Insane Automatism: A Proposal for Reform

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Courts have confined the common-law defence of sane automatism by defining disease of the mind, a requisite component of insane automatism, so broadly as to ensnare anyone whose automatism might recur and lead to violence. This definition of insane automatism in terms of dangerousness means that persons found innocent of wrongdoing are detained and possibly confined for their own good (as others see it) or for what they might do in the future, in the absence of the only justification for giving force to these reasons consistent with respect for their autonomy. That justification is that the person acquitted is suffering from a mental disorder that severely impairs his capacity for autonomous action, justifying diminished respect. The *Criminal Code* definition of legal insanity honours this justification, but the common-law definition of insane automatism does not. Accordingly, a disease of the mind should be redefined as any mental disorder that renders the person generally incapable of appreciating the reasonably foreseeable consequences of his actions or of understanding information relevant to executing his conception of well-being. While this definition would channel fewer acquittees into the post-trial disposition hearing, it provides as much protection from dangerous persons as a free society permits. If impaired autonomy rather than dangerousness were the criterion of insane automatism, there would be no need to make the pleas of sane and insane automatism mutually exclusive or to place the burden of proving involuntariness on the accused.

Les tribunaux ont restreint la défense d'automatisme sans aliénation mentale de la *common law* en définissant la maladie mentale, un élément essentiel de l'automatisme avec aliénation mentale, de façon assez large pour prendre au piège toute personne dont l'automatisme risquerait d'entraîner la récurrence d'un danger pour le public. Cette définition d'automatisme avec aliénation mentale selon le critère de danger pour le public signifie que des personnes jugées innocentes de malfaisance sont détenues et possiblement enfermées pour leur bien (d'après les autres) ou pour ce qu'elles risqueraient de faire à l'avenir, et ce, en l'absence de la seule justification compatible avec le respect de leur autonomie. Cette justification est la suivante : la personne acquittée souffre de troubles mentaux qui diminuent de façon importante sa capacité de poser des actes autonomes, ce qui justifie le respect moins important qui lui est accordé. La définition d'aliénation mentale du *Code criminel* fait honneur à cette justification, alors que la définition d'automatisme avec aliénation mentale de la *common law* ne le fait pas. En effet, une maladie mentale devrait être redéfinie comme tout trouble mental qui rend la personne incapable, de façon générale, d'apprécier les conséquences raisonnablement prévisibles de ses actes ou de comprendre l'information pertinente à la mise en œuvre de sa conception de bien-être. Bien que cette définition réduirait le nombre d'auditions post-procès pour les personnes acquittées, elle accorderait autant de protection contre les personnes dangereuses qu'une société libre puisse permettre. Si l'autonomie gravement diminuée, plutôt que le risque de récurrence d'un danger pour le public, était le critère pour la défense d'automatisme avec aliénation mentale, il ne serait plus nécessaire de rendre les défenses d'automatisme sans aliénation mentale et d'automatisme avec aliénation mentale mutuellement exclusives, ni d'imposer le fardeau de prouver le caractère involontaire de ses actes à l'accusé.

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Introduction

Since the 1950s, the development of the defence of automatism in the common-law world has been toward an ever narrower scope of applicability. Whereas in 1955, an English judge could leave the defence to the jury in a case where the accused's unconscious behaviour was precipitated by a cerebral tumour, the same case decided today would almost certainly result in an instruction to the jury solely on insanity.[1] Why this is so is not difficult to determine. A successful defence of automatism means that the accused has not *acted*, that his bodily movements were not expressions of a mind or will; hence it leads to an absolute acquittal. The fear has been that someone who falls into an automatic state because of a diseased mind and who causes harm will be able to circumvent the restrictions (the reverse onus) and consequences (continued detention) of the defence of insanity and that a person prone to recurrent unconscious behaviour would thus go free, probably to inflict harm again. Accordingly, common-law courts have increasingly confined automatism as an independent defence, taking care that it does not encroach on the defence of insanity. They have done so by drawing a distinction between sane and insane automatism. Sane automatism is unconscious behaviour that is unlikely to recur or that is caused by an external event such as a blow to the head or a psychological shock to which anyone might succumb; insane automatism is unconscious behaviour attributable to a disease of the mind. If the evidence suggests that the accused's automatism was of the latter sort, then the judge will instruct the jury only on insanity.

