on the part of Simcox to control himself: it was sufficient if he had difficulty in controlling himself, provided the difficulty was substantial.

In passing it might be noted that the word 'diminished' which had initially attracted the draftsman was changed to 'impaired' to avoid misunderstanding because the judges in their comments had taken the words "substantially diminish his responsibility for his actions" to

refer to legal responsibility, whereas they were intended to refer to mental responsibility ". The term "impaired responsibility" had occurred in Scottish cases, notably Kirkwood[41].

(d) Mental Responsibility:

Following on from the judges comment above, the drafting committee was agreed that if the word 'responsibility' was used alone it could well be construed as legal responsibility but if so construed would beg the question and accordingly the draftsman was specifically instructed to insert the word 'mental' for the removal of doubt[31]. It is a phrase which does not appear in any other statute and that has created difficulties for doctors and if it had to be taken in isolation would surely be beyond the average juror. It has certainly generated endless discussion among the academics and prompted the glib definition that it is a 'mental state such that psychiatrists believe the accused ought to be convicted'[42]

The Butler Committee, who were not aware of the drafting history of the section, thought that it represented either a concept of law or a concept of morality and not a clinical fact relating to the defendant. The Committee expressed surprise that psychiatrists should be asked and agree to testify as to the legal or moral responsibility.

As might be expected in the haste, section 2 was not the only section of the Homicide Act, 1957 where the legislature has created difficulties for the courts – Section 5(1) is in the same category[43].

C. The Model Direction:

What we do know is that every judge will start his

consideration of his summing-up by reference to the set of specimen directions issued by the Lord Chief Justice some years ago[44] and still extant.

In relation to the direction for 'Murder. Diminished Responsibility' there is an introductory cautionary note: "It is difficult to devise a specimen direction suitable for all cases, but the following is an indication of the sort of direction which could be given, according to the circumstances".

Then follows a standard direction on onus and standard of proof. The three elements as set out in the section are then enumerated and it goes on:

> "As to the first of these elements, "abnormality of the mind", by mind I include perception, understanding, judgment and will.
>
> Although the medical evidence is important when you are considering this element, you must consider not only the medical evidence but the evidence as to the whole facts and circumstances of the case, including the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality. You must approach the question in a broad common sense way' [a direction in these terms should not be given where there is no evidence to throw doubt upon the medical evidence, if it is all one way]
>
> 'as to the third element (that the abnormality of mind substantially impaired the defendant's mental responsibility for his acts and omissions) You must approach the word "substantial" also in a broad common sense way: it means more than some trivial degree of impairment which does not make any appreciable difference to a person's ability to control himself, but it means less than total impairment".

A further note of caution is added in that it is suggested that the judge should carefully scrutinise the medical evidence to see how much of it depends upon hearsay or upon statements made to the doctor by the defendant himself, the truth of which is not admitted by the prosecution.

Conclusion:

That while Section 2 introduced into the law terms not previously defined or the subject of judicial comment; rather curiously, initially the judges made no effort to provide any explanation, merely reading or handing the section to juries and in turn receiving the approbation of the Court of Appeal. Possibly a timidity that recognised that the seeds of the concept were sown by Parliament and did not arise in the judicial breast extended by an official policy which did not encourage any extension of the doctrine by judicial interpretation.

Fortunately a recognition of the absurdity of the situation and the departure from the top ranks of the judiciary of the Old Guard who had participated in the political promotion of the Homicide Act allowed commonsense to prevail and a new course was set. No longer the old constraints. No longer the dependence on the Scottish decisions. At last the emergence of a few notable cases: such as Byrne (in relation to 'abnormality of mind'), which set new and clear parameters which immediately assisted the puisne judges yet did not stifle ordered development.

That so far as the other elements of the section were concerned – arrested development, mental responsibility – the courts are restrained by the drafting of the section and no amount of judicial interpretation will help at the present time. Refuge must be sought in the ingenuity of the psychiatrists.

FOOTNOTES

Chapter VI

1. Home Office files 431/3/7 & 431/3/2 [Public Records Office]
2. Birmingham Assizes. Dec. 19, 1957
3. (1958) 42 Cr. App. R. 69
4. Ibid at p 71
5. Ibid
6. Ibid at p 74
7. 580 H.C. Debs (5th. Series) 1256 (Jan. 23, 1958)
8. Although he escaped death at this point, he was to achieve a violent end. His body was found in June 1984 in the upstairs room of the house in Florentia Street, Cathays, Cardiff, where he lived. The Police found no signs of external injury. The body of Mrs Margaret Larkin, his landlady, was found downstairs with head injuries. The couple had been friends since Spriggs was released on licence. 'Daily Telegraph' June 6 1984
9. 1945 J.C. 55

   Braithwaite is helpful in that it gathered together divers descriptions used by Scottish judges to explain the doctrine

   Lord Goddard had noted in his comments on Fienes draft that "it will be desirable for us to try to study some directions given by Scotish judges"
10. (1959) 43 Cr.App. R. 201
11. 23 M.L.R. 192
12. Supra at p. 205

    In view of what was in fact said in Spriggs, one would not have expected the appeal to fail
13. J.E. Hall Williams, 23 M.L.R. 193
14. Homicide (Special Defences) Act 1959, s.2
15. (1961) 45 Cr. App. R. 496
16. (1960) 44 Cr. App. R. 246

    As the jury in Spriggs must have elected to follow the same view of the law as the jury in Byrne; Spriggs' conviction should, in logic, also have been quashed
17. (1961) 45 Cr. App. R. 180
18. Ibid at p. 184
19. (1964) 48 Cr. App. R. 310 C.A. at p. 312
20. Ibid
21. Ibid

22. Ibid
23. (1958) 2 W.L.R. (C.C.A.) 162 at p. 166
24. Ibid at p. 167
25. (1960) 44 Cr. App. R. 246 at p 252
26. (1984) 78 Cr. App. R. 261
27. Ibid at p 263
28. Ibid
29. 3 & 4 Geo. v, c.28
30. Gowers' Report para 385
31. Home Office file 291/102 [Public Records Office]
32. section 1(2)
33. Cmnd 4202 (1908) H.M.S.O. London

    It is of interest that the Commission was set up by the Government of the day shocked by the revelation that one in three of the volunteers for the Boer War were unfit to serve
34. 17 & 18 Geo. v, c.33
35. (1960) 44 Cr. App. R. 246 at p 253
36. (1966) 50 Cr. App. R. 61
37. Ibid at p. 64
38. Ibid at p. 66
39. (1964) Crim.L.R. 402
40. Supra at P. 66
41. 1939 J.C. 36
42. A. Kenny, 'The Expert in Court', (1983) L.Q.R. 197
43. R. v. Jones (1959) 2 W. L. R. 190
44. Through the Judicial Studies Board, 1981.

Chapter VII

Mental Abnormalities

A. Generally:

The expression 'mental abnormality' in common parlance, covers a multitude of conditions[1]. For the purposes of this thesis, however, we shall confine the term – as did the Gowers' Commision[2] – to cover all forms of mental retardation, mental disease and disorders of personality.

There is no psychiatric illness or abnormal mental state which is necessarily associated with criminality; and only one – the psychopathic state – in which perhaps the majority suffering from it are criminals. Nor is there any type of crime which is invariably the outcome of mental disease. The more abnormal the crime the more likely it is that the perpetrator will be found to be mentally abnormal. In homicide – the rarest and most abnormal of all crimes – the murderer is found to be sane in about half the cases.[3] Of the other half, depressive disorders have moved into first place displacing the aggressive psychopathic states who formerly comprised the largest clinical group. Next commonest are the schizophrenic and paranoid psychoses. A good deal less common than the foregoing are cases of mental retardation, epilepsy and organic dementia.

In England and Wales, about one-third of murderers commit

suicide, nearly always immediately following the murder. There are a substantial number of seriously mentally ill involved in this group, particularly among women.[4] In this murder/suicide group there are a large number of young married women who kill their children; only some of them are suffering from a puerile illness. A depression is much the commonest diagnosis.

Many motives underlie murderous attacks. Most commonly they arise from quarrels in which emotions of hate, rage and jealousy have been aroused. Nearly always the motives are identifiable – whether the attacker is mentally ill or mentally abnormal. In the case of the schizophrenic they may be bizarre. Where there are motives of morbid jealousy this can usually be diagnosed as either a schizophrenic or a paranoid psychosis, but morbid jealousy can also be found in depressive, alcholic and organic illnesses.

The World Health Organisation has provided a comprehensive classification of mental disorders within an 'International Classification of Diseases'[15] which is commonly used in this country, but which is extremely detailed. It is sufficient for our purposes if we observe the basic classification which, firstly, separates mental retardation and personality disorder from mental illness. This on the basis that mental retardation is present continuously from early life and personality disorder from the end of adolescence; whereas mental illness has a recognisable onset after a period of normal functioning in adult life.

The mental illnesses are usually subdivided into two major groupings, the psychoses and neuroses.

The psychoses are major mental illnesses, but they are hard to define for they have no single characteristic although they are usually said to be characterised by severe symptoms, such as delusions and hallucinations, and by lack of insight. The psychoses are themselves divided into organic and functional psychoses. In the organic psychoses there is a demomstrable physical abnormality in the brain; e.g. general paralysis of the insane and delirium tremens. In functional psychoses, no underlying physical disease has yet been demonstrated (thought some physical basis may eventually be found). The functional psychoses include schizophrenia and the affective psychoses.

The neuroses have symptoms much closer to normal experience, such as anxiety or obsessional thoughts. They are sometimes sub-divided into anxiety neurosis, obsessive-compulsive neurosis, hysteria and so-called neurotic depression.

Since the psychoses and neuroses do not cover all mental disorders, there are minor groupings covering adjustment disorders – disorders of childhood – and miscellaneous disorders including, for example, sexual dysfunction, sexual deviation and alcoholic and drug dependence.

B. The Mentally Retarded[6]:

The distinction between mental abnormality and mental sub-normality is not self-evident, but was early noted in England. In the reign of Edward II legislation[7] recognised a difference between the 'idiot' or born fool'[8] and the person of unsound mind who had lucid intervals.[9] This legal recognition of a qualitative

difference arose from the need to deal differently with the estate of an idiot and a lunatic. This legislation applied only to a a relatively few members of society who possessed large estates. It was concerned with feudal rights rather than the welfare of the individual.

By the time of Henry VIII, crude forms of intelligence tests were being applied to determine whether or not a person was an idiot. This mainly arose with regard to the question of his ability to manage his own property. Fitzherbert's test[10] was the capacity of the alleged idiot to count twenty pence, or tell his age or who were his father and mother. Swinburne[11] proposed as a criterion of capacity, among other tests, measuring a yard of cloth and naming the days of the week.[12]

It was the introduction of compulsory education, with the Elementary Education Act of 1870,[13] which highlighted the fact that there were groups in the community who were unable to profit by the opportunities offered and this was confirmed by an Act of 1899[14] [The Elementary Education (Defective and Epileptic Children) Act] which gave the local school authority the power to ascertain what children in their district were defective and had special needs.

The essential feature of mental defectiveness is that the mental development of the defective person is retarded and incomplete, he never attains maturity. There has been an intellectual defect or a defect of understanding existing from birth or at least an early age. In 1904, a Royal Commission[15] was appointed to report upon and make recommendations for the care of

the feebleminded. Its Terms of Reference were extended in 1906 to examining all questions of mental disability. A Report[16] was presented in 1908. Many of the recommendations in the Report were given legislative form in the Mental Deficiency Act of 1913.[17] In particular, the draftsman took from the Royal Commission Report the general term 'mental defective' and applied it to the limited classes of the mentally deficient. These classes were based on criteria of social efficiency. The idiot was unable to guard himself against common physical dangers; the imbecile was incapable of managing himself or his affairs; while the feebleminded person required care,supervision and control for his own protection or the protection of others. Clearly the most severe and obvious forms of mental subnormality were covered by the terms 'idiot' amd 'imbecile'. The concept of feeblemindededness where people were less seriously affected.[18]

There was a fourth class 'moral defective' which does not concern us at this stage, but is of importance when we come to examine psychopaths.

A further Royal Commission[19] was appointed after the Second World War – the Percy Commission – "to inquire into the existing law and administrative machinery governing....persons who are alleged to be suffering from mental illness or defect". The Report of the Commission was published in May 1957 and was followed, two years later, by legislation, namely: the Mental Health Act of 1959[20]. This Act radically altered both the concept of mental deficiency and the administrative procedure for dealing with the 'subnormal'.

We now had a division into only two classes:

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

(b) Subnormality: (means) a state of arrested or incomplete development of mind (not amounting to severe subnormality) which includes subnormality of intelligence and is of a nature or degree which requires or is susceptible to medical treatment or other special care or training of the patient.[21]

When the Mental Health Act was re-enacted in 1983[22] there was yet another change of nomenclature — we now talk of:

(a) Severe mental Impairment:(which means) a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.

This corresponds to the previous 'idiots and imbeciles' and they number about one-quarter of the whole subnormal population and about three-quarters of those under care in mental deficiency institutions.

(b) Mental Impairment: (means) a state of arrested or incomplete development (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnorally aggressive or seriously irresponsible conduct on the part of the peson concerned.[23]

This corresponds to the previous 'feebleminded' group

Despite the changes, it is convenient to continue to use the expression 'mental defective' whatever the stigma it accords the bearer.

(a) The 'Open Door' Policy:

The primary purpose of the 1913 act[17] was to secure the detention of high grade defectives who had not previously been subject to detention. In its administration some injustice arose

thereby, but it regulated the practice in relation to mental deficiency for nearly half a century until the very considerable changes introduced by the Mental Health Act, 1959. Under that Act the status and classification of all patients was reviewed and an 'open-door' policy was adopted. As a result many who were formerly in institutions – where they could do little harm – went back into the community. The Report of the Ministry of Health for the year 1961[24] comments on the "most striking comparison with the past". The report discloses that until 1958 virtually all those people who would be classed under the 1959 Act as suffering from severe subnormality were subject to compulsory detention, whereas by 1961 only 17% of subnormal and 11% of severely subnormal hospital patients were compulsorily detained in hospital. There were, of course, many in both categories who were informal patients, but not subject to detention. This change must reflect itself in the number of homicide cases in which the defence of diminished responsibility on the grounds of 'weakness of intellect' becomes relevant.

(b) Mental Age:

Under the 1899 Act,[14] educational tests came to be applied, in particular Alfred Binet's Intelligence Quotient Tests. These tests had been devised to distinguish between those of a low mental level who could be educated and thus be enabled to become partially self-supporting and those who could not. The tests set out in terms of a percentage the relationship of the person's mental age as ascertained by the tests to his actual age. The

severely subnormal do not, at best, have an I.Q. of more than about 49, or a mental age of more than 7 years. In the case of the subnormal, their I.Qs. range from about 50 to 69, their mental ages from 8 to 11 years.

It should be stressed when considering the concept of mental age that the system has its limitations. It will be appreciated that the extremes are not confined to intelligence and may involve also the emotions and volition but we have as yet no means of measuring any variation from normal nor are we entitled to assume that defects of intellect imply accompanying defects of like degree in emotion and volition. Thus an adult mental defective with a mental age of nine years may differ in important respects from a normal child of nine; notably in sexual and emotional development. It is just this difference which may lead to the commission of crime. The adult will be in some ways more mature and may have learnt a simple trade and may be able to earn a living; but he is exposed to much more violent and dangerous temptations. When the instincts and emotions of an adult are combined with the insight and understanding of a child, it is inevitable that the power to control those instincts should be defective, and should on occasion fail altogether, with results which could prove disasterous. On the other hand, we have in relation to criminal responsibility conclusive presumptions regarding children under ten years of age and rebuttable presumptions for those between ten and fourteen; but there is at present no statutory provision about the criminal responsibility of adult mentally retarded persons other than the provisions under the

Mental Health Act, 1983, to refrain from sentencing such a person on conviction and sending him to an institution instead.

(c) Fitness to Plead:

Another important aspect of mental deficiency – but reflecting itself in the reduction of possible cases, particularly in Scotland[25] – arises from the fact that mental deficiency is a constitutional condition; a person who is a mental defective at the time of the offence will be in the same state at the time of the trial, so that the question of his mental state can also be raised in the context of fitness to plead or other disability in bar of trial.[26] This issue may be raised by his own counsel, by the Crown or by the judge ex proprio motu. It is decided on expert evidence by a jury specially empanelled for this purpose. The question to be resolved is whether or not the accused is able to understand the charge and the difference between pleas of guilty and not guilty. His ability to challenge jurors, to instruct counsel and to follow the evidence. It will be readily appreciated that the severely subnormal will rarely possess this ability and on occasion it might apply to the subnormal. If there is a finding that the accused is under 'a disability' and 'unfit to plead' the court makes an order that he be admitted to the hospital specified by the Home Secretary, where he will be detained without limitation of time.[27] The power to discharge him being exercisable only with the Home Secretary's Consent.

In exceptional cases "where the prisoner's condition"(and this includes severe subnormality) "is such that immediate removal

to a mental hospital is necessary, that it would not be practicable to bring him before a court, or the trial is likely to have an injurious effect on his mental state"; the Home Secretary may order that the prisoner should be detained in a hospital, if he is of the opinion, having regard to the public interest, that it is expedient to do so

If a mental defective charged with murder is found fit to plead, and at his trial, raises the issue of insanity, the immediate problem is that it is difficult to argue that his condition arises from a 'disease of the mind' within the M'Naghten Rules. After all mental deficiency, which is a failure of development of the intellectual faculties, is not a 'disease of the mind' in the ordinary sense of the word. It is not a matter which has been resolved in the Reports although there is little doubt, that in practice, the M'Naghten Rules have often been so interpreted so as to include mental deficiency, at least in cases where the other conditions laid down by the Rules are fulfilled.

Where such a defence is rejected, it would appear that this is rather on the basis that the jury are not satisfied that the accused did not know the nature and quality of the act or did not know that it was wrong. Certainly, at the level of the feebleminded, it is difficult to say that he did not know that he was killing his victim or that he did not know that what he was doing was forbidden by law. He may not appreciate how wrong the act was or understand its full implication and his powers of resisting sexual or aggressive impulses and controlling his actions may have been very much less than that of a normal man.

In Scotland, there is little doubt that mental deficiency may, and usually does, constitute diminished responsibility. We have had occasion in Chapter V to deal at length with the case of M'Lean[28] before Lord Deas in 1876, where the pannel was apparently an imbecile and the judge told the jury that "diminished responsibility by weakness of intellect might be taken into account". In two murder cases in 1882, Brown[29] and Gove[30], Lord Deas left the question of diminished responsibility to the jury. Both pannel were proved to be of 'weak intellect but not insane' (there was no suggestion of intoxication or other self-inducded abnormality). In the one case, a woman killed her two year old illegitimate child and in the other, a man killed his father for no reason that the report discloses. The jury took a merciful view in each instance and prison sentences resulted.

More recently in Scotland, despite the wording of the 'Savage Formmula', a sign has been given by Lord Clyde when, in H.M.Adv. v. Breen[31] — a case in which a plea was offered in bar of trial and rejected — he referred to mental deficiency as presenting "a close analogy to the familar appeal for a recommendation to leniency or mercy on the ground of the accused's proved weakness of mind".

In view of the Legal Draftsman's intention to include those who were subnormal within section 2 and his deliberate choice of words, taken from the 1913 Act, then any accused who can be properly termed mentally defective must automatically enjoy the benefits of the section; for the substantial impairment element must impliedly also be covered

(d) The Cases:

The first case in the English courts in which the diminished responsibility defence was successful was that of Shirley Campbell[32] at Leeds Assizes at the end of April 1957. Miss Campbell was alleged to have strangled a sixteen month old baby – on impulse – while child-minding. At her trial the defence offered evidence of Campbell's abnormally low intelligence coupled with a "very deep-seated mental conflict associated with her colour", and a gross personality defect of a psychopathic nature. The jury found her not guilty of non-capital murder but convicted her of manslaughter under section 2, and a life sentence was imposed.

In an almost identical case the next year, a schoolgirl, Doreen Baird[33], was charged with strangling a sixteen month old child, while baby-sitting. The jury found her guilty of manslaughter under section 2, the defence having called evidence by a consultant psychiatrist to show that Baird was of low intellect and emotionally immature. She was sent to an Approved School.

In yet another case involving the strangling of a baby, Fredrick Dewhurst[34] was acquitted of non-capital murder before a jury at Liverpool Crown Court in April 1958, but found guilty of manslaughter under section 2. The medical evidence here disclosed "incomplete development of the brain which could result in explosive outbursts". He was sentenced to five years imprisonment.

Thereafter there were a string of cases – largely unreported save in the popular press. Helen Sterry[35] at Hereford Assizes in February 1958, where the verdict was manslaughter; there being extensive evidence given of the accused's mental instability

and abnormally low intelligence. It was claimed that she was certifiable under the Mental Deficiency Act 1913. Rosalia Garofalo[36] found guilty of manslaughter under section 2 at Hertford Assizes on October 7th.1958. The successful defence plea being one of mental defectiveness coupled with emotional stress.

Ronald Derek Sowle[37] had been subject to orders under the Mental Deficiciency Act for most of his life. He had a mental age of eight. In 1958 he was reclassified and subsequently released himself from a mental hospital. He appeared at Bristol Assizes in June 1961 on an indictment for murder which alleged that he had strangled a young girl with her own scarf. At the trial, where Sowle was found guilty of manslaughter, two doctors gave evidence that the accused suffered from severe subnormality warranting his detention. A section 60 order under the Mental Health Act 1959 was made by Mr Justice Melford Stevenson, with a restriction, under section 65, for forty years.

On the other hand, Alan Victor Willis[38] was unsuccessful with the plea at Liverpool in November 1961 and was found guilty of murder although a doctor called for the defence had said that Willis was on the borderline between subnormal and low average. His mental age was that of a child of eleven. The same plea was successful in the case of Percy Alfred Blanks[39] who shot a farm worker. The medical evidence, from two doctors, was that Blanks had an I.Q. of 75 and was little above the highest level of mental deficiency envisaged by the Mental Deficiency Act, 1913 and that he had a mental age of ten or eleven. He was detained under sections 60 and 65 of the Mental Health Act, 1959.

James Heron,[40] who was said to be "below average intelligence" and was "withdraw and isolated", secured a verdict of manslaughter under section 2, at his trial for murder at the Old Bailey in September 1962. He had struck and killed a newsagent in the course of petty theft. On the other hand, Ada Patricia McCusker,[41] who had spent seventeen years in a mental hospital since the age of nineteen and had been certified as feebleminded, was convicted at Manchester Crown Court in December 1962 for her part in a joint murder. She was one of those discharged with the change of policy in 1960 and at that time was said to have a mental age of eleven. She had not raised diminished responsibility at her trial.

Joyce Mitchell,[42] a mental defective, strangled her son of fifteen months – also a mental defective – while a patient at a mental hospital. She was found guilty of manslaughter under section 2 at Nottingham Assizes; and there, on the 6th. December 1962, she was ordered to be detained at a mental hospital under section 60 of the Mental Health Act.

It would seem that in most cases the low intellect was usually combined with another factor.

The only case to reach the Reports, in which mental deficiency was a major topic, was that of Roy Speake.[43] Speake, a lad of twenty, was tried at Hereford Assizes for the murder of a young boy who he had tried to assault indecently and then beaten to death when the boy threatened to tell his father. The medical evidence before the court was that the accused was just on the certifiable side of the border of feeblemindedness. This from four

doctors, one of whom claimed that Speake had a mental age of nine. The defence evidence was not rebutted by the prosecution and Speake was acquitted of non-capital murder but convicted of manslaughter under section 2. He was sentenced to life imprisonment.

On appeal to the Court of Criminal Appeal,[44] it was submitted that as the evidence showed Speake was a mental defective, and was under twenty-one, the proper sentence was an order under section 8 of the Mental Deficiency Act, 1913. In dismissing the appeal, it was held that, the finding that the appellant was a person with diminished responsibility did not necesarilty mean that the jury had formed the view that Speake was a certifiable mental defective; and further, the trial court was not bound to take one of the courses open to them under section 8 — that section was permissive. What the appeal court and the trial judge had in mind was, of course, that under the Mental Deficiency Act there was some risk of premature release without any control by the Secretary of State. Where there was a likelihood of some danger to the public, the course adopted was preferred.

From our later samples in the 1980s it would appear that psychiatrists, now with experience of section 2, make their diagnosis rather more comprehensive. Although low intellect may be one of the factors, there were virtually no cases where subnormality was the only symptom mentioned in their reports.

The most obvious sign that mental retardation was the major diagnosis (although not infallible as schizophrenics also go) was where the hospital order for patients from the south and

south-east were assigned to Rampton rather than Broadmoor. An example of such a case is that relating to David Simpson,[45] a youth of 18, who killed an old man who shared his squat. There was a history of subnormality and his mother livedin a hospital, being similarly graded. He was sent to Ramptom without limit of time. About the same time we find John Daniels[46] being sent to Rampton from Lewes Crown Court and Chander Patel[47] from St Albans but the diagnosis in these two cases is not clear.

It is interesting to note that all these later cases are shown to be based on accepted pleas whereas in the early stages of the Act, despite the favourable wording in section 2 to those of weak intellect, the cases quoted all went to trial.

Conclusion:

That before 1957 the mentally deficient on a homicide charge had to depend on being held to be unfit to plead or utilise some provision of the Mental Deficiency Act for they could not claim M'Naghten insanity

That under section 2 they now have the protection of a finding of diminished responsibility for specific provision has been made to cover them.

In practice in recent years, some 80 per cent of homicide cases which result in findings under section 2 now stem from accepted pleas of guilty,[48] yet the records of such cases rarely indicate subnormality as a major factor. So that, despite this favourable wording and the avowed intention of the drafters of the

section to embrace this category, it is clearly not sought on these grounds by legal practitioners or psychiatrists. Perhaps the majority in this group are still siphoned off by their 'disability in bar of trial'.

FOOTNOTES

Chapter VII

1. Professor Nigel Walker, rather whimsically, includes gifted mathematicians and Closed Brethren under this head and draws the distinction between those mentally abnormal and those 'mentally disordered'. Walker and McCabe, Part 1, p. 1
2. Gowers' Report para 212
3. Murder, H.O. Research Unit Report, H.M.S.O. London 1961. Table 31
4. Ibid Table 32
5. International Classification of Diseases – W.H.O. Geneva. Nineth Revision 1978
6. Formerly known as mentally defective and so known in Scotland until 1983 when replaced by term 'mental handicap' [Mental Health (Amendment)(Scotland) Act, 1983 S.8(1)]
7. Statute De praerogativa regis – 1325
8. Factuorum naturalium
9. Compos mentis suae
10. A. Fitzherberbert, La Nouvelle Natura Brevium, 1567 ed. (London 1534) p. 233
11. Swinburne Testaments Part iv (1590)
12. Both tests of an earlier age (de Granville - Bracton) for lack of discretion in children.
13. 33 & 34 Vict. c 75
14. 62 & 63 Vict. c 32
15. Radnor Commission
16. Cmnd. 4202 (1908) H.M.S.O. London
17. 3 & 4 Geo. v, c. 28
18. Section 1(1) of the 1913 Act. Subsequently amended by the Education Acts 1944 and 1948.
19. Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, 1954-57. Also known as the 'Percy Commission'. Report: Cmnd. 169 HMSO London 1958)
20. 7 & 8 Eliz II. c. 72
21. Section 4
22. 1983 c. 20
23. Section 1 (2)

24. Report of the Ministry of Health for 1961. H.M.S.O. London 1962

25. Gowers Commission (1954) pointed out – proportion of prisoners charged with murder who are found unfit to plead is very much higher than in England and although the criterion of unfitness to plead in England and Scotland might theoretically be identical, in practice it was much less strictly applied in Scotland. (para 221)

    Chiswick (1978) using annual criminal statistics points out: Between 1971 and 1975 the annual percentage of offenders admitted under hospital orders in Scotland, who had been found unfit to plead, was consistently between 30 % and 40 % compared with a figure in England of between 3 % and 4 % [(1978)132 Brit.J.Psychiat.598]

26. Governed now in England by the Criminal Procedure (Insanity) Act 1964. (c.64). In Scotland by the Criminal Procedure (Scotland) Act 1975 (c 21) and called "insanity in bar of trial"

27. Loc.cit. - s.5 as amended by Courts Act 1971 s.5 & Sch 11

28. (1876) 3 Coup 334

29. (1882) 4 Coup 596

30. (1882) 4 Coup 598

31. 1921 J.C. 30 at p. 38

32. Unreported - Leeds Assizes. April 26, 1957

33. Ditto Sheffield Assizes. Nov. 27, 1958

34. Ditto Liverpool Cr.Court April 10, 1958

35. Ditto Hereford Assizes Feb. 19, 1958

36. Ditto Hertford Assizes Oct. 7, 1958

37. Ditto Bristol Assizes June 29, 1961

38. Ditto Liverpool Cr.Court Nov. 11, 1961

39. Ditto Essex Assizes March 1, 1962

40. Ditto C. C. C. Sept. 17, 1962

41. Ditto Manchester Cr.Court Dec. 3, 1962

42. Ditto Nottingham Assizes Dec.6, 1962

43. Ditto Hereford Assizes June 12, 1957

44. (1957) 41 Cr. App. R. 222

45. C.C.C. No.83/1599 Dec.21, 1983

46. Lewis Crown Court Dec.13, 1983

47. St Albans Crown Court March 6, 1984

48. Varying figures are provided in the literature [Walker, Dell] – but of this order. Our own observations confirm this figure

Chapter VIII

Mentally Abnormality – The Mentally Ill

(a) Schizophrenia.

Schizophrenia is one of the most frightening and disabling conditions which a human being can experience yet it is also one of the commonest mental disorders in our community. Neustatter puts the figure at one per thousand of the population[1]. Professor Batchelor supports this estmate and remarks that it is the diagnosis of about three-quarters of the long-term patients in mental hospitals in this country[2]. The Professor goes on to comment that "it constitutes one of the most serious disease problems of western civilisation"[3]. Despite its prevalence, it is one of the most difficult of the mental disorders to define or describe.

Originally known as dementia præcox that is: a disorder of young persons ending in dementia, the term was dropped early in this century when it was realised that it was the same term used to describe the dementia of organic brain disorder, which is quite different. In the latter there is deterioration of memory or orientation, reason and judgment. The dementia of the schizophrenic is essentially a process of withdrawal from the world of realities. In any event, many of the patients did not show a permanent dementia and the disorder did not always start early in life, nor did it necessarily involve loss of mental capacity. Further, the term 'dementia præcox' implied a fairly hopeless prognosis and encouraged 'therapeutic nihilism'[4].

Schizophrenia in its most typical form consists in a slow

deterioration of the entire personality. Heredity plays some part. The essential characteristics are two-fold: 'incoherences' in the train of thought and 'incongruities' in the sufferer's mood.

Appearance and behaviour may at an early stage be entirely normal, but a vagueness in the subject's talk may reflect the underlying thought disorder. The patient may himself have difficulty in dealing with abstract ideas (a phenomenon known as 'concrete thinking') or be pre-occupied with vague scientific or mystical ideas. At a later stage, a lack of connection between ideas becomes apparent (known as 'Knight's move' i.e. one forward and two to the side). In its severest form the structure and coherence of thinking is lost so that utterances are jumbled (this known as 'word salad').

Abnormalities of mood are common — and take several forms. There may be sustained abnormalities such as anxiety, depression, irritibility or euphoria but essentially there is sustained emotional indifference or responce, sometimes known as 'flattening of affect'[5]. Again, there is an 'incongruity of affect' where the response is not in keeping with the mood that would ordinarily be expected — thus: excellent news is greeted with a mournful air or some breavement learned of with nothing more than a fatuous giggle.

Other symptoms can be present. In almost all cases insight is impaired[6]. Auditory hallucinations are also common, ranging from noises to whole conversations, from unobtrusive to very severe, causing great distress to the sufferer.

There are various sub-groupings which manifest themselves in muteness, ridigity (catatonic schizophrenia); untidiness and fatuous behaviour (hebephrenia); and elaborate delusional systems, ususally of a

persecutory nature (paranoid schizophrenia). But what is important is that the disease has two distinct stages. An acute stage from which many sufferers recover and a chronic syndrome in which the main features are apathy and social withdrawal, and from which few patients recover completely.

Dr. Henry Rollin, when examining the relationship of offenders to non-offenders among the intake at a South London hospital (Horton Hospital Epsom) discovered that 83% of his patients with a previous criminal record came within this particular diagnosis[7]. Marjorie Wallace writing in the Times newspaper, without quoting an authority, stated that one-third of the prison population fell within this category[8]. It is not however the commonest psychiatric diagnosis for abnormal homicides – that honour now lies with the depressive disorders[9].

It is also clear from the researches of Dr. Rollin that "the hapless, shiftless chronic schizophrenic, who is quite incapable of supporting himself in socially acceptable ways, resorts to crime"[10]. But these crimes are mainly of nuisance value only, secondary to their unemployed condition. The normal corrective or retributive measures imposed by the courts makes no impact on their criminality nor do their sojourns in mental hospitals succeed in alleviating their psychosis. Here one is talking, not of the 'open-door' but of the 'revolving-door'.

There remains however a smaller group of schizophrenics who are positively dangerous when at large from either of the two systems. Violence can occur because the patient is impetuous, disturbed or excited and this is much feared by the man in the street. In fact, homicide is rare with this group – self-mutilation is much more frequent – and about one schizophrenic patient in ten dies by suicide[11]. Where

homicide does arise it is usually a reaction to delusions of persecution (pace.M'Naghten); or where, along with other bizarre characteristics, sexual perversions of a dangerour type have developed. If morbid jealousy is associated with the condition of schizophrenia it is particularly dangerous because of the risk of the offence being repeated.

It will be appreciated that the absence of insight and the inability to feel the appropriate emotion can result in the most brutal acts, which may well appear motiveless to others; and which, after the killing, can be followed by the minimum of attempt to cover up its traces or may be confessed to the police in detail in a calm and detached manner.

A trial which reflects the older attutudes was that of James Frank Rivett at Norfolk Assizes in January 1950, before Mr Justice Stable. Rivett was clearly – on strong medical evidence, a schizophrenic – but his condition availed him nothing. Three English juries, in succession, were not prepared to say – on that same evidence – that his disorder relieved him of criminal responsibility.

The accused had stranged his girl friend. He freely admitted the killing and gave himself up to the police. He displayed no emotion and proffered no motive.

On his first appearance at the assize court the issue of his fitness to plead was placed before a jury who, after one hour's deliberation and in the face of the evidence of two medical men, found him so fit. On his second appearance, nominally for trial, the issue was tried again. On the same evidence reinforced, in the accused's favour, by evidence from the Medical Officer at Brixton Prison, the jury had no

hesitation in finding Rivett fit to plead. In the trial that followed, a third jury found him guilty of murder, rejecting the only possible defence – insanity. He was sentenced to death. An appeal[12], in which Lord Goddard, the Lord Chief Justice, gave the leading judgment[13], was dismissed.

(i)The Cases:

When we turn to consider actual cases before the English courts in the period 1957 – 1962; cases charged originally as murder in which schizophrenia was a major factor; a different picture emerges. There were 34 such cases[14]. In 15 the accused was found unfit to plead on account of that condition. In 10 the jury returned a verdict of 'guilty but insane'. In 4 there were convictions for murder despite the efforts of the defence to urge a reduction to manslaughter under section 2. In only 5 was diminished responsibility established to the satisfaction of the court. It should be noted that, in 3 of of these the prisoner was ultimately sent to Broadmoor.

The five cases in which the plea was successful under section 2, mentioned above and perhaps a good indicator of the true position, were those of Albert Richard Frith[15] who beat his mother to death and was sentenced, at the Old Bailey on 29th.October, 1957, to seven years imprisonment, being subsequently transferred to Broadmoor under section 2 of the Criminal Lunatics Act 1884.

It was a step-mother who was killed by Graham Geer[16]. Evidence of developing schizophrenia was given by doctors from Brixton Prison and the Maudsley Hospital. At Kent Assizes on 11th. March 1958 Geer was sentenced to life imprisonment.

Life imprisonment, imposed at Leeds Assizes on 18th. July, 1958,

was the fate of Lawrence Johnson[17] who was said to be of low intelligence and schizophrenic. Johnson had battered to death a fellow-lodger who had interfered in a quarrel which had developed between Johnson and another lodger in a Salvation Army hostel.

A quarrel over the cooking and heating arrangements in his room prompted Conrad Lecointe[18] to stab his landlord and the landlord's son to death. At Birmingham Assizes, before Mr Justice Winn on 13th. December 1960, Lecointe was found guilty of manslaughter under section 2 and sentenced to ten years imprisonment (on each count concurrently). The medical evidence in support of his claim of diminished responsibility was to the effect that he was suffering from schizophrenia associated with a persecution complex. He was transferred a year later to Broadmoor.

In the other successful case, Amelia Caroline Rowley[19], there was also a transfer to Broadmoor. Rowley had been sentenced to life imprisonment at the Central Criminal Court on 18th.July 1960, for strangling one of her three children, then aged five years. the medical evidence was that she was suffering from a schizophrenic illness with a severe depression. She had delusions both of persecution and about her health. The first signs of mental abnormality had appeared after the birth of her third child, prior to this she had been said to be fond of her children. The child killed (Stephen) was not, of course, the last born.

In recent years there have been a sprinkling of cases in which schizophrenia has been the main diagnosis. Patrick O'Connor sent to Rampton on a hospital order on May 7, 1980 for the killing of his father, his plea to manslaughter on the grounds of diminished responsibility being accepted; was the only such case at Maidstone Crown

Court in the period under review. At the Old Bailey in 1983 there were five such cases[21] out of a total of twenty-two under section 2 in that year. Of these, Christine Harrold in March; Kasura Karunaratne in April; Kenneth Thomas in May and Trevor Sephestene in July all immediately pleaded to manslaughter and had their pleas accepted. Garfield Williams, who was before Mr Justice Talbot in March, stood trial for murder but the finding of the jury (after a five day trial) was that he was guilty only of manslaughter. The court papers disclose that the solicitors for the defence had advanced a plea to section 2 before the trial and the indications are that the D.P.P. was not averse to this. It should be noted that it was a case in which a four year old child had been thrown from the balcony of a fifth floor landing where, while playing with his bike, he had for some reason annoyed the accused. It seems therefore that this was another case like 'Sutcliffe' where the judiciary felt that the matter should be aired in public.

In the event, Williams was sent to Broarmoor on a hospital order without limit of time. This was the order made in each of the four cases mentioned above.

In each of the earlier cases – at a time when hospital orders were not possible – life imprisonment or a long period of custody was imposed; to be followed quickly in most cases by a transfer to Broadmoor. Protection of the public was clearly an overriding consideration at the sentencing stage but sight was not lost of the medical condition of this category of prisoner.

In the later cases, a hospital order was made immediately, but this at a time when hospital orders were being used less and less.

(b) Epilepsy:

To the layman the word epilepsy is a familiar one and conjures up a picture of a person subject to the repeated occurence of convulsive attacks. The terms 'grand mal' and 'petit mal' well known, and while perhaps medically outmoded, still circulate. More accurately however, epilepsy is a symptom rather than a disease. The essential feature is not the compulsive seizure or disturbance of consciousness but the episodic sudden disturbance of function in the brain and central nervious system.[22] These are usually characterised by recurring fits, of which there are three main variants: motor, sensory and psychomotor. Clearly this is an organic disease in which some destruction of actual tissue of brain has affected the individual's capacity for self-control or moral judgment.

While many 'fits' have no demonstriable cause (Idepathic), genetic factors are important as are head injuries inflicted at birth or subsequently and infections.

Surveys made in general practices in 1960 reveal a prevalence of 4-6 per.1000 in the United Kingdom;[23] whereas in a survey of the prison population of England and Wales undertaken by Professor Gunn of the Institute of Psychiatry, in 1964[24], it was found that it contained a somewhat greater proportion of epileptics [7-8 per 1000, especially the 25-44 age group] than did the general population. The survey showed that while they were over-represented among violent offenders, they were in practice no more aggressive than other prisoners but that they had a greater rate of psychiatric distubrance. No explaination was found for the disproportionate numbers.

Lombroso was particularly interested in epileptics. He believed,

at one stage, that the relationship between genius and insanity was reflected in the relationship between the moral imbecile and the criminal and that the 'uniting bond' which connected them was epilepsy. All born criminals, he believed, were epileptic although not all epileptics were born criminals[25].

Nineteenth century medical psychology believed firmly in the link between epilepsy and insanity. Henry Maudsley, influenced by Morel, the French psychiatrist, was one of its strongest exponents in his 'degeneration theory of nervious disorder'. In practice, the courts and juries were not so ready to accept the link and Dr. Roger Smith has attributed this to the fact that most of those subject to violent fits were probably institutionalised already and that severe epileptic fits through common were observed only in asylums. This is true also of research which would be confined to those already in asylums.[26] .

Sullivan thought that homicide was *par excellence* the crime of the epileptic.[27] Most frequently the killing is committed in the phase of obscured consciousness which follows or replaces a fit. Some cases are not the outcome of a homicidal impulse but the continuation in an inappropriate or muddle form of the action in which the epileptic was engaged at the moment of the epileptic seizure – e.g. with a knife in his hand cutting bread.

The importance of the electro-encephalgram [E.E.G.] which provided scientific and precise evidence of the existence of epilepsy and its type cannot be overstressed. This is the sort of positive evidence that juries can understand and readily accept. While E.E.G. cannot exclude the diagnosis of epilepsy it willl normally confirm fairly accurately the type and site of origin. This evidence can be

supplimented by physical examination and a consideration of the history of the patient, which is important.

