

# WHAT THE DOCTOR ORDERED: REVISITING THE RELATIONSHIP BETWEEN PSYCHIATRY AND THE LAW IN THE UK AND IRELAND

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## A INTRODUCTION

Following decades of protracted debate, the introduction of the Criminal Law (Insanity) Act 2006 (the '2006 Act') has once again placed the turbulent relationship between psychiatry and the law under the legal microscope.

The long anticipated arrival of the 2006 Act brought with it into Irish law new definitions of insanity<sup>1</sup> and fitness to be tried<sup>2</sup> in addition to a new plea of diminished responsibility.<sup>3</sup> The question of whether the accused was suffering from a 'mental disorder' at the time he executed the act (or at the time of trial in the case of fitness to be tried) is the primary focus of these sections of the 2006 Act. Defined as including mental illness, mental disability, dementia or any disease of the mind (apart from intoxication),<sup>4</sup> 'mental disorder' presents itself as a medical or psychiatric term within a legislative setting.

The prominent positioning of 'mental disorder', together with the retention of the term 'insanity', demonstrates that the basis of any discussion of the 2006 Act must feature an examination of the hegemonic relationship between the two powerhouses which vie for authority in the field of human behaviour, namely, psychiatry and the law. In this article, I intend to analyse the interplay between these two disciplines within the arena of 'crime and madness', with a view to having a clear understanding of why the law in Ireland is as it is, and whether or not its position is apposite.

Before commencing this examination, it is worth noting that the law and psychiatry both have the unenviable task of dealing with that most evasive entity, human behaviour. As a result, neither can ever achieve uniform perfection in their conclusions. This is not to say, however, that we should simply throw in our daggers and balances on the basis that we at least achieved a certain level of justice in terms of the psychiatric and legal treatment of mentally disordered offenders, but must use it to motivate ourselves to come as close as possible to a flexible, complementary relationship between the professions which will ultimately result in the most appropriate treatment for the accused.

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<sup>1</sup> See s 5 of the 2006 Act, which replaces the Criminal Lunatics Act 1800 and the Trial of Lunacy Act 1883. If an accused person successfully pleaded the defence of insanity prior to the inception of the 2006 Act, he or she was held to be 'guilty but insane.' However, the use of the word 'guilty' was considered to be misleading given that the verdict results in an acquittal. See *People (DPP) v Gallagher* [1991] ILRM 339.

<sup>2</sup> See s 4 of the 2006 Act which replaces 'fitness to plead'.

<sup>3</sup> S 6 of the 2006 Act.

<sup>4</sup> S 1 of the 2006 Act.

The title of the 2006 Act serves as a pertinent place to begin this discussion.

## **B SAFEGUARDING ‘INSANITY’**

The decision by the legislature to preserve the word ‘insanity’, both in the title of the 2006 Act and in the ‘not guilty by reason of insanity’ verdict itself, is significant. Some commentators would argue that ‘insanity’ is a relic of an old and now outdated forensic and clinical nosology which has long since passed out of the medical lexicon and is manifestly out of place in a society that seeks to avoid language with any pejorative connotation.<sup>5</sup> According to Casey and Craven, ‘insanity’ is best regarded as a legal tag without any diagnostic or therapeutic value, and its characterisation is a source of bewilderment to medical practitioners.<sup>6</sup>

Others, however, are of the view that the concept of insanity in a legal context is a perfectly valid and absolute doctrine in its own right.<sup>7</sup> For example, Gordon maintains that the law is concerned with the accused’s responsibility and not his mental health.<sup>8</sup> This notion is echoed by McAuley when he says that, ‘...legal insanity is an excuse for wrongdoing, not a diagnosis of the accused’s mental condition’<sup>9</sup> with the result that insanity is therefore ‘...not a defence because it is a disease ... but because it is a species of one of the excusing conditions traditionally recognised by the criminal law in a civilised society.’<sup>10</sup>

While McAuley’s is a valid argument in the substantive sense,<sup>11</sup> he fails to look beyond the narrow confines of legal classification. McAuley does not acknowledge that the word ‘insanity’ in modern parlance is still, I would argue, tainted with a host of undesirable associations (not least the ‘insane asylum’ which although no longer formally in use still commands a certain derogatory nuance). Nor does he address why, if ‘legal insanity’ is only concerned with responsibility as opposed to mental illness, the law does not

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<sup>5</sup> For example, P Casey and C Craven ‘Psychiatry and the Law’ (Oak Tree Press Dublin 1999) 367-8.

<sup>6</sup> *ibid.*

<sup>7</sup> From an Irish judicial perspective, Griffin J summarises the position succinctly in *Doyle v Wicklow County Council* [1974] IR 55, 72 when he says: ‘... for it is legal insanity with which the courts are concerned, and not medical insanity’. Quoted in Casey and Craven, *ibid.* at n.5.