This in itself is quite unobjectionable. However, the courts have narrowly circumscribed the defence of sane automatism by defining very broadly the term "disease of the mind" and so too the category of insane automatism.[2] In *Bratty* v. *Northern Ireland (A.G.)*,[3] Lord Denning defined disease of the mind as "any mental disorder which has manifested itself in violence and is prone to recur".[4] And such disorders might well include not only psychological illnesses but also diseases of a purely physical or neurological nature such as a brain tumour, arteriosclerosis,[5] epilepsy, or diabetes.[6] This definition of mental disease was expanded further in *R.* v. *Rabey*,[7]

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[1] *R.* v. *Charlson* (1955), 39 Cr. App. R. 37. For an approving commentary on this development, see J.L.J. Edwards, "Automatism and Criminal Responsibility" (1958) 21 Mod. L. Rev. 375.

[2] See K.L. Campbell, "Psychological Blow Automatism: A Narrow Defence" (1980-81) 23 Crim. L.Q. 342; W.H. Holland, "Automatism and Criminal Responsibility" (1982-83) 25 Crim. L.Q. 95.

[3] [1963] A.C. 386 (H.L.) [hereinafter *Bratty*].

[4] *Ibid.* at 412. In *R.* v. *Parks*, [1992] 2 S.C.R. 871 at 903, 95 D.L.R. (4th) 27, 15 C.R. (4th) 289, 75 C.C.C. (3d) 287 [hereinafter *Parks* cited to S.C.R.], Justice LaForest criticized the view that likelihood of recurrence is an exclusive criterion of insane automatism, but it seems that it is nonetheless conclusive.

[5] See *R.* v. *Kemp* (1956), [1957] 1 Q.B. 399, [1956] 3 All E.R. 249, [1956] 3 W.L.R. 724 [hereinafter *Kemp* cited to All E.R.].

[6] See *R.* v. *Hennessy*, [1989] 2 All E.R. 9, 1 W.L.R. 287 (C.A.).

[7] [1980] 2 S.C.R. 513, 114 D.L.R. (3d) 193, 15 C.R. (3d) 225, 54 C.C.C. (2d) 1 [hereinafter *Rabey* cited to S.C.R.].

where it was held that any subjective disposition to which an automatic episode could be attributed constituted a diseased mind whether or not the medical profession would consider it pathological. And in *R.* v. *Stone*,[8] the Supreme Court of Canada pushed this trend to the limit by articulating two propositions that render the defence of sane automatism practically inaccessible. One is that an automatic episode is itself a mental disorder, so that there is a presumption of a diseased mind whenever sufficient evidence to ground a plea of automatism is introduced. The other is that, in assessing the likelihood of recurrence, the judge is to consider not only the psychiatric history and emotional make-up of the accused but also the likelihood that the triggering event will itself recur.[9] Together, these propositions effectively submerge the category of sane automatism, for, according to the first, any case of unconscious behaviour is by definition behaviour evincing a diseased mind unless an external cause can be identified; and, according to the second, even if an external cause can be identified, there may nonetheless be disease of the mind if it is likely that the external cause will recur and irrespective of whether there is evidence of a peculiar susceptibility in the accused. Thus, if *Rabey* decided that a disease of the mind need not be a disease, *Stone* decides that it need not even be predicable of a mind.

Clearly, the definition of mental disease elaborated by the courts in the aforementioned cases bears little resemblance to any that a psychiatrist might proffer. It is a legal rather than a medical definition—one carefully crafted with a view to a policy of controlling persons thought to be dangerous.[10] This definition ensures, first of all, that anyone accused of a crime who lacked conscious choice because of a dangerous and potentially recurrent disorder or event will not go free but will be subject to continued detention and confinement after acquittal. Obversely, it ensures that only those whose lack of conscious choice was caused by an external and probably non-recurrent event will have the benefit of a defence that leads to absolute acquittal and a return to society.

However, the policy of controlling dangerous persons has produced a law of automatism that, I shall argue, is seriously discordant with justice. For it has led to a concept of a diseased mind that no ordinary person would recognize as such and hence to the detention of innocent and reasonably well-functioning persons for their own welfare and that of society—reasons for coercion that we normally admit only in the case of the genuinely insane. Suppose, to take an extreme example, that a perfectly healthy football player inflicts harm during an unconscious episode resulting

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[8] [1999] 2 S.C.R. 290, 173 D.L.R. (4th) 66, 24 C.R. (5th) 1, 134 C.C.C. (3d) 353 [hereinafter *Stone* cited to C.C.C.].