Attacks in which there is a loss of consciousness, with first rigidity and then rhythmic movements of the limbs and body are an obvious sign of an underlying defect of the brain and if they are severe and frequent they must weaken and damage the brain so that in time it will be totally destroyed and the victim can properly be classed as chronically insane and institutionalised.

The concept of diminished responsibility is an ideal way to deal with the majority of cases in which epilepsy is a major factor.

Firstly, there are the cases where epilepsy is present and has resulted in subnormality, either due to genetic factors or more commonly cerebral damage at birth. This fits within section 2 by the very nature of the text of the section.

More generally, it would appear to apply - but, of course, each case must rest on its own merits — where there is evidence of epilepsy, based on satisfactory clinical testimony and E.E.E. readings, yet little direct causal link between the epilepsy and the crime. It is reasonable to assume, particularly where there is no clear motive or the epilepsy has appeared in later life, that the epilepsy has played some part and that the underlying abnormality of the brain may have provided the link in the chain of causation leading to the offence. It would be reasonable to give effect to this assumption under the doctrine of diminished responsibility.

It should be remembered that, with proper and regular medication, the majority of epileptics lead useful lives in the community. It should also be borne in mind that there is no benefit to

be obtained by in-patient treatment save in a few chronic cases and as a result hospital orders are not a normal disposal for section 2 offenders when the only factor is epilepsy.

(i) Automatism:

Automatism (that is to say: the state of a person, who though capable of action, is not conscious of what he is doing) is perhaps the most important aspect of epilepsy from the forensic point of view. Indeed, the term is used medically only in relation to epilepsy and refers to a state of clouding of consciousness which occurs during or immediately after a seizure and during which the individual retains control of posture and muscle tone without being aware of what is happening around him. It can occur as a direct result of a seizure discharge or immediately after termination of such seizure discharge.

Behaviour during epileptic automatism varies greatly from subject to subject and in the same individual on different occasions. While it is possible for serious violence to occur this is extremely rare for if the consciousness is clouded, the accused is rarely sufficiently coordinated to undertake complex aggressive acts. More usually, what occurs is that there is a continuation of a harmless activity in which the accused was engaged before the epileptic seizure. From the legal point of view – and it is essentially a legal concept – automatism can cover many forms of automatic behaviour and, in addition to epileptic or post epileptic states would include clouded states of consciousness associated with organic brain disease and concussional states following head injuries. It can also occur as a result of metabolic disorders such as anoxia and hypoglycaemia, while it is accepted that automatic acts

can occur during sleepwalking.

Because of the last named, a division has developed in that where the alleged automatism has developed from 'a disease of the mind' the defence is one of insanity within the M'Naghten Rules and the outcome Broadmoor; whereas acts done while sleeping or sleepwalking or as the result of concussion would be considered 'non-insane automatism' and success with this defence result in an acquittal.

The division is made by applying the definition of 'disease of the mind' put forward by Lawton L.J. in R. v. Quick:

> "The fundamental concept is a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease".[28]

On this basis psychomotor epilepsy would be treated as insanity.

There are two interesting (and in their own way important) cases arising from that very condition which are worth noting. In the first of these: Bratty v. Attorney General for Northern Ireland[29] the accused gave a detailed account of the victim's death to the police and so the killing was not in issue. The defence put forward non-insane automatism on the basis of epilepsy with a view to securing a not guilty verdict. In the alternative, the defence was insanity within the M'Naghten Rules. The trial judge left the issue of insanity to the jury and they rejected it. So far as automatism was concerned he withdrew this on the basis that the evidence on which it rested was the same evidence in support of the insanity defence – as a disease of the mind. The Appeal Court in Northern Ireland and the House of Lords both agreed with this course of action.

In Bratty, Lord Denning (in the House of Lords) took the

opportunity to indicate that the defence of 'automatism' should be limited to "acts done while unconscious, and to spasms, reflex actions and convulsions". He also commented that: "any mental disorder which has manifested itself in violence and is proved to recur is a disease of the mind". A statement which hardily bears critical examination.

The other case: R. v. Sullivan,[30] again a House of Lords decision, clearly defines the status of epileptic automatism in English law. Sullivan was charged with a [redacted] assault which had occurred while he was recovering from a minor seizure caused by petit mal epilepsy. The evidence was that it is rare for such a sufferer to act violently during an epileptic seizure; that such violence is unpredictible and that the suffered was not conscious of what he did. The defence sought the trial judge's ruling that this evidence showed only non-insane automatism but he ruled against them, holding that the evidence indicated a disease of the mind. To avoid a mandatory committal to a mental hospital, the accused changed his plea and was given a psychiatric probation order.

The Court of Criminal Appeal and the House of Lords affirmed the judge's ruling on the insanity point. Again a member of the court, took the opportunity to comment on the definition of 'a disease of the mind'. Lord Diplock (with the others concurring) expressed the opinion that 'a disease of the mind' for legal purposes might manifest itself only for a short time and might be either organic (as in epilepsy) or functional. Clearly the ratio decidendi of the case is capable of fixing an insanity verdict on epileptic sufferers who inflict harm in what is clearly an accident. Indeed it may be difficult for a court in the future to close its eyes to the insanity issue where psycho-motor

epilepsy is pleaded by an accused. One way out of this dilemma in the case of a homicide would be to seek the acceptance of a plea to manslaughter on the grounds of diminished responsibility.

(ii)The Cases:

When we again examine the cases of abnormal homicide which came before the courts in the period 1957 to 1962,[14] we find that there were only 7 in which epilepsy was put forward, whether by the prosecution or the defence, as a significant factor. None was found unfit to plead, but juries did return verdicts of guilty but insane in 2 cases. Those of Kell and Grant. In one case a submission of diminished responsibility was rejected. In the remaining four cases manslaughter under section 2 was the finding.

It is clear that the doctrine has a significant part to play. Those four would have hanged prior to 1957 or had to seek the mercy of the Royal Prerogative. The element of precision which is so desirable in the criminal law is amply demonstrated in the treatment accorded those epileptics who kill.

When Samual Ronald[31] appeared at Durham Assizes in October 1958, for the murder of his landlady, his plea to manslaughter on the grounds of diminished responsibility was not accepted and he was ultimately found guilty of non-capital murder and sentenced to life imprisonment. A consultant psychiatrist for the defence gave evidence of a history of epilepsy and it was suggested that the killing might have taken place during an epileptic attack. This aspect of the evidence was refuted by the prosecution medical witness.

George Kell,[32] also at Durham Assizes one year later, was

ordered to be detained when he was found guilty of capital murder but insane. He had attacked a drinking companion. At his trial, two doctors gave evidence to the effect that he acted in a frenzied epileptic fury – that he was subject to such fits and while in them "became unconscious for several minutes". That "he was insane within the legal sense".

George Grant[33] who drowned his own child , was found guilty but insane at Liverpool Crown Court on Feb. 12th. 1960 and sent to Broadmoor. The medical evidence was that he had suffered from epilepsy and had, at one time, been detained in a mental hospital.

The first successful finding under section 2 in relation to epilepsy did not occur until June 1959, more than two years after the Homicide Act came into force. A jury at York Assizes found that William Reynolds[34] mental responsibility in the killing of his common law wife was "diminished as a result of an epileptic fit at the time of the offence". From what we know of the disease this is a strange finding and may represent some attitude of the jury or more correctly, may represent a proper finding for the wrong reason. There is always the difficulty of the inadequate newspaper report. Reynolds was sentenced to life imprisonment.

The vagaries of the jury trial plagued Rodney William Bailey,[35] as they did Rivett.[12] At Leicester Assizes three experienced doctors said that Bailey, who had battered a girl to death in a country lane, came within section 2 in that he was abnormal owing to epilepsy. The prosecution did not dispute that. The presiding judge (Mr Justice Hinchcliffe) told the jury that the evidence was "all one way". Yet, on May 25th. 1961, the jury brought in a verdict of guilty of murder. The Court of Criminal Appeal allowed Bailey's application[36] and substituted a

finding of manslaughter under section 2.

Brian Abbott[37] had problems of a different kind. A verdict of manslaughter under section 2 was duly returned at Essex Assizes on June 26th. 1962 where Abbott was charged on indictment for burning the victim of a robbery to death. There was ample evidence from the prison medical officer of a history of epilepsy. As he was under age he was ordered to be detained during Her Majesty's pleasure. This was found by the Court of Criminal Appeal to be the wrong order and detention for life was substituted

For killing his young son, Ronald Eastwood[38] received a life sentence from Mr Justice Phillimore at Leeds Assizes on May 10th. 1962. Eastwood was said to suffer from epilepsy, was of low intelligence, was uncontrollable, unstable and very violent. On this evience the jury found him not guilty of murder but guilty of manslaughter, under section 2.

(c) Mania and Depression::

We talk of man's feelings when we describe his response to any stimuli and the feeling of pleasure or pain experienced in consequence is spoken of as an emotion.

There can be changes in the nature of emotion towards anxiety, depression, elation and anger. These are often accompanied by physical changes. while changes in emotion are found in all kinds of psychiatric disorder. They are the central features of the affective disorder and of the anxiety state.

Similarly, a degree of elated mood is part of normal experience at times of good fortune but again the exaltation and exaggerated

feeling of euphoria can be out of harmony with environment and circumstances. This state is known as mania. The chief symptoms are restlessness, overactivity and extreme volubility while train of thought may be logical.

To the layman, mania is almost synonymous with madness yet it is the hypo-manics – that is the milder cases – who generally commit crimes and even then not crimes of violence for they are usually too excited to stop and think out any elaborate crime. As a condition it is the antithisis of depression. Depression, like anxiety, is of course an emotional condition with which practically all normal people are familiar. Many people are subject to swings of mood, being at one time on the top of their form, and at another somewhat under the weather _ the predominant theme , unhappiness.[39]

Severe depression in a normally well person tends to follow only upon some correspondingly severe cause for grief, such as breavement or intense disappointment in some aspect of life. Indeed if there were no reaction we would consider this abnormal in itself. It is when the depression exceeds, both in severity and in duration, what can normally be regarded as appropriate to the individual's life situation that it is regarded as a form of mental illness.

It is probably the commomest illness with which the psychiatrist has to deal; indeed the milder forms of depression are so commonplace that the gravity of these states is not always fully appreciated. Using the Registrar-General's figures and a survey carried out amoung general practitioners, Professor Nigel Walker[40] has estimated that roughly twelve in every thousand of the population would be diagnosed by a modern English psychiatrist as mentally disordered. Of those twelve; the major

groupings would be: that three would be mentally retarded and a further three would be suffering from depression; of the remainder, the only sizeable group would be two as schizophrenic. Among the group suffering from depression, the majority would be women.

Where there are outside circumstances, for example: grief, worry – to cause the depression it is called '*reactive*'. Where there is no apparent cause and it appears in persons predisposed by temperament, it is known as '*endogenous*'.

Generally speaking, the spectrum of symptoms of depression is wide. Disturbance of sleep is an important symptom as is the 'act of ruminating' that is to say, thinking of the particular problem to the exclusion of all else. There is usually a loss of appetite. A combination of these three leads to irritability alongside a general picture of apathy and listlessness, particularly in a general falling off of works standards, standards of personal habits of dress and cleanliness and in a withdrawal from communal life.

Neurosis can be thought of also as exaggerated forms of the normal reaction to stressful events but in a milder form than psychosis. Anxiety states and neurotic depression are clearly medical conditions and must be, at times, regarded as constituting a disease of the mind and logically would seem to qualify under section 2 but they must rarely be of such severeity to satisfy the criteria that it must substantially impairs the accused's responsibility.

It has always been clear that the intention of the legislature was to exclude killings that are motivated merely by such emotions as jealousy, rage and hatred.[41]

Deprssion is unique among the disorders that we have

considered in that it is amenable to treatment. Indeed in many of the case files studied the accused had recovered completely at the time of the committal proceedings. The removal of the initial worry, the security and ordered environment of the prison (usually the hospital wing) and the course of treatment prescribed by the prison medical staff frequently secure an almost complete recovery. The onset of the disorder may, in any event, have been equally rapid. This phenomenon presents difficulties to the reporting psychiatrist who is of course required to express an opinion on the accused's condition at the time of the offence – but based on subsequent observation.

That this transformation has taken place affects the pattern of sentencing. A hospital order is rarely appropriate. A period in custody is the norm

The general efffect of a depressive illness is to rob the sufferer of his judgment. Very often he can no longer properly judge either the reason for his action or the consequences of that action. This immediately brings him into conflict with the criminal law in a myriad of minor ways. Traditionally, depression is often claimed to be the root cause of recurring bouts of shoplifting; but it is in homicide that the depressive illnesses make their major impact.

Of the murder cases dealt with at Maidstone Crown Court in the years 1980 to 1984 ten resulted in findings under section 2. Of those ten, eight owe their success to 'depressive illnesses' in one form or another. The pattern is repeated at the Old Bailey. But this has not always been the mould. For example: For the whole Country in the first nine months of the Homicide Act there were twelve cases under section 2 recorded. Only four of these could be attributed to the affective

disorders.[42] Not a large proportion.

Confirmation of this picture is also evidenced when one looks at other studies in this field. For example: R. D. Mackay used 14 cases, mainly from the years 1966 to 1977 to consider the position where provocation was also an element in diminished responsibility cases.[43] In each case there had been a psychiatric investigation and this was examined. 8 of those cases were clear cases of depression, mainly of the re-active form. Again, Neustatter[44] looking at his own list of cases involving persons charged with murder – 15 in all – and pointed out that depression existed in eight of those, six being of the severe reactive type.It has been estimated[45] that of those who die as a result of suicide about nine in every ten have some form of mental disorder – the most frequent of these being depression. This is not surprising; it reflects the gravity of depression as an illness and the intensity of suffering. It is, of course , a short step for those intending suicide to feel thet they must take their loved ones with them. Alternatively, a depressed person may well kill someone they love to spare them the imagined sufferings that they foresee. The mother with the young child who, unable to face life herself, does not want to leave the child in the world alone.

It was not always so, for, as we have had occasion to comment, the M'Naghten Rules are concerned solely with defects of cognition or intellegence. The affective or emotional factors must therefore be excluded and a successful defence of insanity on these grounds an impossibility. But it is obvious that emotion is of prime importance. In violence, reason is for the most part absent, it is the surge of emotional energy which determines the impulsive act.

A search of the Reports, for the years prior to 1957, fails to disclose any case where the plea was sustained where the underlying cause was depression (under that name). For example: in R. v. Dixon,[46] where a soldier shot his corporal at a time when he was said to be suffering from depression, it was held that this was not enough to amount to insanity (despite defence counsel reading long passages from Taylor's Medical Jurisprudence to the court). Even in the more relaxed days before the M'Naghten Rules depression did not qualify. We recall Hale's word' about "melancholy persons, who for the most part discover their defect in excessive fears and griefs". These persons he thought qualified only for "a partial insanity of mind".[47] And so section 2 has given effect to his words and come full circle.

This is not to say that those with defects of emotion who stood trial for murder invariably had their defence of insanity rejected. East writing in 1936[48] stated that out of 300 persons committed to Broadmoor for homicide, 62 were diagnosed as suffering from melancholia. The circumstances of a homicide trial that involved a severely depressed person were often of the type which aroused the sympathy of the jury if not the judge; e.g. a mercy-killing. In the event of the failure of the jury to avoid the gallows, the Home Secretary would also be greatly influenced by those same circumstances to grant a reprieve.

A bold move was made by Mr Justice Shearman in 1924[49]. He had before him a young woman who was indicted for poisoning her child at a time when she was clearly sane but was distressed by the death of her husband. The direction to the jury was that if they thought she was so disraught that she did not know it was a dangerous thing to administer poison, they might find the accused guilty of only manslaughter. He

admitted his ruling to be "an innovation"; and it failed.

Conclusion:

That so far as schizophrenia is concerned, what is demonstrated by both the early and late cases is the closeness of this illness to M'Naghten insanity, indeed Christine Harrold might well have qualified under the M'Naghten Rules for, in addition to striking her victim on the head with a hammer, she returned later to open up the body and remove organs which she stored in her kitchen.

Accordingly the cases would seem to suggest that the doctrine of diminished responsibility has a limited role to play where schizophrenia is present. It is apparent that the doctrine need not supplanted insanity as a convenient plea where there is adequate medical evidence to support insanity – which appears to be easily proved in such cases, although diminished responsibility must be doing so in recent years where the number of insanity cases per year can be counted on one hand. These are probably the former insanity cases most usually absorbed by section 2.

Epilepsy, on the other hand, has benefited directly from the introduction of Section 2. In the past the courts were not ready to accept this condition as fully within M'Naghten insanity. The obvious inference which can be drawn by way of a causal link between a proved epileptic condition and a homicide, particularly where there is no motive for the killing, is clear and this condition fits squarely within the concept of diminished responsibility.

Even more startling has been the benefit that has accrued to those whose condition is diagnosed as 'depression'. Now the largest

classification under mental conditions yet pre-1957 it would have carried no weight in the courtroom and even in the first few years of the Homicide Act was not a common factor. It is perhaps notable in being one of the few conditions where recovery may have been achieved before trial.

That it is in the field of 'affective conditions' that perhaps the greatest social good has been achieved by section 2.

FOOTNOTES

Chapter VIII

1. W. Lindsay Neuetter, Psychological Disorder and Crime, p. 55 andThe Oxford Textbook of Psychiatry p. 228 quote widely differing figures extracted from various sources in the literature. The difference arising mainly from the difficulty of definition

2. Henderson and Gillespie's Textbook of Psychiatry,

   Regard should also be had to the 'open-door' policy post 1959 and that many more are at liberty in the community

3. Ibid

4. Ibid p. 247. Professor Granville Williams considers the term schizophrenia itself unfortunate because it misleadingly suggests hysterical dissociation and multiple personality. Criminal Law - General Part 2nd. Edn. p. 443.

   The layman thinks of the term 'split personality'. The literature studiously avoids any reference to this expression. It stems from the writings of Eugen Bleuler

5. This is also important in relation to 'irresistible impulse'

6. A WHO table (of 1973) of the most frequent symptoms of acute schizophrenia set out in the Oxford Textbook of Psychiatryat page 231 shows lack of insight to be present in 97% of cases. Auditory hallucinations in 74%, suspicousness 66% and delusions of persecution in 64%

7. H. R. Rollin, The Mentally Abnormal Offender and the Law, p. 30

8. The Times, December 16, 1985 p. 10

9. Oxford Textbook of Psychiatry p. 731

10. Rollin supra p. 52

11. Oxford Textbook of Psychiatryp. 270

12. (1950) 34 Cr. App. R. 87

13. Ibid p. 88. A judgment criticized by implication by Mr Justice Edmund Davies in Jennion

14. Based on material in Morris & Blom-Cooper, A Calendar of Murder

15. Unreported Central Criminal Court. Oct. 29, 1959

16. ditto Kent Assizes. March 11, 1958

17. Unreported Leeds Assizes. July 18, 1958

18. ditto Birmingham Assizes. Dec. 13 1960

19. ditto C.C.C. July 18, 1960

20. Original court papers - Maidstone Crown Court

21. ditto - Old Bailey

22. Henderson and Gillespie p. 420

23. Pond, D.A. & al. 1960 Epilepsia 1, 285-99

24. Gunn, J. Epileptics In Prison

25. Lombroso. C, Crime: Its Causes and Remedies

conversely: Hibbert, The Roots of Evil at page 267 notes that the Romans valued the blood of criminals as a cure for epilepsy

26. Roger Smith p. 101

27. Sullivan, W.C., Crime & Insanity p 133

28. (1973) 57 Cr. App. R. 722 at p 734

29. (1962) 46 Cr. App. R. 1 & 1963 A.C. 386

30. [1983] 2 All E.R. 673 H.L.

31. Unreported Durham Assizes. Oct. 25, 1958

32. Ditto Ditto Oct. 22, 1959

33. Ditto Liverpool Crown Court. Feb. 12, 1960

34. Ditto York Assizes. June 19, 1959

35. Ditto Leicester Assizes May 25, 1961

36. (1961) Crim. L.R. 828

37. Unreported Essex Assizes. June 28, 1962

38. Ditto Leeds Assizes. May 10, 1962

39. Neustatter su pra p. 64 et seq.

40. Walker, part I p 4

41. Government statement on Second Reading of the Bill. 560 H.C. Debs. (5th. Series) 1154 & 1252. (Nov. 15, 1956)

42. Based on examination of court records and material in Morris and Blom-Cooper.

43. R.D. Mackay, "Pleading Provocation and Diminished Responsibility together". (1988) Crim. L.R. 411

44. Neustatter "Psychiatric Aspects of Diminished Responsibility in Murder" (1960) 28 Med.-Leg. J. 92

45. Oxford Textbook of Psychiatry p. 401 quotes a number of surveys

46. (1869) 11 Cox C.C. 341

47. Hale P.C. Vol 1 Ch. iv p. 30

48. East, W.N. Medical Aspects of Crime

49. R. v. Beadon (unreported), Daily Telegraph, Sept 12, 1924

Chapter IX

Mentally Abnormality – Other Conditions

(a) Psychopaths

We now turn to one of the most interesting groups to fall within the scope of our study; a group whose disturbence is evident, not so much of their own minds or feelings but in their conduct and in the adjustment they make between themselves and the rest of the world. The most commonly used term to cover this condition is that of 'psychopathic personality' – for want of a better alternative.

There is no adequate comprehensive definition partly because the aetiology is obscure and partly because the clinical description of the sufferer can only be rendered for the most part in terms of deviant social behaviour.[1]

The principal features of the condition are a lack of feeling towards other humans coupled with a liability to act on impulse and without forethought. Under suitable circumstances a combination of these two will lead to aggression and viciousness; for which there will be neither a sense of shame or remorse. An underlying aspect is an inability to profit by, or use experience, and thus to respond to punishment.[2]

A frequently quoted descriptive definition is that of Sir David Henderson, a well known authority in this field:

> "The term psychopathic state is the name we apply to those individuals who conform to a certain intellectual standard, sometimes high, sometimes approaching the realm of defect but not amounting to it, who, throughout their lives or from a comparatively early age, have exhibited disorders of conduct of an anti-social or asocial nature, usually of a recurrent or

> episodic type which in many instances have proved difficult to influence by methods of social, penal and medical care and treatment or for which we have no adequate provision of a preventative or curative nature. The inadequacy or deviation or failure to adjust to ordinary social life is not mere wilfulness or badness which can be threatened or thrashed out of the individual so involved but constitutes a true illness for which we have no specific explaination".[3]

Sir David widened his definition by indicating that he would divide the various types of psychopaths into three broad groups: the predominantly aggressive; the predominately inadequate and the creative. This was to be a very rough guide and was in no way exhaustive — each group embracing a wide variety of different types of behaviour.[4]

It should be understood that the psychopath is not insane, neurotic or mentally deficient. That he is a person with an abnormal character and temperament, who differs from the normal person only quantitively or in degree and not qualitively. That the psychopath is distinguished both from the subject of mental disease (the psychotic) and from the neurotic by exhibiting no definite point in time at which his abnormality began but by remaining always fundamentally the same sort of person. The Gowers Commission used a simple analogy to illustrate the difference. In the psychotic: we suppose that there has be some radical breakdown in the machinery; in the neurotic: we suppose that it is working badly though perhaps only temporarily so; in the psychopath: we suppose that the machinery was built to an unusual pattern or is faulty.[5]

The inability to adapt to normal social requirements leads to anti-social conduct and it is a short step to crime. The 'inadequate' psychopath is a prime candidate for the offences of dishonesty. Emotionally unstable, unreliable, impulsive, cold and callous, the 'aggressive' psychopath can be responsible for many serious crimes of

violence and brutal murders.

The Committee on Mentallly Abnormal Offenders,[6] sitting under the chairmanship of Lord Butler during the period 1972 to 1975, considered the position of the psychopath in some detail, particularly in relation to the Mental Health Act of 1959.[7] The Committee traced the history of the condition from roots which they discerned in the time of Hippocrates and Plato; in the distinction then drawn between Divine madness and Natural madness, or in other words, betweeen mental disorder due to psychological causes and that due to medical disease. They also observed that, as civilisation advanced, influenced by church teaching, there were shifting values of community opinion in regard to feelings for other humans, self-interest, offences against property or person or remorse and there was a greater realisation of the influence of environment upon personality characteristics – a view evidenced by the work of Locke, whose teachings influenced much of eighteenth century philosophy and Jean Jacques Rousseau in particular.

Locke also influenced the French physician Philippe Pinel, who in 1801, suggested that though the reason might remain intact, one could yet be insane if the faculties of emotion or will were disturbed. Pinel called this '<u>manie sans délire</u>'.[8] Pinel gave a graphic description of what would now be termed an aggressive psychopath, of which the specific features were; on the one hand: absence of any appreciable alteration in the intellectual function, perception, judgment, imagination or memory. On the other: pronounced disorder of the affective (emotional) functions and bland impulse to acts of violence.

James Pritchard in his <u>Treatise on Insanity</u>,[9] published in 1835, conceded that Pinel was right – that there could be madness without

delusions. He went on to popularise the notion of a defect or disease of the moral faculty [i.e.the emotional faculty] which he saw as a "morbid perversion" of the natural feelings, affections, inclinations, tempers, habits moral dispositions and natural impulses – without any remarkable disorder or defect of the intellect or knowing or reasoning faculties, and particularly, without any insane illusions or hallucinations. By the time that Despines' Psychologie Naturelle[10] appeared in 1868 and expressed a view that, although a criminal might not be insane in the legal sense he could still be 'morally mad', the problem of the moral imbecile had been carefully studied, both in Europe and the United States, by Mayo and Isaac Ray among others. It was by then established that the behaviour complained of was, in the modern sense, immoral and so it remained until 1959.

It should be appreciated that, parallel to this movement, there was another influence stemming mainly from French writers, who believed that these disorders were the result of hereditary degeneration. The process of degeneration – a physical disorder – would, according to its exponents, show increasing severity in successive generations. In its most severe form the degeneration would lead to subnormality of intelligence; in its less severe form to moral defects, and that physical and psychological stigmata could be identified in both. In this way, underlying ideas about the nature of mental defectiveness and of moral defectiveness became linked and for more than one hundred years created an illustion in which there appeared to be a close association between moral defect and mental defectiveness and classed it as a form of subnormality.

Later in the nineteenth century it was realised that mental

illness could occur without delusions and the affective disorders and schizophrenia were recognised as separate entities. Nevertheless, he concept of moral insanity continued, although in a more restricted sense, and the strands were pulled together by Henry Maudsley when he commented "that many cases of moral insanity will be found to be connected with more or less congenital moral defect or imbecility". Maudsley also remarked on the current dissatisfaction with the term and referred to it as "a form of mental alienation which has so much a look of vice or crime that many people regard it as an unfounded medical invention".[11]

In 1891, Kock[12] introduced the term 'psychopathic inferior' to cover this same group of people with marked abnormalities of behaviour yet an absence of mental illness or intellectual impairment, while Kraepeln in one of the later editions of Lehrbuch der Psychiatrie[13] changed the term to 'psychopathic prsonality', mainly to avoid the overtones adversely implied in the use of the earlier term.

The assumed link between anti-social behaviour and low intelligence greatly influenced the Radnor Commission[14] and the legislation that stemmed from their deliberations and in the Mental Deficiency Act of 1913, section 1.[15] there appeared as definition of 'moral imbecile' as follows:

> "persons who, from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has little effect."

This was amended in 1927[16] to read:

> "persons in whose case there exists mental defectiveness coupled with strong vicious or criminal propensities and who require care, supervision and control for the protection of others"

Neither section mentioned intelligence, in fact, but it was read into the the Acts by those who had to administer them, and as Professor Nigel

Walker aptly puts it, "it was necessary to be stupid as well as wicked".[17] Thus many whose anti-social behaviour had psychological origins were excluded. And this was the position, in theory if not in practice, until the Homicide Act came into force in 1957.

The teachings of Sir David Henderson popularised the term 'psychopath' in Britain and Sir David gave very full evidence to the Gowers Commission. As a result, the Report of that body was to state that it considered that "psychopathy" was a "necessary and legitimate concept".[18]

The Royal Commission on the Law Relating to Mental Illness and Mental Deficiency - 1954-1959, proposed in their Report issued in 1959,[19] that in future legislation, for broad administrative purposes, three main categories of patient should be recognised. They grouped together the higher grade feeble minded and moral defectives. This group would be the 'mentally disordered' patients as against the 'mentally ill' and the 'severely subnormal'. The group, they considered, would comprise patients suffering from a personality disorder which did not make them severely subnormal but was recognised medically as a form of mental disorder resulting in abnormal aggressive or inadequate social behaviour. For this group the Commission recommended the term 'psychopathic personality' although they recognised that their use of the label was wider than the normal sense in which it was ordinarily used. The psychopathic group would include those patients who would be classified under the then existing law as feeble-minded persons or moral defectives and who were severely subnormal; and those inadequate aggressive psychopaths who were not considered certifiable as mentally defctive or as 'of unsound mind'. The psychopathic group would thus

include a sub group in which one sign of the patient's personality disorder would be that the intelligence was well below average, and a second sub group in which the intelligence was near or above average. The differentiation was made to allow for suitable forms of care for each sub group.[20]

Although the recommendations of the Royal Commission were largely implemented in the Mental Health Act of 1959[7] those related above were greatly altered in the hands of the legal draftsman. The three groups of the Report became four in the Act. The Government of the day had sought to provide a definition in broad social (rather than medical) terms and so to achieve this the draftsman sub-divided the first group, which the Commission had entitled 'psychopathic disorder' into 'subnormality' and 'psychopathic disorder' in the Bill. The causal association had at last been broken.

After considerable revision in its passage through Parliament, section 4(4) of the Act defined psychopathic disorder as

> "a persistent disorder or disability of mind (whether or not including subnormality or intelligence) which results in abnormally aggressive or seriously irresposible conduct on the part of the patient, and requires or is susceptible to medical treatment"

It should be noted that this is not a single specific diagnosis but a generic term used for legal purposes which may cover a number of specific diagnosis. It may be a vague definition but at least one exists where there was none before.

The Percy Commission[21] heard a great deal of evidence regarding the feasibility of treatment for psychopaths – some of it possibly optimistic. Its successor, the Butler Committee,[22] had the contrary experience. "The great weight of evidence presented to us tends to support the conclusion that psychopaths are not, in general treatable,

at least in medical terms".[23] The net result of this finding being that that part of the definition which related to treatment was expunged – initially by the Mental Health (Amendment) Act, 1982, but reflected in the definition set out in section 1(2) of the Mental Health Act, 1983.[24]

This modification of the definition has had an enormous effect on the mode of disposal of psychopaths convicted by the courts.

At any time, mental hospitals have been reluctant to accept psychopath. They are difficult when kept together in any numbers and a disturbing and disruptive influence if mixed with other patients. Their conduct can often gain a hospital a bad name in a locality while the failure to effect a cure reflects on the competency of the hospital.

In the period between the two committees there was this profound change in professional opinion about the treatability of psychopaths and doctors reporting to the courts recast their reports to give effect to this change in thought. Whereas in the sixties three-quarters of the men described by prison medical officers as personality disordered and not ill were recommended for hospital orders; ten years later, the proportion had dropped to just less than half.[25] The matter went thus: In the early days, the medical officers merely indicated that the individual was "psychopathic within the meaning of the Mental Health Act 1959" and a bed – usually in a Special Hospital – was immediately provided. By the later period, while still diagnosing personality and psychopathic disorders, they would add "but he does not fall within the definition of the Mental Health Act 1959 for he is unlikely to be susceptible to treatment". Whereas initially the DHSS had automatically accepted mentally ill homicides from the courts without question, later, in the face of overcrowding, particularly at Broadmoor, the department

began to scrutinise admissions.[26] There was no dispute about the need for special security but the other test – was he in need of treatment ? – could and was rigorously applied.

(i) The Scottish Experience:

What could be said of the Scottish experience in these matters.

In the first place, the Mental Health (Scotland) Act[27] of 1960 did not contain the definition of psychopath provided in the English Act the previous year. The Committee on Mental Health Legislation set up by the Department of Health for Scotland recognised the need for special penal institutions for psychopaths, but were averse to creating a special statutory class of psychopath.[28] The Scottish Act did however obliquely recognise the psychopath as someone who was mentally ill and as having a special place in the criminal law. For example, section 23 (which dealt with the compulsory detention of persons who were not criminals) excluded from such detention persons over 21 whose mental illness is 'a persistent disorder which is manifested only by abnormally aggressive or seriously irresponsible conduct'. On the other hand, section 55 (now sections 175 and 376 of the 1975 Act)[29] empowered a court to order the detention of a convicted person 'suffering from mental disorder of a nature or degree which, in the case of a person under 21 years of age would warrant his admission to hospital'. This would include a person who suffered from psychopathic personality. In practice it is so used. Thus, where a person charged with murder is found on medical evidence to be a psychopath and suitable for detention in the State Mental Hospital (at Carluke), the Crown bring him before the court on the reduced charge of culpable homicide[30] and he is detained under section

175 of the 1975 Act with an unlimited restriction on his discharge. It matters not that, on the decided case of Carraher,[31] as a psychopath he is not considered to be of diminished responsibility.

We have had occasion, when tracing the development of the doctrine in Scotland to comment on the case of Carreher v. H.M.Adv. It is the most important of the reported decisions on the doctrine in that country — It was a full bench decision. Firstly: it indicated some limiting of the doctrine for the future.[32] This was only the culmination of a trend which had been current for nearly half a century. Secondly: it is authority, and is frquently quoted as such, for the proposition that psychopathic personality does not fall within the doctrine of diminished responsibility. Thirdly: there was obiter regarding the place of drink in a plea of diminished responsibility.

The case arose out of a murder in Glasgow in November 1945. The panel stabbed a drunken soldier with a wood chisel. Armed with the chisel, he and another man lay in wait for a group of men, including the victim, with whom the other man had had a fight earlier in the evening. He himself had not been involved in the earlier fight, but went out to help taking the chisel, which he described as "the very tool for them". The facts were not in dispute[33] and it was accepted that Carreher had taken a great amount of drink on the evening in question. A plea to culpable homicide on the grounds of diminished responsibility was advanced on his behalf on two grounds: that he was a psychopathic personality — a clinical condition which per se, it was averred, inferred diminished responsibility; or alternatively: that psychopathic personality taken in association with the drink he had consumed also inferred diminished responsibility. The Crown disputed these claims.

The trial took place before Lord Russell and a jury in the High Court at Glasgow in February 1946. The presiding judge, in the course of his direction to the jury on the issue of diminished responsibility, directed them to dismiss from their minds the evidence about drink unless they thought that the panel was so drunk as to be incapable of forming an intention to killl or do grievious bodily harm, but he left it to them to consider whether the medical evidence warranted a verdict of culpable homicide in place of a verdict of murder on the grounds of diminished responsibility. The jury found Carreher guilty of murder. He was sentenced to death.

The appeal came before a full bench. It was observed that this was the first time that a case in which the mental state known as psychopathic personality had come before that court.[34]

At the trial, two doctors had given evidence for the defence that the accused was in the category of psychopathic personality — a clinical condition. Dr. M'Niven, after describing what he meant by the term (which was in standard form as set out earlier in this chapter) went on to say:

> "If you ask me, does the accused know the difference between right and wrong intellectually, does he know if he commits a wrong act he is liable to punishment, I say yes, and he is responsible, but if responsibility means that he has a proper appreciation of his social responsibility, that he is capable of resisting temptation, capable of exercising control over his actions, then in my opinion he is not as responsible as a normal person".[35]

The medical evidence for the prosecution was given by a Dr Scott who had had Carreher under direct observation daily since his arrest three months before. That witness, in the words of the trial judge, gave no countenance to the suggestion that there was diminished responsibility in Carreher.[36]

In the opinion delivered by the Lord Justice-General dismissing the appeal, (and concurred in, without additional comment, by Lords Carmont, Jamieson, Stevenson and Birnam), after reviewing the direction given to the jury, Lord Normand said:

> "I also have great doubt whether it was evidence of anything approaching to mental disease, aberration or great peculiarity of mind, and whether the judge might not have been warranted in withdrawing the issue from the jury. The court had a duty to see that trial by judge and jury according to law is not subordinated to medical theories; and in this instance much of the evidence given by the medical witnessses is, to my mind, descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility".[37]

He added:

> "It may be timely to say also that little weight attaches to medical evidence which is based on a history of the panel's conduct about which no evidence has been led before the jury".[38]

and so the law stands.

But we should bear in mind the words of Lord Keith when addressing the Medico-Legal Society on this very subject:

> "There can be no permanence of ideas in a matter of this kind, we move with the times. It must be left . . . to the Scottish courts to consider what weight judges or juries may give to evidence of psychopathic traits in a particular individual".[39]

It must be remembered that Carraher's case arose in the immediate postwar years and the influence for law and order which affected so many of the English homicide cases of that period, and in particular those presided over by Lord Goddard, would apply equally to this case. Carraher was unfortunate also, in that only a short time before his case was decided the first execution for 17 years[40] had been carried out in Scotland, and of a man less of a habitual criminal than Carreher.[41]

From the evidence given to the Gowers Commission it is clear that psychopathic personality is by no means an unverified hypothesis of

a few psychiatrists but is a condition recognised by those same medical men whom Lord Cooper was prepared to accept as proper judges of an accused's fitness to plead.[42] The Royal Commission gave as their opinion: "the available evidence justifies the conclusion that in many cases the responsibility of psychopaths can properly be regarded as diminished".[43] Scottish criminal law merely awaits a suitable case to set the record straight.

(ii) The English Scene:

In view of the favourable line taken by the Gowers Commission in regard to psychopathic personality, yet bearing in mind the attitude of the Scottish jurists, the English courts were in something of a dilemma. They had also to bear in mind that the part of section 2 of the Act within parenthesis, namely: 'whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury' was apparently introduced in order to exclude from the ambit of the defence, persons who committed murder as a result of sudden outbursts of passion or rage, but who were not otherwise mentally abnormal.[44]

In the first case to come before the English courts in which the plea of diminished responsibility was raised – that of Shirley Campbell[45] at Leeds Assizes in April 1957 – psychopathic personality was pertinent. Campbell was charged with the killing of a child while she was baby-minding and convicted of manslaughter under section 2. The defence offered evidence, not only of Campbell's abnormally low intelligence and of a 'very deep-seated mental conflict associated with her colour' but a gross personality defect off a psychopathic nature.

She was sentenced to life imprisonment.

The defence of diminished responsibility due to psychopathic personality arose again when Ronald Patrick Dunbar[46] appeared at Newcastle Assizes in May 1957. Dunbar, a young man of 24, broke into a house occupied by an old lady. She was 82, very deaf and something of a recluse. In searching for money he entered the room in which Miss Mewes was sleeping. She awoke and fearing recognition he hit her with a lemonade bottle. She died from her injuries. The defence was based solely on section 2 and evidence was offered that Dunbar was an 'inadequate psychopath' with a long history of instability. The prosecution produced medical testimony to rebut this. The issue was left to the jury who convicted of capital murder and Dunbar was sentenced to death. His appeal[47] to the Court of Criminal Appeal was successful and a imprisonment for life was substituted by that court. The appeal turned only on the question of a misdirection on the onus of proof and his mental condition was irrelevant to the outcome.

R. v. Spriggs,[48] which has already been the subject of comment on another topic, was another case where the defence at the trial was that the defendant was suffering from diminished responsibility within the meaning of section 2(1) of the Homicide Act 1957. It was said by the defence that Spriggs was emotionally unstable and a psychopathic personality. The prosecution had maintained that the accused had a high intelligence quotient and could not therefore be suffering from an abnormality of mind. There was, however, a great deal of medical evidence to show that he lacked ability to control his emotions and all the medical evidence showed that he was suffering from abnormality of mind to some degree. It was submitted that a person could be normal

intellectually but thoroughly unstable emotionally and of diminished responsibility. The jury rejected this defence and Spriggs was convicted of capital murder and sentenced to death.

The appeal which followed, and failed, turned on the inadequacy of the judge's direction on 'abnormality of mind'. Counsel for the appellant, in his address, submitted that the inference to be drawn from the judgment of that court in Dunbar is that evidence that a person is a psychopath, that is: a person unable to control his emotions, is evidence on which it can be found that that person is suffering from abnormality of mind and that the jury at Spriggs' trial should have been directed that it is not right to equate 'mind' with 'intellect', which is only one of the functions of the mind.

R. v. Matheson[49] is the first reported decision in which the nature of psychopathic personality has been directly considered in relation to the defence of diminished responsibility. At the trial there was no dispute on the facts, Matheson had killed a young boy with whom he had had a homosexual relationship. As he stole the boy's wage packet he was indicted for capital murder. The defence was one of diminished responsibility, and again, there was no dispute about the medical evidence, which was unanimous on the part of three doctors called for the defence. They detailed a long history of mental problems and how he had spent most of his life in a series of penal institutions as well as being a voluntary patient in a mental hospital. Matheson was obsessed by his sexual perversion (sodomy) and had tried to get treatment for it but had been largely unsuccessful owing to his abnormally low intelligence. The Senior Medical Officer of Durham Prison said that the accused had a psychopathic personality and that his mental development

was that of a ten year old boy. The prosecution did not challenge the opinions that the defence doctors had formed.

Despite this overwhelming evidence the all-male jury chose to convict Matheson of murder. It required the Court of Criminal Appeal to reduce the conviction to manslaughter under section 2 and to impose the comparitively long sentence of 20 years imprisonment. But as J.E.Hall Williams commented at the time: "The case of Matheson gives a promising and sympathetic lead in the direction of recognising psychopathy"[50].