<sup>8</sup> GH Gordon *Criminal Law of Scotland* (2nd edn Edinburgh 1978) 348.

<sup>9</sup> F McAuley ‘Insanity, Psychiatry and Criminal Responsibility’ (Round Hall Press Dublin 1993) 2.

<sup>10</sup> (n 3). This argument is echoed by Deputy B Lenihan when he claims that the legislation must be read in the context of the evolution of our criminal law. *Seanad Éireann Criminal Law (Insanity) Bill 2002: Report and Final Stages* 19 April 2005, 180 (B Lenihan).

<sup>11</sup> That is:

[T]hat the question of the proper scope of the insanity defence is not an empirical matter that can be settled by psychiatrists, ... (but that deciding) ... whether or not the relevant mental disorder should be regarded as an excuse ... can only be determined by assessing the effects of the disorder in the light of the general moral principle on which the insanity defence is based: namely, that an inability to act rationally precludes criminal responsibility. (*ibid.*)

reflect this in its vocabulary instead of reinforcing an outmoded and somewhat sullied term. This should surely be of some concern given that it is the function of the law to model its procedures around the framework of our cultural landscape, which is no longer accepting of the term ‘insanity’ and the subtext it begets.

It is as if the law is blind to the fact the word ‘insanity’ once formed part of an idiom common to both the medical profession and the legal profession alike, but was unceremoniously abandoned by the latter through a dramatic and somewhat lengthy course of events, which I shall examine in greater detail below. In so doing I hope to resolve the mystery of why one profession would take deliberate steps to dissociate itself from insanity and the other continue to fortify it.

### **1 The Slow (but Certain) Demise of ‘Medical Insanity’**

According to one school of psychiatrists, the ‘gifting’ of ‘insanity’ from medicine to the law was a deliberate action on the part of medical science to rid itself of unwanted historical baggage. Prior to the mid nineteenth century the word ‘insanity’ was an accepted term which was common to the medical and legal professions as well as the general public. It was used to denote the ‘state of being unsound in mind’ and ‘applicable to any degree of mental derangement from slight delirium or wandering, to distraction.’<sup>12</sup> However, this common acceptance of the term ‘insanity’ (together with the treatment of the insane at the time<sup>13</sup>) would not last; the seeds of change having been planted by the emergence of a field of medicine known as psychiatry.

The private madhouse or asylum which emerged during the period of the Enlightenment became what Porter describes as a ‘forcing-house’ for the development of psychiatry as an art and science.<sup>14</sup> The asylum was not established for the practice of psychiatry, rather the practice of psychiatry developed in order to manage its inmates. Ideas about insanity remained abstract and theoretical before doctors and other proprietors gained extensive experience of handling the mad at close quarters in such houses. Inspired and encouraged by the optimism of the Enlightenment, however, practical psychiatry was transformed through asylum experience, and the claim became standard that the well-designed, well-managed asylum was the machine to restore the insane to health.<sup>15</sup> The common practice of coupling asylums with

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<sup>12</sup> JA Tighe ‘What’s in a Name?: A Brief Foray into the History of Insanity in England and the United States’ (2005) 33:2 *J Am Acad Psychiatry L* 252, 254.

<sup>13</sup> For a concise historical account of madness see R Porter *Madness: A Brief History* (Oxford University Press Oxford 2002). According to Porter, prior to the Enlightenment ‘... it had long been assumed that the mad were like wild beasts, requiring brutal taming, and stock therapies and drugs had been used time out of mind: physical restraint, bloodletting, purges and vomits.’ (at 100).

<sup>14</sup> According to Michel Foucault the Enlightenment followed a period of ‘great confinement’ of the mad and poor. M Foucault *Madness and Civilisation: A History of Insanity in the Age of Reason* (Pantheon New York 1965).

<sup>15</sup> Porter (n 13).

universities further encouraged the development of a profession whose authority was based on their special position in relation to the insane.<sup>16</sup>

As a result of psychiatry's new found prowess within society, the law had begun to take an interest in the regulation of its institutions.<sup>17</sup> However, their interaction became more significant when, like psychiatry, the buoyancy of the Enlightenment had its effect on the law, which resulted in the firm establishment of the legal principle of criminal responsibility owing to the 'reason of man'. The position of the law was made clear in *R v Hadfield*<sup>18</sup> when in defending James Hadfield, (who had shot at the King of England in the hope that he would be hanged and therefore obey a divine command to sacrifice himself without committing suicide), Thomas Erskine stated that: 'It is agreed by all jurists, and is established by the law of this and every other country, that it is the REASON OF MAN which makes him accountable for his actions; and that the deprivation of reason acquits him of crime.'<sup>19</sup> The accused was deemed insane and was sent to a psychiatric institution rather than to prison, thus cementing the legal doctrine that those who lack reason should be excused from punishment for their crime.