[9] *Ibid.* at 440.

[10] See *Bratty*, *supra* note 3 at 410, Lord Denning:

> Suppose a crime is committed by a man in a state of automatism or clouded consciousness due to a recurrent disease of the mind. Such an act is no doubt involuntary, but it does not give rise to an unqualified acquittal, for that would mean that he would be let at large to do it again. The only proper verdict is one which ensures that the person who suffers from the disease is kept secure in a hospital so as not to be a danger to himself or others.

from a blow to the head suffered during a game. If, as *Stone* decides, the unconscious episode itself raises a presumption of mental disease, and if the external cause cannot dislodge the presumption because of the high likelihood of its repetition, then the player's only defence is insane automatism unless he intends to retire. True, there is little prospect that such a person would actually be confined to a mental hospital once acquitted. Nevertheless, he has been stigmatized as not criminally responsible because of mental disorder, detained even though innocent pending his review, and subjected to a process of review for dangerousness whose reservation for the insane shows that we think it unfitting for the mentally competent.

If we regard *Stone* as the end-point in the decline of automatism as an independent defence, then its extreme inflation of the concept of mental disease may be viewed as a reason for Parliament to review the entire law on insane automatism and to embark on a fresh approach. Such an approach should rest on a more principled understanding of the concept of a diseased mind than that hitherto shown by the courts, should bring the law of insane automatism into line with the statutory defence of insanity, and should accomplish the policy objectives of the present law without violating any constitutional rights of the accused. In this essay, I shall suggest such an approach. To see what is needed, however, we must first understand how the present law unjustifiably violates rights. It does so, I will argue, by detaining innocent persons for reasons of social protection and their own welfare in the absence of the only justification for giving force to these reasons consistent with their right to liberty. A satisfactory criterion of insane automatism will provide this justification and will afford as much social protection from dangerous persons as a free society permits. Throughout the essay, I will use the idea of a free society or a society of free and equal persons as a norm by which to test the admissibility of various justifications for coercion. By that idea I mean a society whose moral foundations include (but are not necessarily exhausted by) the premise that individual persons are free to pursue their welfare as they see fit provided they do not interfere with, or impose excessive risks upon, the equal liberty of others.

I. Why is Detention of the Innocent Insane Permissible?

To see what is wrong with the current law of insane automatism, we have to ask more generally what, if anything, justifies confining those who have been acquitted of wrongdoing on the ground of mental disorder. After all, these people are subject to coercion by the state for reasons that would not be considered valid for most people. Having been found undeserving of punishment, they are nonetheless forcibly confined for their own good as others see it and to protect others from what they *might* do in the future. In a society of free and equal persons, such treatment of a sane individual would be regarded as an unjust deprivation of liberty, because by coercing him for our good or to implement our conception of his good, we violate a duty of respect owed to his autonomy. To be sure, punishment also protects us from the convict for a time and affords us an opportunity to reform him according to our conception of his best interests. However, provided the traditional common-law criteria of guilt have been satisfied, punishment is paradoxically respectful of the convict's autonomy; for if he has himself intentionally or recklessly violated a right to liberty, then he has de-

nied that there is such a right, and so has implicitly authorized the use of force against him. By choosing crime, he has willed his own coercion and so too his subjection to the good and good intentions of others. If, however, he has not chosen crime, then intentionally coercing him for the sake of our interests is externally imposed force difficult to distinguish from crime itself. Accordingly, no one would think that a liberal state could confine someone of sound mind who had neither committed nor attempted to commit a crime simply because the authorities were of the view that he had dangerous proclivities or that he would be better off without his liberty. Yet such an Orwellian fate routinely befalls the insane. How can it be justified?[11]

Two possibilities suggest themselves. One is to say that detaining the innocent insane is also a violation of their right, but one that is justified by the social good it produces. The other is to deny that there is a violation of right. The first line of argument is unpromising, however, because any social good that might be obtained by violating the rights of the insane will also be obtained by violating the rights of the sane. We have just as much reason for imprisoning someone we know intends a crime but who has yet to act upon his intent or whom psychological testing has revealed as a sadist as we do for imprisoning someone innocent and dangerously insane. Similarly, if we can violate the rights of the innocent insane for their own good, why not the rights of the innocent spendthrift, alcoholic, or cigarette smoker? Accordingly, the first line of argument threatens to submerge the liberal state in the Orwellian one, from which it will be saved only by *ad hoc* restraints. Besides, although rights can be overridden by goods, they cannot coherently be overridden by *all* goods. A right to autonomy may be overridden by goods ensuring a greater autonomy for all; but it cannot consistently be defeasible by considerations—such as another's good or the opinion of others as to one's own good—incompatible with it, no matter how strongly felt the countervailing interest. To allow a right to autonomy to be so defeated is to deprive the concept of a right of any distinctive meaning or force.