Bernard McCrorey[51] was another who contended at his trial that he fell within the provisions of section 2. He appeared at Manchester Crown Court in July 1962 for the murder of the landlady of a public house, at the time when he stole a small amount of cash from the till. The issue at the trial was whether or not the killing was premeditated or the result of a sudden uncontrollable explosion of violence. The accused had a long mental history and also an equally long history of violence with attempts at suicide. Two psychiatrists said that he was abnormal for inherent causes; he was a psychopathic personality who was liable in moments of crisis to explode into violence. The prosecution doctors, while recognising McCrorey's mental illnesses, thought that the impairment was not substantial. In the event, the appeal court quashed the conviction for murder which had resulted and substituted a verdict of manslaughter under section 2 and a sentence of life imprisonment. There had been a misdirection when, due to a slip of the tongue by the trial judge (Mr. Justice Lyell), the word "not" had inadvertently been inserted in a vital sentence.

(b) Premenstrual Syndrome:

Making a relatively late appearance in the factors which have resulted in a successful verdict under section 2 has been the condition known to the medical profession as premenstrual syndrome.

The courts have always been aware of the role that physiology might play in the commission of certain crimes by women. There are reported instances as early as 1833[52] and there is of course the well-known case of Martha Brixey,[53] a servant-girl, who in 1845 cut the throat of one of her employer's children. She immediately told her master what she had done. She was perfectly conscious of the act she had committed; treated it as a crime, and showed much anxiety to know whether she would be hanged or transported. There was however no motive for the deed. The jury were told that menstrual disorders (from which she was said to be suffering) could be comparable with insanity so as to exonerate from criminal responsibility. The girl was acquitted on the grounds of insanity.

Despite some fifty years research the basic facts about premenstrual tension are still disputed. Its symptoms remain controversial and there is no agreed treatment. Some doctors give progesterone, others give diuretic drugs while others again suppress the cycle by continuous treatment with oral contraceptives. The syndrome is closely associated in Britain with the name of Dr Katharina Dalton who first published a paper describing the syndrome in detail as long ago as 1953. Dr Dalton claims that treatment to correct the deficiency of progesterone will almost invariably prevent the symptoms occurring.

Dr Dalton was closely involved in the first of the cases in which the defence was raised: that of Sandra Craddock[54] at the Central

Criminal Court in 1980. Craddock had stabbed a fellow barmaid to death. It was claimed that, at the material time, the accused was suffering from P.M.S. Although only 28 she had thirty previous convictions, largely for criminal damage and assault. She had made a number of serious attempts at suicide. Many psychiatrists had examined her over the years but declared that she was not suffering from a mental disorder. It was her father who had noticed that all the offences had occurred in 28-day cycles. Tests revealed extreme hormonal imbalance in the form of progesterone.

Sentence was put back for three months to await the results of treatment with progesterone. According to the medical evidence these results were excellent. The defendant's personality completely stabilised and was likely to remain so while she continued to receive progesterone. The Recorder of London then made a probation order with a condition of treatment. In November 1981, Craddock, now known as Sandie Smith[65], appeared again before Judge Miskin charged with threatening a police officer and carrying a knife. She pleaded not guilty and submitted that on this occasion the dose of progesterone had been reduced resulting in the commission of the crime. A finding of not guilty was entered and the Learned Recorder indicated that he would merely continue the probation order. An attempt was made to have P.M.T. accepted as a substantive defence but this was rejected by the trial judge. An appeal against this ruling was firmly rejected by the Court of Appeal,[66] the proposition that Pre-menstrual Tension (as it is more commonly called) was a defence to 'any' crime was "wholly unacceptable" to their Lordships.

The day following Smith's fresh appearance at the Old Bailey, Mr

Justice Purchas, sitting at Norwich, accepted a plea to manslaughter on the grounds of diminished responsibility tendered on behalf of Christina English.[56] Her lawyer claimed that she was suffering from "an extremely aggravated form of premenstrual condition" and had been so troubled since 1966. The charge had been murder of her lover whom she had killed with her moter car. She had had a row with the man when he said that he was going to meet another woman. She followed him in her car and drove at him. Dr Dalton presented the medical evidence in this case also. The judge indicated that he was satisfied that the defendant had committed the offence in "wholly exceptional circumstances" and granted Mrs English a conditional discharge and a driving disqualification. As there was evidence of premeditation in that she had threatened to run him over much earlier in the day the whole thing is rather extraordinary.

A teenager who killed her mother with a hammer, Anne Reynolds,[58] also walked free from a life sentence as the result of evidence of P.M.T. but only after the intervention of the Court of Appeal, Criminal Division. At the original trial at Northampton Crown Court she had been found guilty of murder and sent to youth custody for life. This is not surprising for the evidence reveals that she lied to the police and told them that there had been a burglary and that her mother had been killed by an intruder in her absence. Fresh medical evidence provided by Dr Dalton that her responsibility was substantially diminished by pre-menstrual tension and post-natal depression was supported by the Medical Director of Broadmoor, Dr John Hamilton, and resulted in the appeal judges (Stocker, French and McKinnon) deciding that the murder conviction now had to be regarded as "unsafe and

unsatisfactory". A Psychiatric Probation Order was substituted.

Following the appeal in Smith, pre-menstrual tension must now be considered to act only in mitigation in crimes other than homicide; and in murder can be an extenuating circumstance which diminishes responsibility and changes the character of the offence but it does not exonerate at any time.

(c) Senility

It is characteristic of our modern urban society that we live longer and accordingly an increasingly large proportion of our population falls into a group which, for convenience, we may call'the aged'.

There is no specific age at which the physical functions of the body begin to show a decline but it is probably in the range of 50 – 60 years. The rate of change is slow and can vary from individual. This is also the case with what we may term the psychological factors: changing mental abilities (e.g. memory) and more importantly, changes in attitudes and emotion. Since the prevalence of mental disorder, and in particular dementia, increases with age, senility could be an important condition in relation to homicide.

Perhaps the most significant factor in relation to the aged is the tendency to emotional depression and the impulses which go with that mood, tending initially to suicide but which can extend in extreme cases into other homicidal acts.

Murder is normally the province of the young and fit. In the first five years of the Homicide Act only six persons over 70 years appear to have been charged with murder. Of these, four were found unfit to plead [Thomas Bennett[59] John Batten[60] John Ingham[61] and William

Holding[62] All had killed their wives or the woman that looked after them.] One was found after trial to be insane [Ernest Smedley,[63]] In the remaining case, Mrs Margaret Hebden,[64] aged 71, strangled her invalid husband "to end his misery". The constant nursing had depressed her and the jury found that the verdict should be under section 2. A hospital order was made by the Lord Chief Justice (Lord Parker).

The link with spouse and with a mercy-killing theme seems to be the norm. For example: Taking the year 1981, a plea to manslaughter under section 2 was accepted from Arthur George,[65] aged 88 years for a stabbing. A section 60 order was made. In the same year, Fred Platt,[66] aged 86, was sentenced to one day's imprisonment for stabbing his wife, again a plea being accepted. In the following year also, Joseph Page,[67] aged 70 years, having cut his wife's throat, had a plea to manslaughter in terms of section 2 accepted and a hospital order was made. The pattern is repeated in 1983 with James Flanaghan,[68] a man of 80, who strangled his wife and after his plea was accepted was placed on three years probation. It will be appreciated that these men represent a tiny percentage of the yearly total of those charged with murder and women are rarely numbered among them although they probably represent a majority of the population at that age level.

Conclusion:

That psychopaths, who form a large and important group, have quickly come within the doctrine of diminished responsibility as a result of the decision in Matheson in contrast to the long standing resistance faced by this group in Scotland. This is a substantial and worthwhile move on the part of the English courts who seem to have experienced

none of the difficulties feared by the Scots and certainly have retained control in the hands of the judiciary so far as any danger might arise from premature release on purely medical grounds.

It would appear that a new and significant field is opening up for P.M.T. in relation to the doctrine but at this early stage the high profile of Dr. Dalton aided by the media distorts the picture.

That in contrast, the elderly who kill attract little media attention but the cases that do appear in the press display a great similarity with predominating those factors which require the application of Section 2 to achieve a just and merciful result

FOOTNOTES

Chapter IX

1. The problems of providing the precise status of psychopathic personality who is also a legal offender described in detail:
   Wootton, B. Social Science and Social Pathology, Ch. 8.
2. Psychopathetic Disorders Ch. 1
3. Henderson, D. K. Psychopathic States p. 16
4. Ibid
5. Gowers' Report paras 396 & 395
6. Set up Sept. 21 1972.
   Interim Report April 20, 1974 Cmnd. 5698 H. M. S. O. London (1974)
   Final Report August 14, 1975 Cmnd 6244 H. M. S. O. London (1975)
7. 7 & 8 Eliz II, c. 72
8. Traité Medico-philosophique sur l'alienation mental ou la manie
9. Pritchard, J. C. Treatise on Insanity and other Disorders affecting the Mind.
10. Despine, Psychologie Naturelle
11. Maudsley, H. Responsibility in Mental Diseases, pp 170 & 171
12. Koch, J. L. A. Die Psychopathischen Minderwertigkeiter,
13. Kraepelin, E. Manic depressive Insanity
14. Cmnd 4202 H. M. S. O. London (1908)
15. 3 & 4 Geo. V, c. 28
16. 17 & 18 Geo. V, c. 33
17. Walker, Part II, p. 212
18. Gowers' Report para 394
19. Section 1(1) of the Mental Deficiency Act 1913 (subsequently amended by the Education Acts of 1944 and 1948)
20. Rt. Hon. Kenneth Robinson M. P. 'Law & Practice of Psychopathic Disorders in England and Wales' in Psychopathic Disorders supra p. 27
21. Percy Commission. Cmnd. 169 H. M. S. O. London (1958)
    This was the most controversial part of their Report. There were fears that compulsory powers for so vague a disorder as 'psychopathic personality' could easily be abused.
22. Committee on Mentally Abnormal Offenders — known as the 'Butler committee'. Report: Cmnd 6244 H. M. S. O. London (1975)

23. Ibid 5.34

24. 1983 cap. 20

25. Dell, Murder into Manslaughterp. 19 table 2.11

26. At the end of 1984, there were 410 restricted patients detained in hospital who were classified as suffering from psychopathic disorder. 375 patients were subject to restriction orders, and the remainder were transferred prisoners. The great majority were detained in special hospitals. Of the total of 410 patients, about 200 had been convicted of homicide or other offences of violence against the person.

    DHSS/H.O. Consultative Document. "Offenders suffering from Psychopathic Disorder". August 1986. p.4

27. 8 & 9 Eliz. II, c.61

28. Report of Committee of Scottish Health Service Council on Mental Health Legislation, 1958 paras 8 & 9

29. Mental Health (Amendment) Act, 1975. c.29

30. The powers of the Lord Advocate are such that this reduction in charge cannot be questioned by the courts

31. 1946 J.C. 108

32. And thus, in theory, introduced an element of rigidity

33. Few facts are set out in the official law report but details are published in the Gowers' Report as Appendix 4, No. 14 without identifying Carreher. Further details can, of course be found in the Notable British Trials series

34. It could also have been the first time that a psychiatrist to act as assessor had been appointed under section 6(e) of the Criminal Appeal (Scotland) Act 1926. the appellant has asked for this but it was refused by the court as they considered only legal matters were raised.

35. 1946 J.C.108 at p. 111

36. Ibid p. 113

37. Ibid p. 117

38. Ibid p. 118

39. (1959) 27 Med.-Leg. J. 4 at p. 8

40. John Lyon, tried at Glasgow High Court in December 1945

41. Carraher was a life long criminal. He was tried for murder in 1938 and convicted of culpable homicide for which he received three years penal servitude. That also involved stabbing in the neck. Diminished responsibility was not raised. In 1943 he had been sentenced to the same period for a serious assault with a razor. He had been the ringleader in a prison riot and was on licence at the time of the murder. All this was disclosed to the jury. In due course he was executed.

42. Gowers' Report para 398

43. Ibid para 401

44. 560 H.C.Debs.(5th.Series) 1156 & 1254 (Nov 15, 1956) and Vol. 561 Col. 320-321 (Nov.27, 1956)

45. Unreported - Leeds Assizes April 26, 1957

46. Ibid p. 8

47. 41 Cr. App. R. 182

48. 42 Cr. App. R. 69

49. 42 Cr. App. 145

50. (1958) 21 M.L.R. 549

51. [1962] Crim. L. R. 703

52. London Medical Gazette 12 p. 80

53. Taylor's Principles & Practice of Medical Jurisprudence (1865) p. 1109. See also Roger Smith, Trial by Medicine p. 156

54. Current Law Yearbook - 1981 para 476

55. Old Bailey Nov.9, 1981. Unreported but commented upon in a number of legal journals e.g. 1982 J.P Vol 132 p 476

56. [1982] Crim. L. R. 531 and 'The Guardian' April 28, 1982

57. 'The Times' Nov.12, 1981 pp 2 & 3

58. 'The Daily Telegraph' April 23, 1988 pp 1 & 32

59. Central Criminal Court May 10, 1957

60. C.C.C. Sept. 10, 1958

61. Liverpool Crown Court June 5, 1957

62. Old Bailey. Sept.13, 1958

63. Nottinghanshire Assizes. June 29, 1960

64. Leeds Assizes. Nov. 29, 1962

65. Birmingham Crown Court. March 23, 1981

66. Manchester Crown Court. Nov. 23, 1981

67. Birmingham Crown Court. April 14, 1982

68. Manchester Crown Court. May 27, 1983

Chapter X

Associated Factors

A. Irresistible Impulse:

One of the most striking results of the introduction of section 2, and one not foreseen at the time, although in retrospect, clearly a natural and logical development was the acceptance into English law of the concept of 'irresistible impulse'. The change sprang from the decision of the Court of Criminal Appeal in Byrne.[1]

We have already observed that the M'Naghten Rules do not provide for volitional or emotional factors in mental disorders. The Rules are concerned solely with defects of cognition or intelligence. It follows that since the Rules purport to state fully the requirements relating to insanity as a defence that they deny the relevance of irresistible impulse.[2]

The medical world would say that this is an entirely obsolete and misleading conception of the nature of insanity, since insanity affects the whole personality of the human being, including both the will and the emotion.[3] Doctors with experience of mental disease have long recognised that there are morbid impulses that are almost or quite uncontrollable.[4]

The principal objection to the acceptance of the concept by the jurist is that it is impracticable to distinguish between those impulses which are the product of mental disease and those which are the product of ordinary passion. Even if mental disease exists, the step 'he did not

resist his impulse' and 'he could not resist his impulse' is difficult to gauge. There is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses.[5] While this is no doubt true, it is not to say that their presence cannot be detected in the mentally ill. The real problem lies with the psychopath where there are no other sufficiently distinctive abnormalities, as there are with the mentally ill, to help substantiate the accused's contention that he has really been unable to resist his impulse.

This brings us to another underlying aspect which is often mooted. As a matter of public policy, it is thought that it is unsafe to allow 'irresistible impulse' as a plea for fear that those who could control themselves, for fear of the consequences, might be tempted not to do so. The logic of this propositionn is however a little shaky. If the impulse is indeed irresistible, fear of the consequences would, of course, have little effect in the event. Many psychopaths go on committing offences for which they have been punished previously, well knowing the consequences. and, as Professor Glueck has shrewdly observed, most patients in mental hospitals are deterable; but that does not make them any less mentally ill.[6]

The most obvious factor stressed in any case where irresistible impulse was put forward was that there was an absence of motive — emotions such as jealousy or greed. To the layman this immediately suggests some abnormality of mind. Generally speaking, of course, motive is irrelevant in criminal law. The law is not concerned with the motive at the back of a man's mind or the ulterior object which prompts the operation but with the 'intention'

The true position is perhaps reflected in the words of the trial

judge in the celebrated case of Dr Pritchard, the poisoner of his wife and mother-in-law. In his charge to the jury he said this:

> 'The absence of motive, in the ordinary sense of the word, is not a very uncommon thing in the experience of a criminal court. In truth, the existence of any adequate motive for the perpetration of a great crime is a thing impossible. There is no adequate or sufficient motive for the commission of a great crime . . . . . when we are told that, in the opinion of the prisoner's counsel there is no motive for the perpetration of this crime, it means no more than that the motive has not been discovered . . . . . we may never discover what it was. ..... the motives of human action, we know from history and experience, are often inscrutable'.[7]

The same thought prompted Baron Bramwell in R v. Haynes

> 'It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motives for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But the circumstances of an act being apparently motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable, which might prompt the act.[8]

Prior to M'Naghten, the defence of Irresistible Impulse was frequently invoked. The best known example being that of Edward Oxford, who in 1840, was the first of many to use firearms against Queen Victoria. At his trial, Lord Chief Justice Denman directed the jury: "if some controlling disease was, in truth, the acting power within him, which he could not resist . . . . ."[9] he would not be responsible. Oxford secured a Special Verdict under the Act of 1800. Indeed in M'Naghten's own case, Cockburn put forward a blurred defence of irresistible impulse coupled with the more acceptable plea that disordered reason had led to ignorance.

The acceptance of the idea that irresistible impulse qualified a man's guilt owes much to an American, Dr. Isaac Ray. In his Treatise on the Medical Jurisprudence of Insanity, published in Boston in 1838, he wrote:

> 'In medical science, it is dangerous to reason against facts. Now we have an immense mass of cases related by men of unquestionable competence and veracity, where people are

> irresistibly impelled to the commission of criminal acts while fully conscious of their nature and consequences . . . . They are not fictions invented by medical men for the purpose of puzzling juries and defeating the ends of justice, but plain, unvarnished facts'.[10]

Ray was writing of an American system of jurisprudence which was still closely modelled on the English common law. He was himself however, greatly influenced by the works of French psychiatrists and his study of French law. His influence in England is demonstrated by the fact that he was quoted by Cockburn in the defence of M'Naghten - this only five years after publication in the United States — to counter arguments based on Hale put forward by the Solicitor-General. His influence on the various jurisdictions in the United State of America is reflected in the acceptance of the doctrine of Irresistible Impulse in at least ten States and some Federal courts.[11]

In England, in a somewhat similar work by Dr James Prichard, published in 1842, while dealing with 'moral insanity' which concerned emotional and volitional powers of the mind, the Bristol physician noted:

> "In this disorder, the will is occasionally under the influence of an impulse, which suddenly drives the person affected to the perpetration of acts of the most revolting kind, to the commission of which he has no motive. The impulse is accompanied by consciousness; but it is in some instances irresistible".[12]

Other Englishmen who followed in the tradition of Ray were Forbes Wimslow, Harrington Tuke and Henry Maudsley. There were parallel movements on the Continent: for example, J.E.D. Esquirol.

During this period, valiant efforts were being made by many jurists to establish the defence beyond doubt.[13] Notable among these was Sir James Fitzjames Stephen. Stephen — originally a doubter[14] — adopted the charge used by Denman earlier quoted,[9] in many of his cases.[15] He spoke in favour of the concept before the Select Committee

on the Law of Homicide Amendment Bill of 1872[16] (much of which he had drafted). He pressed his views when the Draft Criminal Code of 1878 was considered;[17] and finally, in Chapter XIX of his History of the Criminal Law of England he wrote:

> "all that I have said is reducible to this short form: knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self control".[18]

Authoritative consideration was given to the topic by the Atkin Committee in 1922.[19] In their Report issued in 1924 they commented:

> "It was established to our satisfaction that there are cases of mental disorder where the impulse to do a criminal act recurs with increasing force until it is, in fact, uncontrollable ..... We think that it is right that such cases should be brought expressly within the law by decision or by statute .....".[20]

The recommendation of the Committee was embodied in a Bill — The Criminal Responsibility (Trials) Bill,1924. The relevant clause ran:

> "If at the time the act was done or omission made, he was suffering from such a state of mental disease as therefrom to be wholly incapable of resisting an impulse to do the act or make the omission....."[21]

The Bill was introduced in the House of Lords by Lord Darling and was opposed by the Lord Chancellor (Lord Haldane). The proposal to admit the defence of irresistible impulse was fully debated.[22] In the event, the move failed for the House refused to give the Bill a Second Reading.

In R. v. Kopsck[23] in 1925 the Court of Criminal Appeal firmly rejected the defence; and did so again the following year in R. v. Flavell.[24] The defence was rejected yet again in Sodeman v. R,[25] but this time by the Privy Council.

The Gowers Commission drew attention to the manner in which the strict rules in relation to M'Naghten were avoided.[26] The then D.P.P. (Mathew) told the Commission in evidence that the M'Naghten Rules were

very broadly interpreted, and in particular, that "a person who acted under irresistible impulse could be held to be covered on the ground that he 'did not really appreciate the nature and quality of the act' taking those words in their widest sense". [27] Sir John Anderson gave evidence to the same effect;[28] as did the Prison Medical Officers.[29]

In March 1960, the Judicial Committee of the Privy Council had an opportunity to examine the whole question of 'how far a defence that an otherwise criminal act was committed under the influence of an irresistible impulse is compatible with the defence that the accused was insane within the meaning of the M'Naghten Rules'. This was in the case of the Attorney-General for South Australia v. Brown.[30] Again the defence was rejected save that the Board indicated that it could possibly be relied on if there were medical evidence, in a given case, that it could operate and had operated so as to prevent the accused from knowing that what he did was wrong.[31] They were conscious, as was the Supreme Court of South Australia, that possibly section 2 would be appropriate on the facts of the case. Within weeks we have the decision in Bryne.

(a) Provocation:

With the focus of the argument on '*lack of self-control*', one immediately turns to that aspect of the criminal law in which lack of self-control has, for many centuries, had an established place[32] – that is to say: in the defence of provocation. The Court of Criminal Appeal in Byrne' did exactly that.

Prior to the modifications introduced by section 3 of the Homicide Act of 1957, the common law rule was:

> "Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable

> person, and actually causes in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind".[33]

The effect of a successful plea is to reduce a homicide in which there was an intentional killing, and prima facie murder, to a less serious grade of criminal homicide, namely: manslaughter. Traditionally this kind of homicide has been termed, at common law, 'voluntary manslaughter'. From what has been said, it is clear that diminished responsibility must also amount to voluntary manslaughter, although in statutory form. As indeed must also killing in a suicide pact.[34] As these three defences are now covered by sections 2, 3 and 4 respectively of the Homicide Act, 1957, the foundation is laid for a composite defence of diminished responsibility to embrace all three situations.

If the foundation is laid, the relationship between provocation and diminished responsibility is even closer. Not only do they both change the grade of the offence but neither is exculpatory. Neither applies to attempted murder or to any other charge than murder, in England.[35] It is submitted that there is no valid reason why both should not, in a composite defence, be applicable to a full range of offences.

Where the two defences differ is in that while provocation acts on the mind, it does not usually depend on medical evidence but stems from environmental conditions to which the accused is subjected and the conduct of the victim. The advantage of the introduction of diminished responsibility, where the main thrust is provocation, is that it allows the leading of medical evidence which may have some effect upon the jury when they consider 'loss of self-control'. The test, prior to the introduction of section 3, (laid down in the well known authorities)[36] as

to the provocation necessary to constitute a defence indicated that it turned on the effect of those conditions on the 'normal' reasonable man; not one with impaired mental equipment. Attempts have been made to persuade the Court of Criminal Appeal to extend the test to include those within the latter category – notably in R. v. Alexander[37] (a mental defective) and in R. v. Lesbini[38] (lack of mental balance) but without success. Again, what of the 'reasonable man' ? Murderers are not normally reasonable men, if they were they would not be killing in this fashion, and the fact that they are murdering proves, in many cases, that they have lost their self-control. Is it not more sensible to ask – not what would have caused a reasonable man to lose his self-control; but what did cause this man to lose his self-control. To treat the individual as an individual.

One of the many problems facing trial judges where a verdict of guilty to manslaughter is returned, is to decide the grounds for the jury's decision where there is a basis for both diminished responsibility and provocation. It will be recognised that these cases will be infrequent for it will be appreciated that to set out to run both defences which depend on such diametrically opposed factors is not an easy task and is not normally consciously embarked on by defence counsel – rather will their emergence result from the manner in which the evidence unfolds. And anyway, factors which are appealing to jurors are not always apparent 'on the papers'.

The practice of the judges in the Scottish courts[39] is to say nothing and the jury is not asked the basis for their decision – such a course is fraught with danger and the spectre of the appeal court. The Judge makes his own assessment from the relevant evidence and gives

such weight to each factor as he thinks proper when he deals with sentence.

When section 2 was first introduced, the English courts followed the same practice. It was in line with the longstanding belief that once a jury had brought in a verdict they had performed their function and were not obliged to answer any question from the judge in order that he might determine, for the purposes of sentence, the factual basis on which the verdict was returned. The dangers of so doing had been amply demonstrated in R. v. Larkin,[40] where the foreman of the jury had given two inconsistent answers to the trial judge.

A typical case was that of Rosalia Garofalo[41] tried at Hertford Assizes in October 1958. The accused, an Italian servant, had become pregnant by an Italian man, to whom she considered herself engaged. She found that he was already married and had a wife and children in Italy. He refused to marry her. She took a knife and stabbed him. If cuckolds finding their wives flagrante delicto can kill and claim provocation, why not the seduced. Accordingly a verdict of manslaughter was returned. A complication in Miss Garofalo's case was that there was an element of mental backwardness, and the defence submission was that diminished responsibility should also be considered. As the sentence was one of 3 years imprisonment it would appear that the provocation element was the one that was dominant in the judge's mind.

In 1960, Lord Goddard took the opportunity of a full bench of five judges in Matheson[42] to make two practice directions in respect of diminished responsibility. One was in relation to the acceptance of pleas (since withdrawn and the reverse procedure followed). The other direction was to the effect that where, in a murder case, the defence

asked for a verdict of manslaughter on the grounds of diminished responsibility and also on some other ground, such as provocation – if the jury returned a verdict of manslaughter – the judge may, and generally should, then ask them whether their verdict is based on diminished responsibility or on the other ground or both. There is no evidence, based on perusal of very many court logs or by enquiry from officials who would be in a position to know, that this is normally done. It would appear that High Court trial judges prefer to base their sentencing on their own recollection and assessment of the evidence as a whole.

Archbold's Pleading, Evidence and Practice[43] without quoting any authority, suggests that 'if the jury is to be asked upon what basis a verdict of manslaughter was returned, they should be told during the course of the summing-up that the question will be put to them'. This approach may be illustrated in the court records of the case of Lionel Peter Knight,[44] tried before Mr Justice Talbot and a jury in March 1983. Knight had stabbed his wife in a massage parlour where she worked. He objected, so he said, to the mode of life she was leading. She had been a prostitute at various times in the past including the period before they married. The prosecution doctors were unable to find any 'abnormality of mind' but two well-known psychiatrists called for the defence contended that there was. The Old Bailey jury returned a verdict of manslaughter. This has been recorded on the court record as 'unanimous' but one of the notes from the jury retained in a special folder in all court files makes all clear.

> "By a majority of 11 to 0 we return a verdict of manslaughter. It is on the grounds of a combination of both diminished responsibility and provocation. There was 1 abstention on a matter of principle".

The judge used this information to impose a period of 4 years imprisonment so presumably he felt provocation was the stronger element.

To turn to the case of Patrick Joseph Byrne.[1] He was tried at Birmingham Assizes in March 1960. The facts of the killing – strangling and mutilating – were admitted and the only defence was one of diminished responsibility under section 2 and that the proper finding was manslaughter and not murder.

Three medical witnesses were called by the defence. The Senior Medical Officer at Birmingham Prison and two specialists in psychological medicine. Their uncontrdicted vidence was that the accused was a sexual psychopath, that he suffered from an abnormality of mind, as indeed was abundantly clear from the other evidence in the case, and that such abnormality of mind arose from a condition of arrested and retarded development of mind and inherent causes. The nature of the abnormality of mind of a sexual psychopath – according to the medical evidence – is that he suffers from violent perverted sexual desires which he finds it difficult or impossible to control. Save when under the influence of his perverted sexual desires he may be normal. All three doctors were of the opinion that the killing was done under the influence of his perverted sexual desires and although not insane in the technical sense of the M'Naghten Rules it was their view that his sexual psychopathy could properly be described as 'partial insanity'.

After summarising the medical evidence the judge told the jury that if the killing was done under a sexual impulse or urge – an urge stronger than the normal urge of sex and one very difficult or perhaps impossible to resist, yet otherwise the accused was normal. Those facts with nothing more would not bring the case within section 2.

> "In other words, mental affliction is one thing, the section is there to protect them. The section is not there to give

> protection where there is nothing else than what is vicious and depraved".[45]

On this direction the jury convicted of murder and Byrne was sentenced to life imprisonment.

When the Court of Criminal Appeal sat in June 1960 to consider Byrne's appeal – which turned on the trial judge's direction – they had ringing in their ears the words of the Privy Council in Att.-Gen. for South Australia v. Brown.[30] They were also very conscious of the analogous position of the defence of provocation.

In considering the exact meaning of 'abnormality of mind' – and this was the main thrust of their decision –they indicated that it appeared:

> "to be wider enough to cover the mind's activities in all its aspects, not only the preception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong".

but also:

> "the ability to exercise will power to control physical acts in accordance with the rational judgment"

and further:

> "The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will power to control his physical acts".[46]

To put matters beyond doubt, they summed-up their thoughts thus:

> "Inabilty to exercise will-power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis in the sub-section is, in our view, sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts, depending on the degree of difficulty, may be sufficient".[47]

This decision they would leave to the jury, taking into account the whole of the evidence, using their commonsense, and on a balance of probabilities.

In the case records which have been studied no psychiatrist has been so bold as to base his opinion that there has been substantial impairment on irresistible impulse simpliciter, rather has it been put forward as a major factor in an overall picture of a psychopathic condition.

What is clear is that the unwillingness of the courts to adopt formally any 'doctrine of irresistible impulse' has, over a long period, put mentally abnormal offenders at a disadvantage as against the man who can be shown not to have been able to control his actions through any cause other than disease of the mind. This anomaly has been removed. Also removed is the unedifying spectacle of a just result being obtained by the subterfuge of the jury or the ministrations of the Home Secretary, where the task properly lay with the law.

So much for the comments of Lord Hewart,L.C.J. in Kopsch when he said: "The fantastic theory of uncontrollable impulse which . . . is not yet part of our criminal law, and it is to be hoped that the time is far distant when it will be made so".[48] It took thirty-five years.

B. Intoxication:

Lord Alverstone is reputed to have claimed on one occasion that drink was responsible for 90% of crime. Reflection shows that this is an wild exaggeration – consider for a moment the number of crimes which can be attributed to juveniles – but there is no doubt that the desire for intoxicants initiates many offences, particularly those of dishonesty; their ingestion generates further offences, normally those of violence (including homicide). In practice however, the submission that intoxication is involved in a crime and has some mitigating quality is

seldom raised in isolation but is combined with other defences, such as provocation or mistake.

Before about the Nineteen-sixties, alcohol was by far the most widely used psychotrophic drug.[49] From that date other drugs such as cannabis and cocaine and on a lesser scale heroin and the other opiate-narcotics, the barbituates and the amphetamines have become popularly used as intoxicants. The criminal law took cognizance of this change in R. v. Lipman[50] and D.P.P. v. Majewski,[51] and in both these cases the issue of criminal responsibility for harm done during voluntary intoxication —from L.S.D. and amphetamines respectively — were decided according to the decisions in alcohol cases such as D.P.P. v. Beard[52] and Att.Gen. for N.I. v. Gallagher.[53]

It must be borne in mind that any consideration of this important topic, in legal terms, is bedevilled by the moral disapproval which intoxication itself incurs and by the social policies which follow from that disapproval. This is particularly evident in the treatment accorded to the factor of alcohol in crime by the early jurists, such as Hale:

> "This vice (drunkeness) doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy; and therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkeness answerable to the nature of the crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenessthan the crime committed in it: but by the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses".[54]

Hawkins' Pleas of the Crown[55] contains a passage to the same effect. Coke upon Littleton similarly treats drunkeness as an aggravation of the offence: "As for the drunkard who is Voluntarious daemon hath no privilege thereby: but what hurt or ill so ever he doth, his drunkeness

doth aggravate it: nam omne crimen ebrietas et indentit et detergit".[56] Blackstone in his Commentaries has a passage which echoes the same thought.[57]

Scots law, on the other hand, was less severe in its condemnation, although Hume held in effect, that intoxication was irrelevant as a defence, in the following terms:

> "The law of Scotland views this wilful distemper with a quite different eye from the other (scil: insanity) which is a visitation of providence, and if it does not consider the man's intemperance as an aggravation, at least sees no good reason why it should be allowed as an excuse, to save him from the ordinary pains of his transgressions".[58]

All along, of course, it was recognised that complete exemption from criminal responsibility was likely to arise where it could be proved that the intoxication arose from causes outside the control of the accused person. When in Hale's phrase, a man became drunk "by the unskillfulness of his physician or by the contrivance of his enemies".[59]

From the late Nineteenth Century English law tended to modify the harsh views outlined above.

The prime action of alcohol in the body is its depressant action on the functions of the central nervious system, the brain. The part of the brain affected and the degree of impairment depends on the concentration of alcohol in the blood, and therefore action on the brain. Although this action is entirely on the brain, and is akin to a mental condition, disturbance in behaviour is manifest in the organs controlled by the particular brain area affected. Continued over a long period that may result in a change of character. Conversely, alcoholism is often associated with character deficiencies which have been inherited.

Both English and Scots law have recognised that sustained or excessive indulgence in alcohol, even although voluntary, may lead to a

toxic condition which affects the mind. The commonest of these is delirium tremens, but there are others such as alcoholic hallucinations, Korsakkov states[60] and alcoholic dementia. The English law has accepted that such a state, even although temporary and self-induced,[61] is a disease of the mind within Questions II and III of the M'Naghten Rules for it is possible to have an attack of 'DTs' at a time of complete abstinence from alcohol. As Stephen J. said in R. v. Davis:

> "Drunkeness is one thing and the diseases to which drunkeness leads are a different thing; and if a man by drunkeness brings on a state of disease which causes such a degree of madness, even for a time, as would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible".[62]

Although the first of the Scottish cases to introduce the doctrine of diminished responsibility as we know it to-day, Dingwall,[63] was intimately linked with drunkeness, Lord Deas himself considered persistent alcoholism only to be one element which might impair responsibility and he was not prepared to accept drunkeness per se as a defence at all; indeed in Granger[64] he did not seem prepared even to accept delirium tremens as the equivalent of insanity. His learned brother Lord McLaren however expressed different views in H.M. Adv. v. Brown,[65] namely that an accused person suffering from temporary insanity caused by drink was not in law responsible for his acts.

Lord Deas accepted, of course, that a combination of circumstances coupled with drink could impair responsibility, for a person who commits a crime while in drink may well, by reason of epilepsy or retarded mental development, not have the same degree of responsibility as a normal person.

The present Scottish position, however, is clearly seen in the case of Savage[66] where the accused was charged with the murder of a

young woman with whom he had been living, by cutting her throat with a razor. To this charge he pleaded not guilty and entered 'a special defence' that he was insane and not responsible for his actions. Evidence was adduced on his behalf that he had had an injury to his head, was eccentric in his habits, drank excessively (not only normal alcohol but methylated spirits also) and when drunk was violent and irresponsible. He claimed 'to be in drink' when he killed the woman. The prosecution evidence was to the effect that he was sober at the time. In the course of his charge to, the jury, the Lord Justice Clerk (Lord Alness) said this:

> "To say a man who takes a drink and while under the influence commits a crime is to be excused from the penalty of a crime merely because he has made himself drunk would, of course, be a most perilous doctrine, and it is not the law of Scotland. The man himself is responsible for getting drunk and the mere fact that he had taken drink and while under the influence of drink committed a crime is not sufficient to excuse him from the consequences of his crime. On the other hand, it appears, as I say, equally well established, and although it has been variously phrased, that the state of mind of the prisoner may be such, short of insanity to reduce the quality of his act from murder to culpable homicide ..... there must be some form of mental disease".[67]

Carraher[68] was a later case where the element of drunkeness was carefully examined in conjunction with the pannel's psychopathic condition; it being contended that diminished responsibility could be inferred in the circumstances. Lord Russell, who presided over the trial, after some hesitation, left to the jury the question whether the case was indeed one of diminished responsibility, but he took it upon himself to direct them that, as there was no evidence that the pannel was actually suffering from illness due to alcoholism and that, unless they could find that drunkeness had negatived the capacity to form the necessary intent, then they could dismiss diminished responsibility from their minds.

But in MacLeod,[69] Lord Hill Watson had the final word when, relying on the decision in Carraher, he stated the law to the jury in these terms:

> "If a man is not shown by the evidence to be within the category of one with a diminished responsibility when sober, he cannot place himself within the category by taking drink".

This appears to be the attitude adopted in England since the Homicide Act in 1957. Thus in the case of R. v. Dowall,[70] where a young soldier, prone to consuming gin in large quantities, appeared at the Old Bailey charged with the murder of a prostitute, and secured a verdict under section 2, Mr Justice Donovan said:

> "If a normal person got drunk or drank to excess and in that condition killed another, it would be no defence to say that he lost his self control or that his self control was diminished".

He also observed that the section in the Homicide Act dealing with diminished responsibility was not intended to be nor was it 'a charter for drunkards'.

In R. v. Di Duca,[71] where the accused had relied, among other defences, on that of diminished responsibility, the jury returned to court after their initial retiral and put the following question to the judge: "... if a man's mind is impaired by the effect of alcohol, does the verdict come under that of manslaughter or murder ?" They were clearly concerned with the toxic effect of drink as causing abnormality of mind and diminishing responsibility. The judge apparently misunderstood the effect of their note and gave them the well recognised direction with regard to the effect of drink on intent, without any reference to the effect of drink on diminished responsibility. On the hearing of the appeal, it was held unnecessary on the facts to decide the question but the court expressed a doubt whether the transient effect of drink, even if it produces a toxic effect

on the brain, can amount to an injury within the meaning of section 2(1) of the Act.

Also of interest in this regard is the case of R. v. Clarke and King,[72] two merchant seamen who, after consuming a considerable quantity of alcohol threw an injured shipmate overboard in shark infested waters some 70 miles from land. King's defence was drunkeness; that of Clarke diminished responsibility. In the course of the trial, one of the doctors called by the Crown gave as his opinion that, on the hypothesis that the medical history put forward by the defence was accurate, Clarke was probably a schizoid psychopath and that his mental responsibility was impaired and that drink was likely to worsen such a condition. He agreed with the defence that if the accused's responsibility was diminished as a result of his abnormality of mind that must have been substantially increased by the drink, and that as a matter of probability the diminution of responsibility was substantial. On appeal against a conviction for murder, the court was careful when repeating these words to point out that it was not necessary for it to adjudicate on this point and that it must not be taken to be ruling, when it changed the finding of murder to manslaughter, that any abnormality of mind, however slight and producing however little impairment, will constitute a defence when that slight impairment is increased substantially by drink.

An approach which held sway for some time stemmed from an application for leave to appeal at the instance of Lancelot George Turnbull[73] against his conviction at Exeter Crown Court in April 1976 for the killing of a drinking companion.

At the trial, the only issue run by the defence was one of manslaughter under section 2. This was narrowed further as it was

accepted by the Crown that Turnbull was a psychopath and that his psychopathic tendencies represented an abnormality of mind arising from inherent causes. This left the case to turn on the third requirement of section 2, namely: whether or not it could be shown, on the balance of probabilities, that at the time of the killing the abnormality of mind in question substantially impaired the mental responsibility of the accused for his acts and omissions. The jury were directed by the trial judge (Lawson J.) that it was for them to decide, weighing the evidence, which was the main factor for the killing, the inherent defect of mind or the effect of alcohol. The jury convicted of murder.

The Lord Chief Justice, in refusing the application, quoted the final direction of Mr Justice Lawson on the point at issue:

> "Do we think it more probable than not that at that time Turnbull's responsibility was substantially impaired by the fact that he suffers from a psychopathic disorder ? You may think, it is a matter for you, that drink had something to do with this, but what is the substantial cause of Turnbull's inability to control his behaviour that night ? What is the substantial cause of his stabbing this man in this horrible and savage way".

He then added: "This is exactly the right test".[74]

Earlier in R. v. Fenton,[75] the Court of Criminal Appeal had observed (per the Lord Chief Justice):

> "We recognise that cases may arise hereinafter where the accused proves such a craving for drink or drugs as to produce in itself an abnormality of mind . . . . . we do not see how self-induced intoxication can of itself produce an abnormality of mind due to inherent causes".[76]

Martin Fenton had led a somewhat turbulent life. On the day in question he had drunk a prodigious amount of alcohol. He shot dead a policeman who sought to detain him and then proceeded to a club in Torquay where he kiled three people on those premises. In the course of his trial, on the four indictments for murder, he attempted to change his pleas to guilty of manslaughter on account of diminished responsibility.

This was not accepted by the prosecution. Five medical witnesses were called and all agreed that Fenton was suffering from abnormality of mind, either he was a psychopath or had a psychopathic personality. The jury however convicted of murder.

The conviction had followed a ruling by the judge (Mr Justice Boreham) that the effect of the alcohol consumed by the defendant was to be ignored, since the effect of the drink did not amount to an abnormality of mind due to inherent causes and accordingly, there was a direction that the jury must convict of murder if satisfied that the combined effect of the factors other than alcohol was insufficient to amount to a substantial impairment in the mental responsibility of the defendant. The appeal court did not think that the directions of the trial judge were open to criticism or capable of amounting to an irregularity at the trial or capable of causing the verdict to be unsafe or unsatisfactory – and the appeal was dismissed.