Accordingly, the insane offender was sent not to jail, but to the asylum where he would be confined under the auspices of the psychiatrist, just as the prisoner was detained at the pleasure of the court. The responsibility thus bestowed upon the psychiatric profession naturally lead to a desire to uphold and defend its new found status within society. Its control over the insane, coupled with the academic and clinical research being carried out at the time, meant that psychiatry wanted the law to recognise its expertise in the courtroom. The seeds of a power struggle were thus planted. To begin with at least, the potential for conflict between the professions was kept at bay because the earliest psychiatric approaches adopted a conception of treatment involving individual moral reform through the promotion of self-governance, and thus were not far removed from the law's own ideas on human conduct.<sup>20</sup> And so for a short period of time, law and psychiatry shared an analogous notion of 'insanity'.

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<sup>16</sup> The first modern-style university psychiatry department was established in Berlin in 1865, where teaching and research were pursued alongside clinical work. For a detailed account of the early workings of psychiatry see RP Bentall *Madness Explained: Psychosis and Human Nature* (Allen Lane London 2003).

<sup>17</sup> For example, in the United Kingdom the Act of Parliament in 1774 emphasised that inmates of asylums were to be cured and no longer regarded as hopeless and only in need of asylum, and the Act of Parliament 1808 recommended the creation of asylums in every county. For a more detailed account see generally Casey and Craven (n 5), and C Unsworth *The Politics of Mental Health Legislation* (Clarendon Oxford 1987).

<sup>18</sup> (1800) 27 St Tr 1281.

<sup>19</sup> *ibid* 1309-10. Quoted in Gordon (n 8).

<sup>20</sup> A Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd edn Butterworths London 2001) 177. See also Porter's account of the 'moral management' approach pioneered by such doctors as Francis Willis who once treated George III, 'A visitor was impressed by the tone of Willis' Lincolnshire madhouse: "...these were the doctor's patients; and dress, neatness of person and exercise being the principal features of his admirable system, health and cheerfulness conjoined toward the recovery of every person attached to that most valuable asylum.'" Porter (n 13).

Such harmony would be short lived. From the mid-nineteenth century onwards, questions were being asked about the ability of the professions to share the language of insanity. This was set against a backdrop of rising doubts about the efficacy of the asylum and moral treatment, intense infighting between the superintendents and the newly created speciality of neurology, and the general structural changes that were part of the reorganisation of the medical profession at the end of the nineteenth century.<sup>21</sup> Psychiatry was dealing with what was beginning to be considered more and more as a disease or an illness, and as such, the profession increasingly found itself leaning towards a more scientific or medical approach to the study of insanity in terms of both theory and practice, in order to seek to explain its underlying cause(s). Following their methodology to its natural conclusion, psychiatrists then argued that in actual fact the essence of insanity lay in the underlying causal mechanisms of the brain, and not the irrational behaviour of an individual (as is the legal position).<sup>22</sup> It was this assumption (that deterministic mechanisms can equally well explain the behaviour of the person) which led to confrontation between psychiatry and the law.

Thus, in the late nineteenth century, the term 'insanity' began to fade out of the medical lexicon. Attempts to rename 'insanity' were largely ineffectual and controversy abounded over attempts to qualify the word by various adjectives and modifiers such as adolescent, circular, homicidal, religious, moral and delusional. The medical professions which dealt with the term failed to agree upon a common meaning, and so, the limitations of the old approach became so obvious that they could no longer be avoided.<sup>23</sup>

Relentless progress in the field of psychiatric theory such as the emergence of a more clinically informed disease classification scheme pioneered by Emil Kraepelin and the introduction of psychoanalysis, would lead psychiatrists into a new scientific framework. Progress in scientific methodologies and models led to increased disillusionment with, and desire to distance theory and practice from, psychiatry's asylum-dominated past. The word 'insanity' was seen as representative of this era and so these forces combined to lead to psychiatry's abandonment of the term. This change in language was tentative at first, marked by some ill-fated efforts to revive the term in an effort to hear the law and medicine speaking the same language, however, these attempts were not to come to fruition.<sup>24</sup>

Like many decisive moments in history, we cannot mark a particular date and time of psychiatry's abandonment of the term insanity but occur it did, as is evidenced by the following quote from the eminent psychiatrist William White: 'Insanity is purely a legal concept and means irresponsibility, or incapacity for making a will, or for entering a contractual relationship...'<sup>25</sup>

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<sup>21</sup> Tighe (n 12).

<sup>22</sup> Norrie (n 20).

<sup>23</sup> Tighe (n 12) 255.