One might object, however, that the right of self-defence is surely available to anyone whose life or safety is threatened by a person, and that this right justifies the use of force against a potential assailant provided the defender uses no more force than is necessary to protect himself.[12] Detaining and confining the dangerously insane is arguably justified by self-defence, and there is nothing illogical about declining to exercise the right in other cases where it might also apply. Other factors—such as a concern for liberty—might lead us to invoke the right of self-defence against the dangerously insane but not, say, against someone we strongly believe intends a crime but who has neither conspired with another nor acted upon his intent.

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[11] In *R.* v. *Swain*, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, 63 C.C.C. (3d) 481, the Supreme Court of Canada did not have to address this larger question, for it found a violation of fundamental justice in the previous regime's lack of controls over the detention of the innocent insane. For example, the latter could be held in custody indefinitely without a mandatory inquiry into their dangerousness to society and without periodic reviews of their continuing dangerousness.

[12] See *Criminal Code*, R.S.C. 1985, c. C-46, s. 34.

However, while the instinct for self-preservation may partly (for concern for the needs of the mentally ill is also at play) motivate our policy of maintaining control over those acquitted of crimes because of mental disorder, the right of self-defence will not lend its normative stamp to the gratification of this instinct. The right of self-defence is a right of self-help applicable only when the state's powers of law enforcement are not realistically available and when the defender is thus effectively in a state of nature vis-à-vis his assailant. Formally speaking, the right cannot be invoked by the state against an individual subject to its laws, for this would imply that the collectivity is in a state of nature vis-à-vis the individual, which implication contradicts its authority as a state. Applied to the public authority, the "right of self-defence" against those subject to its laws is nothing more or less than its right to apprehend and punish wrongdoers, and yet the insane we are concerned with have already established their innocence. Moreover, even if we view the right as being invoked, not by the state, but by all potential victims severally, its rationale would not apply against the innocent insane. Since the defenders have no greater authority to use force than the state has, the rationale for their right of self-defence is identical to that of the state's right to apprehend and punish. Like the latter, the right of self-defence justifies the use of necessary force against a *wrongdoer* who has, by his intentionally wrongful act or intentionally wrongful threat of impending harm, implicitly challenged the validity of rights and so authorized the violation of his own.[13] Those acquitted because of mental disorder were not, however, intentional wrongdoers in the past, nor do those whom we confine after acquittal necessarily threaten others intentionally in the present, and those that do may be dealt with as criminals. Thus, the right of self-defence cannot justify maintaining control over the innocent insane.

Suppose, however, one is threatened with impending harm by someone whom one knows is acting under the delusion that he is being attacked by extraterrestrials and must kill in order to save himself, and in response to this threat one ties up the delusional agent. Here, surely, the right of self-defence applies even though the wrong is unintentional, and if an individual may invoke this right, so may a class of those similarly threatened. To this argument there are two rejoinders, one a terminological quibble, the other a more substantive reply. The quibble is that the defender here lacks culpability, not because he has a right of self-defence properly understood (and which has a distinctive rationale akin to that of punishment), but because he has a defence of necessity, which justifies the infliction of harm when necessary to protect an interest more important to freedom than the interest harmed, or which excuses unjust acts of self-preference in extraordinary situations of peril where persons of ordinary fortitude would have reacted similarly.[14] Since the delusional assailant does nothing that *deserves* a coercive response (he would be acquitted at trial), his position is no different from that of someone whom impersonal necessity (here the disease working on his

[13] Thus, the statutory right of self-defence is premised on the existence of an unlawful assault; see *Criminal Code, ibid.*

[14] See *R.* v. *Perka*, [1984] 2 S.C.R. 232, 13 D.L.R. (4th), 6 W.W.R. 289, 42 C.R. (2d) 43, 14 C.C.C. (3d) 385.

powers of perception and judgment) has made one's competitor for self-preservation. The substantive reply is that the defence of necessity can neither justify nor excuse our existing practice of confining those acquitted because of mental disorder; for this practice requires no showing of an impending harm that would justify an immediate response or make delay impracticable for the person of ordinary fortitude.