After deciding in Turnbull that "exactly the right test" was used to consider what was the substantial cause of Turnbull's inability to control his behaviour; in R. v. Gittens[77] the Court of Appeal (Criminal Division), presided over by the Lord Chief Justice (Lord Lane) decided that that direction was incorrect – in general terms – and should not in future be copied.

Briefly the facts of the case were as follows: The accused (Charlesworth Alexander Gittens) was tried at Reading Crown Court for, inter alia, the murder of his wife and step-daughter. He was convicted of those offences and sentenced to life imprisonment. Gittens' marriage had been an unhappy one and he has sought medical treatment for depression, had spent a period in hospital and had attempted suicide.

The defence included a claim of provocation but the main issue was diminished responsibility, and this was the only issue on appeal. The prosecution medical evidence was that he was indeed suffering from an abnormality of mind which was brought on by drink and drugs (sleeping tablets) and thus was neither inherent nor the result of an illness.

The trial judge (Kenneth Jones J.) basing himself on Turnbull, directed the jury to ask themselves whether the abnormality of mind from which the defendant suffered arose from inherent causes or disease or injury not from the taking of drink or drugs and if the abnormality of mind arose substantially from reasons other than drink or drugs, the defence under section 2(1) had been established. On appeal, it was conceded by the Crown that it was a misdirection to ask the jury to decide what was the substantial cause of the defendant's actions in any case where the cause of his actions might be a mixture of matters which do and matter which do not fall within the provisions of section 2.

> The Court agreed and said:
> "where alcohol and drugs are factors to be considered by a jury the best approach is that adopted by the judge and approved by this court in Fenton. The jury should be directed to disregard what, in their view, the effect of the alcohol and drugs upon the defendant was, since abnormality of mind induced by alcohol or drugs is not (generally speaking) due to inherent causes and is not therefore within the section. Then the jury should consider whether the combined effect of the other matters which do fall within the section amounted to such abnormality of mind as substantially impaired the defendant's mental responsibility within the meaning of "substantial" set out in R. v. Lloyd".[78] [79]

The appeal was allowed and verdicts of manslaughter were substituted although the sentences of life imprisonment remained unchanged.

R. v. Atkinson[80] is an example where the trial judge used the Gittens direction, namely: "was it more probable than not that the responsibility was substantially impaired by arrested or retarded

dvelopment of mind; if drink had something to do with it, was it the substantial cause, the root cause of his inability to control himself".

The Gittens direction was again referred to in the appeal of Linda Tandy[8] in November 1987. Mrs Tandy had strangled her 11 year-old daughter. There was no doubt that the accused was an alcoholic and because of this the quantity of alcohol she had consumed on the day that the girl died (perhaps 400mgs per mls of blood) would have killed a normal person yet she displayed no clinical signs of intoxication when seen by a doctor. There was ample evidence that she was not likely to have killed the child if sober. At her trial at Leeds Crown Court before Mr Justice Kennedy she offered a plea of diminished responsibility based on alcoholism ,which was not accepted. She was found guilty of murder and senteneced to life imprisonment.

In the appeal which followed Watkins,L.J. reaffirmed what must be established if a successful defence under section 2 is to be achieved, namely: (i) that he was suffering from an abnormality of mind at the time of the killing; (ii) that the abnormality of mind was induced by disease, namely, the disease of alcoholism; and (iii) that the abnormality of mind induced by alcoholism was such as substantially impaired his mental responsibility for the act which caused the death.

It was also reiterated in Tandy that the diminished responsibility defence was not available where the drinking was voluntary and the accused was still able to resist the impulse to drink. In Mrs Tandy's case, the jury found it was only the first one of the day she could control; but that represented choice.

Despite the major place of drug-taking (including so-called 'Hard Drugs') in the social life of Britain, particularly in the inner

cities, the reports disclose few cases where homicides directly attributable to drugs have resulted in a finding under section 2. One such case is that of Mustafa Ali,[82] jailed for six years at the Old Bailey in 1984, following the killing of an old woman, his blind next door neighbour aged 88. It was claimed that the brain damage and obsessions from which Ali suffered resulted directly from four years of 'self-destruction' by glue-sniffing.

Again in the case of Nicholas Tidmarsh,[83] who was charged with the murder of his girl friend before the Common Serjeant at the Central Criminal Court in February 1983 and had his plea to manslaughter under section 2 accepted. The two psychiatrists who provided the reports which justified a hospital order to Broadmoor, while satisfied that he suffered from a psychotic illness, suspected that it arose from involvement wirh LSD or magic mushrooms

It is true that many narcotics have a sedative effect and are unlikely to lead to aggression but that is not true of all drugs. Could it be that many cases, where the contributing factor is the misuse of drugs are charged as manslaughter from the first, on the basis of lack of specific intent – as are indeed many where alcohol is involved – and having regard to the circumstances result in guilty pleas and anonymity.

C Mercy Killing:

As Professors Smith and Hogan wryly observe, when dealing with the topic of homicide in general, "We all must die sooner or later: therefore every killing is merely an acceleration of death".[84] Nowhere is this more true than of those who hasten a death prompted by motives

they consider afford an excuse – the so-called 'mercy killers' – carrying out the actus reus of homicide under the influence of strong emotion and distress of mind. Euthanasia[85] has now overtaken abortion as the principal topic of the continuing debate on the sanity of life;[86] but it is essentially a fundamental ethical problem, and while it remains unsolved, the lawyers and the courts must cope – as of right – with the 'wide gulf in moral guilt' which cases present and not leave them to the executive to be dealt with as a matter of grace.[87]

Mercy killing has always been classed as murder. Hale stated the rule:

> "If a man is sick of some disease which, by the course of nature might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating or provoking the disease to operate more violently or speedily, this is murder or other homicide according to the circumstances in the party by whom such wound or hurt was given. For the person wounded does not die simply' ex visitatione Dei, but his death is hastened by the hurt which he received; and the offender is not allowed to apportion his own wrong".[88]

The Gowers Commission considered taking mercy killings[89] out of the category of murder. When the then Archbishop of Canterbury (Dr Fisher) appeared before that body and the question was put to him, he replied, "the law ought not to call the act something different from what it is".[90] Rather was he in favour of adjusting the penalty to suit the circumstances. Other witnesses agreed with this view, although on different grounds.[91] The question of a new definition of mercy killing to resolve the practical difficulties was canvassed. The Society of Labour Lawyers – aided by Lord Denning – suggested the following:

> "If a person who has killed another person proves that he killed that person with the compassionate intention of saving him physical or mental suffering, he shall not be guilty of murder".[92]

This was not recommended for acceptance by the Commission.[93]

The Criminal Law Revision Committee in the Working Paper[94] which followed their twelfth Report 'On the Penalty for Murder' in 1972[95] recognised that many mercy killing cases might be satisfactorily dealt with under section 2 of the Homicide Act, there might be others in which there was insufficent evidence of mental abnormality to found the defence; after all the section had not been drafted with mercy killing in mind. Clear evidence of mental imbalance was expected and while it might be forthcoming in the case of a distraught mother unable to control her desire to end her child' misery, it is not so with parents who, having rationally weighed up all the factors, considered that it is their responsibility to the child to end the suffering. In the Report, the Committee tentatively suggest that there should be a new offence carrying a maximum penalty of two years which would apply to 'a person who, from compassion, unlawfully killed another person where the accused with reasonable cause believed that the victim was (i) permanently subject to great bodily pain or suffering, or (ii) permanently helpless from bodily or mental incapacity, or (iii) subject to rapid and incurable bodily or mental degeneration'. In their Final Report,[96] the Committee indicated that they no longer recommended that course.[97] The idea foundered on the notorious difficulty in the jury trial of establishing motive, which unlike intent, cannot be inferred from a person's overt actions. The killing of an invalid father by a daughter could arise equally from a desire for material gain, from a natural wish to bring to an end a trying period in her life or from a combination of motives.

Until the second half of this century these difficult cases were adequately dealt with by the various subterfuges outlined in an earlier chapter.[98] For example: the discretion of the prosecutor to charge

manslaughter rather than murder.[99] The jury also might reflect their sympathetic view of the case in the form of their verdict, albeit perverse, and in the recommendation they might make as a rider. Where murder convictions did result resort was had to the powers of the Home Secretary to commute the sentence. For a 'mercy Killing' the period of incarceration, notionally for life could be very short indeed.[100] A typical case is that of a Mrs Brownhill[101] in 1934. She had undergone a serious operation and was worried about the future of her thirty-one year old imbecile son. She killed him by gassing and administering aspirin. Two day after the court sentenced her to death she was reprieved and after three months received a pardon.

In Scotland, at a time when the doctrine of diminished responsibility was well established, no attempt was made to invoke the doctrine in cases involving mercy killing. The approach was by way of 'prosecutorial discretion'. The Lord Advocate, having wider powers than the Director of Public Prosecutions (and being unfettered by examining magistrates) could prefer a charge of culpable homicide from the outset rather than a murder charge, if he thought fit. Again, in the course of the trial, on his authority, the charge of murder could be reduced to culpable homicide at any stage of the proceedings if he considered that the circumstances justified such a course.[102]

Since the Homicide Act has been on the Statute Book, Courts have increasingly turned to section 2 to secure an appropriate outcome to genuine cases of mercy killing. None of these cases has found its way into the Reports and it is necessary to refer to original records or Press reports to detect the trend.

If we consider cases which came for trial in 1957 and whose

indictment was signed after the Homicide Act came into force – there are seven cases which could be termed 'mercy killings'. Two accused were found 'unfit to plead' (John Inghan[103] and Pamela Ross[104]).Two were found 'Guilty but insane' after trial (Elizabeth Bowron[105] and Robert Mackintosh[106]). Three accused persons successfully invoked section 2 – but late in the year.

The first of these was Harry Gent,[107] at Liverpool Crown Court where on 11th, November 1957 he was sentenced to 10 years imprisonment after the jury had returned a verdict of manslaughter. Gent had killed his child in its cot. The medical evidence in respect of the accused traced a history of mental disorder, in particular that he suffered from paranoid delusions, and that it was precisely because he was fond of the child and was afraid of someone else having custody over him that he killed the baby.

Money trouble and a severe depression following the birth of her second child caused Mary Dayson[108] to decide to gas herself and to do so to her other son Robert as she was afraid to leave him alone with no one to care for him properly. Her suicide attempt was unsuccessful but the boy died. Dayson was placed on probation with a condition that she underwent hospital treatment, after her plea to the alternative count of manslaughter was accepted at Stafford Assizes on November 28th. 1957.

The third case, that of Louie Harmon,[109] also at Stafford Assizes and only a few days later – 6th. December 1957. In contrast, this case resulted in a period of life imprisonment being imposed. There had been a trial and the jury returned a verdict of manslaughter for the killing of the accused's son. Kenneth Harmon, then 16, had lost

a finger in an accident and as a result was downhearted and depressed. His mother became convinced there was something wrong with his mental condition. She decided to use coal gas to kill them both; but she survived. There was medical evidence at the trial that she suffered from delusions and obsessional neurosis.

In the full year 1958, there were four cases which could properly be classed as mercy killings. Three of these falling to be dealt with under the terms of section 2.

A soldier home on leave, Alec Taylor Lawrence,[110] having heard that his foster-mother, of whom he was very fond, might be going blind, shot her seven times in the head to "put her out of her misery". At his trial at the Central Criminal Court, defence doctors gave evidence that Lawrence was suffering from hysteria, a disease of the mind. He was acquitted of capital murder but found guilty of manslaughter and given 3 years imprisonment on May 8th. 1958.

John Stanley Marples[111] received an eighteen month period of imprisonment on 11th.June after the jury at Derbyshire Assizes had accepted a defence submission of diminished responsibility due to the accused's acute mental depression. Their finding – not guilty of non capital murder but guilty of manslaughter. Marples had shot his mother while she was asleep, after he was told by the doctor that she was suffering from cancer, with little hope of recovery.

The remaining case was that of William Ernest Moodie,[112] a prison officer who killed his young daughter with an overdose of drugs. The girl had been an imbecile since birth and could neither walk not talk. Moodie was "quite passionately devoted" to her. At his trial at Durham Assizes, the medical evidence, which was not rebutted by the

prosecution, was that the accused was suffering from acute nrevious depression. The jury in making their finding of manslaughter added a strong recommendation for mercy. The judge however imposed a sentence of 3 years, reduced on appeal to 12 months on the grounds that the judge had not given full weight to the jury's recommendation.

A diminished responsibility plea might have been rather more appropriate in the other mercy killing case that year, namely: that involving John Thomas Batten.[113] A retired Civil Servant, aged 77, Batten had killed his sick wife by striking her repeatedly on the head. He was found insane and unfit to plead when he appeared at the Old Bailey on 9th. September,1958. After the killing Batten had tidied his affairs, written farewell notes and then attempted suicide. One note ran:

> "As we get older we shall be still less able to attend to ourselves and to each other . . . so as not to depress me, my wife professes confidence that my operation will be successful, but I know that she fears it will not be and she dreads the thought of being left alone after all these happy years and I cannot go on without her".

In the event, the finding allowed the widower to take a benifit under his victim's will, when Mr Justice Pennycuick held, in the Chancery Division, that a person who feloniously killed another while suffering from insanity was not disqualified from so doing.[114] The Forfeiture Act[115] of 1870 now gives a court power to modify the rule preventing anyone guilty of another's death from benefiting from that death in any way.

In the decade reviewed by Dell, that is: 1966-1977,[116] it was found that there were ten cases where men had killed close members of their family, who were seriously ill.[117]

Perusal of one national newspaper, 'The Daily Telegraph' for the

year 1985 discloses five cases of mercy killings which had been dealt with under section 2 in the period May to October of that year alone and are considered sufficiently newsworthy to be recorded in the Southern editions of that journal.

Norman Houghton[118] and his wife Janet were placed on probation at Maidstone Crown Court for the killing of their son in May 1985. Mr Justice French in sentencing them said:

> "To take the life of any human being is a dreadful thing and one which, in virtually every case, whatever the homicide, is visited with the sentence of imprisonment but in the light of the jury's verdict and all the circumstances I take the view that the public interest does not require you to receive any further punishment".

The boy had been terribly injured in a car crash in 1980, was unable to feed or wash himself and only his family could understand his impaired speech, but his intellect remained intact and he kept saying that he wanted to die.

Two psychiatrists, called for the defence, said that the couple were subjected to an almost intolerable degree of stress which substantially diminished their responsibility. The Couple themselves, who did not give evidence at the trial, once sentence was safely passed, were rather more forthcoming – their comment: "We haven't regretted our action, not for one minute".[119]

At Exeter Crown Court in July of that year, Vivian Masters[120] secured his immediate release, when a custodial sentence equal to the time he had spent on remand was imposed for the killing of his 73 year old wife. His plea to manslaughter under section 2 was accepted. Mrs Masters had had a stroke which partially paralysed her. She was terrified of hospitals and her husband, to whom she had been married for 55 years, cared for her. She had repeatedly told visitors "I would

rather be dead – what is there in life for me ?" One night in February 1985, Masters held a chloroform-soaked pad over her face. The newspaper report contains no reference to the mental condition of the accused, although the judge (Mr Justice Webster) in passing sentence observed: "You were a loving and caring husband who was driven to the point of desperation about what might happen to her".

In August, Carole Grote[121] 'walked free' from the Old Bailey, placed on probation after pleading guilty to manslaughter and having her plea on the basis of section 2 accepted. She had smothered her son, a victim of cystic fibrosis, for whom she had lovingly cared for a period of six years. At the time of the killing she was said to be suffering from a mental illness known as 'adjustment reaction'.

Another to 'walk free' from the same court and some six weeks later was George Messenger,[122] a retired postman. Messenger could not bear to see his chronically sick wife suffer any longer and he "put her out of her misery". They had been married forty years and he was devoted to her. Her health had deteriorated rapidly and her husband became depressed and had delusions, blaming himself for his wife's "downfall". The Recorder of London had this to say: "Euthanasia will always be punishable with imprisonment in this country unless, as in this case, your responsibility for the crime has been reduced to vanishing point".

A two year suspended sentence was given to John Doran,[123] who pleaged guilty to manslaughter on the grounds of diminished responsibility at Birminham Crown Court in October. He had suffocated his wife, who was suffering from cancer and who had pleaded with him to kill her.

To substantiate the defence in many of these cases it was clear, at an early stage, that while section 2 might be satisfactory in some cases, in others there might be insufficient evidence of mental abnormality. That there must be "a certain amount of perjury on the part of doctors and very possibly the straining of the jurors' conscience".[124] While it is perhaps possible to say that the mind is temporarily unhinged by the stress of grief, at no time did psychiatrists feel constrained – as did the lawyers – by the apparently rigid terms of section 2 relating to 'abnormality of mind resulting from 'inherent cause, disease, injury or retardation'. and in appropriate cases they would be quite willing to describe the mental state of the mercy killer so as to bring him within the definition.

Professor Granville Williams has put it thus: "The defence of diminished responsibility is interpreted in accordance with the morality of the case rather than as an application of strict psychiatric concepts" and psychiatrists "will adapt themselves to any legal formula once their sympathies are engaged".[125]

It could be said that the second limb of the defence, that 'the abnormality of mind should cause substantial impairment of mental responsibility' has similarly been interpreted imaginitively in cases deserving sympathy. In any event, many jurors require little or no assistance from medical experts in reaching verdicts of diminished responsibility where the facts invoke sympathy.[126]

In a case in which Susanne Dell had access to the medical reports, she noted that a prison medical officer wrote:

> "Doctors tend to differ in the way they look at cases of this kind. Some would say he was suffering from reactive depression and regard it as a mental illness. Others would look upon it as a more or less normal reaction to human misery and not think of it in terms of mental illness or

abnormality".[127]

Miss Dell draws attention to a feature common[128] to many mercy killing cases which emerge in her survey; that at the time of examination of the accused, the doctor reported that he was unable to discern the presence of mental disorder but that he nevertheless supported the plea of diminished responsibility because he inferred from the circumstances that mental abnormality must have been present at the time of the offence. In effect, a switch of emphasis from the accused's state of mind to the circumstances and related motives involved in the case. A possible explaination lies too, in the fact that, while the offender is seen after the crime, the doctor is required, for the purposes of the Homicide Act, to diagnose the mental state at the time of the crime. The crime – by its very nature may have had a 'cathartic' effect on the accused.

Conclusion:

That in the light of the advance of medical knowledge it was a natural progression to include irresistible impulse within the scope of section 2. In any event, the judicial climate was right for such a development to remedy an unjust situation.

That in respect of provocation the courts have always been ambivalent. The parallel between provocation and diminished responsibility can be easily drawn and the foundation for a composite and all-embracing defence clearly indicated.

That very properly, the courts have not allowed section 2 to be used as " a drunkard's charter" and have maintained the existing rules in relation to intoxication within the framework of the doctrine. That

they have acted in this firm and logical way instils confidance and gives credence to their approach to other conditions.

Their actions in regard to 'mercy-killings' may be one case where that provisio does not hold good. What has taken place is clearly in accord with public sentiment but it is less clear whether it is in accord with justice. It is highlighted by our case of Houghton at Maidstone before Mr Justice French but is more clearly demonstrated in a recent case before Mr Justice Boreham at Manchester Crown Court that of Anthony Cocker who had strangled his wife after she had begged him to do so, she being confined to a wheel chair and suffering from a wasting disease, by ruling that pleas for euthansia did not constitute provocation and however good his motives his actions were calculated - there was no evidence of loss of self-control. Whereupn Cocker changed his plea and, on direction, the jury found him guilty of murder and he was sentenced to life imprisonment. The next day 11 of the 12 jurors wrote a letter to the judge telling him that he had "wrongly interpreted a matter of fact as a matter of law and thus denied the defendant the opportunity of trial by jury as was his right".[129] On 26th.May 1989 Lord Lane (with Farquharson and Potts) upheld the conviction (and the actions of the learned judge) in the Court of Appeal.[130]

The fears (and curbs) that the Scottish courts feel justified in the case of psychopaths could well be exercised by the English courts in so-called 'mercy-killing' cases.

FOOTNOTES

Chapter X

1. 44 Cr. App.R. 246

2. The M'Naghten Rules do not form part of the law of Scotland. The critical test for insanity being 'alienation of reason'. Nor would irresistible impulse be a sufficient defence; (see evidence of Faculty of Advocates to Gowers Commission, Minutes of Evidence p. 444(12); Walker Q.5614-9)

3. Gowers Report para 227

4. For example: Epilepsy and manic depressive psychosis. (Spirer in 33 Journal of Crim. L. & Crim. 457)

5. The classic rule of thumb of the courts: 'would he have done it if he had a policeman at his elbow' stems from observations made by Baron Bramwell to the Capital Punishment Commission of 1866 (B.P.P. 1866 Vol. 21, p.24)

6. Sheldon Glueck, Law & Psychiatry P.52

7. (1865) 5 Irv. 88 at p. 184

8. (1859) 1 F. & F. 666

9. (1840) 9 Car & Payne 525 at p. 526

   Post M'Naghten, the defence was rejected in a string of cases: e.g. R. v. Brough [(1854) 2 F. & F. 838]; R. v. Haynes [footnote 8 supra]; R. v. Brunton [(1863) 3 F. & F. 772]; R. v. Holt [(1920) 15 Cr. App. R. 10]; R. v. Quarmby [(1921) 15 Cr. App. R. 63] and R. v. True [(1922) 16 Cr. App. R. 164].

10. Quoted by Winifred Overholser. "Isaac Ray" in Pioneers in Criminology, p. 121

11. The earliest leading case is Commonwealth v. Rodgers, (1844) 7 Metc. (Mass.) 500. The New Hampshire Rule of Judge Charles Doe (State v. Pike 49 N.H. 1 Shirley 399) stems from Ray's writings, as does 'the Durham Rule'. The American Law Institute (ALI) 1962 provision incorporating an irresistible impulse component within the M'naghten Rules has been widely adopted (with variations) in the United States.

12. J.C.Pritchard, On the Different Forms of Insanity, in relation to Jurisprudence, p. 19

13. Liberal judges appeared to indicate that irresistible or uncontrollable impulse due to insanity should be admitted as a defence. see for example: the more modern of these cases, nemely: R. v. Hay (1911) 22 Cox 268; R. v. Fryer, (1915) 24 Cox 403 and R. v. Jolly, (1919) 83 J.P. 296

14. In a paper to the Juridical Society in 1855:

    "There may have been many instances of irresistible impulse of this kind, although I fear there is a disposition to confound them with unresisted impulses".

15. E.g. R. v. Davies, (1881) 14 Cox 563
R. v. Burt, (1885) unreported.
16. Clause 24. (B.P.P. 1872 Vol. 2, p.245)
17. Clause 22. (B.P.P. 1878 Vol. 2, p.31)
18. Vol. 2, pp 124 et seq.
19. Set up following the True case.
20. Report of the Committee on Insanity and Crine.
Cmnd 2005 H.M.S.O. London (1924)
21. Second Reading only (May 15, 1924) - not printed. See long report Times May 16, 1924 p.9
22. 57 H.L.Debs. (5th. Series) 443f
23. (1925) 19 Cr. App. R. 50
24. Ibid at p.141
25. [1936] 2 All E. R. 1138 (P.C.)
26. Gowers Report paras 232/235
27. Mathew p.183, Q. 2127/8, 2203
28. Anderson Q. 4497/8
29. Gowers Report para 236
30. (1960) 2 W.L.R. 588
31. Ibid p. 599
32. 1 Hale P.C. 451; Foster 290; East P.C. 232
33. R.v. Duffy [1949] 1 All E. R. 932. Devlin J. at p.932n
34. Section 4 Homicide Act
35. The position is, of course, different in Scotland re: diminished responsibility
36. R. v. Hopper (1915) 2 K.B. 431; Kwake Mensah v. R. [1946] A.C. 83
37. (1913) 9 Cr. App. R. 139
38. (1914) 3 K.B. 1116
39. Based on personal observation and the literature.
Cf. T.B.Smith 1957 Crim. L. R.354 at p. 361
40. (1944) 29 Cr. App. R. 18 at p. 27
41. Unreported Hertford Assizes Oct.7, 1958
42. (1958) 42 Cr. App. R. 145 at p. 153
43. Archbold, 43rd.Edn. 20-45
44. Original records. C.C.Cr. 821335 of 1983
45. (1960) 44 Cr. App. R. 246 at p.250

46. Ibid at p. 252

47. Ibid at p. 254

48. (1925) 19 Cr. App. R. 50 at p. 51

49. Mind altering, intoxicating.

A drug is any substance that, by its chemical nature, alters structure or function in a living organism

50. (1970) 1 Q. B. 152

51. (1977) A.C. 44

52. (1920) A.C. 479

53. (1963) A.C. 349

54. Hale, P.C. Vol. 1, p. 32

55. Book I, C. 1, S. 6

56. I Inst. 247a

57. Book IV, C. 2, S. III

58. Commentaries i 45-47 and Bell's Notes

59. Hale supra p. 54

60. Chronic brain syndrome which results in severe and irreversible intellectual damage. Typical symptoms are loss of memory, disorientation, childishness. Notably tendency to 'confabulate' as a means of covering up gaps of memory

61. R. v. Davis, (1881) 14 Cox 563

R. v. Baines, The Times Jan 1, 1886

62. 14 Cox 563 at p. 564

63. (1867) 5 Irv. 466

64. (1878) 4 Coup. 86

65. (1882) 4 Coup. 569

66. 1923 J.C. 49

67. Ibid at p. 50

68. 1946 J.C. 108

69. 1956 J.C. 20

70. [1962] Crim. L. R. 838

71. (1960) 43 Cr. App. R. 167

72. [1962] Crim. L. R. 836

73. (1977) 65 Cr. App. R. 242

74. Ibid 246

75. (1975) 61 Cr. App. R. 261

76. Ibid at p. 263

77. (1984) 3 All E. R. 252 C.A.

78. (1966) 50 Cr. App. R. 61

79. R. v. Gittens supra at p. 332

80. Unreported. Ct. of Appeal No. 1640/83 1.3.851

81. (1988) 87 Cr. App. R. 45

82. Unreported. The Daily Telegraph July 29, 1984

83. C.C.C. No 82/1426 Feb. 21, 1983

84. Smith & Hogan, Criminal Law, 5th. Edn p. 276

85. From the Greek 'Happy death'

86. Particularly in relation to the Voluntary Euthanasia Society (formerly called EXIT) and their booklet 'A Guide to Self-deliverance' issued June 1981

87.. Gowers Report para 568

Mercy-killing bedevilled the draftsman of the Homicide Act. Three-quarters of the letters on capital/non-capital offences [see Home Office file 291/103/Cri Public Records Office] wanted poisoning retained as a 'hanging' offence but of course overdosing is a common form of mercy-killing. The clamour was resisted for this reason.

88. Hale, P.C. p. 428

89. Mercy killing can take many forms. The common features of the cases under discussion are that the killing (whether spontaneous or premeditated) was prompted by anguish in the knowledge of the victim's severe handicap, imminent death or severe pain and a compassionate decision that the victim would be better off dead

90. Gowers Commission Minutes of Evidence. Fisher Q. 4904

91. Gowers Report para 179

92. Ibid para 180

93. Ibic para 790(10)

94. Working Paper on 'Offences against the Person' H.M.S.O. London (1976) pamphlet Vol. III

95. 12th. Report on 'Penalty for Murder' Cmnd 5184 H.M.S.O. London (1972)

96. 14th. Report on 'Offences against the Person' Cmnd 7844 H.M.S.O. London (1980)

97. Ibid para 115

98. Chapter II C

99. The D.P.P. gave evidence to this effect to the Gowers Commission. See Report para 24

100. See Gowers Report para 646 and Appendix 3, table 12

101. Quoted by Norman St John-Stevan in Life, Death and the Law p. 263

102. Gowers Report para 25. From the evidence given to the Commission it would appear that there had been no such case in recent years

103. Ingham, a man of 71, who battered his wife to death when he realised she was going severely deaf and have to enter hospital for a serious operation. He had himself been ill nut the nature of his illness is not disclosed in the note. Liverpool Crown Court. June 5, 1957

104. Mrs Ross thought that she had contracted a disease from a teacup and passed it on to her children. She therefore decided to kill them but changed her mind after she had gassed and drowned the first. There was evidence of paranoid schizophrenia. Durham Assizes. Oct. 23, 1957

105. Elizabeth Bowron, who suffered from delusions and had a history of mental illness, killed her six year old child claiming that the girl – wrongly – had TB. Warwick Assizes. Nov. 27, 1957

106. Mackintosh battered his elderly wife to death then gave himself up to the police. His belief that his wife's illness was cancer had caused severe mental depression and he had hardily eaten or slept in the two weeks before her death. Hampshire Assizes. Dec. 6, 1957

107. Liverpool Crown Court. Nov. 11, 1957

108. Stafford Assizes. Nov. 28, 1957

109. Stafford Assizes. Dec. 6, 1957

110. Central Criminal Court. May 8, 1958

111. Derbyshire Assizes. June 11, 1958

112. Durham Assizes. Oct. 27, 1958

113. Central Criminal Court. Sept. 10, 1958

114. (1961) 105 S. J. 529

115. 33 & 34 Vict. c. 23

116. Dell did not look at every diminished responsibility case in the period but took a sample – 2/3rds in the years 1966/69 and 1/3rd for 1970/77

117. Typical of the cases in this period would be Gray, (1965) J.P.N. 819 and Price, " The Times", Dec 22, 1971

118. "The Daily Telegraph" May 15, 1985

119. This appears a blatant case and an abuse of the section

120. "The Daily Telegraph" July 2, 1985

121. Ibid Aug. 3, 1985

122. Ibid Sept. 25, 1985

123. Ibid Oct. 21, 1985

124. Granville Williams: New L.J. 136 Jan 27 1986

125. Idem: Textbook of Criminal Law, pp 623 & 629

126. Roger Leng: 'Mercy Killing and the CLRC', New L.J. 132 Jan. 28, 1982 p. 76

127. Dell, supra, p. 35

128. Ibid p. 36

129. "Sunday Times" July 31, 1988.

130. "The Independent" May 27, 1989

Chapter XI

Procedure and Evidence

A. The Plea:

Whether or not diminished responsibility might arise, the indictment for a homicide would normally be drawn to charge murder. In any event the prosecution and the committing magistrates would have no knowledge of such a defence at that stage. It is, of course, common practice for an accused when arraigned to plead not guilty to the charge in the indictment but guilty to a lesser charge on which he could lawfully be convicted, but it is always in the discretion of the judge to refuse to allow such a plea to be accepted.[1] So far as the prosecution are concerned, the duty of counsel for the Crown would be to present the offence charged in the indictment unless the depositions clearly show that a reduction in the charge should be made.[2]

When the Homicide Act first passed into law it was assumed, from the wording of the Act, that as Parliament had placed the burden of proving diminished responsiblity on the accused, a judge should not accept a plea to manslaughter on those grounds. In fact it was done on a limited scale.[3] In Matheson,[4] in 1958, the Court of Criminal Appeal took the opportunity of that case to draw the attention of judges to the breach of practice and to indicate that in future it should not be done at all. The issue should be left to the jury, as in insanity. They were still repeating this advice in March 1962 when they dealt with the case of R. v. Ahmed Din[5] and the Lord Chief Justice commented:

> "Before parting with this case, the court would like to say that in their opinion, it is a good illustration of what for

> long has been apparent, namely, that the prosecution are only too ready in these cases to fall in with and to support a defence of diminished responsibility. This court has already said that this is an issue which in every case must be probed. . . . It is something of which a jury must be satisfied, and in order that they should be satisfied the matter must be fully tested".[6]

Of course there were cases in which it was obvious that a plea should be accepted. Yet in 1962, when Leo Abse asked the Home Secretary whether in the light of recent murder trials, he would introduce legislation to enable a person charged with murder to submit a plea of diminished responsibility, as an alternative and in addition to a plea of not guilty, Mr Fletchter Cooke for the department, replied "No, My Right Honourable Friend is not convinced of the case for such legislation". Quite apart from the waste of court time in hearing long cases in which there was no real dispute on the facts, real distress could be caused to mentally ill accused who had to undergo these protracted hearings. Many High Court judges thought this was wrong. As a result, at a meeting of the higher judiciary later in 1962, it was agreed informally that in future where there was clear evidence of mental imbalance and medical opinion was not divided nor were there other grounds on which the plea might be challenged, then their discretion would be exercised so that the plea be accepted.

This approach only came to the attention of practitioners in R. v. Cox (Maurice)[7] in November 1967. In that appeal, where the only matter at issue was one of whether he merited punishment or a hospital order should be made, the accused had been convicted of manslaughter on the judge's direction. Winn, L.J. delivered the judgment of the court:

> "From the very outset of the trial it was quite clear not only that the appellant was prepared to plead guilty to manslaughter on the grounds of diminished responsibility but also that the medical evidence available, in the possession of the prosecution as well as of the defence, showed perfectly plainly that that plea was a plea which it would have been

> proper to accept. However, the matter proceeded to be tried by the jury, as a result of which time and money were spent and the appellant was no doubt kept in some anxiety and uncrtainty whilst the trial went on. The Court desires to say yet again (sic), not at all for the first time in the experience of every member of the court, that there are cases where, on an indictment for murder, it is perfectly proper, where the medical evidence is plainly to this effect, to treat the case as one of substantially diminished responsibility, to accept a plea to manslaughter on that ground, if the plea be tendered, and to avoid a trial for murder".[8]

The Court did stress in R. v. Vinagre,[9] although obiter, that it was never intended that pleas should be accepted on flimsy grounds (as they clearly thought had happened in Vinagre).

Some clarification has emerged from the Report of Mr Justice Farquharson's Committee on the role of prosecuting counsel published in May 1986 which roughly followed the views contained in the Guidelines to Prosecution Counsel by the Bar Committee of the Senate of the Four Inns of Court and the Bar issued in 1984. General approval of the guidance in the Report was given by the Court of Appeal in R. v. Jenkins.[10] It does not vary the view that when Counsel for the Crown does invite the judge to give approval to the acceptance of a plea to a lesser count that approval is no idle formality and the judge is not a rubber stamp.[11]

A celebrated occasion in recent years when this was attempted, was at the trial of Sutcliffe, the so-called Yorkshire Ripper, at the Central Criminal Court in May 1981.[12] At the outset all four psychiatrists were agreed that Sutcliffe was of diminished responsibility. The diagnosis being schizophrenia. Sir Michael Havers, the Attorney-General, for the Crown, was prepared to accept a plea to manslaughter on the grounds of diminished responsibility to the murder counts. His reasoning, later revealed in the Press, "to save the relatives of the victims some of the gruesome details of the killings".[13] The trial judge, Mr Justice Boreham,

refused, reportedly also on the grounds of public policy. That the matter should be fully tested before a jury so that the public should not think that there had been any sort of cover-up. He was influenced also on the ground that the medical evidence in support of diminished responsibility rested not on signs or symptoms observed by the doctors but on revelations volunteered by Sutcliffe himself and at a late stage.'[14]

In the event, the jury having heard the evidence, in particular that of the psychiatrists called for the Crown and for the Defence, returned verdicts of murder on those counts. No doubt they had regard to the gravity and persistence of the crimes and to Sutcliffe's cunning in avoiding detection which indicated that he was aware of the restraint of the law. His responsibility was not 'substantially' diminished. Once in prison, Sutcliffe was transferred almost immediately to a hospital on the grounds of his mental condition.'[15]

In their Working paper'[16] on 'Offences against the Person' the Criminal Revision Law Committee suggested that, if the relevant medical evidence was available, some means should be provided to allow a person committed by the magistrates for murder to be indicted for manslaughter. The committee was motivated by the same considerations that had troubled the High Court judges. This course of action seems to have been well received in many legal circles. Any doubts expressed centred on the basic presumption of sanity until the contrary be proved and the prejudice that might result from a jury being aware of mental weakness in the accused when he had chosen to contest facts or present an alibi. Encouraged by this interest and taking account of the observations made, the committee recommended in their Report'[17] that provision should be made enabling a magistrates' court, if the accused consented, to commit for manslaughter by

reason of diminished resposibility or, if he has been committed for trial on a charge of murder, to be indicted by reason of diminished responsibility. It was clear that statutory enactment would be necessary to circumvent section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act[16] of 1933. The Law Commission in their draft Criminal Code,[19] drawing heavily on the work of the Criminal Law Revision Committee, have provided just such a possible clause as:

> "59.—(7) Where the defendant has been committed for trial for murder...the prosecution may, with the consent of the defendant, serve notice in accordance with Rules of Court of evidence of mental abnormality and indict him for manslaughter...by reason of diminished responsibility"

B. Notice of Intention to Raise:

A recommendation made by the Butler Committee on Mentally Abnormal Offenders[20] in 1975 which might well have been implimented whatever else happened to the proposals of that committee — but has not been for reasons which are obscure — was that notice should be given by the defence of their intention to adduce psychiatric evidence, as is down with 'alibi', within a certain number of days of committal. The Criminal Law Revision Committee in their Foureenth Report[17] questioned the value of this procedural step considering that the prosecution with its own medical advisors and reports would not be taken by surprise by such a defence. In practice the implications are much greater and to introduce some element of certainty at an early stage could only improve presentation of the Crown case; open up negotiations on a plea; contribute to the saving of witnesses time and the better use of court facilities and little prejudice can accue to the accused. It is interesting, on the other hand, to observe that this practice has never been followed in Scotland in respect of diminished responsibility as it is with proposed defences of 'alibi' (a

recent direct import with this rule into England),'self-defence', 'the crime committed by another person named and designed', 'asleep when crime committed' and notably 'insanity', all known as 'special defences' and of which notice has to be given by the Second Diet before the sheriff.[21] Diminished responsibility is not considered a special defence.

Some hope now looms on the horizon for the suggestion is incorporated as part of section 59 in the draft Criminal Code,[19] issued by the Law Commission as a discussion document, in the following terms:

> "(2) The defendant shall not, without leave of the court, give or adduce evidence of mental abnormality unless, not more than — days after the end of the committal proceedings he has given to the prosecution notice in writing of his intention to do so and of the nature of the mental abnormality alleged.
>
> (3) The court shall not refuse leave if it appears to the court that the defendant was not informed in accordance with Rules of Court of the requirements of subsection (2)".

C. Onus Probandi:

(i) Who may raise:

Section 2. —(2) of the Homicide Act,1957 is in the following terms:

> "On a charge for murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder".

Clause 2 of the original Bill was drafted in identical form so it would appear that it was the intention of the Government from the first to follow the usual course of placing the burden of proving a mental disability on the accused.

The legal draftsman had, of course, the precedent of the plea of insanity. We have seen in Chapter VII that at the time of arraignment, the question of insanity can be raised by the judge, the prosecutor or by the defence. As the issue of insanity at the time of the act is in the nature

of a defence it must be raised by the accused or on his behalf. This stems, of course, from the Answer to the Second Question put to the Judges following the M'Naghten trial: "Every man is presumed to be sane ..... until the contrary be proved to the satisfaction of the jury".[22]

The draftsman would also be aware, that as the law then stood, the duty of the prosecution was limited to placing at the disposal of the defence and the court any evidence of insanity in their possession. This course, of long standing, is founded on the direction in R. v. Smith.[23] Counsel in that case had asked the Court of Criminal Appeal for a direction as to the duty of counsel for the Crown with regard to tendering evidence of a defendant's sanity. The Lord Chief Justice stated that at a meeting some seven or eight years earlier, all the judges resolved that it was not proper for the Crown to call evidence of insanity but that any evidence in the possession of the Crown should be placed at the disposal of the accused's counsel, to be used by him as he thought fit.

The practice in the Scottish courts had been given to the Gowers Commission.[24] Braithwaite[25] had clearly established, that so far as the common law doctrine of diminished responsibility was concerned, it was for the panel to raise the defence.

But was what was proposed in accordance with the basic principles of English criminal law ? The classic words of Viscount Sankey L.C. in Woolmington v. D.P.P. rings in ones ears:

> ""No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".[26]

Before clause 2, as drafted, reached the Statute Book many voices were raised in protest; notably that of Mr R.T.Paget, Labour Member of Parliament for Northamption. At Committee Stage in the House of

Commons he moved to have the clause amended by inserting the word "prosecution" for the word "defence".[27] It was contended that it should be changed for reasons of principle and of convenience. Why, Mr Paget asked, when it is the will which is defective the defect should be proved by the defence ? The prosecution has to prove that the killing is not accidental or not done by negligence, surely they should also have to show that there was the mental capacity to form the necessary intention - in murder, the element of malice aforethought. On the grounds of convenience, Mr Paget felt that the prosecution had readier access to information based on observations of the accused while on remand and therefore could, without inhibition, put forward the plea. The fact that insanity was an exception to the general rule did not justify – in his view – adding to the anomaly by putting diminished responsibility in the same category.[28]

When the Committee divided on the motion 'that "defence" stand part of the Clause', the Ayes were 239 and the Noes 187.[29] This where for much of the debate there were "fewer than a dozen Honourable members on either side present". And so it passed into law.

An interesting and important case on procedure is that of Cebert Bastian[30] who confessed to killing his two young sons by beating them to death with a rolling pin – possibly to spite his wife. After the incident he attempted to commit suicide. He had been under observation as a mental patient not long before. At his trial at the Central Criminal Court, on arraignment, Bastian pleaded guilty but, after some discussion, that plea was withdrawn and a plea of not guilty entered. At the close of the case for the prosecution, counsel for Bastian stated that he had no instructions from his client to put forward a plea of insanity, but that he intended to call medical evidence to show that the accused was suffering

from diminished responsibility. Counsel for the Crown then contended that if such evidence were called he would be entitled to cross-examine to show that the degree of abnormality was such as to amount to insanity and to call evidence to that effect.