<sup>24</sup> For a more detailed account see generally Tighe (n 12).

<sup>25</sup> W White *Insanity and the Criminal Law* (Macmillan New York 1923) 102. Quoted in Tighe (n 12) 256.

Medical textbooks, journals and organisations would soon follow suit in eliminating the word ‘insanity’ from their texts.<sup>26</sup> By the 1930’s, the term had been fully abandoned and psychiatry continued to remain focused on developing scientific means for diagnosing, understanding and treating mental illness.

The law, however, demonstrated a marked resistance to change and continued to cling fast to the notion of the reason of man.<sup>27</sup> Thus, whatever revolution psychiatry may have experienced, it did not cross over into the legal arena. (However, the law did at least develop procedures through which the expert psychiatrists could share their knowledge in the courtroom in order to facilitate the making of decisions as to competence and mental condition). Embedded in the deliberate movements of each profession is the suggestion that the theories underlying law and psychiatry are incompatible.

## **2 The Retention of ‘Legal Insanity’**

Prior to exploring this apparent theoretical conflict, I would like to finish this section with a brief discussion of why the law may have chosen to retain the term insanity within its lexicon, even today. We have already touched upon when and where the respective ideologies of the professions diverged and how this resulted in psychiatry renouncing ‘insanity’. Consequently, it is likely that the law retained the term because it was reluctant to allow psychiatry to have any meaningful impact upon the law and was perhaps threatened by psychiatry’s expertise in the area of human behaviour, which it probably felt was its exclusive domain. Perhaps law makers, recognising the apparent clash of ideologies, took a step back in order to prevent the whittling away of the principle of criminal responsibility so embedded in the insanity defence.

While this reasoning may also apply in today’s legal climate, it does not tell us why the law continues to retain the term (even if it does just see it as a label for a class of excuse) given its derogatory connotations.<sup>28</sup> (This query becomes particularly pertinent in an Irish context when we consider that the legislature had the ideal opportunity to change this position as recently as 2006). The fact that civil mental health legislation does not use ‘insanity’ may give us a clue. The criminal law is keen to retain the term for the very ‘reason that it is deeply stigmatic. The word itself can be viewed as counteracting the fact that an accused is acquitted when he or she is found not guilty by reason of insanity, as it implies that the accused clearly crossed the perceived dividing line between the sane and the insane and this is why they have been excused

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<sup>26</sup> For example, the professional organisation for physicians working with the mentally ill made a very public gesture in 1921 by changing its own name to the American Psychiatric Association and that of its journal from the American Journal of Insanity to the American Journal of Psychiatry. Tighe (n 12) 256.

<sup>27</sup> For example, see *R v Kemp* [1957] 1 QB 399, 408, where Devlin J states that ‘A defect of reason is by itself enough to make the act irrational and therefore normally to exclude responsibility in law’.

<sup>28</sup> For example, see N Walker *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Blackwell Oxford 1980), wherein Walker puts forward the contention that most of the ‘labelling’ effects of conviction, sentence and acquittal are, if and when they occur, harmful to the individual defendant.

in the eyes of the law. To remove this division would make it more difficult for the law to justify its exculpatory verdicts, thus leaving it at risk of being branded 'soft' on crime.

This idea is supported by the fact that in today's cultural climate, some mental disorders, (for example, depression, anxiety disorders, and eating disorders) are frequently diagnosed by psychiatrists and even general practitioners, with the result that the stigma that was once attached to them has largely evaporated, (particularly given that many children are also diagnosed with disorders, for example, attention deficit hyperactivity disorder).<sup>29</sup> Having a 'mental disorder' today is perceived as a relatively common, medical complaint and is therefore accepted by society at large,<sup>30</sup> whereas the notion of being insane (thanks to its chequered history) still commands a derogatory undertone. Perhaps the legislature is of the view that to remove the word 'insanity' from the law would somehow dilute the gravitas of the defence which, as it stands, is already suffering from an image crisis.<sup>31</sup> To go one step further and suggest that 'insanity' be replaced by 'mental disorder' may give the damaging impression that individuals could avail of the insanity defence by reason only of having a mental disorder (something which the law is keen not to encourage).<sup>32</sup> Indeed, this notion is reflected in the reasoning given by Minister McDowell to the Seanad for his refusal to remove the reference to 'insanity' in the title of the Act, and replace it with 'Mental Disorder'. He argued that 'to change the word "insanity" to "mental disorder" would send a signal that thresholds were being significantly lowered.'<sup>33</sup>

Essentially, what appears to be at play is a balancing act between a social perception of being tough on crime and the stigmatisation of the mentally disordered acquittee. Clinging onto a pejorative term in the hope of maintaining public confidence in the government's crime agenda is coming at the cost of allowing an accused who is excused from responsibility for his actions as a result of the effect of having a mental disorder to be free of depreciatory intimations. The legislature failed to avail of an ideal opportunity to address this anti-defendant bias in Ireland with the implementation of the 2006 Act.