Accordingly, if our coercion of the innocent insane is to be legitimated, it must be done so not through a claim that the violation of their right is justified but through a denial that their right has been violated in the first place. Such a denial might be supported by either of two lines of argument. One could argue that coercion of the innocent insane does not violate their right, because if they knew what we know about the risks they pose and possessed full powers of deliberation and judgment, they would consent to being held in custody for their own and others' safety. I shall call this the argument from constructive consent.[15] Alternatively, one could deny that the insane fully possess the capacity for autonomous action that is the basis of the right the state must respect. If a capacity for autonomy is the quality of a person that commands respect as a matter of right, and if the insane lack this capacity, then coercing them for reasons incompatible with respect for autonomy violates no right of the insane. I shall call this the argument from diminished respect.[16]

There is reason to view the argument from constructive consent with suspicion. The point of this argument is to justify coercion in a way that takes rights of autonomy seriously as a constraint on the societal pursuit of values external to those of the person coerced. The argument is that we can pursue these values only if the person against whom force is used consents to the force. The idea of consenting to force will seem less paradoxical if we recall the story of Odysseus who, to protect himself from the allure of the Sirens' song, commands his sailors to bind him to the mast and to disregard any attempts he might make to revoke his order. In this example, of course, Odysseus actually consents to the future application of force (much as someone might do now by creating a power of attorney), whereas the argument under consideration relies on a notion of constructive consent. Such an argument may nonetheless derive more or less force from the Odysseus example depending on how closely the situation in which force is used approximates one of actual consent. To borrow an example (somewhat modified) of John Stuart Mill's, if someone is unwittingly about to walk in the path of a truck and there is no time to warn him, applying force to stop him can be justified by a notion of constructive consent, since a reasonable person would actually consent to such a trivial interference if it were necessary to save his life.[17]

However, the farther we get from a situation of imminent and certain harm to life and limb, the more strained and artificial does the argument from constructive consent

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[15] See J. Woodward, "Paternalism and Justification" in W. Cragg, ed., *Contemporary Moral Issues*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1992) 398.

[16] This was Hegel's argument; see *Hegel's Philosophy of Right*, trans. T. M. Knox (Oxford: Clarendon Press, 1964) at 82.

[17] See J.S. Mill, *On Liberty* (New York: Crofts, 1947) at 97; Woodward, *supra* note 15 at 400.

become.[18] This is so because, short of that extreme situation, the point at which someone may prefer protection against a risk of harm to his freedom of movement involves a subjective weighing of values that varies from one individual to another. If, within the area of reasonable diversity of preference, we simply impute to the insane person the values we hold or consider rational to hold, then obviously our respect for the autonomy constraint on the pursuit of our values is a sham. We could, however, say that coercion of the insane is justified only if the insane person would have consented in advance given the relatively enduring content and configuration of his own values and commitments. And we might thus require substituted consent from someone intimately familiar with those values. Yet, the cases of imminent harm to oneself aside, the impossibility of projecting oneself into another's schedule of values so as to decide as he would have decided, as well as the high risk of bias in doing so, means that here too the argument from constructive consent—and the device of substituted consent in particular—is a mere figleaf for a consequentialism freed of effective constraints.[19] Indeed, our practice understands this, for it places no reliance on substituted consent as a legitimating precondition for confining the innocent insane. It simply confines them.

Accordingly, the argument from constructive consent will justify coercion of the innocent insane only in a very narrow range of cases involving imminent and practically certain harm to interests crucial to anyone's conception of welfare. Needless to say, our present practice of confining the insane is not limited to such cases. Therefore, either this practice cannot be justified in a free society or there exists another justification.

This brings us to the argument from diminished respect. The reason we may coerce the innocent insane, according to this view, is that they lack the capacity for full autonomy that grounds a right to respect for their choices. Here we make no pretense of receiving consent for subordinating their liberty to the welfare of others or to their own welfare as others see it. The detention is non-consensual but nonetheless permissible because in the case of the insane, consent is not required.

The argument from diminished respect may have an unattractive ring, but there is at least one element of the law of insanity for which it provides an attractive explanation. I refer to the presumption of sanity and the corresponding burden on the accused to prove insanity should he wish to plead it. Since the result of a successful plea of mental disorder is that the accused is morally innocent of criminal wrongdoing, the reverse onus violates his right to be presumed innocent, as a majority of the Supreme Court held in *R.* v. *Chaulk*.[20] However, this violation is justified in a free society, one

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[18] This was recognized by Mill, see *ibid.* at 98.