Counsel for the defence then called two medical witnesses in support of a plea of diminished responsibility and asked for a verdict of manslaughter. It was said in evidence that Bastian's condition was bordering on insanity - he might be suffering from melancholia or schizophrenia. The prosecution then called one witness at this stage in rebuttal - Dr Brisby, the Principal Medical Officer at Brixton Remand Prison. The Crown asked for a verdict of guilty but insane.

The jury were directed by the trial judge (Donovan J.) that, the prosecution having proved that the accused killed the two children, then:

> "the issue was what his mental state was at the time, namely, whether he was guilty of the act but insane at the time he did it or whether his mind was so affected by some disturbance that his responsibility was diminished and that therefore the proper verdict was one of manslaughter".[31]

The jury returned a verdict of manslaughter and Bastian was sentenced to imprisonment for life.[32]

The converse situation to that of Bastian arose in the following year in relation to Lyndon Emrys Nott.[33] Nott was a butcher who strangled and then stabbed a girl, Veronica Ryan, he had just raped in a Hertfordshire lane. He gave himself up to the police on the day following the crime.

At his trial at Bedfordshire Assizes, the defence was that, at the time of the commission of the offence, Nott was insane within the meaning of the M'Naghten Rules. The defence called one medical witness to establish this averment, the witness being cross-examined by the Crown.

There was strong evidence regarding Nott's mental state – schizophrenia – with a long history of treatment in mental hospitals and attempts at suicide. At the close of the case for the defence, the prosecution sought leave from the trial judge (Elwes J.) to call medical evidence rebutting the defence. It was indicated that the witnesses whom they desired to call would say that the prisoner was not insane within the M'Naghten Rules at the time of the offence, but did come within the definition of diminished responsibility under section 2.

The defence did not seek to resist the application and Mr Justice Elwes, after referring to Bastian,[30] gave the prosecution leave to call the evidence and witnesses were called. These witnesses were cross-examined by the defence. In the event, the trial judge advised the jury to accept the defence evidence that a schizophrenic attack had occurred and Nott was found 'Guilty but Insane'.

In R. v. Price,[34] Mr Justice Lawton refused to allow the prosecution to call such rebuttal evidence. In this practice he was followed by Mr Justice Elwes when he presided at the trial of Joyce Marshall[35] at Nottingham Assizes in December 1962. At this trial the judge declined to allow the prosecution to allege that the accused was guilty but insane when the defence raised the issue of diminished responsibility. Mitchell was ultimately ordered to be detained in a mental hospital.

The trial of Irene Mary Duke[36] at the Old Bailey in 1961 for the capital murder of her husband resulted in the jury returning a verdict that she was guilty of manslaughter but insane – not guilty of capital murder. There is nothing remarkable in that as she had told the police "I don't know what made me do it. The gun was in the ... cupboard. I kept

hearing noises in my head. I feel like two people ... I am a wicked woman but he said he was going to leave me and I'd be better off". The appeal which followed, although unsuccessful, raised an interesting point as the law then stood. By pursuing a course which resulted in the finding of 'Guilty but insane' (introduced by the Trial of Lunatics Act[37], 1883) the special verdict as an acquittal deprived the accused person of a right of appeal. Bastian[30] had opened the way for this to become commonplace. The point was taken up by the Home Secretary and referred to the Criminal Law Revision Committee. In a Report[38] which followed – and which contained a draft Bill – the Committee stated that they thought that the point of not allowing the prosecution to counter a plea of diminished responsibility by adducing evidence of insanity would be less valid once there was a right of appeal. It recommended, however, that the issue should be resolved by Pariament making statutory provision that the prosecution could give evidence of insanity to rebut a plea of diminished responsibility and vice-versa. This recommendation ultimately resulted in the Criminal Procedure (Insanity) Act[39] of 1964.

That there was no uniformity is illustrated by the actions of Mr Justice Marshall in R. v. Russell,[40] where the trial judge did not adopt the practice in Price[34] but followed the decision in Bastian.[30] He did however express the hope that the recommendations of the C.L.R.C. would be speedily implimented.

What of the defendent whose condition merits consideration that his responsibility might be diminished yet refuses, even on advice, to tender this plea ? His condition might in itself deprive him of the ability to make a full and rational decision to put the plea forward. Again, the stigma that still attaches to the suggestion of mental

abnormality within a family may result in a failure to utilise the defence of diminished responsibility, either under pressure from that family or of the accused's own volition.

One such case was that of Alvada Ruth Kooken.[41] Kooken had been convicted at the Old Bailey of the murder of a woman friend with a hand gun. She had shot the victim convinced that the deceased and another woman had conspired together to persuade a surgeon[42] to carry out a hysterectomy upon her. After the operation Kooken said that she felt 'dewomanised' by it and blamed the deceased for her condition. At the trial a number of highly qualified medical witnesses gave evidence that the accused was suffering from a marked degree of schizophrenia which resulted in delusions of persecution, and that at the time of the killing she was suffering from diminished responsibility. Kooken however declined to allow such a defence to be put forward. The only defence run was that of provocation. This was rejected by the jury. Kooken was sentenced to life imprisonment but shortly afterwards was transferred to Broadmoor under the provisions of section 72 of the Mental Health Act 1959.

Eighteen months later, Kooken sought leave to appeal against conviction from the court of appeal.[43] It was submitted inter alia: that the trial judge erred when he declined to call that evidence on his own motion

The Lord Chief Justice gave the judgment of the court. Mr Justice Peter Pain and Mr Justice Stuart-Smith were with him. His Lordship commenting on the submission that the trial judge should have intervened said: "We very much doubt whether any such discretion can exist in the judge". He went on:

> "However it is always dangerous to forecast that no possible situation could ever arise in which the judge may not have to consider his powers in that respect. But we find it difficult to envisage any situation where the judge could properly call

> evidence to this effect in the face of the wishes of the defendent, upon whom the choice lies and upon whom alone the choice lies".[44]

They then went on to dismiss the appeal dealing with other major grounds raised which are set out later in this chapter.

It is interesting that it took so long for focus to turn on the position of the judge in such matters. This is obviously – and remains – a grey area and that should not be; after all the Gowers Commission in 1954 had recommended that:

> "The judge, both in England and Scotland should be given [specific] power to raise the issue of insanity, to call relevant evidence and to put the issue to the jury, if he has reason to believe that the accused may have been insane at the time of the offence and that the trial of that issue should be in the interests of justice".[45].

The court in Kooken declined to particularise the difficulties which it thought might arise generally or under section 6 of the Criminal Procedure (Insanity) Act,[39] 1964. It may be that these difficulties are more apparent than real. Increasingly, and with approval, judges are stepping in on their own responsibility to direct the course of trials – withdrawing counts where the principal witnesses are discredited or the identification evidence is poor[46] – to ensure a fair outcome to proceedings. It is a short step to the judge, in the interests of justice, directing s jury to return a verdict of manslaughter on the grounds of the accused's diminished responsibility. Indeed, such a course was taken by Mr Justice Blain in the case of Maurice Cox[7] at Sussex Assizes in March 1967, although the evidence on which it was founded was called by the prosecution and the defence.

There is no reason why the recommendation of the Gowers Commission regarding insanity and quoted above should not be implemented in respect of diminished responsibility and the trial judge allowed – as he

is with those under a disability – to put the matter in the arena where the Crown do not feel able to do so; for example: on grounds of public policy (as in the Sutcliffe case)

The question of burden of proof concerned the Butler Committee on Mentally Abnormal Offenders. The Committee took the view[47] that while the initiative in raising the issue might remain with the defence, the only burden should be an evidential one; thereafter the burden would be on the Crown. Of course, the prosecution would retain the rights they now have under the Criminal Procedure (Insanity) Act,1964 to raise insanity if appropriate. This view is in accord with the general approach to criminal offences and the draft Criminal Code treats it in this way using a clause drafted by the Criminal Law Revision Committee in their Eleventh Report.[48] One result is, of course, that it puts diminished responsibility on all fours with provocation on this point.

(ii) Standard of Proof:

Concomitant with the knowledge that in insanity and in the Scottish doctrine of diminished responsibility the burden of proof was placed on the defence, the draftsman of the Homicide Bill would be aware that in both these situations the standard of proof arising was of a less exacting standard than that placed on the prosecution.

In Sodeman v. R,[49] an Australian appeal before the Privy Council which turned on the question of insanity in relation to murder, Viscount Hailsham L.C. had said:

> "It is certainly plain that the burden of proof in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendent in civil proceedings. That this is the law has not been challenged".[50]

It has long been accepted that the standard of proof required

in civil cases is generally expressed as 'proof on the balance of probabilities'. The basis for this proposition has been attractively expressed by Mr Justice Humphreys:

> "What is the burden resting on a plaintiff and defendent in civil proceedings can, we think, best be stated in the words of the classic pronouncement on the subject by Willes J. in Cooper v. Slade.[51] That learned judge referred to an ancient authority in support of what he termed "the elementary proposition that in civil cases the preponderance of probability may constitute sufficient grounds for a verdict". The authority in question was the judgment of Dyer C.J. and the majority of the Justices of the Common Pleas in Nervis v. Lark[52] decided in the reign of Queen Elizabeth. The report contains this passage — 'where the matter is so far gone that the parties are at issue . . . so that the jury is to give a verdict one way or the other, then if the matter is doubtful, they may found their verdict upon that which appears the most probable shall be good evidence'".[53]

Denning J.(as he then was) clarified the matter further when he commented in Miller v. Minister of Pensions:

> "if the evidence is such that the tribunal can say 'We think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not".[54]

The position in relation to diminished responsibility in Scotland was stated by Lord Cooper, then Lord Justice Clerk, in Braithwaite[25] in his direction to the jury in that case:

> "It is for the accused to make good his defence of partial responsibility, and that means that he must show you that the balance of probability on the evidence is in favour of the view that his accountability and responsibility were below normal".[55]

When published, the Homicide Bill was silent as to the standard required of those who urged the defence. By Clause 2(2) however, it placed the 'burden' squarely on the defence 'to prove' that the person charged was not liable to be convicted of murder by virtue of diminished responsibility.

At Committee Stage, fears were expressed that 'proved' did not reflect the intention of the movers of the Bill and an amendment was proposed by Sir Frank Soskice (a former Attorney-General) to put the

matter beyond doubt. He proposed that the word proved be deleted and 'satisfy the jury' be substituted. This was strongly resisted by the Soliciitor-General (Sir Harry Hylton-Forster).[56] Indeed, neither phrase was appropriate.

To Sir Frank, 'prove' implied that it was entirely upon the defence to establish affirmatively a diminished responsibility. He also felt that in the context of recent decisions the word 'prove' was invested with a slightly sinster significance, in the sense that there was some doubt sometimes as to precisely what was the onus which a person seeking to prove something takes upon himself. Sir Frank thought it preferable to use language more familiar in the courts than the language used in the Bill.

Sir Harry in reply, stressed that it was the Government's intention to impose on the defence nothing more than a burden to prove 'the preponderance of probability' — certainly not a burden 'beyond reasonable doubt'. He claimed that the word 'prove' did just that, based on "the plainest possible authority". Sir Harry had in mind the cases of Sodeman, already referred to, and to R. v. Carr-Briant.[57]

Carr-Briant was prosecuted under section 2 of the Prevention of Corruption Act,[58] 1916 with bribing a minor War Office official. He was convicted and sentenced to a prison term of eighteen months. He appealed.

The Prevention of Corruption Act 1916 was one of those rare statutes which make a presumption against the accused person in certain circumstances. In particular, section 2 'deemed' the transaction between the accused and the third party to be corrupt 'unless the contrary be proved'. At the original trial the judge had directed the jury that Carr-Briant had not only to discharge the burden of proof and show that he

gave the money without a corrupt motive, but he had also to do so beyond all reasonable doubt, and if the jury were left in doubt by the evidence given on behalf of the accused, they must convict.

Mr Justice Humphreys [sitting with the Lord Chief Justice (Viscount Caldecote) and Mr Justice Lewis] delivered the judgment of the court. After quoting passages from Woolmington[59] and Sodeman and the general authorities cited above in respect of the burden in civil proceedings, he said this:

> "In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person 'unless the contrary is proved' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish".[60]

Opposition members very properly pointed out that what might apply to corruption did not necessarily apply to a defence of diminished responsibility.

Although they did not draw attention to it, these cases of statutory exception, where the legislature has relieved the prosecution of its original onus, and placed a 'legal' onus on the defence — as they have done with diminished responsibility — contrasts sharply with the many cases where the accused's defence introduces new issues, as for example: automatism, provocation, self-dfence or duress. This he may do by the nature of his cross-examination of prosecution witnesses or by evidence called on his behalf or by a combination of the two. Once he has succeeeded in doing this (and thereby discharged his 'evidential' burden) it is for the prosecution to destroy that defence in such a manner as to leave in the jury's mind no reasonable doubt that the accused cannot be absolved on the grounds of the alleged facts constituting the defence.

The general defences of provocation and diminished responsibility are very similiar in nature and effect. Both are extenuating defences based on a loss of self-control and both may operate in reducing the quality of the offence charged. Similarly an accused person's mental condition at the time of the crime is also critical in the case of self-defence. especially where the accused believes incorrectly, but with some foundation in fact, that the deceased was about to do him some grievous bodily harm. Yet diminished responsibility receives different treatment from its nearest neighbours – provocation and self-defence.

The alternative proposition 'to satisfy the jury' foundered on the analogy that the words were close to the modern direction which has succeeded 'beyond reasonable doubt' in Woolmington. This was the. direction which had emerged in 1950 when the Court of Criminal Appeal expressed the view that in cases where the burden was on the prosecution the jury should be told in the summing-up that "they should be satisfied so that they felt sure" before they convicted.[61]

Perhaps the wisest thoughts in the whole debate were uttered by the Member for Oldham West, Leslie Hale, who, when talking of 'the balance of probabilities', said "Why on earth should we have to adopt some old legal formula because thirty or forty years ago some judge said it meant something or other ? Why not put it in the Statute and make it clear".[62]

Again, Sir Frank Soskice was not to know that the fears he expressed in the debate: "that it would be something of a catastrophe when this new and important change is made in the law if five or ten years hence some court of criminal appeal has to decide the meaning of the word 'prove' in that context"[63] – was to be realised so soon.

Ronald Patrick Dunbar,[64] an 'inadequate psycopath' had killed an old lady while robbing her. At the trial, before Mr Justice Ashworth and a jury at Newcastle-upon-Tyne Assizes in May 1957, there had been no dispute that Dunbar was responsible for the killing or that it had been done in the course of theft. The only defence raised on his behalf was that he was, at the time of the crime, suffering from diminished responsibility. The defence submitted that the correct verdict was one of manslaughter giving effect to section 2. The issue was left to the jury and they found the accused guilty of capital murder and he was sentenced to death.

Dunbar appealed on the grounds: inter alia, that the trial judge failed to direct the jury properly, or misdirected them, on the onus or standard of proof required and in particular, that at the beginning of his summing-up he equated the onus or standard of proof required of the defence with that required of the prosecution, and directed the jury that before giving effect to the 'special defence', they must be "satisfied" and if not satisfied must reject it.

The appeal followed a curious path. The original court of three judges adjourned to obtain a copy of the petition in Soderman's case[36] although there was a majority for allowing the appeal. It was intended that it be reconvened as a full court of five when the hearing was resumed but in fact it was before the same three judges [Lord Goddard C.J., Byrne and Devlin JJ.] Lord Goddard gave the judgment of the court allowing the appeal and substituting a verdict of manslaughter. It was clearly stated that where the defence of diminished responsibility was raised it must be pointed out to the jury that the burden on the defendant of establishing the defence is not as heavy as that which rests on the

prosecution to establish guilt, and if the jury are of the opinion that the balance of probability is in favour of the defence, they should return a verdict of manslaughter, but that if they cannot find in the evidence material to justify the conclusion that the balance of probability is in favour of that defence, it is their duty to return a verdict of murder.

The matter was carried further by Mr Justice Paull when directing the jury in R. v. Grant.[65] Grant had been charged with the murder of his son. Again there was no challenge on the killing. Diminished responsibility was put forward by the defence who sought a verdict of guilty of manslaughter. In the course of the cross-examination of a doctor called for the defence, the prosecutor elicitated an opinion that the accused did not know the nature and quality of his act, whereupon counsel for the Crown contended that the proper verdict was one of 'guilty but insane'. In his summing-up the judge directed that the defence could establish diminished responsibility by showing that that contention was more probable than not; while the prosecution could establish that the accused was insane within the meaning of the M'Naghten Rules only by proving their contention beyond reasonable doubt, since it was an issue set up by the prosecution.

What has not been commented on judicially in relation to diminished responsibility and the balance of probabilities is the well-established principle in the civil courts that while the standard of proof required to prove a criminal offence in civil proceedingss is no higher than the standard of proof ordinarly required in civil proceedings; the more serious the allegation the higher the degree of probability that is required — and what could be more grave than homicide ?

> Lord Denning put the test in this way:
> "the degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require for

> itself a higher degree of probability than that which it would require when asking itself if negligence is established. It does not accept so high a degree as a criminal court even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commenserate with the occasion".[66]

D. Medical Evidence:

(i) Need for Medical Evidence:

It has long been the law that 'medical evidence is not essential to prove insanity'[67]. An early authority was the case of Eliza Dart,[68] who had thrown her child and herself into the Serpentine. There was evidence before the court that the accused's behaviour since the event had been strange and counsel for the prosecution suggested that scientific evidence as to the girl's state of mind should be forthcoming. Lord Justice Brett said that it was a mistake to suppose that, in order to satisfy a jury of insanity, scientific evidence must be adduced. If the evidence of facts (e.g. the words and actions of the accused) were such as to indicate an unsound state of mind that was quite sufficient.

The medical profession view the decision in Dart – still quoted in legal textbooks[69] – as something "worthy of the dark Ages"[70]. They would not, they said, expect a jury to decide, on the facts, that a disease of the kidneys existed so why allow them to do so when it is the complicated mechanism of the mind. Of course, what the jury is really deciding is not a medical question but that of responsibility. In any event, juries are daily looking into the minds of defendants – looking for specific intent or more generally mens rea – so it is certainly not a task beyond them

Lord Goddard in R. v. Rivett – where the issue was insanity – emphasised that:

> "it is for the jury and not medical men of whatever eminence to determine the issue, unless and until Parliament ordains that this question is to be determined by a panel of medical men, it is to a jury, after proper direction by a judge, that, by the law of this country, this decision is to be entrusted".[71]

However, in relation to section 2 of the Homicide Act, 1957, the Government made it clear in their statement on the Second Reading of the Bill in November 1956[72] that the intention was to restrict the defence to cases where it was supported by medical evidence.

In fact, section 2 does not specifically state that there should be medical evidence adduced in support of a defence of diminished responsibility. Defence counsel tried to exploit this apparent lacuna in the section in a case at Bristol Crown Court in 1980. Namely: that of Trevor Glyn John Dix.[73]

Dix had made a full admission to his crime in his statement to the police. There was no dispute he had shot a woman friend in the back, covered her body with foliage and then left the area. The only possible defence lay in his mental condition but no medical evidence was available to support either insanity or diminished responsibility – indeed it may have been sought and been found unfavourable. Although section 2 had been on the Statute Book for more than twenty years, counsel asked the trial judge, at the close of the prosecution case, to rule whether or not the two elements of the defence of diminished responsibility were susceptible of proof by general evidence relating to the accused's conduct at or about the time of the killing and by reference to all the surrounding circumstances and the relevant history. In effect, it was contended that the jury could come to the right

conclusion as to the application of section 2(1) without the assistance or guidance of medical evidence as to the nature and source of the abnormality of mind from which the accused was suffering.

An analogy was drawn with the numerous cases in which medical evidence was tendered by both the defence and prosecution supporting a plea of diminished responsibility but the jury rejected that evidence and convicted of murder; the history and circumstances of the offence being treated by the jury as having greater significance than the scientific evidence. If juries were entitled to act in this way why should they not come to the conclusion, one way or the other, as to diminished responsibility when there was no medical evidence at all.

The judge (Mr Justice Grifffiths) ruled against the submission, being satisfied that it was a requirement of the section that the defence should provide the evidential basis upon which a jury could reasonably conclude that the accused was suffering from an abnormality of mind of one of the types specified in the section. Whether or not he was must be a matter of medical evidence. The judge added: "Unless the defence lead such medical evidence, it would not be right to leave the issue of diminished responsibility before a jury". Thereupon, the indictment was put again and Dix changed his plea to 'guilty to murder'. He was sentenced to life imprisonment.

Rejecting an appeal against conviction, lodged on the ground that the trial judge had erred in law, Shaw, L.J. reading the judgment of the court, drew support from the judgment of Lord Parker C.J. in Byrne.[74] He pointed out that it was clear from Lord Parker's words in that case that scientific evidence of a medical kind is essential to establish abnormality of mind. Thus, while the sub-section does not in terms

require that medical evidence be adduced in support of a defence of diminished responsibility, it makes it a practical necessity if that defence is to begin to run at all.

In reply to the contention of defence counsel that the tendering of medical evidence was not a sine qua non to a successful reliance on the plea, the lord justice maintained that: "the logic of the argument might be stronger if there was no onus on the defence to prove diminished responsibility".[75]

(ii) Basis for Medical Evidence:

During the course of our examination of the case records we have been impressed by the care and diligence that examining psychiatrists have exercised to furnish themselves with the fullest possible background to the case and the accused's condition prior to the killing. The committal papers are fully studied. Records of social agencies which have played some part in the defendant's life in the past or in the life of his victim are consulted, predominantly these are of the Probation Service and the welfare agencies of the local authority. Medical records from general and psychiatric hospitals and the notes of the local general practitioner are almost always sought.

Psychiatrists instructed by defence solicitors have access to a wealth of information provided by relatives keen to help: e.g. of incidents in youth, then unremarked, now significant. The prosecution must be content with any comments gleaned from neighbours, anxious to avoid involment.

Defendants themselves are interviewed by the psychiatrists on at least one occasion and this, in addition to providing an opportunity to observe the patient, throws up a lot of early history which may or

may not be accurate – either by design or default. It is against this type of background that Lord Justice General Normand observed in the Scottish case of Carraher:[76] "It may be timely to say [also] that little weight attaches to medical evidence which is based on a history of the pannel's conduct about which no evidence has been led before the jury".

Strictly speaking in any criminal case a doctor may not state what a patient told him about past symptoms as evidence of the existence of those symptoms because that would infringe the rule against hearsay but he may give evidence of what the patient told him in order to explain the grounds on which he came to a conclusion with regard to the particular condition.[77]

The matter is well illustrated in the case of Ahmed Din.[78] Din had killed another Pakistani with whom he believed his wife was having an affair. At his trial at Birmingham Assizes in December 1961 the only issue had been the accused's mental state and all the medical witnesses agreed that Din was suffering from an abnormality of the mind resulting from paranoia due to a belief in his wife' infidelity for which there were no reasonable grounds. The doctors had obtained their information either from the accused himself (who gave no grounds for his belief) or from his daughter (who said that she had no reason to suspect her mother). No defence evidence was called to lay a basis for the opinion that the belief was unreasonable nor had there been any cross-examination (save on the question of insanity) although the doctors' evidence was that paranoia would not be established if the accused's belief in his wife's infidelity was reasonable. The trial judge had told the jury it was for them to make up their minds whether they really felt that they had been satisfied, on a balance of probability,

that the accused's beliefs were delusional and that he had no reasonable grounds for suspecting his wife's infidelity. They convicted of murder.

On appeal to the Court of Criminal Appeal[79] it was argued that the evidence was all one way, namely: that he was suffering from delusions and therefore from paranoia and a verdict of manslaughter should be substituted. The appeal was dismissed. It was held that the opinion of the doctors had little value being based on hearsay.

The court was quick to point out that it was the duty of the prosecution to probe the question whether the accused's beliefs were due to a delusion or not, and to scrutinise the medical reports closely to see how much of it consisted of purely medical evidence. Although diminished responsibility cases depended largely on medical evidence — it will be appreciated that evidence of diminished rsponsibility rarely comes from the defendant himself unless he has recovered — there are involved in the defence matters of fact on which a jury is just as fit as medical men of whatever eminence to determine the issue, and unless and until Parliament ordains that this question is to be determined by a panel of medical men, it is to a jury, after proper direction by a judge, that, by the law of this country, this decision is to be entrusted.[80]

(iii) Medical Evidence Available but Not Called

We have seen earlier in this chapter how in R. v. Kooken[43] an attempt was made to alter a conviction on the alleged failure of a trial judge to introduce medical evidence which would tend to prove that the applicant was suffering diminished responsibility (due to a marked degree of paranoid schizophrenia) at the material time. This evidence was available at the time of the trial, indeed it had been utilised to

resolve the question of whether the accused was fit to plead. The psychiatrist had not been called as a witnesss as Miss Kooken adamantly refused to allow a defence of diminished responsibility to be put forward. the jury rejected her contention that she had been the subject of provocation and she was convicted of murder and ultimately sent to Broadmoor.

While the conduct of a case rests in the hands of counsel and it is for him to decide, in his professional judgment, the nature of the evidence to be call, he will, of course, be guided by the views of his client. It was submitted to the Court of Appeal[81] by the applicant, through her Guardian ad litem, the Official Solicitor of the Supreme Court, that it was in the interests of justice that the Court of Appeal should hear medical evidence which tended to prove that the applicant was suffering from diminished responsibility within the meaning of section 2 and that the Court should exercise its discretionary powers under section 23(1) of the Criminal Appeal Act[82] of 1968 to order that Dr D.R. Pitcher and Dr B.G. Berry should be questioned by the Court.

The grounds of the application were that reports from these doctors were available at the trial but that the applicant refused to allow her legal advisers to call medical evidence. Further, that when the applicant refused to allow her advisers to call such evidence she was incapable of exercising a reasoned judgment in arriving at such a decision; that the jury had expressed a wish to hear medical evidence prior to being required to consider their verdict and that it was in the interests both of justice and of the applicant that a verdict which reflected her true degree of criminality should be recorded.

The Court declined to intervene,being influenced by Miss

Kooken's own wishes (she had written them a letter) and by the fact that at most a change of label would result.

The Lord Chief Justice, in the course of his judgment, drew attention to the words of Lord Widgery, C.J. in R. v. Melville[83] that in order to succeed in a appeal where it is sought to call fresh medical evidence it is ncessary to show that that evidence is strong enough to secure either a quashing of the conviction or at least a new trial. Nothing else will help. In Melville. Lord Widgery had also quoted from an unreported case, R. v. Dodd,[84] where Fenton Atkinson L.J. had said:

> "In the view of this court, cases must be rare indeed when the defence have chosen to run at the trial as their only defence of accident or provocation, or a combination of the two, and when that defence has failed can consult and call a psychiatrist ..... with a view to getting a retrial to run a defence of diminished responsibility. It may well be that if subsequent evidence of diminished responsibility was really overwhelming the court might well feel moved to substitute a verdict of manslaughter or order a new trial.[85]

It was pointed out, with some emphasis, that the function of the Court of Appeal was to supervise the operation of the lower courts and to correct their mistakes and not maintain supervision over prisoners and substitute wholly different sentences merely bcause of a change of circumstances after conviction.

On the submission that it was "necessary or expedient in the interests of justice" to intervene, this comment was made:

> ""Can it be in her interests to take a course which, albeit she is not mentally sound, she does not wish to take ? Is it in her interests to call evidence she does not wish to be called ? To achieve a result which she does not want ? " [86]

After "anxious consideration" the court refused to intervene and the application was refused. A factor which was certainly in the mind of the court – that, having regard to Kooken's condition she would remain in Broadmoor and that any action by the court would merely change the label from imprisonment to hospital order – must, of necessity, lessen

the authority of this decision.

(iv) Medical Evidence All One Way:

Whatever the direction in Rivett, this is not to say that the jury can completely disregard the expert evidence -as they did in R. v. Matheson[4] and R. v.Bailey.[87] In both these cases the Court of Criminal Appeal quickly substituted verdicts of manslaughter on the grounds of diminished responsibility for those originally reached by the jury.

In Albert Edward Matheson's case, where he had been charged with the capital murder of a 15 year old boy in particularly horrifying circumstances, having homosexual overtones, the facts were freely admitted and the issue was the accused's mental state. Three doctors (including the Senior Medical Officer of Durham Jail) were called by the defence. All three were agreed that Matheson was not insane within the meaning of the M'Naghten Rules, but all three were equally agreed that his mind was so abnormal as substantially to impair his mental responsibility. There was no dispute that the accused was a psychopathic personality who was feeble-minded with the mental age of a boy of ten. The prosecution did not challenge the opinions advanced and cross-examination was limited to the elucidation of some points of their evidence and no medical evidence was given by the prosecution in rebuttal. Yet the jury convicted of capital murder.

Similarly with Rodney William Bailey. This young man had beaten a girl of 16 to death with an iron bar. There was no apparent motive. Again three medical men (including a prison Senior Medical Officer) gave evidence that there was abnormality of mind induced by disease, namely: epilepsy, and that thereby his mental responsibility was

substantially impaired. Again there was no real challenge by the prosecution. In his summing-up, the trial judge drew the jury's attention to the medical evidence but he did say "the opinions of the doctors are not binding on you, but in this case . . . you will have noted that all the opinions are one way". He also pointed out that the Crown had not called any evidence in rebuttal. After deliberating for two hours, the jury returned a verdict of murder.

In both appeals, the Court pointed out that the juries had not been faithful to their oath [i.e. to return "a true verdict according to the evidence".] If there is nothing before them which throws doubt on the medical evidence then that is all that they are left with and the jury must in the circumstances accept it. The court then substituted a verdict of manslaughter.

In R. v. Spratt,[88] the Court of Appeal, Criminal Division, substituted a verdict of manslaughter for one of murder (and released on compassionate grounds) where the sole issue had been diminished responsibility and the Crown had subsequently conceded that the medical evidence which had been called in rebuttal was defective, leaving the defence evidence unchallenged.

(v) Medical Evidence uncontradicted but Other Factors:

This is not to say that the jury must slavishly follow the medical evidence even although uncontradicted. Matheson and Bailey clearly show that juries are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. If it is recognised that juries can on occasion properly refuse to accept medical evidence, it follows that they

must be entitled to consider the quality and weight of that evidence. The whole matter was put in proper prospective when Walton v. R.[89] came before the Privy Council Byrne[74] had indicated that a jury should approach their task "in a broad commonsense way" and the subsequent cases that they should consider not only the medical evidence and any history of abnormality but such factors as the nature of the killing and the conduct of the defendant before, at the time of and after it. Their decision being based on a balance of probabilities. There might well be cases where that evidence could be a relevant consideration for the jury in determining the issue and which could justify a jury coming to a conclusion contrary to the unchallenged evidence of the doctors in the case. Juries were entitled to reject or differ from the opinion of the medical men if there was some basis for their action. Such a case was Walton.

Barbados, like many other Commomwealth countries,[90] has incorporated the defence of diminished responsibility into their criminal law[91] and David Walton was one of the first to invoke its provisions. Early in February 1974, after a day at the races, Walton was driving his girl friend and her mother home in his car. They did not like the manner of his driving; he was "acting funny"; so they insisted that he stop and they sought a lift in a passing vehicle. After an altercation with the driver of that other car, Walter shot and wounded him and killed one of his passengers – both complete strangers. At his trial, where he was convicted of murder and sentenced to death, there was evidence from a psychiatrist, a clinical psychologist and the prison doctor. It was the evidence of one of the doctors that he was suffering from 'an extremely immature personality' and while not within the

M'Naghten Rules his mental development had been so retarded as to impair substantially his responsibility for his acts. The other doctor(the Prison Medical Officer) said no more than that he had been treating him for depression while on remand and he had not responded well to treatment. Tests by the psychologist suggested average intellectual ability but an inadequate personality enhanced by emotional immaturity and low tolerance level. There was no rebuttal medical evidence for the Crown. The defence medical evidence fell a long way short of that in Matheson and Bailey and the Board held that the jury were entitled not to accept as conclusive the psychiatrist's opinion that Walton's condition satisfied the statutory definition of diminished responsibility bearing in mind the other evidence of conduct which was before it.

(vi) Medical Evidence Conflicting:

This is not an unusual state of affairs.

A great number of variants will effect the initial opinions of the psychiatrists. The period for observation and clinical study of the accused, knowledge of his past history etc. quite apart from the obvious difference in relative skill and experience between different practitioners. Initial divergences of opinions that will be accentuated under cross-examination and crystallised as the individual defends his position.

It is at this point that the jury come into their own, and Rivett (which is still the law despite Matheson and Bailey) is applied. While counsel in their closing addresses may contrast and analysis the differing views of the medical witnsses, the judge after recounting the evidence given will simply say — as he said in R. v. Jennion[92] — one of the earlier diminished responsibility cases:

> "Well, it is now for you twelve people to decide, even though the doctors disagree. It is a question of fact for you whether the evidence in this case brings this young woman within the section, that she was in all probability suffering from such abnormality of mind as substantially impaired her mental responsibility for her act .... doing the killing".[93]

It is worth recalling further words of Lord Goddard in Rivett which could equally apply to Jennion when he said that the jury "had the opinion of medical men of undoubted integrity and whose qualifications none would question" but "they also had the facts and the undisputed facts of all the surrounding circumstances".[94]

Jennion had killed her aunt in a fit of temper. At the trial two doctors gave evidence for the defence to the effect that at the time of the killing the acused was suffering from such abnormality of mind as substantially impaired her mental responsibility for her act. The Crown called a consultant psychiatrist who maintained that although the girl was a mildly psychopathic personality and was suffering from an abnormality of mind it was not such as substantially to have impaired her mental responsibility. After a summing-up which was said to be very fair and helpful the jury arrived at a conclusion which was adverse to the accused and the appeal court declined to interfere as it was a decision to which they were quite entitled to come.

Conclusion:

Considering the long history of jury trial in England and the plethora of authoratative commentaries thereon, it is surprising that section 2 went through such a difficult initial period. The wrangle in Parliament over onus should never have occurred. Once it arose it should have been dealt with firmly. Strangely on this aspect, where the Scots could have helped immeasurably, they were ignored.

Once commonsense had prevailed and certainly after 1964 few troubles have arisen. This is clear from the remarkably few cases on procedure in relation to section 2 which grace the Current Law Year Book. For many years none at all.

Despite the medical profession's view of the legal approach to a field they consider peculiarly their own it is doubtful if it can be faulted. The cases which have come forwarded under section 2 show a smooth and logically development. The English legal system can justly feel satisfied to have coped so rapidly and well with this new dimension.

FOOTNOTES

Chapter XI

1. Criminal Law Act, 1967, (c. 58). sec 6(2)
2. R. v. Soanes (1948) 32 Cr. App. R. 136
3. For example: Ronald Griffin, Bristol Assizes, Nov. 19. 1957
   Mary Dayson, Stafford Assizes, Nov. 28, 1957
4. 42 Cr. App. R. 145 at p. 153
5. (1962) 46 Cr. App. R. 269
6. Loc. cit. at p. 275
7. 52 Cr. App. R. 130
8. Ibid at p. 131
9. (1979) 69 Cr. App. R. 104
10. (1986) 83 Cr. App. R. 152
11. (1979) 68 Cr. App. R. 281.
12. See The Times for 19th. May 1981 et seq.
13. 'Profile' – Sir Michael Havers – The Times Dec 6, 1984
14. The Times May 19, 1981. Also disclosed in a conversation held with Mr Justice Boreham on this and other topics
15. Information gleaned from Dr Milne, one of the defence psychiatrists
16. Working paper No. 26 "Offences Aaginst the Person" HMSO London (1976)
17. Criminal Law Revision Committee, Fourteenth Report: Offences against the Person, Cmnd. 7844. H. M. S. O. London (1980)
18. 23 & 24 Geo. V, c. 36
19. Codification of the Criminal Law – A Report to the Law Commission. (Law Com. No. 143.) H. M. S. O. London (1985)
20. Report of the Committee on Mentally Abnormal Offenders (Chairman Lord Butler) Cmnd 6244. H. M. S. O. London (1975)
21. T. B. Smith Scotland p. 224
22. (1843) 10 Cl & F. 200
23. (1910) 6 Cr. App. R. 19
24. Gowers Commission para 377
25. 1945 J. C. 55

26. [1945] A.C. 463 at p.481

27. 561 H.C. Debs. (5th.Series) 353 (Nov. 27, 1956)

28. Idid Col.354

29. Ibid col.450

30. (1958) 42 Cr. App. R. 75

31. Ibid at p. 76

In R. v. Casey [(1947) 32 Cr. App.R. 91] the Court of Appeal expressed disapproval of the procedure followed when the prison medical officer was put in the box by counsel for the Crown so that counsel for the defence could cross-examine him

32. After the killings Bastian tried to commit suicide in a pond on Clapham Common. In the year following his release from a Bodmin psychiatric hospital, to which he had gone from Broadmoor, he drowned himself in the River Camel at Wadebridge, Cornwall. "Daily Telegraph" June 12, 1986

33. (1959) 43 Cr. App. R. 8

The ruling leds to the strange result that the Crown, in seeking to prove the accused to be insane, was contending for what was at that time technically a verdict of acquittal.

34. [1963] 2 Q.B. 1

see footnote to Price(1962) 47 Cr. App. 21 at p. 26

35. Unreported: Nottingham Assizes Dec 6, 1962

36. Unreported: Central Criminal Court July 5, 1961

37. 46 & 47 Vict., c.38

38. Criminal Law Revision Committee, Third Report. Cmnd 2149. HMSO London (1963)

39. 1964, cap. 84

40. (1963) 3 All E.R. 603

41. Central Criminal Court, July 12. 1979

42. One result of this was that when Kooken escaped from a holiday party from Broadmoor and was at liberty for a number of days the Queen's Gynæcologist, Mr Pinker had to be protected by the police. "Daily Telegraph" June24, 1986

43. (1982) 74 Cr. App. R. 30

44. Ibid at p. 34

45. Gowers Report. Recommendation No. 36

46. R. v. Galbraith, 73 Cr. App. R. 124

47. Butler Report para 19.18

48. C.L.R.C. 11th Report with draft clause 8

49. (1936) 2 All E.R. 1138

50. Ibid at p. 1140

51. 6 H.L. Cas. 772

52. (1571) Plowd 403

53. R. v. Carr-Briant, 29 Cr. App. R. 76 at p. 87

54. (1947) 2 All E.R. 372 at pp. 373/4

55. 1945 J.C. 55 at p. 58 and confirmed in H.M. Adv. v. Kidd1960 J.C. 61

56. 561 H.C. Debs. (5th. Series) 453 (Nov. 28, 1956)

57. 29 Cr. App. R. 76 supra.

58. 6 & 7 Geo. 5, c. 64

59. 25 Cr. App. R. 72

60. 29 Cr. App. R. 76 at p. 87

61. R. v. Kritz (1949) 33 Cr. App. R. 164 & 177; R. v. Summers (1952) 36 Cr. App. R. 14, 15

62. H.C. Debs. supra col 467

63. Ibid

64. 41 Cr. App. R. 182

65. (1960) Crim L. R. 424

66. Bater v. Bater (1951) P. 35 at p. 57

67. See e.g. Att. Gen. for South Australia v. Brown 44 Cr. App. R. 100 at p. 112

68. (1878) 14 Cox C.C. 143

69. It remains in Archbold 43rd. Edition para 17 – 47

70. For example: Dr. Dunston (1925) Vol. XLII S.A.L.J. 445

71. (1950) 34 Cr. App. R. 87 at 94

72. 560 H.C. Debs. (5th. Series) 1154-1252 (Nov. 15, 1956)

73. (1982) 74 Cr. App. R. 306

74. 44 Cr. App. R. 245

75. (1983) 74 Cr. App. R. 306 at p. 3111

76. 1946 J.C. 108

77. Cross on Evidence (5th. Edn) p. 446

78. Birmingham Assizes Dec. 11, 1961 – Stable J.

79. (1962) 46 Cr. App. R. 269

80. Ibid at p. 273

81. (1982) 74 Cr. App. R. 30

82. c. 19 of 1968

83. 62 Cr. App. R. 100

84. Unreported save in Melville

85. See 62 Cr. App. R. at 103

86. (1982) 74 Cr. App. R. 30 at p. 35

87. Decided 1961: Reported (1978) 66 Cr. App. R. 31

88. (1980) 71 Cr. App. R. 125

89. (1978) 66 Cr. App. R. 25

90. Bahamas: Homicide (Special Defences) Act, 1959.

Hong Kong: Homicide Ordinance of 10th. May, 1963

91. Sec 3A(1) Offences Against the Person Act 1868 as amended by Offences against the Person (Amendment) Act 1973-11

92. (1962) 46 Cr. App. R. 212

93. Ibid at p. 217

94. (1950) 34 Cr. App. R. 87 at p. 94

Chapter XII

Sentencing

A. Introduction:

The Homicide Act of 1957 makes no specific provision in respect of sentencing for the classes of case which fall under section 2: it merely classifies the offence as manslaughter and implies the appropriate penalty for that offence. Thus, in the absence of legislation, it is for the judiciary, guided by the Court of Appeal to shape sentencing policy.[1]

Clearly the most important feature of the introduction of 'diminished responsibility' is that it releases the sentencer from the strait-jacket of the fixed penalty when dealing with this type of homicide. How has he utilised this dispensation over the thirty years since the Act came into force ? During those three decades the sentencer has been operating under ever changing conditions. The death penalty has gone - hospital orders and the other trappings of the Mental Health Acts of 1959[2] and 1983[3] have been introduced - sentences can now be wholly or partially suspended[4] - community service orders are an option.[5]

In practice the changes in sentencing attitudes over the period have been quite staggering. And - whether the approach is based on the 'tariff' or individualised - it could not yet be said that a consistent and stabilised pattern has begun to emerge'.