## C

### MENTAL DISORDER IN THEORY

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<sup>29</sup> For example, a survey carried out by Mental Health Ireland ('Public Attitudes to Mental Illness' (2005)), revealed that just over two thirds of Irish adults (68%) have had some experience of mental illness in respect of people they are close to.

<sup>30</sup> According to the 2005 survey, overall sympathy levels for those who have experienced mental health difficulties is high. This sympathy hinges on greater awareness of mental illness in Ireland today and here, a number of factors come into play: personal experience of mental illness; experience of mental illness among family/friends/acquaintances; and exposure to publicity about mental health.

<sup>31</sup> For example, see E Silver and others 'Demythologizing Inaccurate Perceptions of the Insanity Defense' (1994) 18 L and Human Behaviour 1, 63: 'Public opinion data show that the most prevalent concern expressed regarding the insanity defense is that it is a loophole through which would-be criminals escape punishment for illegal acts.'

<sup>32</sup> See earlier discussion.

<sup>33</sup> Seanad Éireann *Criminal Law (Insanity) Bill 2002: Committee Stage (Resumed)* 7 April 2004, 176 (M McDowell)

As previously mentioned, the credence being placed on the term ‘mental disorder’ in the 2006 Act has resulted in the medicalisation of the legislation in this area of the law. This amalgamation of disciplines is curious when we consider the time-honoured argument that because the principles of law and psychiatry are based on opposing paradigms, they cannot work together. Both claim to have a monopoly on understanding human behaviour but, paradoxically, appear to approach it from two different standpoints. I shall explore these standpoints in turn.

## 1 The Law and Free Will

Traditionally, the argument is that the ‘epistemological and purposive foundations of the discipline of law are framed by the concepts of free will, moral choice, guilt and innocence.’<sup>34</sup> Or to put it in more basic terms ‘that each individual should be treated as responsible for his or her own behaviour’.<sup>35</sup> This doctrine flows from the ‘reason of man’ principle which owes its origins to *R v Hadfield*.<sup>36</sup> According to Norrie, at the time of its emergence, the presence of the principle of rationality within the law presupposed the possibility of its opposite, the existence of irrationality. The law therefore had to develop a concept of insanity, which it naturally did in accordance with its conception of the individual as a reasoning being. The legal approach to insanity concerned a test for the absence of rational intelligence within the human mind.<sup>37</sup> Eventually the test emerged in the form of the M’Naghten Rules of 1843 (viz. those where the accused’s condition prevented him from knowing either what he was doing in the physical sense or that he was acting contrary to law).<sup>38</sup>

The M’Naghten Rules remain the basis of the law in Ireland today. Unlike its English counterpart, however, the new Irish law also incorporates the notion of irresistible impulse. This follows from the common law decision of *Doyle v Wicklow County Council* where the Supreme Court recognised the existence of the defence of volitional insanity.<sup>39</sup> In delivering his judgment,

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<sup>34</sup> Hunter and Bagen ‘Diminished Responsibility: “Abnormal” Minds, Abnormal Murders and What the Doctor Said’ in Meng Heong Yeo (ed) *Partial Excuses to Murder* (Gault Inc Sydney 1991) 14. Quoted in McAuley (n 9) 128.

<sup>35</sup> A Ashworth *Principles of Criminal Law* (Oxford University Press Oxford 2006) 25.

<sup>36</sup> Hadfield (n 18). See also A Kenny *Freewill and Responsibility* (Routledge & Kegan Paul London 1978). The natural logical progression from this principle is that it would be ‘unjust to hold individuals criminally responsible for their acts and omissions unless those acts and omissions are themselves voluntary or are the foreseeable consequences of other voluntary acts and omissions.’ Kenny (n 36) 34.

<sup>37</sup> Norrie (n 20) at 176. This test was known as the Arnold test, which provided that the defendant ‘must be a man that is totally deprived of his understanding and memory’ (16 St Tr 695, at 764). McAuley (n 9) 24.

<sup>38</sup> (1843) 10 Cl and Fin 200. According to the M’Naghten Rules it must be established that cognitive incapacity, ‘defect of reason’ was caused by a ‘disease of the mind’. As such the mere fact that an accused suffers from impaired reasoning powers is not sufficient to raise the defence of insanity. A causal link between the incapacity and an underlying ‘disease’ is called for. See ST Yannoulidis ‘Negotiating “Dangerousness”: Charting a Course Between Psychiatry and Law’ (2002) 9 Psychiatry, Psychology and L 2, 151–62, 153.