[19] In Ontario's *Consent to Treatment Act*, S.O. 1992, c. 31, s. 13, if the substitute decision-maker does not know of an actual wish of the incapable person with respect to the proposed treatment, he is instructed to act in the incapable person's best interests, and the values and beliefs of that person are only one of several factors to be considered in deciding where his best interests lie.

[20] [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, 62 C.C.C. (3d) 193.

could argue, because an acquittal on grounds of mental disorder exposes the individual to consequences that would be degrading to a free person, and we need more than a reasonable doubt about the accused's sanity before we subject him to those consequences. Even if the accused prefers therapeutic custody as a diminished person to conviction as a full one, the inalienability of the person's right to autonomy requires that he prove the condition for diminished respect, at least on a balance of probabilities. Here, then, the reason for limiting the right to be presumed innocent is consistent with the norm of respect for persons underlying the right itself.

Let us assume that an argument from diminished respect is needed to justify detention of the innocent insane for prophylactic and paternalistic reasons. A question now arises as to whether all those who have a disease of the mind lack the capacity for autonomous action that grounds a right to respect. Here we must distinguish between two senses of autonomy. The latter can mean a purely formal capacity for choice in the presence of which we can always say that an agent could have done otherwise than he did, no matter how powerful the emotions or distorted the perceptions that drove him to act in a certain way. It seems clear that, with the exception of a transient episode of automatic behaviour, no mental disorder can vitiate autonomy in this weak and formal sense, which is why insanity justifies at most a diminished respect for agency rather than a total withdrawal. Even those insane persons deemed dangerous to themselves or to others are entitled to—and under our positive law generally receive—as much respect for their choices as is consistent with their own and the public's safety.[21]

However, the idea of autonomy can also denote something richer and more capacious than mere freedom of the will. It can refer to a capacity to act from ends themselves chosen after reflection on the kind of life one wishes to lead and an ability to see in the outcomes of one's deeds the embodiment of one's considered values and choices. It seems possible that mental disorder could seriously impair autonomy in this larger sense, if only because it might pervasively distort information about the environment that one needs in order to accomplish what one chooses to do. If I want to behead a snake that is attacking me but instead decapitate a person who appears to me as a snake, I do not act autonomously in the capacious sense, for I do something and face consequences I did not choose. And if as a result of an underlying pathology, I suffer from these delusions frequently, then my overall capacity for autonomous action is fundamentally damaged.

There is, however, no reason to think that mental disorder necessarily effects such a radical diminution of one's capacity for autonomy, and so we need to distinguish between those disorders that justify diminished respect for autonomy and those that do not. Section 16 of the *Criminal Code* does this quite ingeniously, for it employs a formula that does double duty as a criterion of both moral innocence and diminished respect. It states that "no person is criminally responsible for an act committed...while

[21] See, for example, *Criminal Code*, *supra* note 12, ss. 672.54 and 672.55.

suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act...or of knowing that it was wrong." That the person did not appreciate what he was doing renders him innocent of criminal wrongdoing because he lacked the *mens rea* for the offence. That he did not appreciate because he *could not* means that he is generally incapable of fully autonomous action, hence less worthy of respect than those with full capacity, hence subject to continued detention even though innocent. Similarly, that the accused did not know his action was wrong negates criminal intent in the same way that colour of right negates guilt for theft. That he was *incapable* of knowing means that he is chronically subject to delusions that lead him to mistake criminal actions for ones that reasonable people would regard as justified or excused. Because he did not know, he is innocent of crime and undeserving of punishment; because he could not know, he has a diminished capacity for autonomy and so is detainable for reasons of safety alone.

The statutory provisions relating to fitness to stand trial can be understood in a similar way. Someone "unable on account of mental disorder to conduct a defence...and, in particular, unable...to understand the nature or object of the proceedings...the probable consequences of the proceedings, or commmunicate with counsel"[22] is excused from trial, because the fairness of the trial would be seriously compromised by the accused's inability to mount a defence or to provide counsel with the information needed to mount one for him. But the same criterion that selects those unfit for trial also selects those whose mental disorder is so extreme as to render them incapable of functioning as autonomous agents. And it is because they are incapable of so functioning that they can be indefinitely confined without trial by virtue of their dangerousness alone.