B. Fixed Penalty:

From the thirteenth century, when it replaced mutilation, death by hanging was the sole penalty for murder in England. It was a sanction based on the theories of deterrence rather than retribution.

We have chronicled elsewhere the campaign for the abolition of Capital Punishment[6] in relation to murder and its lack of success in the first half of this century. It is necessary to detail here the changes which occurred in this fixed penalty over the period under review, for it provides a background and a raison d'être for much of the changing fortunes of section 2 - and, of course, for the defence of insanity also.

The first modification was introduced by the Homicide Act itself. While the Act retained the death penalty, it restricted it to those homicides categorised as 'Capital Murders' (i.e. murders done in furtherance of theft; by shooting or causing explosions; in resisting arrest or when the victim was a police or prison officer[7] or where two murders were committed but on separate occasions).[8] In all other cases of murder - one would think the majority of cases of homicide - the only sentence possible was to be one of imprisonment for life.[9]

For a few months in 1948[10] the death penalty had been suspended de facto for all cases of murder by the actions of the then Home Secretary, Mr Chuter Ede, when he announced that for the time being - while the Criminal Justice Bill was being discussed - he would advise a reprieve in all cases. A different view was taken by another Home Secretary (Major G. Lloyd George)[11] in 1956 when the Death Penalty (Abolition) Bill was before Parliament.

> "It would be unconstitutional..... to abrogate capital punishment by administrative action in anticipation of amendment of the law, and it is our duty to apply our minds

to the circumstances of each particular case....."[12]

In the outcome however, all murderers were reprieved until after the passing of the Homicide Act a year later.

It was suspended de jure in November 1965 when, by the Murder (Abolition of Death Penalty) Act, 1965[13] life imprisonment was made the penalty in all cases of murder for those over the age of eighteen years of age. The Act was declared to continue in force until 31st.July 1970 and was then to expire on that date unless affirmed by resolution of both Houses of Parliament. In 1969 those Resolutions were passed[14] and hanging ceased to be the penalty for murder.

It has continued, of course, as the sanction for treason and for piracy.[15] Apart from the period of the two World Wars, there have been no executions for any crime save murder since 1861

C. Determinate Sentences.

(a) Generally

English law does not countenance a minimum period of custody for any offence[16] but in all cases proscribes a maximum which must not be exceeded - be it life or a fixed term of years.[17]

Since 1861 the maximum sentence for manslaughter has been 'life'.[18]

Good sentencing practice dictates that a maximum sentence is only considered for the most serious example of that particular crime likely to encountered in practice, where no mitigating factors are present. In practice, anything approaching the maximum sentence is rarely imposed.

A fixed term of imprisonment would appear to be ideal in a

section 2 case. It would reflect, on the one hand, the need for a custodial sentence for an offence of such gravity - the taking of a human life - yet give scope to take into account the strong mitigating factors which must necessarily be present. Such a course has been followed for many years where manslaughter has been the verdict as a result of a successful claim of provocation or in cases of infanticide.[19] It also follows the Scottish practice[20] where, right up until the Second World War, the invariable course was to give long determinate sentences on a verdict of culpable homicide on the grounds of diminished responsibility. Kirkwood[21] in 1939 was one of the first cases where life imprisonment was imposed.

What, of course, is happening in effect is that an accused who has successfully pleaded diminished responsibility on psychiatric grounds, serves his sentence in an ordinary prison under the same regime as the man convicted of dishonesty. One wonders why Parliament did not apply its mind to this aspect of the section when debating the original Bill. The draftsman was much too busy with other sections and his attention was not drawn to penal aspects by any other government department such as the Home Office; but what of Opposition Members of Parliament?

If we look at the sentences imposed in the first nine months of the operation of the Act, we see that of 12 cases in that period, only 4 merit 'life' - another was placed on probation. The remaining 7 all received fixed periods of imprisonment - none less than seven years. In the year 1958 the cases were evenly balanced at 13 in each category. For 1959, there were 14 cases under section 2 dealt with by way of fixed period as against 10 life sentences. In 1960 the figures were 10

and 12 respectively.[22] Thus it could be said that fixed terms were being used at least equally with life terms during this period and in most cases the fixed terms were for a substantial length of time.

These figure change dramatically if we look at the years of the 1960s and 1970s. But it is not the division which is striking, this remains roughly equal but the total numbers. For example: the Criminal Statistics published over those years show that for all periods of imprisonment, and this includes life, the figures drop as low as 11 in the year 1967 and 9 in each of the years 1968 and 1969. Thereafter the figures mount: 20 in 1970 and 1971; 19 in 1972; 25 in 1973 and reaching 40 in 1977. This change is largely attributable to the advent of the hospital order. In many of the early years noted above hospital orders were made in 70 per cent of cases coming under section 2. This was not so by 1977; in that year imprisonment was the outcome in 62 per cent of cases whereas hospital orders only accounted for 31 per cent.[23]

Turning to consider the practice in the 1980s[24] we find, for example: In murders arising in the year 1982, the sentence in 29 cases was for a fixed period, whereas in 18 cases a life sentence was imposed. Again for the year 1983, 29 cases were for a fixed period as against 10 for 'life'. Only 2 of the fixed term sentences exceeded five years.[25]

Some indication of the judicial approach can be seen in cases which have come before the Appeal Court. In R. v. Slape[26] in 1965, the accused had pleaded guilty to killing his wife while suffering from diminished responsibility. He had brooded on his suspicions of his wife's infidelity and developed a severe anxiety state with reactive depresssion. When she taunted him with another man - he killed her. Medical evidence at the time of the trial was that he had recovered

through treatment and that the source of his anxiety had gone. At the time of the appeal that medical evidence was extended to the effect that there was no likelihood that he would repeat the offence. Lord Parker,L.C.J. sitting with Marshall and Widgery JJ thought a period of three years adequate in the circumstance

Again, in R. v. Fulker,[27] a 1972 case, where there was a substantial degree of provocation as well as medical evidence to support a plea of diminished responsibility - but not to support a hospital order; the Court of Appeal said that the circumstances went a long way to reducing, in every moral sense, the degree of culpability which would otherwise arise in such a case. As the trial judge did not sufficiently reflect those circumstances the period in custody was varied to three years from the original five years

When dealing with R. v. Tenconi[28] in the same year, the Court of Appeal noted the plea based on "a mild degree of depressive illness" at the time of the killing and that there was no justification for a hospital order by the time of the trial; but they upheld a sentence of three years imprisonment in view of "the measure of deliberation" with which the offence had been committed

While the choice may well normally lie between life imprisonment and a hospital order, the cases reported above and our own sample suggest strongly that where there is no continuing disorder e.g. the accused has been suffering from some form of depression at the time of the killing - and this now forms by far the largest group invoking the section - but has recovered by the time of the trial and is neither in need of treatment nor dangerous, then a sentence of fixed (and possibly modest) duration [18 months to three years] will be imposed.

This is also a common course where the underlying cause is sub-normality.[29] At most the scale seems to go to seven years depending on the degree to which responsibility is affected by the mental condition and the extent of the deliberation in the homicide. No longer the horrendous periods of the late 1950s and early 1960s. The Scottish courts seem also to have escaped that regime but are turning to life imprisonment more.

(b) The Anomaly.

An anomaly was quickly detected. It came to the attention of the public in two Scottish cases which were reported in the English legal press. H.M.Adv. v. McCrorie[30] and H.M.Adv. v. Fiddes.[31] The problem had arisen equally in England and without publicity but was known to the Home Office.

The situation was this: In imposing a sentence of a fixed term the court might, in many cases, be subjecting the prisoner to a longer period of incarceration than if a life sentence was given.

McCrorie's case[30] perhaps demonstrates the position as clearly as any. He was found guilty of culpable homicide on an unanimous verdict of the jury (fifteen members acting at all times on a simple majority). He had killed a man with an axe after hearing him boast of his adultery with McCrorie's wife.(the killing would be known in Scotland as 'homicide in chaude melle').[32] McCrorie was sentenced to fifteen years imprisonment. On appeal, it was argued that the sentence nullified the goodwill of the jury and was harsh and oppressive. Had he pleaded guilty to the original charge of murder he could not have been sentenced to more than life imprisonment, which, it was submitted in practice

averages nine to ten years. In fact, in this particular case, the Court declined to interfere with the sentence, on the grounds that it had not been shown that the sentence went beyond what was usual and necessary which would justify the (Scottish) Court of Appeal interfering. Comment seems to have been made that the Secretary of State had power to review long sentences where he thought that necessary, quite apart from his powers to release on licence persons sentenced to life imprisonment under the Prisons(Scotland) Act 1952.[33]

It was the judge (Lord Hunter) who was troubled in Fiddes[31]. The panel had had his plea to cupable homicide accepted in view of the evidence of diminished responsibility. He too was sentenced to fifteen years. In the course of sentencing Lord Hunter observed that there was an urgent need to review the administrative practice of releasing persons sentenced to life imprisonment after limited periods. In the case before him the sentence was discretionary and could be as much as sixteen or seventeen years, whereas in practice, a person sentenced to life imprisonment was frequently released[34] before someone sentenced for the lesser offence. The present situation, said the judge, produced an inducement to plead guilty to murder in view of the greater certainty of duration of sentence; and further, caused ethical problems for defence counsel.

The Home office were already aware of the problem. They were worried, in particular, about the case of Richard Dobb.[35] Dobb, an ex-prisoner of war of the Japanese, had tried to plead guilty to the manslaughter of his girl friend's mother. He had claimed that his experiences as a prisoner justified a finding under section 2. The prosecution led evidence in rebuttal, but after a trial, the jury

returned a verdict of manslaughter. He was sentenced at Nottingham Assizes to fifteen years imprisonment - perhaps influenced by the Scottish practice, for it was November 20th., 1957 and the Act was only eight months old. Even earlier in the same year, again under section 2, Kenneth Sharley[36] had received a period of fourteen years imprisonment. The offence one of strangling his fiancée. No motive was apparent. It is possible that Sharley was suffering from a severe state of depression. In any event, his plea to manslaughter was accepted by the prosecution. In 1961, Brian Edgington,[37] a barely literate psychopath, was convicted under section 2 of the manslaughter of his child and sentenced to fifteen years imprisonment by Mr Justice Sachs. There were sentences of twelve years in the case of John Billings[38] and John Sharp[39] and many of ten years.

A Home Office Minute of 20th.July 1964[40] suggested that such cases as those quoted above gave some support to the view expressed on page 40 of the Longford Committee Report[41] (and earlier suggested by the Howard League) that the Homicide Act should be amended - when the death penalty went - by providing that the sentence in diminished responsibility cases should always be one of life imprisonment. A further minute on the same file, but dated 25th.July 1964,[42] noting the earlier comment and the disparity disclosed agreed that such a change would ensure uniformity; that it would be sufficient to vindicate justice yet allow the prerogative to be exercised in a consistent way

After this period of time it cannot be established who was the author[43] of the minute in question but he made the comment that while it was required that section 2 changed the nature of the crime from murder to manslaughter it would be difficult to leave the court

without the discretion it has in relation to manslaughter generally. In the event, nothing was done.

(c) How Long is Life?

It has never been the intention in this country, whether in theory or practice, that imprisonment for life should be carried out literally. While modern prison conditions might make it feasable to detain a man in custody over a very long period, experience in the past has shown rapid physical deterioration in time in the harsher regimes then existing. Accordingly a review is undertaken by the Home Secretary periodically to consider the necessity of further detaining 'life prisoners'

In information supplied to the Gowers Commission,[44] the Home Office indicated the steady downward trend in the period of detention of such prisoners which had begun one hundred years before. In 1866 the minimum period was fixed by Sir George Grey at twenty years. By the beginning of this century twenty years had come to be regarded as the maximum; and when the practice of notionally giving remission for good conduct - as for other prisoners - was instituted, a release was normally secured at fifteen years. By 1939, most life sentence prisoners were released after serving between ten and thirteen years; and in the immediate post-war years the majority of 'lifers' were released after serving between six and ten years.

These figures relate to a period before the introduction of the doctrine of diminished responsibility and it can be assumed that in most cases no question of mental abnormality arose. Contrast this position with the period in detention of those found 'unfit to plead'.

The Criminal Statistics for the year 1954 disclose the classic case of the young man charged with theft in 1897 at the age of eighteen and still detained in 1954. The same Statistics show that of 518 detained in Broadmoor charged with murder, 108 had been there more than twenty years and a further 251 between five and twenty.[45]

The procedure which governs the release of 'lifers' has changed greatly over the last thirty years. Up until 1973, the prisoner might have to wait as long as seven years before a review was undertaken by the Home Secretary. In 1973, a procedure that involved cooperation between the Home Office and the Parole Board was instituted and a joint committee set up with a first review at about three to four years. Almost half the cases then considered by that joint committe fixed parole for a date lying between the sixth to eighth year of the sentence but many were fixed at nine,ten or more years

The material for a study of the pattern of release became available to Miss Susanne Dell of the Istitute of Psychiatry in the course of her research into sentencing in the period 1966 to 1977. She took the year 1980 and in her survey[46] found that none of her life prisoners sample was released in less than four years. One being released after that period. Another was released in the 8th.year of his incarceration and one in the 9th.year (12.5 per cent.). Thus in a nine year period only three had been released in contrast to those detained in Special Hospitals who were released in quite large numbers after a comparatively short time

In 1983 the procedure changed again. After three to four years a file is prepared which includes a summary of the offence, the prisoner's background and history, any comments made by the judge at the

trial and reports on the prisoner's progress in prison. Originally this was sent to the Lord Chief Justice and the trial judge, if available, for an initial view on the period of detention necessary to satisfy the requirements of retribution and deterrence in the particular case. A referral was then made by the Home Secretary to the Local Review Committee. In fixing the date of this, the Home Secretary would take into account the opinion of the judges and it would normally be three years before the expiry of the period decided as necessary to meet the requirements of retribution and deterrence. From the Review Committee the case would go to a special panel of the Parole Board which included a High Court judge and a psychiatrist. If the Parole Board recommended a release and this was accepted by the Home Secretary, the prisoner was given a release date, usually about one year hence. The over-riding consideration at that stage being the degree of risk that release into the community could engender.

Following the judgment of the Queen's Bench Divisional Court in the case of R. v. Handscombe and others,[47] the Home Secretary revised the procedure whereby he obtained the view of the trial judge and the Lord Chief Justice on the length of detention necessary to meet the requirements of retribution and general deterrence. In place of waiting three years, the trial judge is now required to make an immediate report[48] - using a detailed pro-forma - giving his views on the length of detention necessary to meet those requirements. This form also replaces the letter which was formerly sent after the trial setting out the salient features of the case and the factors which led the trial judge concluding that an indeterminate sentence was necessary. In calculating the length of detention necessary to meet the

requirements of retribution and general deterrence in non- murder cases judges are 'asked' to deduct one-third notional remission from the length of the notional determinate sentence that they would have imposed if the life sentence had not been passed. A further development is a 'direction' that the trial judge when he intends to pass an indeterminate sentence should invite defence counsel's observations in the following terms: "Is there anything you want to say about any advice which I may give to the Home Secretary as to the minimum length of sentence which should actually be served".

As we shall see later in this chapter, the release of patients from Special Hospitals, albeit restricted and where the question of public security also arises, takes place on a gradual and steady basis from the very first year. Dell has suggested it could be said that the judiciary, for their part, are setting a tariff based on culpability which dictates release rather than the protection of the public alone.[49]

(d) Suspended Sentences

Since 1972 the courts have had the power to suspend any fixed period of imprisonment - of two years or less.[50] This period can be 'activated' if a further offence is committed within the period of suspension (between one and two years). It is axiomatic that the sentencer had considered a custodial sentence in the first place but had decided that, due to the exceptional circumstances, the accused need not go to prison immediately, but if he should transgress again then he should serve this sentence plus any imposed for the subsequent offence. The usual type of case in which this mechanism is used is where the accused is of good character and while the offence may be of some

gravity the harm actually done is minimal. There is, of course, the sanction of punishment in the future if he does not behave.

One would not have thought that this power was particularly useful in relation to section 2 cases but there have been instances where it has been invoked, Looking at the period between May 1980 and June 1985, it was used at the Old Bailey on October 31st.,1983, in the case of Celia Riley,[51] who had shot her husband. She received a sentence of eighteen months imprisonment suspended for two years. It should be noted that she had recovered from her depressive illness and no longer required treatment. She presented no danger to the public. An important factor was that she had already been deprived of her liberty for six months on remand.

A further power available to the court when suspending sentence is to make a 'Supervision Order'[52] - that is to say, placing the offender under the care of a probation officer during the period of the suspension. The amount of support and advice is probably less that that under a full probation order but it can be invaluable to a man or woman trying to re-establish himself or herself in a family which has been shattered by the homicide. In this context the suspended sentence has some validity. This course was followed by the Common Serjeant in Riley,supra and at Birmingham Crown Court with Dee Nayer[53] (who killed a yound woman). Again it was used at Leeds with Charles Ireland,[54] who shot his mother and father.

Yet another variation is that rather than suspend the whole of the fixed period sentence for a term of years, the court can order that the sentence should commence forthwith but that a proportion of it should be suspended and not served unless there be another offence

within the overall perod of the original sentence, when the balance could then be activated.[55] This part of the sentence is usually expressed as a proportion of the whole, The benefit of this approach is that the sentencer is able to impose a sentence which he considers reflects the gravity of the offence and yet suspend part of that sentence so that the total period served is appropriate to the offender and his circumstances. Thus Robert Bowman[56] received a period of two years imprisonment at Sheffield Crown Court on April 18th.1984 when he was found guilty of the manslaughter of his brother but Mr. Justice Sumption suspended six months of this. The factors which prompted this course of action are not apparent from the report of the case and it might not be thought that the difference between 24 months and 18 months was very great allowing for remission and parole. It is after all the initial part of the sentence – 'the clang of the prison gate' which is the punitive element.

In general, however, the use of suspended sentences in relation to section 2 offences must have limited application if the correct criteria are being applied.

(e) Remission.

All prisoners on fixed/determinate sentences 'may' be entitled to a remission of a proportion of their sentence for "industry and good conduct". The origins are historical and linked with the days of transportation. In fact, now, under the Prison Rules, it is established practice.[57] At the present time, one-third is allowed under this concession[58] but a sentencer must not take this factor into account when he is considering the total length of sentence to impose. The

prisoner will also get credit for any period spent in custody on remand as an unconvicted prisoner. Again this is not normally something which should enter into assessment of the length of sentence. On the other hand, credit will be given for a guilty plea - if such it be; possibly one-third off the appropriate total, perhaps less depending on the strength of the evidence against the accused and the stage at which admissions were made.

It should be borne in mind that when a section 2 offender comes forward for sentence he will almost certainly have been in custody on remand from the time of the killing until the trial. He will like other remand prisoners be building up credit to set off against any final determinate sentence as mentioned above. What it means in effect is that at the time of sentencing the credit earned may well be the equivalent of a straight twelve month sentence served. This is a factor often given weight by a sentencer when releasing an offender by the use of some non-custodial measure.

(f) Parole

The introduction of parole in 1967[59] added another dimension to the length of sentence served on a fixed term. The Statute gives the Home Secretary the power, on the recommendation of the Parole Board or its local Review committee - in addition to any other power he may have - to release a prisoner from a determinate sentence after he has served a third of that sentence or a period of six months, whichever is the longer. On release he is on licence until the date on which he would have been released with remission for good conduct. While on licence he is liable to recall. The underlying principle being "an assessment of

the benefit to the inmate in rehabilitative terms of serving the balance of his sentence on licence against the risks to the community of having a sentenced offender out of prison before his time".

While parole is used very liberally for those serving relatively short sentences and may be based on local review committee decisions the position of those serving longer sentences (over five years) for offences falling within the list of serious crimes specified in section 32 of the Criminal Justice Act[60] 1982 (which includes manslaughter) are subject to very close scrutiny by the Parole Board itself and only if there are exceptional circumstances are recommendations made to the Home secretary; who in turn, only grants parole "for the most compelling reasons". This is in line with the policy announced by the Home Secretary on 30th.November 1983 to the House of Commons.[61]

In 1986, for example, of those serving up to five years for manslaughter, favourable recommendations were made in 99 cases out of 201 whereas for those serving in excess of this period only 1 recommendation was made although 46 individuals had their cases considered by the Board.[62]

D. Indeterminate Sentences:

(a) Generally:

As we have observed at an earlier stage - with the passing of the Homicide Act the penalty for non-capital murder was to be imprisonment for life.[63] No alternation was made at that time in the existing penalty for manslaughter, which remained imprisonment for a maximum of life.[13] Thus both categories of homicide might result in the

same sentence. It is true that in one case the penalty was mandatory; in the other, a discretionary maximum. We have also observered that the normal canons of sentencing dictate that the use of a maximum penalty for any particular offence would be confined to the worst possible example of that offence that it would be able to imagine, bereft of any mitigating factor. In practice, a life sentence is frequently imposed in section 2 cases where credit is denied even for a guilty plea. Why should this be ? Is this another anomaly ? The answer would appear to lie in a desire to ensure some protection for the public.

(b) The Need for Protection

Statistics adduced in the Capital Punishment controversy in 1948 clearly demonstrate that, at that time, released murderers rarely commit fresh crimes of violence. Of 174 life sentences prisoner convicted between 1st.April 1928 and 31st.March 1948, 112 had been released by May 1948.[64] Only five of these had been convicted of serious offences up to that date - and only one of murder. This was Walter Rowland. He had been convicted again in 1947 for killing a woman by striking her on the head with a hammer. He had throughout protested his innocence. He was hanged after the Court of Appeal and a private inquiry ordered by the Home Secretary had considered a confession made by another man.[65]

This rosy picture is not borne out by our research into the behaviour of offenders who successfully invoked section 2 of the Homicide Act.

Neustatter in his book 'The Mind of the Murderer' devotes a whole chapter to the case of Bennet, a latent schizophrenic,who murdered

again in England after his release from prison in Scotland where he had made a successful defence of diminished responsibility to an earlier homicide and was sentenced at that time to nine years.

Herbert Simcox, whose appeal was dealt with by the Court of Criminal Appeal in February 1964, had been convicted of a second murder, the details of which are not revealed in the report.. Raymond Bush who suffered from a personality disorder secured a finding under section 2 for the second time at the Old Bailey in May 1983 and was given a hospital order without limit in time. He had served a sentence of five years imposed in 1972 for another killing. He was under the influence of drink on both occasions. And the young man John Donald Merrett who secured a 'not proven' verdict by a majority in the High Court in Edinburgh in 1927, for the murder of his mother, (one of the trials of the Century) committed suicide in Germany shortly after the war having killed his wife and mother-in-law.[66]

Random perusal of the national press reveals several cases where offenders, dealt with once by the English courts under section 2, reappear again charged with murder, In 1964, Ernest Fredric Dillingham killed his first wife by hitting her on the head with an iron bar. He was under the impression that another man was paying too much attention to his wife and children. At Manchester Crown Court on October 12th.1964 his plea to manslaughter on the grounds of diminished responsibility was accepted and he was granted 'a Conditional Discharge' (sic). The Times report[67] does not disclose the period of the discharge. In December 1966, he strangled his second wife - a girl of 17 - after a quarrel over the children of the first marriage. At the Central Criminal Court on May 11th.,1967 the jury found him not guilty of murder but

guilty of manslaughter. Mr. Justice Blain sentenced him to life imprisonment. In passing sentence, the judge said that the indefinite sentence would allow the authorities to release Dillingham when they were satisfied it was safe to do so.

Margaret Wiggins,[68] who was sent to Broadmoor for murdering her young son in 1964, was returned to Broadmoor by an order made at York Crown Court on May 8th.,1974, after pleading guilty, on the grounds of diminished responsibility, to the manslaughter of her granddaughter aged four. She had thrown the girl into the river an the same way that she had killed her son colin then aged seven. Mrs Wiggins' son Roy was also in Broadmoor at that time after receiving a life sentence for murder.

At the Old Bailey in July 1984, Andreas Diomedous[69] pleaded guilty to manslaughter on the grounds of diminished responsibility and was sent to Broadmoor. He was said to have suffered from schizophrenia from the age of 14 and to have a psychopathic disorder. That he should go to hospital was his dearest wish. In 1974 he had been sent to a Special Hospital for attacking a girl in a train, armed with a pair of wirecutters. He was released in 1978. His parents made repeated efforts to have him readmitted but these requests were refused. In January 1984 he entered a McDonalds in Peckham, South London, selected a young victim, followed him round the premises and then stabbed him four times with a flick knife. The boy died instantly.

There must be many such cases which go unreported and many where the details are suppressed. There is of course no statutory definition of what is a dangerous individual. Some figures are published but they relate to all offences and the psychopaths and the

sexual offenders distort the overall picture.

The modern Scottish position was clearly stated by the Lord Justice-General in Kirkwood:

> "I cannot assent to the contention that the protection of the public is to, be disregarded, nor to the implied separatation of the pannel's own protection from that of the public. . . The interests of society include the reformation of the criminal, the prevention of the repetition of the crime by him or by others, and the protection of other members of the community. When . . . there is evidence that the impairment of his powers of resistance may come into play after a long interval during which there has been no premonitory signs of danger, and when the crime has been one of atrocious ferocity, the protection of the public against its repetition is specially relevant".[70]

The Butler Committee made a number of recommedations to protect society against the premature release of dangerously mentally disordered individuals. In particular, the Committee thought that there should be a new form of sentence which would be indeterminate but would allow release on medical considerations rather than as a result of consultation with the judiciary – and be subject to review.[71] This recommendation has not been followed-up. It will be appreciated that the old release by the Home Secretary from a life sentence did carry compulsory after-care, being known as 'release on licence'. That licence was kept in force until the Home Secretary terminated it. When the licence terminated the prisoner was unconditionally at liberty; before it was done he was always liable to recall for a breach of the requirements of the licence.

(iii) Transfer of Mentally Disordered Prisoners

Among a large prison population there are always those whose mental disorder, not made an issue at their trial, may have become obvious in the conditions of priison life once they have been convicted and commenced to seve a sentence – or indeed, the disorder may have

developed subsequent to their trial. While there are psychiatric wings at Wakefield, Holloway and Feltham, prison hospital is not the answer however good the facalities.

From 1816 onwards, legislation existed under a succession of Acts[72] to allow the Secretary of State – on medical advice – to transfer a sentenced prisoner, whose condition warranted it, to a hospital for treatment. Walker quotes[73] a figure of 300 such cases a year at the turn of the century, but included in that figure were many whose disorder was mental deficiency rather than mental illness. Very often there was no specific treatment or regime which could effect any cure but the care provided in a medical environment could only be beneficial and it relieved the prisons of difficult prisoners. In the 1950s the figure had fallen to about half that number.

When the Homicide Act came into force the governing legislation was the Criminal Lunatics Act[74] of 1884. It might be thought that in the sophisticated world of High Court trials and diminished responsibility findings based on psychiatric evidence, the Home Secretary and the 1884 Act would have no place. This is far from the case.

In one of the earlier trials under the Homicide Act, Albert Frith[75] was convicted at the Old Bailey under section 2 and sentenced to seven years imprisonment. The sentence was pronounced by the trial judge on October 29th. 1957; by December 23rd. of thre same year he had been transferred to Broadmoor under section 2 of the Criminal Lunatics Act, 1884. Similarly in another Central Criminal Court trial in the next year; that of Bastian.[76] After a trial in which the prosecution tried to set up insanity in rebuttal to the defence plea of diminished

responsibility, the jury returned a verdict of manslaughter under section 2. The judge then imposed a life sentence, yet within three months there had been a transfer to Broadmoor.

This very rapid transfer from a prison sentence (thought appropriate by an experienced High Court judge) to a secure hospital environment by executive action was a common occurrence. One would suspect that the prison medical officers were the prime movers. Thus for Douglas Hamill[77] the change from life imprisonment to Broadmoor was effected in just over a month in 1958. Joseph Pantry[78] and George Smith,[79] both tried in 1958 and given life imprisonment and fiften years respectively, were quickly moved to Broadmoor. There are others: Manjit Singh[80] in 1959; Lester Vincent Barrett,[81] Edward Hanlon,[82] Conrad Lecointe[83] and Alfred Rastenas[84] all of whom stood trial in 1960. This at a time when there were relatively few cases under section 2.[85]

In the examples cited above Broadmoor with its element of security was the normal destination but it need not necessarily be so,any hospital with psychiatric facalities could be selected if they had a vacancy and were willing to take the prisoner. In practice, many of these hospitals were also utilised as a 'halfway house' to eventual freedom from Broadmoor. In effect it was back to the situation with the exercise of the prerogative of mercy, when, in their impotency, the judiciary must defer to the executive power of the Home Secretary. As Devlin J.(as he then was) said in another context[86]: "it is better to devise means to enable the law itself to do justice instead of having to rely on the Executive to correct its injustice". This state of affairs was only ameliorated by the introduction of the hospital order by the Mental Health Act of 1959 and the 'Direction in Morris'.[86]

The trial of Philip Morris took place at the end of 1960 - after Part V of the Mental Health Act 1959 had come into force. Morris was sentenced by the trial judge at Glamorgan Assizes to life imprisonment for the 'mercy-killing' of his invalid wife. The prosecution medical evidence showed an even greater degree of mental abnormality than the defence doctors had contended. The judge had refused to allow the prosecution to raise an issue of insanity and the case came before the court of appeal on that point.[87] Although the court declined to interfere they did direct that normally where punishment was not intended, it was better to make a hospital order and not leave it to the Home Secretary to transfer the prisoner from prison to a mental institution.

That the direction in Morris was not always followed is clear frow the case of Constance Ann James[88] in the same year. During her second pregnancy, in a state of anxiety, James gave sleeping tablets to her son of six and he died. At her trial at York Assizes for murder there was unchallenged evidence from two doctors that she was suffering from a mental illness whereby her responsibility for her action was greatly diminished and the verdict was manslaughter under section 2. Mr. Justice Austin Jones then sentenced her to three years imprisonment. Almost immediately the Home Secretary had her transferred to hospital under section 72 of the Mental Health Act 1959[2] which had replaced the Criminal Lunatics Act 1884.[74]

The case had already gone on appeal. Glyn-Jones J. giving the judgment of that court[89] said that on the facts there were no grounds om which it could be said that the appellant deserved punishment notwithstanding her mental condition; and while in one sense, there was

nothing effective which the court could do as she was already in hospital, the court thought it right to substitute for the sentence of imprisonment a hospital order directing that she be received for treatment (together with a restriction order under section 65, without limit of time) so that the appellant should be spared the stigma of living the rest of her life having been sentenced to imprisonment for taking the life of her own child.

Mental Health Act1959[2] section 72 replaces section 2 of the Criminal Lunatics Act 1884[74] and the procedure thereunder was essentially that for a hospital order with the same restrictions. Thereafter there was no conflict and no anomaly. In turn, the Mental Health Act 1983[3] section 47 has become the mechanism for transfer by the Home Secretary and again the procedure is almost identical to that which governs hospital orders under section 37 of the same Act.

E. Psychiatric Treatment:

It might be thought that the need for some form of psychiatric treatment would be uppermost in the mind of a sentencer when the charge before him has just been reduced from murder to manslaughter largely on the evidence of psychiatrists and yet the Homicide Act made no provision for machinery to ensure those convicted under section 2 were treated, not punished, for the mental condition which led them to commit the crime.

(a) Psychiatric Probation Orders:

In 1957, when section 2 came into operation, the only option open to a court to achieve any medical help (other than under the Mental

Deficiency Act 1913) was to make a 'psychiatric probation order' under section 4 of the Criminal Justice Act 1948.[90] That is to say: make a probation order in the normal way, as under section 3 of the same Act, but with the additional requirement that the probationer should, during all or part of his period of probation, submit to treatment under a qualified medical practitioner "with a view to the improvement of the offender's mental condition".

The introduction of a full probation service into England and Wales in 1907, by the Probation of Offenders Act[91] of that year, was a relatively late development in penal reform. It had found its roots in the 'missionaries' appointed to the London Police Courts by the Church of England Temperance Society and a little used 'Probation of First Offenders Act[92] passed in 1887. Under the 1907 Act, one of the grounds specifically mentioned as a possible reason for placing an offender 'on probation' (i.e. under the care of a special officer of the court) was his 'mental condition'. No enforceable stipulation could however be made by the court regarding treatment. If any treatment was undertaken it could only be the result of efforts by the individual officer assigned or the probationer's friends or relations, who had arranged it. Facilities were scant in the early days – being largely in London but gradually they increased as their value was seen. By 1938, when the Criminal Justice Bill was first drafted, the practice of linking probation with treatment was well-established, if only on an ad hoc basis. A clause in the Bill sought to regularise the position. In fact, because of the War, the clause covering this advance (ultimately section 4) did not become law until 1948.

In effect, what section 4 did was to link the skills of the

psychiatrist (treatment) with those of the probation officer (after-care) and added the sanction which a breach of a probation order would bring. It nevertheless hedged the order with statutory safeguards for the sake of the probationer.

In the first place, an order could not be made unless the court had received written or oral evidence that the mental condition of the offender was such 'as required and may be susceptible to treatment' and 'that suitable treatment was available – by or under the direction of a medically qualified doctor'. It was sufficient if this evidence was given by one doctor, who did not even need to be a psychiatrist. A Reception Order[93] required two – as does a hospital order. The mental disorder could be of a minor nature; subsequently it was held that it need not even fall within the scope of the Mental Health Acts and thus a a psychiatric probation order was available when the evidence would not support the making of a hospital order.

An initial problem which has now largely been remedied arose from the fact that very often the evidence and the recommendation were provided by a doctor who did not in the end direct the treatment. This was particulaly true of prison medical officers. The present practice is to require the doctor who provides the report that initiates an order to state therein the suitability of the offender for treatment and by implication to give an indication of the doctor's own ability to provide it.

As with all probation orders, the consent of the offender was required. With mentally disordered defendants this may readily be given without the full implication of the order with its attendant responsibilities being realised. Care is needed. Yet again, any

suggestion of 'forced compliance' in the atmosphere of the courtroom must be avoided. Unless there is a willing and true acceptance of the order there will be great difficulties in the successful operation of the order.

A drawback in the initial stages was the provision[94] that while the probation order itself might run for any period from twelve months (now six months) to three years, the period of treatment could not be ordered to be of more than one year's duration.[95] This has now been altered and an order can run as an in-patient or out-patient, concurrently for the full three years.[96] Treatment could, of course, always continue beyond the one year limit on a voluntary basis— as it can now beyond three years, but it lost the sanction of the breach of the order if it was the probationer who discontinued the treatment.

In theory, the probationer was a voluntary patient throughout the period of his treatment if he was an in-patient at a hospital. He could not be detained against his will by the hospital authorities, but, of course, if he broke off treatment without good reason he was in breach of a condition of his probation order in the same way that failing to notify the probation officer of a change of address constituted a breach of that order. It could result in proceedings which could return him to court — possibly with a short period in custody before he got there — and have an alternative (and usually less pleasant) penalty imposed for the original offence.

In practice, many doctors in the early days became dissatisfied with the non-co-operation of probationers passed to them whose attitude had changed between the courtroom and the ward and halted treatment before the stipulated period had elapsed — as they

were entitled to do under the Act.[97] Rarely did they pursue a breach of an order or indeed provide the evidence on which such a break could be brought. Wilful non-cooperation is a difficult thing to prove in any event. The net result was that this provided a positive disincentive for many medical men. It also harmed the concept in the eyes of many judges.

Another limiting factor that the sentencer must bear in mind is risk to to the public. The Court of Appeal has constantly pointed the way the use of psychiatric probation orders where there is no substantial risk to the community, if at large, even although the case could be considered to be of the utmost gravity. Typical of the cases in that court being R. v. Miles,[98] where the accused was convicted of manslaughter of his wife while he was suffering from an acute depressive illlness but had substantially recovered by the time of the trial. In R. v. Clemence,[99] a period of four days imprisonment was changed to a psychiatric probation order; while in R. v. Griffith,[100] a life sentence was changed to an order with conditions of treatment. There must always be however a reasonable chance that the treatment will be successful.

In R. v. Chambers[101] which sets guide lines for sentencing in cases where there has been a successful defence of diminished responsibility, Leonard J. sitting with Lord Lane, C.J. and McCullough J., indicated inter alia: "provided there is no danger of repetition of violence, it will usually be possible to make such an order as will give the accused his freedom, possibly with some supervision".

The Butler Committee reported that medical opinion expressed to them was broadly in favour of the use of psychiatric probation orders

and they recommended their use in the future.[102] They commented that little research work appeared to have been undertaken on the subject citing only Max Grünhut[103] and Mrs Woodside.[104] Further useful research has indeed been done by Peter Lewis[105] but again on a limited scale and little can be drawn from these three papers. In any event there have been great changes in social pattern and medical techniques (for example: in the use of drugs) since Grünhut reported.

Possibly the most telling thing to emerge is the comment made by Lewis that he found that constantly it was the same issues which recurred. Points argued by Butler were the same as those raised in the 1930s and in the Morrison Committee in 1962.[106]

The Percy Commission[107] never committed themselves on such orders as they were awaiting the publication of Grünhut's fndings.

Lewis[108] feels that the courts have recognised the psychiatric probation order as a flexible and useful device and have taken full advantage of them. Walker[109] reports that these orders are the most frequent form of psychiatric disposal in the criminal courts. The latter writer is, of course, concerned with all types of offences and with both magistrates and higher courts.[110]

In relation to section 2 the position appears to be as follows: In the first years of the Homicide Act, the courts used section 4 orders once in each of the years 1957 to 1961, years in which a total of 11, 25, 23 and 36 cases respectively were before them.[111] Later figures are hard to obtain.

It is interesting to look at the pattern of the cases in the first years. The first such case was that of Mary Dayson,[112] aged 23, who while disraught from domestic problems and in a severe depression

following the birth of her second child, some eleven months earlier, decided to gas herself. Afraid to leave her other child alone with no one to care for him she decided to gas him also. She was found unconscious while the elder child was dead. At Stafford Assizes she pleaded to manslaughter and this was accepted. An order placing her on probation with the condition that she undergo hospital treatment under section 4 was made on November 28th. 1957.

The odd 'man' out in these cases was Albert French,[113] who killed his daughter, aged two years, of whom it was said he was very fond. He had lost his temper after she had misbehaved and he strangled her, thereafter trying to commit suicide suicide by gassing himself. He had a history of mental illness and at the trial evidence was given that he was suffering from a severe depression. An order under section 4 was made at Lancaster Assizes on May 29th. 1959.

In 1959 it was Winifred Shingler,[114] "a devoted wife and mother" who was found in almost identical circumstances to Mary Dayson after a gassing incident. Again the diagnosis was a severe depression. A probation order for a period of three years was made but the report does not disclose if there was a condition of treatment. In the following year, the court held for Dorset Assizes placed Winifred Budden[115] on probation for two years with a condition of residence in a mental hospital for the first twelve months of the order. She had been found guilty of manslaughter after a trial. Budden had drowned her son by floating him out to sea on an air mattress. It was her intention to commit suicide but she in fact ran away. The basis for the verdict under section 2 was depression and mounting emotional stress at the time.

In 1961, another "wonderful mother", Lillie Dean[116] smothered her child of eighteen months. At Manchester Crown Court she was found not guilty of murder but guilty of manslaughter under section 2. Mr Justice Veale placing her on probation took into account that she had been previously treated for anxiety and nervious tension and that she had been very depressed since the birth of her child. He made a straightforward order for three years without conditions, adding: "doctors regard you as being cured now, and I agree".

In the same year another identical case was dealt with by another mechanism. Kathleen Warnock[117] had battered her only child to death. She was said to be "a devoted mother" and was unable to explain the killing. There were elements of deprssion and she had been an in-patient at a mental hospital. Mr Justice Slade gave her an absolute discharge, the accused having indicated a willingness to undergo voluntary treatment for her mental condition. This practice and that of deferring sentence to test the sincerity of potential patients is now frowned upon following the comments of the Court of Appeal in R. v. Skelton[118] against "acting on an undertaking".

Part V of the Mental Health Act 1959 came into force on November 1st. 1960 and there after hospital orders were used in many cases by the assize courts where formerly they would have used a probation order with a condition of treatment. This trend was so pronounced that Dell could find no example in her samples for the years 1966-9 when the use of the hospital order was at its height (almost 70% of all disposals) and only two examples for the period 1970-3 and 1974-7. She comments: "judges made little use of the provision and doctors rarely mentioned it in their reports".[119]

That such orders still have some part to play in respect to convictions under section 2 is amply demonstrated by looking at the cases which have been dealt with in recent years. Taking the year 1983[120] as an example, when eighty cases were dealt with under section 2, we find twelve cases in which a probation order was made. Five with a condition of residence in hospital – a further four where the records show a condition of treatment without spelling out what that treatment entails. Seven of those twelve cases are of parents who kill their children – usually the mother. Three more are of elderly men who kill their wives and the remaining two, wives who killed husbands.

There were of course during these periods many cases where the convicted prisoner required treatment but for whom psychiatric probation orders were not suitable.