<sup>39</sup> See s 5(1)(b)(iii) of the Act, following the decision in *Doyle v Wicklow County Council* (n 7).



Griffin J stated that the M’Naghten Rules should be read in light of their limitations (i.e. that they were essentially a response to a series of questions about the legal effect of insane delusions), and without prejudice to the possible exculpatory effect of other forms of serious mental disorder.

## **2 Psychiatry and Determinism**

Over the centuries the ‘free will’ argument associated with the law has been contradicted by the ‘determinist’ claim that all human behaviour is determined by causes that ultimately each individual cannot control.<sup>40</sup> (Or as Kenny puts it, ‘If the universe is deterministic, and the body is merely a complicated machine, can there be any genuinely free action?’)<sup>41</sup> Psychiatry, as a branch of medical profession, is naturally informed by a ‘scientific’ understanding of human behaviour, and so it concerns itself with ‘determinism, degrees of cognitive and volitional control, classification of diseases, and definition of treatments.’<sup>42</sup> As such, the psychiatric concept of mental illness is tied to diagnostic categories made up of clinically significant behavioural or psychological syndromes or patterns that occur in an individual.<sup>43</sup>

## **3 The Conflict**

The apparent conflict between psychiatry and the law emerges, according to Norrie, from the two contrasting ways of understanding human nature (as highlighted above) naturally leading beyond that, to two conflicting social ideologies. According to the law, society was made up of rational individuals who, if they committed a crime, would be punished for reasons of deterrence and justice. The crucial element in this conjunction of utilitarian and retributive goals was that the guilty should not escape the sanction of the law. Conversely, for the psychiatric profession insanity was not to be viewed as a question of irrationality, but as a matter of physiological causation. Thus, Norrie would argue, scientific progress put forward a new approach to social order, in which the problems of crime would be solved by treating the causes of crime within the psyche, not by the punishment of an individual who could

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<sup>40</sup> Hunter and Bagen (n 34) 25.

<sup>41</sup> When addressing this question, Kenny distinguishes between two types of freedom; freedom conceived in terms of choice is liberty of spontaneity, and freedom conceived in terms of power to do otherwise is liberty of indifference. Ashworth (n 35) 25.

<sup>42</sup> McAuley (n 9) 15. According to Kenny, any objections to responsibility that may be put forward are generally based on conceptual confusion. The principal objections can be grouped into three classes; the epistemological, the metaphysical and the ethical. The metaphysical is what we would be concerned with for present purposes. It starts from a presumption that science has shown, or made it extremely likely, that determinism is true. Accordingly, so the argument goes, if every act of every human being is determined in advance by inexorable laws of nature, then it seems unfair to single out particular actions for judgment and reprobation. Moreover, it may well seem pointless to try to change or affect people’s actions by punishments or the threat of punishments, if everything they will ever do is predictable in advance from laws and conditions that obtained before ever they were born. Ashworth (n 35) 9-10.

<sup>43</sup> Norrie (n 20) 154.

not help himself. The aim was not one of retribution but prevention and cure, and the old punitive ideology was deemed irrational, ineffective, and unjust.<sup>44</sup>

Therefore, what appears on the surface as two differing theories on the notion of human behaviour is in fact a much deeper question involving an ideological struggle between two differing accounts of the theory underlying social and legal order. However, it is worth noting one significant parallel between the two professions vying for control, that is, each has a tendency to segregate those individuals who are deemed to be either insane or guilty of a crime, be that for their own benefit or for the benefit of society.

#### **4 Compatibility in Theory**

Having taken an initial look at the competing theories of law and psychiatry, it would not be unreasonable to question how they can co-exist in society, let alone in a piece of legislation. However, if we take a pragmatic approach to the relationship we can see that the underlying theories can in fact complement each other, which in turn leads to a somewhat unexpected form of alliance (or collusion) between the professions in practice.

From a theoretical perspective the concepts of free will and determinism, although they may appear so on first analysis, are not mutually exclusive. In fact, most commentators tend to strike a sensible balance between the two notions in order to reflect the fact that routine existence is largely based on the assumption that individuals are generally responsible for their own actions unless there is some overriding cause which detrimentally affects such responsibility, such as mental disorder or duress.<sup>45</sup> According to Ashworth, such an approach makes acceptable the fundamental proposition that behaviour is not so determined that blame is generally unfair and inappropriate, yet at the same time, in certain circumstances behaviour may be so strongly determined that the normal presumption of free will may be displaced.<sup>46</sup> Thus, we can see a way for the law and psychiatry to get along, at least in theory, but what of practice?

#### **5 Compatibility in Practice**

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<sup>44</sup> Norrie (n 20) 178.

<sup>45</sup> For example, see MS Morse *Law and Psychiatry Rethinking the Relationship* (Cambridge University Press 1984), who concludes that '... in the fight about a radical rethinking of who we are, both law and psychiatry are on the same side in defending an Intentional conceptualization of persons as rational and autonomous agents ...' His view is similar to that of McAuley who states that:

... the law's refusal to abandon the language of moral responsibility is a reflection of its abiding commitment to the irreducible facts of human experience, not an ostrich-like posture in the face of scientific progress...It is also a serious mistake to suppose that psychiatric explanation implies a form of behavioural determinism that leaves no room for purposive action. On the contrary, most forms of psychiatric disorder coincide with the ability to engage in purposive action, and this fact is widely acknowledged by psychiatrist. McAuley (n 9) 15.

<sup>46</sup> Hunter and Barga (n 34) 26. An example of one philosopher who defends the theory that free will is compatible with one form of determinism is Kenny. According to Kenny's 'compatibilism', it is unjust to hold responsible for their actions those who lack the relevant freedom, those who could not have done otherwise than they did, but it does not follow from determinism that agents always lack the opportunity and ability to do otherwise than they do. Consequently it does not follow that it is unfair to hold people responsible for their actions.

The emergence of a form of compatibility between the law and psychiatry in practice is largely due to the failure of the M’Naghten Rules to effectively reflect society’s expectations as to the administration of the defence of insanity. The Rules have been criticised as being, at one level, too wide in their application, and at another level, too narrow.<sup>47</sup> However, for present purposes I wish to focus on their failings in terms of narrowness.

The limitations of the Rules come from the fact that they are essentially restricted to cognitive defects, and therefore exclude from the insanity defence those forms of mental disorder that involve significant emotional or volitional defects.<sup>48</sup> There are two limbs to the cognitive component of the Rules. In the first limb, the mental disorder must prevent the accused from knowing the ‘nature and quality’ of his act. Kenny’s famous example of ‘the madman who cuts a woman’s throat under the idea that he was cutting a loaf of bread’<sup>49</sup> is an illustration of a delusion that falls within this limb because there is a qualitative difference between what the accused thinks he is doing and what he is actually doing, put simply, he is ignorant of the physical nature of his act.<sup>50</sup> The narrowness lies in the fact that it matters under this test precisely what the delusion is, resulting, somewhat absurdly, in the courts having to draw lines between delusions.<sup>51</sup> The second limb of the Rules permit the accused to show that he did not know that he was doing wrong. Here the law is specific that ‘wrong’ means against the law, rather than morally wrong, again forcing the jury to pick and choose between delusions.<sup>52</sup>

Essentially, the effect of the Rules is to limit the availability of the insanity defence to those situations where the accused’s mental disorder results in a loss of contact with physical reality (through severe hallucinations) or the total disintegration of his moral sense.<sup>53</sup> Consequently, as McAuley points out, the Rules afford no protection to the person suffering from melancholia who kills (usually a loved one and sometimes his whole family) in unrealistic despair at the hopelessness of his situation.<sup>54</sup> This legal test is a narrow, individualistic one which focuses not on the broader social

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<sup>47</sup> For a concise account of the difficulties see Norrie (n 20) 179-182.

<sup>48</sup> Hunter and Bargen (n 34) 207. Note that Ireland recognises volitional defects in s 5(1)(b) (iii) through irresistible impulse.

<sup>49</sup> A Kenny *Outlines of Criminal Law* (19<sup>th</sup> edn. London 1965).

<sup>50</sup> *R v Codere* [1916] 12 Cr App Rep 21.

<sup>51</sup> As Norrie explains, ‘[t]he belief that one is an avenging angel sent by God to kill prostitutes may be delusional, but it will not fall within this limb of the test because the accused appreciates the nature of his acts (the putting to death of other human beings).’ (n 20) 181.

<sup>52</sup> Norrie makes the point that it would in principle make a difference whether a divine command to murder someone was a direct instruction to bypass the law of the land in favour of a higher law, or whether it advised the insane person that the law of the land had in fact been suspended for him. In the latter situation, he would not believe he was breaking the law. *ibid.*

<sup>53</sup> According to McAuley, this interpretation essentially reinstates the old Arnold test. (n 36).

<sup>54</sup> McAuley (n 9) 24.

circumstances which naturally have a significant impact on the behaviour of the accused, but solely on his internal rationality and psyche.

The law's restricted interpretation of criminal responsibility left it exposed to the potential of being seen to unjustly convict an individual who acted under extreme social, emotional and psychological pressure, as in McAuley's example above. If this were to come about, it would shake the very foundation of the principle of the reason of man, not to mention the authority and the integrity of the criminal legal system. The law therefore was obliged to enrol the help of expert psychiatric evidence, which served to extend the narrow test of insanity beyond the realm of the M'Naghten Rules.