(b) Detention under the Mental Deficiency Act 1913:

It should be remembered that the higher courts – as indeed did the magistrates' courts – had long had power under section 8(1) of the Mental Deficiency Act[121] of 1913, instead of passing sentence on a mental defective convicted of a criminal offence punishable with imprisonment, to order his removal to a mental hospital or other suitable institution (or could commit him to guardianship just as a civil judicial authority could have done). This discretionary power did not apply in England to offences punishable with death[122] although, by virtue of section 24(2) of the Criminal Justice (Scotland) Act 1949 there was no such restriction in Scotland and it seems to have been utilised there.[123]

In the 1950s English assize courts and quarter sessions were

making about eighty of these orders a year covering the whole spectrum of offences.[124] For the more seriously afflicted the destination would be Rampton.

The definition of mental defectiveness set out in the 1913 Act (as amended in 1927)[namely: "a condition of arrested or incomplete development of mind whether arising from inherent causes or induced by disease or injury"] was incorporated virtually in its entirety into section 2 to describe the degree of mental abnormality which must be shown if the accused is to establish a plea of diminished responsibility. Thus many cases dealt with under the diminished responsibility provisions must fall squarely within the 1913 Act.

No reported example can be found of the Mental Deficiency Act, 1913 being invoked directly as a disposal in the section 2 cases dealt with in the period before hospital orders became available as a sentencing option to the courts; that is: prior to November 1960. In some cases however efforts were made without success to canvas the Act; for example: that of Helen Sterry,[125] who while on leave from a mental hospital took a five week old child from its pram and threw it into the River Wye. At her trial at Hereford Assizes in December 1958, the defence led evidence that the accused was 'certifiable' under the 1913 Act and further, that there was no prospect that her condition could be improved by treatment. The verdict of the jury was not guilty of non-capital murder but guilty of manslaughter under section 2 and the trial judge sentenced Sterry to life imprisonment without commenting on that aspect of her condition.

(c) Hospital Orders:

We have seen how, under executive powers, many mentally

disordered prisoners were transferred for treatment and care to mental hospitals, often very shortly, after they had commenced to serve their sentences in a normal prison. It would seem a logical step to allow the court to make its own order in these terms, if it deemed it necessary – at the time of sentence.

Such a power was granted to the courts – with much else – by the Mental Health Act, 1959,[2] a statute derived in large measure from the proposals of the Royal Commission on the Law Relating to Mental Illnss and Mental Deficiency 1954-57.[107] The effect of the relevant section [60] was almost identical to that of section 8(1) of the Mental Deficiency Act,[121] 1913 (which in turn was repealed by the 1959 Act) in that the court could now deal with a mentally abnormal person who was proved to have committed an offence by means of an order which either committed him to a mental hospital or entrusted him to the guardianship of a local health authority or a person approved by a local health authority. As with section 8(1) the offender subject to a hospital (or guardianship order could not be discharged from hospital (or guardianship) until the responsible medical officer thought that this should be allowed. Again the provision did not apply to murder.[126]

The courts required medical evidence before it could act and this must come from two medical practitioners, of whom one at least must be on the list of those approved by the local health authority as having special experience in the diagnosis or treatment of mental disorders.[127]

Whereas the 1913 Act, as might be expected, restricted exercise of the power to detain to the various grades of mental deficiency, the new Act, while retaining mental deficiency, extended the

scope of the section to mental illness and to psychopathic disorder. The Act drew certain administrative distinctions and required that the offender be classified by both doctors as within one of these categories.[128]

It is a further requirement that both medical practitioners must agree that the offender's mental disorder was of a nature or degree which warranted his detention in a hospital for treatment.[129] Treatment being defined to include nursing or care and training under medical supervision.[130] This was a limiting factor inserted to cope with those psychopaths who might clutter up mental hospitals making a nuisance of themselves without in turn deriving any benefit and reserving hospital places, particularly in Special Hospitals for offenders likely to benefit. This presents problems for an accused where his condition cannot be diagnosed with confidance or there is disagreement between the medical witnesses.

There must also be a hospital able and willing to receive the patient and to assume responsibility for him and many otherwise suitable cases founder on the inability to secure places in hospitals other than special hospitals (where admission is already limited by space and controlled by the Dept. of H.S.S. and possibly further limited by a "kill first" policy).[131]

On the one hand many consultants resent the curb on their professional freedon imposed by a restriction order and will have nothing to do with hospital orders. On other occasions the difficult stems from the lower grades. There is no doubt that many nursing staff are subject to assault and abuse by patients. Trade Unions (e.g. COHSE) are rightly concerned for their members. Trained nursing

personnel are in short supply. Regional Health authorities are concerned for staffing levels. It is not surprising that the admission of violent or disruptive offender-patients is opposed. The ultimate discretion rests with the managers to refuse admission to a hospital and that is what happens. The future of the prisoner, found psychiatrically disordered according to the law, does not rest with the consultant. The judge, in turn, finds himself having either to release the man (perhaps with a psychiatric probation order) or, more likely, for the protection of the public, send him to prison which may be completely unsuitable for this offender and may even do harm. In R. v. Harding,[132] Lawton,L.J. expressed the view that he found this "intolerable", as had Scarman L.J In R. v. McFarlane[133] and McCullough J. in R. v. Gordon[134] before him. Another comment from the Court of Appeal was that this was not "to do justice to all men".[135] Excessive adjourments to await places or an appeal against a prison sentence (on the ground that the judge would have made a hospital order if a hospital place had been available) will serve no useful purpose.[136]

Our perusual of court files and the Reports frequently discloses comments by the trial judge when imposing a custodial sentence that the accused will be able to receive treatment for his mental condition during his period in prison. Typical was a reference in R. v. Tate[137] where a medical report having been before the court referring to the possibility that the offender might benefit from Grendon Underwood prison and the judge indicated that the sentence [3½ years] was long enough for the accused to qualify for admission to Grendon Underwood, if it could be arranged. In fact, the prisoner was not found suitable for Grendon and he then asked the Court of Appeal

(unsuccessfully) to reduce his sentence. The very real danger of raising the expectation of offenders which often, for good reason, were disappointed were high and have been stressed in a line of cases, notably: R. v. Hook,[138] where the facts were very similar.

The Crown Court has no power to direct treatment, it is purely a matter for the proper authorities. That is not to say that there does not now exist an informal link whereby a telephone call to the Crown Office has the desired effect – the sin is to raise the hopes of the accused by reference to the possibility, and in the case of a determinate sentence to extend it to allow time for treatment beyond the period warranted by the facts of the offence.

Although faced with clear and consistent medical evidence a sentencer is not automatically obliged to dispose of the prisoner by way of a hospital order. The court is required to take into account: "all the circumstances, including the nature of the offence and the character and antecedents of the offender, and the other available methods of dealing with him"[132]. Having done so, the sentencer then has to decide whether this was the "most suitable method of disposing of the case".[139]

Clearly if the only purpose of the hospital is 'containment' and there is little likelihood of improvement in response to treatment then the place for the offender is prison. But there are exceptions; for example, where the underlying problem is subnormality a local hospital may well be adequate and preferable.

If punishment is required it is right to send the offender to prison even though he qualifies for a hospital order and a place is available.[140]

In general, the Act directed that hospital order patients

should be released back into the community by exactly the same process as had been used in the past for those compulsorily admitted to a mental hospital'[134]. They might be given leave of absence if the responsible medical officer thought that their progress justified it. Conversely, they could be transferred to another hospital with a more strigent security regime , if this was warranted. At the end of one year they were free to leave the hospital permanently unless the responsible medical officer reported that their continued detention was necessary in the interests of the patient's own health or safety or for the protection of others. If such a report was made the patient could be detained for a further year and so on from year to year; there being a right of appeal to the local Mental Health Review Tribunal set up under the Act,'[141] who could overrule the hospital authorities and direct a hospital to discharge the patient.

Another shared right with the non-offending compulsorily admitted patient, and one which presents difficulties, arises if the patient absents himself from the hospital or over-stays his leave and remains at liberty for a period of 28 days [six months in the case of patients aged 21 or more who are classified as psychopathic or sub-normal]. At the end of that period, if he is still at large, he cannot be taken into custody again without fresh proceedings — and fresh criminal proceedings on the same facts would not be possible. All this a relic of the days when if he could fend for himself for a period then he did not need the care of an asylum. This difficulty is overcome by the use of another provision of the Act — then section 65 now section 41 — which allows 'a restriction order' to be made.

Dell's survey'[142] which had shown the slow release of life

imprisonment prisoners indicates that those subject to hospital orders without restriction orders and sent to local NHS hospitals were released remarkably quickly – over half her sample had left hospital within the first year and all save one by the end of the second. In the case of the special hospital patients only 12 per cent of her sample had been released by the end of the second year, one third at the end of the fifth year and half by the eighth year. Thereafter many had long periods detained before being released even to another hospital and might indeed be longer than a straight custodial sentence where the prisoners came out in substantial numbers after nine years. The rate of release appears to dpend to a large extent on the original diagnosis. Those held to be suffering from depresssion (most of those in the NHS hospital were in this category) recovering and being released more quickly than the schizophrenics and they in turn than the psychopathic disorders.

(i) Restriction Orders:

The effect of a restriction order is dramatic. The court may if it considers it necessary for the protection of the public from serious harm (and the responsibility is the judge's alone) specify the period for which it may last or alternatively set no time limit.[143] While the order is in force the patient cannot be given leave of absence, transferred to another hospital or discharged without the consent of the Home Secretary. If he absents himself without leave there is no limit in time (save the duration of the restriction order itself) to the period within which he can be returned to hospital.

After the first year he can request the Home Secretary to

take the advice of the Mental Health Review Tribunal on his case, but, unlike the discharge of other compulsorily admitted patients, his discharge can only be advised and not directed by the tribunal.[144]

If he is discharged at any time, the Home Secretary can attach conditions to the discharge, much as he does in the case of released 'lifers' and discharged cases initially detained until 'Her Majesty's Pleasure' be known.[145]

In the circumstances outlined above it is clear that a restriction order should not generally be made unless the offender is to be detained in a special hospital or a NHS hospital which has really secure conditions. There is no point where the patient can walk out at will. It must, at least, be possible to contain him while he still requires treatment.

The judiciary reacted rather strongly to a noted instance of release from mental hospitals which attracted public attention in 1961. The case which caused concern was that of Arthur Nash[146] who in a fit of depression had strangled his epileptic daughter. He was given a hospital order by Mr Justice Lawton and released from an Epsom hospital within a few weeks. His release being medically justified. On the same day at Bristol Assizes Mr Justice Melford Stevenson made a 40 year restriction order in the case of Ronald Sowle.[147] Although the Court of Appeal thought that this was long, in all the circumstances it was justified. In an appeal the following year that of Ronald Rose,[148] where on a submission that a restriction order without limit was restricting the recovery of the patient and was equivalent of a life sentence, the contention was rejected in the over-riding public interest of protection and the view was repeated in a Direction of the Lord Chief Justice[149]

that restriction orders should be made which would avoid those guilty of crimes of violence being released too soon. More recently the other side of the coin has appeared when a restriction order was quashed where there was no danger to the public if the patient was released fairly soon.[150]

The safest course is to make a restriction order without limit in point of time unless the doctors are unable to assert confidentially that recovery will take place within a fixed period.[151]

(ii) Special Hospitals:

The name 'Broadmoor' is synonomous with the criminal lunatic. Built at Crowthorne in Berkshire in 1863, it was the first of the 'State Asylums' designed to contain the dangerous patient for whom Bethlem and the county asylum were unsuitable. In 1912 another similar institution was built at 'Ramption' near Retford, to be followed by 'Moss side' near Liverpool two years later. In 1960 all three establishments were redesignated as 'Special Hospitals', put on the same footing and under overall control passed to the Department of Health and Social Security. A further special hospital, 'Park Lane' was recently opened in the grounds of Moss Side making a total of about 2000 beds available.

All four hospitals have as their primary object the provision of "treatment under conditions of special security on account of the dangerous,violent or criminal propensities of the patients involved".[152] They can, in fact, receive non-offenders under compulsory treatment in addition to H.M. pleasure cases, transferred prisoners and those committed by the courts. In practice the degree of security varies between the hospitals; and while Broadmoor specialises in the mentally

ill or psychopathic patients whose intelligence is at least average. At the present time, about a quarter of their six hundred patients have severe personality disorders, the rest mainly mental illnesses such as schizophrenia – few are depressives. Rampton and Moss Side deal mainly with patients with some degree of sub-normality.

(iii) Regional Secure Units:

It must be understood that all mentally abnormal offenders dealt with by the courts do not go to a special hospital. Many are sent to the ordinary typical N.H.S. hospital in the area. The range of care there is normally adequate and the nearness for contact with relations and friends is important. As the 'Open-door' policy gained strength the locked ward was one of the first casualties. It was obvious that there was a need for some intermediate type of institution which fell between the special hospital and the ordinary mental hospital where there would be a greater degree of security. This type of establishment could also absorb patients which other N.H.S. hospitals found difficult to handle.

Although mooted twenty-five years ago and clearly advocated by Butler, it is only in the 1980s that Regional Health Authorities have felt able to provide such units.

(iv) Grendon Underwood:

In 1939, the East-Hubert Committee,[158] formed to investigate whether certain prisoners might not benefit from treatment rather than punishment, recommended the setting up of a specialised unit for abnormal and unusual types of criminal – but within the penal and not the hospital system. In 1962 the recommendation was implimented with

the opening of Grendon Underwood near Aylesbury, a maximum security psychiatric prison but with a medical superintendant as Governor, professional psychiatric staff and volunteer prison personnel, many of whom were trained hospital officers. The adjoining open prison "Springhill" was a complimentary and useful adjunct.

Its inmates are drawn mainly from those who had been convicted of crimes of violence including murder. No one stays more than two years. While many 'lifers' (about 40 per cent. of intake at any one time) are sent to Grendon for assessment of their behaviour and their response to treatment there for the Parole Board others have to apply to transfer. There is no question of a prisoner being sent there on the orders of the court. The Governor and the Chief Psychiatrist decide whether or not their application will be accepted, giving rise to the criticism that there is a danger of it becoming highly selective. There is a greater demand for places than can be satisfied and indeed it can handle only a small number of those who may benefit. Although Grendon can accommodate just over 400 persons in all, two wings are kept for young prisoners and one is devoted to Rule 43 prisoners so there is available space for 250 adults but at any given time the actual intake may represent a slightly lower figure or about 0.5 per cent of the total prison population.

The regime at Grendon is based on group psycho-therapy techniques and no one mentally disordered within the meaning of the Mental Health Act 1983 is accepted nor is it suited to the psychotic or inadequates with a low IQ. The aim is to make the inmates responsible for their own behaviour both in Grendon and more importantly,in the future. Some 20 per cent of those accepted ask to be returned to their

original prisons before their time is up, unable to withstand the emotional pressures of probing and questioning that goes on.

While it is not possible to identify section 2 prisoners among the inmates as a separate group clearly the programme is well suited to many in this category. With a high proportion of 'lifers' then the prison has an important role to play in the rehabilitation of those who have pleaded to or been convicted of manslaughter on the grounds of diminished responsibility.

(d) Guardianship Orders:

Under the same section[154] of the Mental Health Act and requiring the same conditions to be fulfilled as a hospital order (but as an alternative to such an order) provision is made to confer control over an offender by placing him under the guardianship of a local authority social services department or other specified approved person, willing to act. These powers are by definition equated with those that would be exercised if they stood in the relationship of father to the patient and the patient was under fourteen years of age although they must, in fact, have attained sixteen years.[s.34(1) old act]

Normally the order specifies the address at which the patient will live; the nature, times and place of treatment; any occupation, training or education which should be followed.

An important stipulation is the grant of access to a doctor, or approved social worker involved with the patient. The disadvantage - that there is no sanction available in the event of noncompliance as there would be in the case of a probation order and no restriction order can be made.

It would seem that this procedure is well suited to the subnormal or mildly psychopathic offender who is not likely to improve appreciably under hospital treatment (or has already improved from an earlier stay in hospital or on remand) but remains out of trouble if he receives a modicum of supervision and possibly selected accommodation.

But guardianship orders are comparatively rarely made. Taking, for example: 1961[155] we find for all imprisonable offences (although murder is excluded) that 11 men and 5 women were dealt with in this way. Again; In the year 1982[156] nine people were made the subject of such orders. Using the detailed lists of the D.P.P., no example can be found over the whole period since their introduction where a guardianship order has been directly used in a section 2 case but there is no reason why this should not be, indeed it might well be more beneficial than probation. The perjorative connotation 'probation' (despite the fact that it is no longer used for juveniles) may well have an adverse effect on a young mother trying to pick up the pieces of a shattered life but well accustomed to accept, without demur, social services help in other facets of her existence.

F. Other Penalties:

One of the progressive penal innovations of the Seventies was the introduction of the Community Service Order[157] as a direct alternative to imprisonment. Under this provision the offender would give back to the community something for his transgressing. Without losing his liberty in the sense of being locked up he would forfeit his free time in the evenings and at the week-ends to perform work of a communal benefit under mimimum supervision. A group project painting an

old peoples home or assisting mentally handicapped or under-priviliged. Again no trace can be found of this type of order being used for section 2 cases. The answer is not hard to find. If imprisonment is to be considered it will be on a tariff basis either on the grounds of protection and will be for 'life' or will be a fixed sentence to mark the gravity of homicide and the 'deliberate' element in the killing. If individualised considerations are uppermost these will be medical and social and it is doubtful if it will extend to deciding that the accused will benefit by repaying his debt to society by hard work and prompt timekeeping; while there must be an element of public relations in not sending a man of violence to dig a widow's garden

At the bottom of the sentencing scale come discharges (absolute and conditional) and bind overs which reflect normally a view that the present offence, while perhaps a serious one in the criminal calendar is not in the particular circumstances so, but regard must be had to the future and possible repetition. Homicide is not by its nature likely to be repeated and if it is this is not the way to deal with the situation. Some cases under section 2 have received conditional discharges and these have already been commented upon.

It is not necessary to consider the position of juveniles and young persons specially in relaton to sentencing. Although they form a disproportionately high proportion of the community before the courts they do not do so in relation to section 2 offences. Mental abnormalities do not appear to have developed at their age or more probably have not yet been clearly identified as such. Feltham has a psychiatric wing and most modern young offender institutions are well able to cope within the forms of detention laid down.

Conclusion:

That it is interesting to examine the sentencing pattern developed after the introduction of the doctrine into English law. The rather slavish following of the long determinate sentence of the Scottish courts – to be horrified when the full implication of its effect vis-a-vis a life sentence became obvious. Excesses again in the first flush of use of the hospital order to return on the swing of the pendulum to moderate and well reasoned determinate sentences when the limitations of hospital orders became apparent.

That it is interesting also to see how the opportunities for psychiatric treatment have developed from ad hoc probation orders through hospital orders to the regime at Grendon Underwood.

While it might be thought that as the defendant was dealt with under section 2 because he suffered from an abnormality of mind which substantially diminished his mental responsibility he would always thereby qualify for a medical disposal the courts have not hesitated where they considered that the protection of the public warranted it, to ignore treatment and impose a life sentence. Similarly, where they can detect a degree of culpability they will give a sentence to reflect that, as they would with an ordinary criminal.

The public, viewing an individual case, may often be unhappy with the outcome in that case (in which they had an interest) but viewed as a whole the public and the defendants are well served by the present approach to section 2 cases of the higher judiciary.

FOOTNOTES

Chapter XII

1. R. v. Newsome & Brome[1970] 54 Cr. App. R. 485 & 490

   "Well-known duty of this Division to lay down principles and guidelines to assist sentencers of all grades in the application of the discretion which the imposition of sentence requires".

2. 7 & 8 Eliz. II, c. 72

3. c. 20 of 1983

4. Powers of Criminal Courts Act 1973, (c. 62) section 22

   Criminal Law Act 1977, (c 45) section 47

5. Powers of Criminal Courts Act 1973, (c. 62) section 14

6. Chapter IV

7. Section 5(1)

8. Section 6(1)

9. Section 7

10. From April 16 to June 10

11. Later Lord Tenby

12. 561 H.C.Debs (5th.Series) 581 (Feb. 23, 1956)

13. c. 71 of 1965

14. 793 H.C.Debs (5th.Series) 1297 (Dec.16, 1969)

    306 H.L.Debs (5th.Series) 1321 (Dec.18, 1969)

15. Treason Acts of 1790, S.1; 1814 S.1; and 1817 S.6

    Piracy Act, 1837 (7 Will. 4 & 1 Vict. c 88) S.2

    The 'Black Cap' continues to form part of the apparel of High Court judges

16. Save that five days is considered the minimum period for a prison sentence otherwise the prisoner has not been through all the documentation by the time he has been released. Magistrates can and do use police cells for lesser periods of custody. Re: Manslaughter and minimum sentence see R. v. Fleming (1973) 57 Cr. App. R. 524

17. Normally provided by statute creating the offence or subsequent amendment. Most major offences carry a maximum of fourteen years

18. Offences against the Person Act 1861 (24 & 25 Vict. c.100) S.5

19. Duff v. H.M.Adv (1983) S.C.C.R. 461 at p. 463

Askwith "Sentencing in Provocation Cases" [1975] Crim L.R. 553

20. At the time of the Homicide Bill debate it was noted that life imprisonment for diminished responsibility was unusual in Scotland

21. 1939 J.C. 36

22. Criminal Statistics for relevant years

23. Ibid

24. Ibid

25. Ibid

26. [1965] Crim L.R. 320

27. [1972] Crim L.R. 579. The wife had formed an adulterous relationship and thereafter treated her husband "with callous disregard". He went beserk and fatally stabbed her

28. March 1972. Unreported but quoted by D.A. Thomas in Principles of Sentencing 2nd. Edn pp 76 & 294.

Spenser also unreported but quoted by Thomas is another case where the Ct. of App. considered the factor that the killing was 'deliberate'. As there is little risk of further offences of a like nature the need to deter the accused or others seems unlikely. The only conclusion that retribution is the underlying reason for such a sentence

29. R. v. Wainfor (1985) 7 Cr. App.R. (S) 231

30. [1960] Crim L.R. 839

31. [1969] Crim L.R. 42

32. Hume Commentaries following the French

33. 15 & 16 Geo.VI and Eliz.II, c.61

O'Reilly v. H.M.Adv. 1942 J.C. 23

34. See post

35. Unreported – Nottingham Assizes, Nov. 20, 1957

36. Unreported – idem June 25, 1957

37. Unreported – Oxford Assizes, Oct. 11, 1961

38. Unreported – Lincoln Assizes, Feb. 12, 1962

39. Unreported – Lancaster Assizes, Feb. 6, 1962

40. Home Office file 431/7/17. Minute signed "Wilson"

41. Longford, Earl (Chairman) (1964) Crime – A Challenge to us All

42. File 431/7/17.

43. Signature illegible, probably Permanent Secretary or Home Office Minister

44. Gowers Report para 645

45. Criminal Statistics – 1954

46. Dell Murder into Manslaughter p. 46

47. (1988) 86 Cr. App. R. 59

48. Memorandum from Lord Chief Justice. Sept. 29, 1987

49. Dell supra p. 52

50. Powers of Criminal Courts Act 1973 (c. 62) S. 22

51. Unreported. Original court papers. C. C. C. 83/0859 Oct. 31, 1983

52. P. of C. C. Act s. 26

53. Birmingham Crown Court March 8, 1982

54. Leeds Crown Court March 25, 1983

55. Criminal Law Act 1977(c. 45) S. 47

56. Unreported – Sheffield Crown Court, April 18, 1984

57. Prison Act 1952 (15 & 16 Geo 6 & 1 Eliz 2, c. 52) S. 25

58. It changed from one-quarter to one-third during the Second World War to reduce the prison population, which was not high in any event. It was recently reduced on a temporary basis to one-half for those serving less than one year

59. Criminal Justice Act 1967 (c. 80) S. 60 as amended by the Criminal Justice Act 1982 (c. 48) S. 33

60. c. 48 of 1982

61. 49 H. C. Debs. (6th. Series) 505 (Written Answers (Nov. 30, 1983)

62. Report of the Parole Board 1986, H. M. S. O. (London) 1987

63. Section 9

64. White Paper on Capital Punishment, Cmnd. 7419 H. M. S. O. (London) 1948. It may be that the worst types had hanged

65. Gerald Gardiner never accepted his guilty. See Capital Punishment as a Deterrent and an Alternative, p. 60 et seq.

66. [Simcox]: [1964] Crim. L. R. 403

[Bush]: C. C. C. 83/1622

[Merrett]: Notable British Trials Series (1927). 2nd. killing under the name Chesney

67. The Times May 12, 1967

68. The Times May 9, 1974

69. Daily Telegraph June 9, 1984,
July 7, 1984

70. 1936 J. C. 36 at p. 40

71. Recommedation 39

72. 56 Geo. III. c. 117

9 Geo. IV. c.40

73. Walker Crime and Insanity in England, Vol 2, p.23

74. 47 & 48 Vict. c. 64

75. Unreported: C.C.C. Oct.29, 1957

76. [1958] 1 W.L.R. 413

77. Unreported - Leeds Assizes Dec.17, 1958

78. Unreported - Lewes Assizes March 24, 1958

79. Unreported - Stafford Assizes July 8, 1958

80. Unreported - Stafford Assizes March 19, 1959

81. Unreported - Stafford Assizes Dec. 7, 1960

82. Unreported - Birmingham Assizes Dec. 12, 1961

83. Unreported - Birmingham Assizes Dec. 13, 1960

84. Unreported - Leicester Assizes Oct. 26, 1960

85. 285 H.L.Debs. (5th.Series) 1813 gave figures as follows:- 1957: No. of sentences of inprisonment on finding under section 2 = 10 (transferred 3). 1958: 22 (6). 1959: 20 (2). 1960: 21 (6). 1961: 19 (3). 1962: 12 (1). 1963: 21 (3). 1964: 13 (2). 1965: 16 (2). 1966: 18 (1).

86. [1954] Crim L.R. 661

87. [1961] 2 Q.B. 237 at pp 240/1 and 45 Cr. App. R. 185

88. York Assizes. June 12, 1961

89. [1961] Crim L.R. 842

90. 11 & 12 Geo. VI. c.58 now provided by P. of C.C. Act 1973, s.3

91. 7 Edw. VII, c.17

92. 50 & 51 Vict., c.25

93. Under Criminal Justice Act 1948

94. Section 3

95. Section 4(1)

96. Criminal Justice Act 1972 (c.72) consolidated Powers of the Criminal Courts Act, 1973. (c.62) Section 3

97. "susceptible to treatment" taken with 1st schedule

98. Unreported - May 6, 1976. Ct. of App. No. 528/B/76

99. Unreported - July 25, 1975. Ct of App. No. 1051/C/75

100. Unreported - May 1, 1975. Ct. of App. No. 3537/C/74

101. (1983) 5 Cr. App. R.(S) ...

102. Butler: Recommendations 88 - 95

103. Grünhut, M: Probation and Mental Treatment.

104. Woodside, Moya: "Probation and Psychiatric Treatment in Edinburgh" (1971) 118 Brit. J. of Psych. 651. She dealt only with 55 cases in one Edinburgh hospital 1966-68

105. Lewis, P: Psychiatric Probation Orders. 120 cases in Nottinghamshire

106. First Report of the Departmental Committee on the Probation Service (Chairman R.P. Morison). Cmnd 1650 H.M.S.O. London (1962)

Second Report. Cmnd. 1800 (1962)

107. Percy Commission Report Cmnd 169 HMSO London (1958)

108. Lewis supra p. 2

109. Walker Sentencing p. 324

110. About 1500 a year from a peak of 2000 in 1973. (Lewis supra)p. 3 and Appendix II

111. Criminal Statistics for the relevant years

112. Unreported – Sheffield Assizes, Nov. 28, 1957

113. Unreported – Lancaster Assizes, May 29, 1958

114. Unreported – Sheffield Assizes, Nov. 26, 1959

115. Unreported – Dorset Assizes, Oct. 13, 1960

116. Unreported – Manchester Crown Court, April 27, 1961

117. Unreported – Wiltshire Assizes, Jan. 15, 1961

118. [1983] Crim L.R. 686. Accd. agreed to be a voluntary in-patient at a mental hospital - left to join a Buddhist colony

119. Dell suprap. 41 but she dealt only with a male sample

120. D.P.P.'s (Yearly) Murder List [no longer maintained since the formation of the Crown Prosecution Service]

121. 3 & 4 Geo. V. c. 28

122. Wording of Section 8(1) "punishable with imprisonment"

123. An interesting Scottish case is that of H.M. Adv. v. McIlvena [High Ct. of Justiciary April 14, 1954 and reported in the 'Scotsman' April 15, 1954.] The panel had pleaded guilty to culpable homicide. At sentence the Advocate-Depute asked leave to call medical evidence for an order under section 24(2) of the Criminal Justice (Scotland) Act 1949. This was granted but the evidence was strenuously contested by the advocate appearing for McIlvena and, in answer to the judge, counsel indicated that his client would rather serve a prison sentence than bear "the stigma" of treatment as a mental defective. In fact an order to the State Hospital at Carstairs was made. This is the same theme which has, more recently, been one of the underlying causes of the decline in the use of the insanity plea

124. Criminal Statistics for the relevant years

125. Unreported – Hereford Assizes, Feb. 19, 1958

126. i.e. an offence punishment fixed by law

127. Section 37 of 1983 Act read with section 12(2)

128. Section 1 of 1983 Act.

129. Section 37 (2)(i). See e.g. R. v. Adams Ct. of App. 3291/B/74 of April 11, 1975

130. Section 145

131. R. v. Macfarlane (1975) 60 Cr. App. R. 320

132. The Times, June 15, 1983

133. (1975) 60 Cr. App. R. 320

134. (1981) 3 Cr. App. (S) 352

135. R. v. Officer (1976) Crim L.R. 698

136. R. v. David James [1977] Crim L.R. 234

137. (1982) 4 Cr. App. R. (S) 268

138. (1980) 2 Cr. App. R. (S) 353

139. Section 37(2)(b)

140. R. v. Gunnell (1966) 50 Cr. App. R. 242

141. Section 66

142. Dell supra p. 46

143. Section 41(1)

144. Section 74

145. Section 42

146. C.C.C. June 29, 1961. Released Long Grove Mental Hospital

147. Times Law Reports Oct. 20, 1961

148. Original order Kent Assizes July 18, 1962. Appeal reported "The Guardian Law Reports" July 2, 1963

149. Times Law Reports Jan. 24, 1967

150. R. v. Courtney (1987) 9 Cr. App. (S) 404

151. R. v. Gardiner (1967) 51 Cr. App. R. 187

152. National Health Services Reorganisation Act 1973 (XX) S. 40

153. East & Hubert: The Psychological Treatment of Crime

154. Section 60 now section 37

155. Walker: Crime & Punishment in Britain p. 272

156. Criminal Statistics - Supplimentary Tables 1982

157. Powers of the Criminal Courts Act 1973 (c. 62) s. 14

Chapter XIII

Concurrent Trends

A. Diminished Responsibility in Scots Law since 1957:

When the Scottish judicial amd legal witnesses gave evidence before the Gowers Commission[1] in the early 1950s they made no reference to cases embracing diminished responsibility decided during the immediate post war period. There had indeed only been one reported case - and that cited in the Scots Law Times in July 1946 - Caldwell v. H.M. Advocate.[2] It was in line with the decision in Carraher[3] and reflected the attitude of the time and added nothing. There were others unreported which were only later made public when Professor T.B.Smith quoted[4] them having extracted them from a thesis by Dr.M.R.Wright lodged in the library of Aberdeen University. Notably among these were: Henry Gibbon,[5] who was tried in the High Court in January 1949 before Lord Sorn, for stabbing his wife who had left him. Gibbon had a heart condition (an irregular heart beat) and had become a bag of nerves. While the trial judge did not think that there was enough, the jury were unanimous in finding culpable homicide and a sentence of 15 years imprisonment followed. A plea of guilty was accepted from George McKerron[6] where there was evidence of hypoglycaemia as the result of a blood condition. At a High Court diet held in Aberdeen in 1955 he received 12 years imprisonment. There are other cases where dementia praecox(sic)(Charles Brown)[7]; sexual excitement and history of insanity (McCafferty);[8] drink and personal grief (Smith)[9] and early history of St Vitus dance (William Miller)[10] were not sufficient to secure a culpable

homicide verdict from a jury.

A Justiciary case of some note was that of H.M.Adv. v. McLeod[11] which came before Lord Hill Watson sitting at the High Court in Glasgow in October 1955. The accused was completely sane but there was evidence from McLeod himself and two defence witnesses that from time to time he suffered from 'blackouts', i.e. a brief loss of consciousness, particularly when under emotional stress. The Crown contended that these might be due to an epileptic condition precipitated by taking drink. The panel had had a small quantity of drink just before he killed his wife and he claimed that immediately upon striking her he had had a 'blackout'. When taken into custody, less than an hour later, he was calm and completely sober. The trial judge gave the jury this direction:

> "if a man is not shown by the evidence to be within the category of one with diminished responsibility when sober, he cannot place himself within the category of diminished responsibility by taking drink".[12]

In fact, the jury returned a verdict of culpable homicide but the question of provocation had also been raised. The sentence was one of fifteen years imprisonment.

In 1959 there is a long report in Justiciary Cases in respect of the case of William Dowie Kidd[13] who had murdered his wife and daughter by administering chloroform to them. It was one of the first cases in which the distinction between capital and non-capital murder under the Homicide Act had arisen in Scotland. A special defence of insanity was lodged and a great deal of the argument was concerned with this aspect, including an observation by the the trial judge to the effect that the test of insanity is not that of the M'Naghten Rules. Lord Strachan put to the jury that it had been suggested that the accused's "accountability and responsibility were below normal". To assist them he read passages

from Braithwaite[14] and Muir[15] which dealt with diminished responsibility and then went through the medical evidence. He reiterated that whether the panel was of unsound mind at the time or whether his responsibility was diminished were matters for the jury to decide upon a balance of probabilities. This was not new law; Lord Deas had said it in Dingwall[16] and Lord Cooper in Braithwaite. What a pity the English judges had not paid more attention to those precedents.

No other cases are reported in Justiciary Cases. Any other mention of the doctrine appears in the Scots Law Times, basically a solicitor's journal, where the reports are not necessarily as detailed. Occasionally comments on particular aspects of Scottish cases appeared, in these years, in the Criminal Law Review.

Such a report, but of a High Court trial at Oban in 1978,which was subsequently appealed, is Gemmell v. H. M. Adv.[17] Gemmell had stabbed a 14 year old girl. He was charged with murder. The Crown eventually conceded that the accused was of diminished responsibility and sought only a conviction for culpable homicide – which they secured. In the course of Crown evidence about the panel's medical history his previous convictions of a somewhat similar nature emerged but not to justify the legal question of diminished responsibility. Gemmell felt he had been prejudiced. It was held that this was not so.

In the next year,in the same journal in the section devoted to "Notes on Recent Decisions', there is a report of a successful appeal under the title McMillan v. H.M. Adv.[18] The grounds for the appeal 'the imposition of the personal views of the trial judge on the jury'.

The paucity of references to the doctrine over a period of thirty years does not suggest that it is a live issue in Scottish legal

circles which presents practitioners with profound problems. Statistics are difficult to obtain: firstly, as culpable homicide can be returned for a variety of reasons, notably provocation, without the reason being disclosed and secondly, as the manner of publishing statistics is constantly changing. Taking the period 1978 to 1984 we find:

Year:	1978	1979	1980	1981	1982	1983	1984
Murder	41	38	44	38	47	51	48
C. Homicide	37	36	42	47	32	40	37

Analysing press reports that appear in the 'Scotsman' and 'Glasgow Herald' newspapers the best figures that can be obtained by this method are as follows:

In 1980: two cases attributable to diminished responsibility, both women. One killed her husband and was placed on probation,[19] the other her mother and the appeal court varied her 4 year sentence to an 'alcoholic programme'.[20]

In 1981: again two cases, a mother[21] strangling her child and receiving three years imprisonment and a man[22] who killed a fellow patient in a Dundee mental hospital. He went to Carstairs without limit of time.

In 1982: the number is again two. A man[23] "so depressed he was deranged and of diminished responsibility" who burnt a colleague to death (doubly unfortunately it was the wrong man). The sentence was one of life imprisonment which is rare for depression cases where there is normally a chance of recovery. The other case a young mother[24] who smothered her two children on the eve of being evicted from their home. Her plea to culpable homicide was accepted and she received a period of three years imprisonment.

For some reason the year 1983 produced six cases. The first a

plea by a old man,[25] depressed and in the early stages of dementia, who struck out at his 80 year old wife, who nagged him and accused him of lies, when she found him attempting to commit suicide. He was ordered to be detained in a mental hospital without limit of time. Another plea carried a life sentence for a Fife man[26] who killed a 78 year woman for no apparent reason although it could be said that his mental condition bordered on that of a mental defective. A mother[27] was placed on probation for killing two newly born twins, again there was evidence of mental deficiency (now called in Scotland 'mental handicap'). A trial in the High Court in Edinburgh resulted in a verdict of culpable homicide, which had been the plea offered by the accused[28] three days before and rejected by the Crown. There was a history of schizophrenia in 1977 and 1978 but the panel was not mentally ill at the time he battered his elderly mother to death, only drunk. Lord Cameron who gave the panel 11 years imprisonment was not great enamoured of the finding of the jury for he said:" although mental illness, as the jury have held, played some part in your conduct, it was only a mitigating factor". The two other cases stemmed from depression, which is now the underlying basis of the majority of diminished responsibility cases in England. In the first, a husband[29] killed his wife, from whom he was separated, having long harboured delusions regarding her unfaithfulness. He was sent to Carstairs without limit of time. Probation with a requirement for psychiatric treatment was directed in relation to a depressed mother[30] who killed her nine day old child with a dressing gown cord. She was again pregnant when sentenced by Lord Cowie at the High Court sitting in Dunfermline.

In 1984: there were two cases reported. A depressed man[31]

whose wife died with him in a 'suicide pact' in a van in which he had started the engine. There was some suggestion during the three day trial that the wife was not a willing party. The cause of his depression – his elder son's behaviour; the outcome, 2 years probation. Another depressed husband[32] stabbed his wife twenty-one times and then tried to commit suicide. His depressed condition was a reaction to his matrimonial affairs and the trauma in connection with custody of the child. He was sent to prison for three years after his plea to culpable homicide on the grounds of diminished responsibility was accepted by the Crown.

In 1985: only one case was detected. This was of a man[33] who stabbed his wife and attacked his children and who had his plea accepted by the Crown. According to a psychiatrist there was evidence of diminished responsibility. He had a family background of aggression which left him with a personality disorder relating to his father. His wife had compared the two fathers and this had acted to trigger off a frenzied attack. There was also evidence that he had quarrelled with his wife having spent the benefit money on days of drinking. At the High Court in Inverness he was sentenced to fifteen years imprisonment.

In 1986: there were four cases. The first of these reflects the approach of the older generation of Scottish judge. A young mother[34] had suffocated her three children (7, 4 and 10 weeks) with a pillow and then slashed her own wrists. She was suffering from post-natal depression and in a pre-menstrual phase at the time of the killing. She had said "I cannot take life anymore. I cannot leave the kids". The Crown accepted her plea to culpable homicide The reports received by the court had seemingly not recommended a period in hospital and the

presiding judge (Lord Robertson) rejected the possibility of a psychiatric probation order, as that was limited to twelve months. While he agreed that there was no danger to the public he then sentenced the panel to 2 years imprisonment saying that he must mark the gravity of the offence and that in prison the young woman would be able to settle down and come to terms with her situation in a protective environment. One month later, again in the High Court in Glasgow (but the judge is not named), appeared a father[35] who "lost his reason" and killed his baby daughter who "would not stop crying". On a guilty plea there was a sentence of five years. Five years was also meted out to a husband[36] who, on New Year's Day, stabbed his wife after arguments over the behaviour of their son. According to the newpaper report, he pleaded guilty in April but was sent on a hospital order to Carstairs. This must in fact have been 'in bar of trial'. In October, now recovered from his mental illness, he pleaded to culpable homicide , had the plea accepted on the basis of diminished responsibility and was sentenced to prison like a common criminal. The fourth case followed a chequered path. The accused[37] had tried to strangle and break the neck of his mother after she criticised his conduct, finally he stabbed her with a knife. Initially the defence sought to have a plea to culpable homicide accepted - the basis being provocation. The Crown found this impossible to accept. After medical evidence, in which it emerged that he was a schizophrenic, the Crown asked the jury to accept this and return a verdict of culpable homicide. He was then sent to the State Hospital at Carstairs with a restiction order which was without limit of time.

In Europe, diminished responsibility is a doctrine of general application and this caused some problems for the Gowers Commission in

their deliberations.[38] There is no doubt that last century the doctrine was invoked in Scotland to reduce sentence in various types of crime other than murder.[39] It is worth bearing in mind that at the time that the doctrine was first openly introduced into Scots law the death penalty was a competent punishment for many crimes including rape and some cases of theft. Lord Keith has observed:

> "There is no instance of its ever having been applied in Scotland with similar effect to any other category of crime (than murder, *to reduce the quality of the crime*). But if the judgment of Lord Deas in M^c^Lean's case be accepted there is no reason why this should not be so, if there is postulated a crime which may be reduced from a higher to a lower category. I can conceive of some such. On the other hand it is difficult to see what lower category could be invoked in a case of simple theft. But the question is largely academic because, as only murder . . . carries with it a fixed penalty, the other cases can be met by mitigation of sentence".[40]

In H.M.Adv. v. Cunningham,[41] which was a road traffic case in which a pedestrian was fatally injured. it was held that the accused could not claim that he was not responsible on account of the incidence of temporary dissociation due to an epiletic fugue or other pathological condition. The point had been argued before a bench of three judges. Inter alia, the Lord Justice-General (Lord Clyde) said this: "An argument was presented to us in regard to diminished responsibility. But diminished responsibility is a plea applicable to murder. It is not open in the case of a lesser crime such as culpable homicide or of a contravention of section 1 of the Road Traffic Act, 1960".[42]

An intriguing situation has arisen with the case of Jack Blake. He had an obession that he had a fatal cancer. When he thought that the doctor was hiding the grim news from him he smashed an axe over her head. In March 1986 he appeared at the High Court in Glasgow charged with attempted murder. Blake pleaded not guilty and lodged a special defence that he was insane at the time the crime was allegedly

committed. It was also argued that even if he was not insane at that time, he was suffering from diminished responsibility. In the course of his charge to the jury the trial judge dealt with insanity and the standard of proof at some length but in fairly practical terms; he then turned to the second limb of the defence and went on:

> "..It is for the accused to show that on the balance of probabilities his accountability and responsibility were below normal.
>
> The state of mind of the accused may be such, short of insanity, as to reduce the quality of his act from attempted murder to assault. A man may suffer from some infirmity or aberration of mind or impairment of the intellect to such an extent as to render him not fully accountable in law for his actions. Such a man is decribed as being a man of diminished responsibility. If he has not been fully responsible for what he had done, he is guilty not of attempted murder but of assault".

There is much more in the same vein and in due course the jury cleared him of original charge and he was found "guilty of 'assault to severe injury under deletion of attempted murder on the ground of diminished responsibility". Lord Brand then sentenced him to life imprisonment.[43] Only weeks later he dived to his death at Barlinnie Prison still convinced that he was suffering from cancer.[44] His death resulted in the abandonment of any appeal but the decision was not lost for the papers were forwarded to the publishers of the Scots Law Times on behalf of the trial judge.[45] No comment on H.M.Adv. v. Blake has subsequently appeared in the literature.

Perhaps the most devasting comment on Scots Law over this period and the most authoritative comes from the present Lord Justice-General (Lord Emslie). In the course of research, permission had been sought from many quarters to examine records. In every case this was readily granted and great kindness shown save one — the Justiciary Office in Edinburgh — permission there was refused. In the letter from

the Deputy Principal Clerk of Justiciary it was stated that my request would impose an unacceptable burden on the staff of that office.

The letter then goes on: "The Lord Justice General has also indicated that before arriving at a decision on the matter he took into account the fact that so far as he is aware there has been no material change in the law of diminished responsibility in Scotland during the last 30 years or so".[46] Exactly what this researcher wanted to demonstate vis-à-vis the runaway development of the doctrine in England in the same period.

B. Infanticide since the Homicide Act:

Since 1957 there have been virtually no reported decisions[47] in the usual sets of Reports on the offence of infanticide, which, as a topic, has excited very little interest in practical court terms.

Before 1957 the number of infanticide cases per year was of the order of 20 cases per year. Mainly these involved the killing of an unwanted child by an unmarried mother shortly after birth or the mercy killing of a grossly deformed or disabled child.[48] No difficulties arose over a guilty plea. After 1957 the figures varied with big fluctuations in some years. Thus:

1957: 16 1958: 10 1959: 10 1960: 16 1961: 13 1962: 17

1981: 7 1982: 6 1983: 11 1984: 2 1985: 8 1986: 3[49]

Where there was little variation was in the mode of dealing with them. The majority were dealt with by probation or discharge, as they had been in the immediate post war period. An example quoted by Walker[50] from the Criminal Statistics for 1961 may give some indication.

It shows there were thirteen successful prosecutions in that year and although the maximum penalty on conviction of infanticide is life, in fact twelve of the thirteen accused were placed on probation. Another example[51] – taking the period from 1976 to 1986, where the outcome was always a hospital order or probation, save in the year 1978. Rarely was any woman sent to prison. Of course hospital orders were not previously available but there is some evidence that a good many women were at one time committed to institutions for the mentally defective or after 1948 to mental hospitals.[52]

In Parliament, opportunity was found for the First Reading of a Private Member's Bill[53] in 1970 but it got no further, being "objected to" each time it came up on Second Reading and it failed to reach the Statute Book. It was a short Bill presented by Mr D. Coleman and supported by a number of Labour members. Giving cognizance to the sort of figures set out in the previous paragraph, a clause laid down a maximum penalty for infanticide of 12 months imprisonment. As a extension of that theme the Bill would have made it an offence triable either way, making the magistrates courts available for a quiet and less stressful appearance. A refinement was a prohibition on the identification of the woman in press reports.

The only material change which has occured in the period since 1957 is that the alternative finding of 'Concealment of Birth' which could follow acquittal on infanticide was removed by the Criminal Law Act 1967.[54] 'Concealment' had been one of the provisions of Lord Ellenborough's Act in 1803[55] but was subsequently modified by the Offences against the Person Acts of 1828[56] and 1861.[57] Despite the modifications, section 60 of the 1861 was never couched in terms that

could be said to be fair to the accused if linked to a more serious offence.

What interest has been generated has come from the Butler Committee on Abnormal Mental Offenders and the Criminal Law Revision Committee (when dealing with 'Offences against the Person') arguing for and against the abolition of the separate offence of infanticide; and if abolished, its subsumption within the provisions for diminished responsibility.

The starting point for the argument of those who favoured abolition was that the medical principles on which the 1938 Act was based were probably no longer relevant; for " puerperal psychoses are now regarded as no different from others, childbirth being only a precipitating factor".[58] It is doubtful if, even in 1922, they were more than a legal fiction. There was no evidence that lactation was associated in any way with mental disturbance nor that the underlying reason for killings was connected with the period following childbirth. Resnick[59] has found: that where the killing occurs within twenty-four hours after birth, the child is unwanted and the mother is young and unequipped to care for the child, not psychiatrically ill. When the killing occurs more than twenty-four hours after the child's birth, in most cases, the mother has a depressive disorder and has killed the child to save it from suffering she anticipates for it. Another general study by Dr D.J. West,[60] of married women who had killed their children found no particular association with this period. The accepted view now is that stress or personality problems are the root causes and these may just as easily affect the father as the mother and are not restricted to the year following the birth. If you are to accept these

causes and consider section 2 appropriate then stress and personality problems must be acknowledged as mental abnormalities which substantially impair resposiblity.

The Butler Committee were impressed by evidence from the staff at Holloway Prison[61] which put most of the cases in the 'Battered Baby' class (which had had fatal consequences), but clearly this is only part of the story and a new part of the situation since 1957. The medical profession and the social services are much more aware — and the press have made the public all too aware — of the Battered Baby syndrome in recent years and one must not lose sight of the need for a residual power in the courts to deal adequately with those cases.

The other anomalies of the offence have already been commented upon.[62] That she is still liable to be convicted for the murder of an older child killed at the same time and for the same causes and she might be arraigned on separate charges. While she could plea to the infanticide charge and the judge would have to accept it he is not so bound if she tries to tender a plea to manslaughter on the grounds of diminished responsibility. A trial on at least one aspect of the killing might be required. In any event, the expert medical witness would be preparing their reports on a different basis. Where the charge is murder, an evidential burden on the issue of 'disturbance' would fall on the defendant but the onus of proof would remain with the Crown. Where the charge was infanticide, the onus of proving 'mental disturbance' appears to be with the Crown; but this is, of course, unlikely to be contested. Yet again, the medical thinking of infanticide does not extend to the case where the child survives for one reason or another and is merely injured by his distraught mother.

The Criminal Law Revision Committee in their 'Working papers'[63] issued for comment when considering 'Offences against the Person ' did not feel competent to deal with the medical aspects of infanticide; either in relation to the time of birth or extending the offence beyond twelve months or to include other children. Their view was that there were advantages in having a separate arrestable offence, triable on indictment, either for the full offence or for attempt, in which a plea could be tendered and accepted as of right.[64] Again they felt that the maximum penalty of life imprisonment was wildly out of line with what was happening in the courts in fact. In the Committee's view, at that stage, a two year period of imprisonment was an adequate maximum[65] – and of course, diminished responsibility, if substituted, would retain 'life'.

Subsequently, in their Report,[66] the Committee indicated that they disagreed with the Butler Committee that the offence could go.[67] They did not consider that 'diminished responsibility' (as redefined by the Butler Committee) could cover all the types of cases then covered by infanticide and further, that not all cases could properly be treated as a mental disorder in terms of section 4 which would thrust 'diagnostic disputes' on medical witnessess and result in strain on their consciences.[68] The Committee repeated their views on reducing the maximum penalty[69] and did not recommended that the offence should be extended to cover children above 12 months.[70] To assist, they prepared a draft of the offence as they saw it.

Since 1981 a team of distinguished academics[71] has been assisting the Law Commission to formulate a criminal code for England and Wales. In that draft criminal code there is a section dealing with infanticide under that name:

> 67.—(1) A woman who, with the fault specified in section 56 or section 57 (1)(c), kills or is a party to the killing of her child by an act done when the child is under the age of twelve months and when the balance of her mind is disturbed by reason of the effect of giving birth or of circumstances consequent upon that birth, is not guilty of murder or manslaughter but is guilty of infanticide.
>
> (2) A woman who, in the circumstances specified in subsection (1) attempts or is a party to an attempt to kill her child is not guilty of attempted murder but is guilty of attempted infanticide.
>
> (3) A woman may be convicted of infanticide (or attempted infantidice) although the jury is uncertain whether the child had been born or had an existence independent of her when his death occurred (or, in the of an attempt, when the act was done).[72]

C. Absorption of Other Abnormalities:

Clearly the introduction of a via media between sanity and insanity has made provision for precision in this area of the law which did not exsist before and must be a step forward. What was not expected was that it should expand its tentacles and draw in all other conditions of mental abnormality, even those of a most severe kind.

It was Gibson and Klein who first drew attention to this facet in their Home Office Research Unit Report, published in 1961:

> "... surprisingly, perhaps, there is no sign of an increase in the proportion of persons deemed to be mentally abnormal, in spite of the operation of section 2 . .; the figures suggest that the defence of diminished responsibility has to some extent replaced that of insanity, ..."[73]

The figures set out in the Report show that the proportion of those convicted who were found to be mentally abnormal (that is to say: insane or [in the later stage] insane or suffering from diminished responsibility) was 47 per cent for the years 1952 to 1956 and 56 per cent for the years 1957 to 1960). Gibson and Klein repeated the calculations and commented upon them in a further Home Office Resaerch Study in 1969.[74] Their comment on this occasion: "The defence of

diminished responsibility has tended more and more to replace that of insanity, but when the two are taken together, the proportion of persons found to be mentally abnormal remains near to half the total, with fluctuations above and below this level".[75]

The number found 'insane on arraignment' is now negligible as is the number found 'not guilty by reason of insane'; but the overall total does not appear to have changed.

Walker carried out a similar statistical exercise in graphic form for the first volume of Crime and Insanity in England, which was published in 1968.[76] While he found that there had been a steady fall in both findings of 'insane on arraignment' and findings of 'guilty but insane' this figure had been compensated for by verdicts of 'diminished responsibility' so that the figures gave the same overall total or very near it.

It was repeated, extended to 1973 for the Butler Committee with the same result.[77]

That counsel should wish to advise a client to put forward a diminished responsibility plea is not hard to understand. (In practice, about 80 per cent of all section 2 cases are dealt with as guilty pleas and disposed of in a matter of ten to fifteen minutes in terms of court time).[78] He will avoid 'a fight' and certainly avoids his own difficulties in coping with the unrealistic restrictions of the McNaghten Rules. It is certainly easier for the medical witnesses. For the accused it lifts the stigma of being 'mad' and places him in the category of being mentally ill. But most important of all – it throws open the whole field of sentencing (although not including hospital orders until 1960) The insane prisoner, on the other hand, will almost certainly go

to hospital fettered by controls imposed by the Home Secretary. Of course, it is open to prosecuting counsel to stymie this manœuvre by adducing evidence under section 6 of the Criminal Procedure (Insanity) Act,1964[79] to prove insanity, but experience shows that this is a rare occurence indeed. If the proposals made by the Butler Committee on a new insanity defence were implemented the position might change again.

This situation covers of course the many conditions that would have come under insanity in any event and there is no reason why on the balance of convenience the new defence should not be used and the figures would be as they now are – a sum total. But this leaves unexplained a whole range of mental abnormalities which could never have been considered under the McNaghten Rules pre-1957. Where have they gone ? If the diagnosis is schizophrenia there might be some dubiety but where the underlying cause – as in the majority of cases nowadays – is said to be depression, this cannot be so. It clearly is not so where the defence is based on irresistible impulse.

It must be remembered that we are dealing with fluctuating percentages, albeit within fairly narrow limits, but two explainations offer themselves as those involved gain experience. With the abolition of the death penalty, many police forces may charge suitable cases at the lower end of the scale as manslaughter from the outset if they can. Prison medical officers and prosecution psychiatrists may now take a stronger line – but in the absence of data on both these aspects it is not possible to be dogmatic.

Conclusion:

That it is difficult to establish the exact number of cases of

murder in Scotland which are reduced due to diminished responsibility factors as such statistics as are published use the more general heading of culpable homicide. That even in those cases where the factors are discernible it is not easy to make a true comparison for 'provocation' is also readily accepted and nothing is said to indicate this in the verdict.

That even making allowance for the much smaller population and an already developed doctrine of diminished responsibility the paucity of reported cases over the last thirty years is extraordinary. Indeed, the cases hardly seem even to be newsworthy.

That the true picture emerges with the gloomy words of Lord Emslie that " so far as he is aware there has been no material change in the law of diminished responsibility in Scotland during the last thirty years or so".

That the only encouraging sign is the action of Lord Brand in trying to extend the doctrine to attempted murder and assault - a step in the direction of general application. Perhaps in the 1980s the period of stagnation has come to an end.

That cases of infanticide which ran at about twenty a year before 1957 have dropped well below that figure in the decade that followed with a annual total of two or three in the 1980s.

That the universal mode of disposal was a probation order which is now an argument for reducing the maximum penalty from 'life' to a period of one year or two, with a possibility of having the case tried in magistrates' court.

That the penalty should not be life is advanced as an argument for not allowing infanticide to be subsumed by section 2; but, it is only

by including it under diminished responsibility that the killing of other children (which is just as likely to be from the same causes) could be realistically tackled.

That the modern tendency to treat many infanticide cases as manifestations of the 'Battered Baby Syndrome' does not go far enough. In many battered baby cases, the child survives (possibly by prompt medical attention) though the root causes of his injuries are the same. This situation needs to be dealt with by absorbing infanticide into the basic proviso for diminished responsibility and making diminished responsibility a doctrine of general application.

That section 2 with its advantages was beginning to absorb other mental states, including M'Naghten insanity, was early apparent. The phenomenon has exercised Professor Walker and the Butler Committee.

That the Criminal Procedure (Insanity) Act 1964 does something to redress the balance in proper cases.

That no great harm is done where one who might have secured an insanity finding is dealt with under diminished responsibility. Considerations of treatment, protection and degree of culpability are still foremost in the sentencer's mind. Advantages accrue to the defendant. It is for consideration whether — in some extended form — diminished responsibility might not embrace this condition.

That it would be retrograde to deal with more defendants on a freer basis of 'disability' as is done in Scotland. If court proceedings are possible to resolve the issue then the accused is entitled to those proceedings.

FOOTNOTES

Chapter XIII

1. Gowers Minutes of Evidence. Mainly 18th day (Q.5406 et seq.) Lords Cooper, Keith, Crown Agent, Faculty of Advocates
2. 1946 S.L.T. 9
3. 1946 J.C. 108
4. 1957 Crim. L. R. 364
5. High Court of Justiciary, Jan 4, 1949
6. H.C.J. Aberdeen, 1955
7. H.C.J. Dec. 10, 1946
8. H.C.J. May 1, 1951
9. H.C.J. July 24, 1951
10. H.C.J. Jan 6, 1953
11. 1956 J.C. 20
12. Ibid p.21
13. 1959 J.C. 61
14. 1945 J.C. 55
15. 1933 J.C. 46
16. (1867) 5 Irv. 466
17. 1978 S.L.T. 217
18. 1979 S.L.T. 68
19. Elaine Walker, (High Ct. of J. Perth) 'Scotsman' June 17, 1980
20. Margaret Steven, (Cr. Appeal Ct.) 'Scotsman' July 11, 1980
21. Patricia Strachan, (H.C. Edinburgh) 'Scotsman' March 31, 1981
22. David Ryan, (H.C. Perth) 'Scotsman' May 19, 1981
23. George Hood, (H.C. Edinburgh) 'Scotsman' May 27, 1982
24. Elizabeth Stevenson, (idem) 'Scotsman' Nov. 10, 1982
25. William Fyfe, (idem) 'Scotsman' Jan. 8, 1983
26. Robert Duff, (H.C. Dundee) 'Scotsman' Feb. 8, 1983
27. Sheila McMillan, 'Glasgow Herald' March 11, 1983
28. James Mooney, (H.C. Edinburgh) 'Glasgow Herald' May 6, 1983
29. James Weir, (idem) 'Scotsman' June 26, 1983
30. Marjorie Dick, (H.C. Dunfermline) 'Scotsman' Sept. 27, 1983

31. George Kerr, (H.C. Edinburgh) 'Glasgow Herald' Jan. 28, 1984
32. Allan Whyte, (idem) 'Scotsman' Dec. 6, 1984
33. Kenneth Beaton, (H.C. Inverness) 'Glasgow Herald' March 31, 1985
34. Catherine Maxwell, (H.C. Glasgow) 'Scotsman', July 8, 1986
35. Terrence Line, (idem) 'Scotsman' Aug. 8, 1986
36. Robert Ratteray, (H.C. Edinburgh) 'Scotsman' Oct. 3, 1986
37. Paul Black, (H.C. Perth) 'Scotsman' Dec. 12, 1986
38. Gowers Report para 413
39. H.M. Adv. v. Fergusson (1894) 1 Adam 517 [fire-raising
    H.M. Adv. v. Wilson (1877) 3 Coup. 429 [firing haystacks]
    H.M. Adv. v. McLean (1876) 3 Coup. 334 [housebreaking]
    H.M. Adv. v. Small (1880) 4 Coup. 388 [theft from post office]
40. (1958) Jur. Rev. 230 at p. 236
41. 1963 J.C 80
42. Ibid at p. 84
43. H.M. Adv. v. Blake, 1986 S.L.T. 661
44. 'Scotsman' Jan. 20, 1987
45. Personal letter from General Editor 'Scots Law Times' Nov. 26, 1986
46. Letter from Deputy Principal Clerk of Justiciary, May 25, 1987
47. R. v. Scott [1973] Crim. L.R. 708: an unsuccessful appeal against a rare 18 month sentence
    R. v. Smith(K.A.) [1983] Crim. L.R. 739: where St Alban's Crown Court (Mr. Justice McCowan) allowed a count of attempted infanticide without demur
48. Criminal Law Revision Committee, Fourteenth Report: "Offences Against the Person", Cmnd 7844 (H.M.S.O) London 1980. Hereinafter referred to as C.L.R.C. and the 14th. Report.
49. Annual Criminal Statistics for relevant periods. See also Gowers Report para 160
50. Walker, N., Crime and Punishment in Britain, p. 282
51. Glanville Williams, Textbook of Criminal Law p. 694
52. Criminal Statistics for relevant years
53. No. 38 of 1969/70. Ordered to be published Nov. 26, 1969
54. c.58 of 1967
55. 42 Geo. III, c.58
56. 9 Geo. IV, c.31
57. 24 & 25 Vict. 100
58. Report of the Committee on Mentally Abnormal Offenders. (Lord

Butler Chairman) Cmnd. 6244 (H.M.S.O.) London. 1975. para 19.23. Hereinafter referred to as "The Butler Report"

59. Resnick: P.J., "Child Murder by Parents", 126 American Journal of Psychiatry 325-334

60. West: D.J., Murder followed by Suicide p. 147

61. The Butler Report pare 19.24

62. See Chapter III A in Part 1

63. C.L.R.C. Working papers No 26 'Offences Against the Person' (1976)

64. Ibid para 68-70

65. Ibid para 66

66. C.L.R.C., 14th. Report paras 100-104 and Recommendation 1

67. Ibid para 108 and Recommendation 5

68. Ibid para 102

69. Ibid para 108

70. Ibid para 106

71. Griew, Smith et al.

72. Clause 67, Draft Criminal Code Bill annexed to Report to Law Commission (No. 143) "Codification of the Criminal Law"

73. Gibson Evelyn & S. Klein, Murder. H.O. Research Unit Report No 4 (1961) p.9

74. Same authors: Murder 1957 to 1968. H.O. Research Studies No. 3 (1969)

75. Ibid page 9 (read with Table 8)

76. Walker Crime and InsanityVol.1, p.159

77. Butler Report: Comment para 18.9; Graphics Appendix 9

78. Disclosed by our research experience, supported by experience of Dell supra see pp. 25/26

79. c.84 of 1964

PART 3

The Future

Chapter XIV

Prospects

A. The Butler Committee:

If in a paradoxical way, the Gowers' Commission laid the ground work for the adoption of diminished resposibility into English criminal law and then turned its face against it, another equally important Government appointed commission - the Committee on Mentally Abnormal Offenders under the chairmanship of Lord Butler of Saffron Walden — has provided the basis for a sound future for section 2 while recommending that the concept need not be retained within the penal framework.

One of the main thrusts of the Butler Committee proposals was to bring the criteria for a 'special verdict' into line with both present day psychiatry and modern concepts of criminal responsibility. The Committee were anxious to stem the retreat from this type of defence which, for practical purposes, had dwindled into insignificance being taken over in most cases by diminished responsibility, with its evidential and sentencing advantages. They hoped to achieve this by grafting some of these advantages on to their new verdict "not guilty on evidence of mental disorder".[1]

The verdict could be satisfied in two ways — 'was the accused suffering from a mental disorder which affected his awareness of what

he was doing?' Mental Disorder being here used in the sense it then had in the Mental Health Act; or alternatively,given that mens rea existed, 'was the accused suffering from severe sub-normality or severe mental illness?'.[2] In place of the former manadatory order for indefinite commitment to a mental hospital as a 'restricted patient', it was proposed that the court should have a complete range of appropriate sentencing options down to absolute discharge (but not, of course, the right to imprison or fine, for that matter).[3]

That said, the Committee looked at the position of section 2. In their view, the whole section was thoroughly unsatisfactory. "Abnormality of mind" was an extremely imprecise phrase; "Mental responsibility" created difficulties both for doctors and for jurors. The use of the word "Substantial" only added to the problem. Yet with the will of the medical profession and a little 'stretched evidence' on their part it seemed to work – in most cases, but not necessarily all – to avoid severe sentences.[4]

From the days of the Gowers' Commission the arguments in favour of diminished responsibility had been that there was no sharp dividing line between sanity and insanity and the acceptance of the doctrine could reflect that state of affairs and bring the law into closer accord with reality; but equally important was the aspect that it freed the court from passing sentences of death which would ultimately prove nugatory. On the basis that the medical scope of their new special verdict was widened and given utility; that, in addition, the mandatory life sentence for murder be abolished and that sentencing in respect of the special verdict was free ranging, the Committee suggested that diminished responsibility would thereby be otiose and could be

abolished.[5] To cover a possible objection that this might leave the stigma of an unqualified conviction of murder for people who might otherwise receive a verdict of manslaughter by reason of diminished responsibility, a further proposal was that a jury should be empowered to return a verdict, in appropriate cases, of "murder (or manslaughter) by reason of extenuating circumstances".[6] The extenuating circumstances not to be defined in law. Such a verdict would not however restrict the sentencing powers of the judge.

In the event that the mandatory life sentence for murder be kept, the Butler Committee felt that section 2 should be retained but that an attempt should be made to improve the wording.[7] A new section, which in their view, removed some of the difficulties of interpretation but did not alter the practical effect of the section was essayed in the following terms:

> "Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in section 4 of the Mental Health Act 1959 and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter".[8]

In a new marginal note the section would have been entitled "persons suffering from mental disorder".

As with the special verdict the Committee was linking the section to the definition of mental disorder in the Mental Health Act which would assist medical witnesses and making clear that the other aspect was the task of the jury, once deciding that a mental disorder existed, of deciding the degree of extenuation that the particular mental disorder merited.

As a third choice, the Committee backed up their recommendations with another alternative if the mandatory life sentence

remained. In this the provision for diminished responsibility under section 2 would go but on conviction for murder the judge would have a discretion, if the medical evidence was there, to make a hospital order or a psychiatric probation order in place of the life sentence, but no other order.[9]

B. Criminal Law Revision Committee:

The new wording for section 2, set out above, came under the scrutiny of the Criminal Law Revision Committee when that Committee was considering 'Offences against the Person'.[10] They welcomed the proposed new section and agreed that section 2 as it exists to-day is unsatisfactory but this committee had certain reservations about the Butler Committee approach.[11]

Firstly, they thought, contrary to the expressed expectation of the earlier committee, that the tying of the mental disorder to the definition in the Mental Health Act would in fact be restrictive and exclude cases which presently fall naturally within section 2.[12] They instanced the depressed father who kills a severely handicapped subnormal child or a morbidly jealous person who kills his or her spouse. For some reason they linked their concern to the making of hospital orders in such cases - which are clearly not called for. Before their Report was issued however they were reassured on this point by the medical advisers to the Department of Health and Social Security and generally agreed that the new wording would not be more restrictive than the old.[13]

Erring to the other extreme the Committee thought that the wording was too lax in relation to the second element,[14] namely: "if in

the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter". Here the judge would have to direct the jury whether the mental disorder was an extenuating circumstance and whether that extenuating circumstance was such that it ought to reduce the offence from murder to manslaughter. On the latter part of that direction the jury would need guidance as to what extenuating circumstances ought to reduce the offence, and in practice that would mean that the mental disorder had to be 'substantial'. To strengthen this element the Committee offered an alternative phrase "...the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter".[15]

The Committee were also concerned with the anomaly that in cases involving provocation and diminished responsibility (and the close link between the two defences did not escape them) there was no provision in statute law to allow the charging of an attempt to commit manslaughter. If the accused succeeded in stabbing his wife and her lover and the latter died, he might be convicted of attempted murder and of manslaughter. That is to say: where she survives he is convicted of an attempt to commit the greater crime. It arose in the Sutcliffe case where there was one charge of attempted murder — and the plea bargainers could do nothing about that. It must be presumed that Mr Fiennes when drawing section 2 and 3 of the Homicide Act was reflecting the law as it was then understood to be; but in fact, the Criminal Law Revision Committee unearthed a number of reported cases from last century[16] which demonstrated that provocation was a defence not only to murder but to wounding with intent to murder, this being a kind of

attempt to murder which has now been merged with the general offence of attempt to murder. The view was that a new provision would not substantially add to the length of trials; would not prejudice the accused and might even encourage additional pleas.[17]

C. The Criminal Code:

One of the Butler Committee justifications for proposing to overhaul the law on mental disorder and crime was the need to produce an appropriate provision for incorporation in the Law Commission's projected Criminal Code. Since 1981 a group of academics had been assisting the Commission to formulate such a code. In 1985 a Report[18] together with a draft code was issued as a basis for discussion. The draft covered the whole spectrum: General Principles of Liability – Specific offences – Evidence and Procedure – Disposal of Offenders. One of the most important aspects of the drafting was that it incorporated recommendations for the reform of the law made by public bodies, for example: the Law Commission, the Criminal Law Revision Committee and ad hoc committees, such as the Butler Committee on Mentally abnormal Offenders – and this is reflected in the work done on mental disorder in relation to homicide and offences against the person. Firstly, The term "diminished responsibility" is retained in the draft Code and statutory recognition is given to a verdict "guilty of manslaughter by reason of diminished responsibility" as distinct from a general verdict of "guilty of manslaughter" where provocation or excessive force arises in a killing.

> The new concept is simply stated:
> "58.–(1) This section applies where the person who kills or is a party to the killing of another is suffering from a form of mental abnormality which is a substantial enough reason to reduce his offence to manslaughter.

> (2) In this section "mental abnormality" means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind except intoxication.
>
> (3) Where the person suffering from mental abnormality is also intoxicated this section applies only where it would apply if he were not intoxicated.'[19]

It will be immediately noticed that this is an amalgam of the wording suggested by two of the committees mentioned. One is also struck by the ring of commonsense practical everyday English about the section although it is doubtful if on reflection it makes the task of the jury any easier.

The major part of the first published draft dealing with general propositions of law and offences was considered by a series of small committees of practitioners, each committee dealing with four or five clauses and approaching the draft as a succinct statement of the law as it was rather than as it should be. It was felt that radical proposals would bog the whole thing down and nothing would ever reach the statute book. So far as can be ascertained this practice was not followed in relation to the sections which dealt with mental abnormality.

A new revised draft of the code is now with the printers but the contents have not been divulged. Such indications as are available[20] suggest that the draft follows the thinking of the Criminal Law Revision Committee.

Conclusion:

That since 1957 section 2 has not been amended by Parliament only judicially interpreted, but in due course, it will be reproduced as a section of the Criminal Code. That Criminal Code being intended to be a restatement of the law as it is.

Since 1957 there have been two succeeding mental health Acts. Any new section 2 must reflect their terms. The draftsmen of the Code have been assisted by the deliberations of the Butler Committee who drew a new section 2 linked to the wording of the Mental Health Act.

That wording has been revised and simplified by the Criminal Law Revision Committee and forms the basis of the first draft for the Code and is believed to be reflected in the final draft. Wording which is well suited to continued smooth development although still restricted to homicide.

FOOTNOTES

Chapter XIV

1. Butler Report Recommendation 45
2. Ibid but see also paras 18.17 - 18.18
3. Recommendation 64 read with para 13.1
4. Para 19.5
5. Recommendation 57
6. Para 19.16
7. Para 19.17
8. Ibid
9. 19.20
10. C.L.R.C. Working Paper 'Offences against the Person' (1976)
11. C.L.R.C. Fourteenth Report: 'Offences against the Person' (1980)para 92
12. Ibid
13. Ibid
14. Ibid para93
15. Ibid
16. Thompson (1825) 1 Mood 80; Bourne (1831) 5 C.& P. 120; Beeson (1835) 7 C. & P. 142; Thomas (1833) ibid 817; Hagan (1837) 8 C.& P. 167
17. Report para 98
18. Report to the Law Commission. 'Codification of the Criminal Law'. Law Commission No. 143(1985)
19. Clause 58
20. Discussion with Law commission staff

CONCLUSIONS

This thesis has examined the development of the doctrine of diminished responsibility in English Criminal Law since its introduction by section 2 of the Homicide Act 1957. By the very nature of the subject matter – a legal topic – an analysis and evaluation of the material, its ramifications and general implications has taken place in the body of each chapter as it has evolved.

Underlying our study has been consideration of the Scottish model from which section 2 was drawn and perforce a critical comparison. It is a major contention flowing from that consideration that not only has English criminal law 'adopted and adapted' the Scottish doctrine but in the thirty years of its existence has greatly 'advanced' the doctrine of diminished responsibility; at a time when the Scottish doctrine, already developed and settled, in a similar environment, has done no more than mark time.

While some brief conclusions have been draw at the close of each chapter which indicate the support for that proposition and comment thereon, it is perhaps profitable, at this stage, to consider the overall position resulting from the introduction of the doctrine of diminished responsibility into English criminal law and that theme in particular.

Clearly the introduction of the doctrine has brought into the sphere of personal responsibility in English criminal law a degree of precision which did not exist before but which the Scottish courts had enjoyed since Dingwall. This has probably been its greatest contribution. It has been welcomed by psychiatrists and legal

practitioners alike on that ground alone, but it has also afforded some assistance to juries. The issues put more realistically in turn reflect more closely the jury's true finding, according to their conscience – and the terms of their oath. The mentally deficient and the mercy killer are now adequately catered for. No longer is there a temptation to seek sanctuary in a verdict of not guilty because there is no other way to recognise the role of the mentally abnormal at the time of the offence.

That there is a conviction in a proper case which might otherwise fail provides a degree of protection to the public, which without it, might be absent. Such a degree of precision cannot but enhance the public regard and respect for the whole judicial process.

Nor is the accused without benefit. Apart from the obvious advantage that he is dealt with more precisely according to his needs, it can be important to him that the verdict reflects his perceived assessment of his moral culapability. This can have a therapeutic effect on any treatment that he receives. It is also important to him and his family - and the Court of Appeal have given expression to this - that the moral stigma that a murder verdict might bring, be avoided, in proper cases.

There is no doubt that while the concept was not foreign to English legal thinking and was present at an early stage of forensic development it did not blossom quite so openly as in Scotland. In drawing the two strands of history in our study, the parallels have been clear. This makes its rapid development in England once it has been brought out in the open and given statutory effect all the more remarkable and commendable.

In 1957, Scots law was being adopted and adapted. It was a

process of codifying in a few clauses a common law concept, making allowance for the absence of M'Naghten insanity in Scotland and the differnt appproach to disability in bar of trial. The meaning of the concept was contained in the 'charge to the jury' in some four or five modern Scottish cases and the task of drafting was performed tolerably well. To start like this with a wealth of someone else's experience to draw on should mean that you avoid simple pitfalls. These have been ironed out. In theory there is only one way to go and that is forward.

But notice the chaos in Parliament over the meaning of section 2(2) before it reached the Statute Book. Yet this point had always been well settled in Scotland, and the authority (Braithwaite) quoted to the Gowers Commission. It took the Criminal Procedure (Insanity) Act of 1964 to bring any clarity to the matter of who may raise the issues, details long settled in Scotland. Why did they not turn to the Scots on the one aspect on which they might have helped.

This is equally true of procedure in general. There were virtually no Scottish cases to follow, it is true, as application of the doctrine had never foundered on these rocks. Throughout the Scottish courts had used the freer practices which had been applicable to insanity. It would be charitable to say that haste in drafting was the cause for the lack of clarity in section 2 but perusal of the original files suggests that, in truth, no thought at all was given to the matter. Scottish legal advice was available from the outset - in Cabinet committee - in correspondence - in Parliament.

It could now be said that the procedure for the application and execution of the mechanism of the doctrine as exemplified by section 2 is well settled and is adequate, straightforward and well-understood and

on a par with the practice in Scotland, but no more. But it has taken an unnecessarily and unconscionable time to reach that stage. There has been no advance or innovation in the field of procedure.

One of the principal fields in which progress has been made in England has been in relation to the reception of psychopathy within the criminal justice fold.

We know from the the gloomy words of the senior judge in Scotland that the Scottish doctrine has not appreciably changed in at least the last thirty years and the cases support this opinion. The cases also contain little evidence to hint at a favourable approach by the courts to the conduct of those suffering from a personality disorder, indeed the less favourable definition in the Mental Health (Scotland) Act means that fewer psychopaths secure hospital places in Scotland in any event. And the Act serves to illustrate the professional attitude outside the courts as well. Carraher set bounds which have not yet been broached, even although he might be a creature of his time.

In England, R.v.Matheson was clearly an important case in this field, particularly when you bear in mind that it was a full court decision and that judgment was reserved. As J.E.Hall Williams commented at the time: "The case ... gives a promising and sympathetic lead in the direction of recognising psychopathy". Dunbar and Spriggs launched the concept on its way but it is plain that there is a greater chance of acceptance where the accused is of low mentality. Perhaps an unexpressed link with the 1913 Act and moral defectives.

We should not be so surprised that 'irresistible impulse' now is included under the doctrine. The scene had been set for its incorporation under some guise in the cases which preceded Byrne and

there was ample evidence before the Gowers Commission that in practice judges and juries gave effect to the submission in practical terms. The Court of Appeal in Byrne while laying down a broad and useful meaning for the interpretation of 'abnormality of mind' were very specific when dealing with 'irresistable impulse' and it must be assumed that they were anxious that the matter should be laid to rest once and for all in clear terms.

The Scots are still without any guidance on the topic. There are no decided cases in point. Perhaps those likely to put forward this defence are skimmed off by the extensive process 'in bar of trial' or vanish unnoticed in the freer interpretation of insanity as a defence. In criminal law certainty is a desirable quality

One of the encouraging signs for the future has been to observe the approach of the English courts to the factor of 'irresistible impulse'. The challenge, clearly put in their way, has been accepted and dealt with firmly by minds open to change. The same could be said of the approach to the intrusion of intoxication. Again the brisk no-nonsense approach setting clear limits. It is in relation to 'mercy-killings' that the firm hand may be less in evidence (save with individual judges). Some of the examples of homicide in this survey (which have popularly borne this label) have stretched the terms of section 2 beyond any rational meaning. Of course it maybe that a new bout of jury dominance in this field is about to start, but in general we are dealing with 80 per cent guilty pleas – and that is a matter for the judge. It is tentatively suggested that this is an area of concern for the judiciary in England and that both alarm and the proposed action should be expressed publicly, as has been done in Scotland by their

Lordships of Justiciary in respect of psychopathic disorders

So far as strictly medical conditions are concerned it is difficult to comment. One can comment in relation to the position of each as it effects section 2 and this has been done at the end of the relevant chapters. There is nothing very exceptional about them. It is more difficult to draw comparisons with similar conditions in Scotland in the absence of access to official case records and meaningful statistics. What has emerged in England is this great growth in 'significant' depression cases but nothing comparable has been detected in our study in Scotland but the material is inadequate to be meaningful.

In relation to sentencing of dimimished responsibility cases, current English practice could now be said to be 'in advance of' and an example to, the Scottish courts.

Whereas in the late 1950s, the English courts immediately 'adopted' fairly slavishly the standard Scottish practice of imposing a long fixed period of custody as appropriate in most cases where diminished responsibility was the dominant feature, they have now managed to break away from this pattern.

The advent of the hospital order seems to have had a more unsettling effect in the English courts, dealing as they were with many more cases and a greater range of mental institutions; there coming a time when 70 per cent of cases resulted in orders under the Mental Health Act.

When that phase ended, as hospital beds became difficult to secure, a very constructive regime followed in which sentences were clearly tailored to the needs of the accused: a life sentence, if protection of the public was paramount and treatment not likely to be

successful; a hospital order where it was; but in large measure, fixed sentences of short duration became and remain the norm. This reflects the individuality of the case which is after all why the case has been reduced from murder to manslaughter in the first place.

So far as can be ascertained, for the statistics do not cover diminished responsibility as such, the High Court of Justiciary are still wedded to the long fixed term with the odd hospital order at Carstairs and by way of innovation, the occasional use of a life sentence.

In all the circumstances, the English courts sentencing practices are a true progression, reflecting the proper function of the doctrine.

But the good can still be improved. The deliberations of the Butler Committee and the Criminal Law Revision Committee with their discussions on the future of infanticide do not obscure the anomalies. The most satisfactory course is to deal with infanticide in terms of diminished responsibility. Not difficult to achieve and immediately, the problems of other children killed at the same time or in place of the newest born are resolved. But further improvement is required to cover the child of perhaps a trio who survives the attack and where the charge would be attempted murder. Only if the doctrine was considered 'general' in application could this be accomplished. But is there any harm in so regarding it. We have Lord Brand (a possible latter day Lord Deas) doing just that in the 1980s without comment. Of course specific provision can be made to include 'attempted murder' under diminished responsibility, and it is contemplated, but is it not untidy and did not go as far as Lord Brand contemplated. The 'specific intent' of certain offences have not figured in our study and this complicates the issue

but there is no reason why they should not be integrated in any general doctrine, particularly in relation to assault. The benefits of a simplified yet extended scheme would be substantial.

It is submitted that logically to take account of developments there should be an extension of the doctrine of diminished responsibility as incorporated in the Penal Code. It should replace the Special Verdict and absorb all those conditions which are strictly legal insanity and possibly those under disability. There are difficulties in respect of conviction and civil liberty, but as regards both it should be remembered that magistrates' courts try men who make no defence before making a hospital order, satisfying themselves that an offence is disclosed. In any event, most defendants who could plead insanity at the present do not object.

There has impinged indirectly on our study at various times the analagous position of children before the court as they pass from being held to be completely exempt from responsibility, [the doli incapax], then through a stage in which their responsibility is qualified [malitia supplet aetatem] and finally reaching a situation when they are held to be fully responsible for their actions. Immediately the position of the mentally abnormal is brought to mind. Where the parallels and similarities spring to mind in their strongest form is in hearing the tests applied to the child and the insane: The lack of discretion, Hale's Fourteen year old child, the good and evil, right from wrong tests

Having observed the links, then it could be contended that, at the other extreme, the doctrine should be re-drafted and extended to take the opportunity to tie the disabilities of youth with the general doctrine of diminished responsibility. The court could consider whether

any element of diminished responsibility could be said to be present on the grounds of impaired mental or physical capacity or by reason of age.

With confidance it can be said that while English criminal law may in an emergency and for the wrong reasons, have "adopted and adapted" the Scottish doctrine of diminished responsibility in 1957, in the years since, and after a shaky start, section 2 has developed well and the English legal system through its academics and practitioners has greatly "advanced" the operation of the concept — to the benefit of all.

And further: The way is now clear before momentum has been lost, in the context of the Penal Code, to provide a new doctrine of diminished responsibility: 'General' in application. And in the foreseeable future to extend this to a 'Comprehensive' doctrine.

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D. C. Cir. .....Circuit Court, District of Columbia

E. D. L. ..... Eastern Districts Local Division of the Supreme Court of South Africa

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Maclaurin. ..... Maclaurin's Arguments and Decisions 1670 - 1770

Mass. ..... Mass

Med.-Leg. J. ..... Medico-Legal Journal

M.L.R. ..... Modern Law Review

Mich. L. R. ..... Law Review of Univ. of Michigan

N.H. ..... New Hampshire

N.L.J. ..... New. Law Journal

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W.L.D. ..... Witwatersrand Local Division of the Supreme Court of South Africa

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