In short, psychiatry's broader, deterministic-based theory compensates for the law's lack of forethought in terms of responsibility. In doing so, it also serves a greater purpose common to both professions. Psychiatry colludes with the law in, (to use Norrie's terminology), 'covering up' the link between social context and 'criminal' behaviour, thus attributing such behaviour to the individual accused rather than to a societal problem. In this way, the law uses psychiatric evidence to support its conclusions, as is frequently demonstrated by the fact that psychiatric testimony will often overreach not just the legal criteria of insanity but its own criteria of what constitutes mental disorder or illness where a compassionate or merciful response to crime is required.<sup>55</sup> A modern example of this collusion in practice can be seen in the plea of diminished responsibility, which presents a more open view of the legal and psychiatric alliance, particularly when it comes to the case of a mercy killing. Where there is a case involving a non-professional defendant the usual response is that 'legal and medical consciences are stretched to bring about a verdict of manslaughter by diminished responsibility'.<sup>56</sup>

According to Yannoulidis, the law's tendency to rely more and more on psychiatry to support its conclusions is testament to the fact that it has implicitly conceded that some elements of determinism can be present side by side with the notion of free will.<sup>57</sup> However, as Barbara Hudson has warned:

[T]he notion of free will that is assumed in ideas of culpability... is a much stronger notion than that usually experienced by the poor and powerless. That individuals have choices is a basic legal assumption: that circumstances constrain choices is not. Legal reasoning seems unable to appreciate that the existential view of the world as an arena for acting out free choices is a perspective of

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<sup>55</sup> For an example of this in practice, Norrie refers to a nineteenth century cases in which parents (usually mothers) killed their children in conditions of abject poverty. These were not situations in which the M'Naghten test would acquit the accused, nonetheless many of these parents were found insane by juries going beyond the confines of the Rules by accepting the testimony of psychiatrists to support their verdict. (n 20) 190.

<sup>56</sup> The Criminal Law Revision Committee 14th Report, [115]; cf *Cocker* [1989] Crim L R 740 with Lord Goff, 'A Matter of Life and Death' (1995) 3 Medical L R 1, 11. For further discussion on this issue see Ashworth (n 34) 283-4.

<sup>57</sup> Yannoulidis would argue that the reason the courts are seeking to legitimise decisions by means of an appeal to scientific truth is to pay regard to community perceptions of 'mental illness', but in doing so, redefines the boundaries of psychiatry's area of discourse. Norrie (n 37).

the privileged, and that potential for self-actualization is far from apparent to those whose lives are constricted by material or ideological handicaps.<sup>58</sup>

Hudson's point is reflective of the unfortunate legal practice of decontextualising social acts, particularly in terms of madness. The focus on responsibility in the insanity defence does not pay heed to the circumstances in which madness occurs within society. It serves to isolate the accused and consequently his mental condition. Although psychiatry, as I have alluded to above, has a wider ambit in terms of compassion and thus is perhaps more humane and realistic in its dealings with those suffering from a mental disorder, it too is guilty of decontextualisation. It does this by locating the problem of insanity in the constitution of the individual, thus hiding the social significance of madness by portraying it in terms of individual mental disorder.<sup>59</sup> Consequently, both psychiatry and the law are guilty of discounting the profound social significance of insane crime, thereby calling into question their acting systems of conviction, punishment and treatment.

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## CONCLUSION

In terms of the 2006 Act, the apparent incompatibility of the respective theories underlying the professions (as previously discussed) is reflected in the juxtaposition of the term 'mental disorder' with 'insanity'. Whilst 'insanity' gives the impression that the law in Ireland is somewhat archaic, draconian, and still associating itself with redundant terminology from the asylum era, 'mental disorder' suggests something quite different. For the law to decree 'mental disorder' a condition of the pleas of insanity, fitness to be tried and diminished responsibility, (coupled with the fact that section 5(1) requires that evidence as to the accused's mental condition must be given by a consultant psychiatrist), denotes an acceptance of and an appreciation for modern psychiatric diagnoses in the courtroom. This, to me, suggests that the law is using 'insanity' as its shield against appearing 'soft' on crimes against the person (as discussed above), while simultaneously falling back on psychiatric testimony as to mental disorder in order to ensure that it is not perceived as being too narrow, and thus too harsh. In so doing, the law in Ireland has failed to recognise the social context of mental illness, and, like its predecessor (and indeed its British counterpart) it continues, with the aid of psychiatry, to 'manage' those who fall outside our social norms.

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<sup>58</sup> B Hudson 'Punishing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy and Practice' in A Duff and others (eds) *Penal Theory and Practice* (1994) 302. Quoted in Ashworth (n 34) 26.

<sup>59</sup> See Norrie (n 20) 189.