Accordingly, the *Criminal Code* provisions on mental disorder can be reasonably interpreted as carefully selecting those who are subject to state coercion for public safety and paternalistic reasons even though innocent of crime (or not yet proved guilty) on the basis of a diminished capacity for autonomy. Although incapacity to appreciate consequences and to know right from wrong might, along with past violent conduct, strongly indicate a dangerous person, it is clear from the overall structure of the *Code* provisions on mental disorder that dangerousness is not the criterion for the Court's remitting the innocent insane to state custody. Where dangerousness becomes the key factor is at the post-trial disposition hearing, at which the Court (now reconstituted as an administrative body) or Review Board is instructed by law to impose the least restrictive order consistent with public safety and the welfare of the mentally disordered individual.[23] At this stage a full inquiry is conducted into the present dangerousness of the acquittee—an inquiry that would be redundant if section 16 were interpreted as providing predictors of violence. Moreover, the criterion of unfitness to stand trial—inability to conduct a defence—is not even loosely connected with a propensity for violence, nor is the suspected commission of an unlawful act,

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[22] *Criminal Code*, *supra* note 12, s. 2.

[23] *Ibid.*, s. 672.54.

which may not have involved violence at all. Accordingly, section 16 and the fitness provisions are best viewed as providing eligibility criteria for determining which innocents will be vulnerable to state coercion for reasons of dangerousness rather than as themselves providing indicia of dangerousness. So interpreted, these provisions are fair because, by selecting for coercion for social protection and paternalistic reasons only those innocents who, lacking a capacity for full autonomy, command diminished respect for their agency, they violate no right of the person.

II. Insane Automatism and the Condition for Diminished Respect

Now let us turn to the law of automatism. The latter is a common-law defence, and the limitations that have formed around it are common-law limitations. In particular, the distinction between sane and insane automatism is a judge-made distinction; and the definition of insane automatism has been developed by judges with a view to cases of involuntary behaviour and without regard to how well it agrees with a statutory definition of legal insanity developed with a view to non-intentional conduct. Despite this difference in origin, the courts have treated the defence of insane automatism as subsumed under the section 16 defence, in order that the legislative regime for dealing with the acquitted insane may take over. This merger, however, produces a rather glaring disharmony. Although someone acquitted of a crime because of insane automatism will have been acquitted because he was incapable of appreciating the nature and quality of his act and will be subject to the process governing those acquitted because of mental disorder, he will not have been channelled into this process under the same criterion as others acquitted under section 16. Whereas those who acted consciously are detained after acquittal simply because of their incapacity due to mental disorder to appreciate what they were doing, those who behaved unconsciously are detained because their involuntary behaviour was attributable to an internal disposition likely to lead to recurrent episodes. Under the common law of automatism, therefore, dangerousness rather than a diminished capacity for autonomy selects the innocents destined for continued detention.[24] Such detention is unjust, however, because it involves the coercion of someone who is innocent of crime and who has full capacity for autonomy for the sake of interests external to his own. It thus violates the autonomy of someone who has neither authorized such a violation through criminal conduct nor justified a diminished respect for his autonomy through severe mental disorder.

It might be objected, however, that the criterion of insane automatism, no less than that of section 16 mental disorder, does double duty as a test of moral innocence and diminished autonomy, so that no one worthy of full respect will be detained after an acquittal because of insane automatism. Anyone who falls into an automatic state

[24] This is also true of the Law Reform Commission of Canada's proposal, which would have codified the common law essentially as it existed after *Rabey*, *supra* note 7. See *Criminal Law: The General Part: Liability and Defences* (Working Paper 29) (Ottawa: Law Reform Commission of Canada, 1982) at 67.

and commits a violent act from a mental disorder that is likely to recur is, one might argue, as lacking in full autonomy as the person who was incapable of appreciating what he was doing or of knowing that it was wrong. Yet a consideration of some cases will reveal this assurance as overly sanguine.

In *Kemp*, the accused struck his wife with a hammer causing a serious wound. There was strong medical evidence that at the time of the attack, the accused was not conscious of picking up the hammer nor of striking his wife with it. Two doctors also testified that the accused's loss of consciousness was probably caused by an inadequate supply of blood to the brain, in turn attributable to arteriosclerosis. Much of Lord Devlin's judgment is taken up with a discussion of whether arteriosclerosis is a disease of the mind so as to warrant an instruction on insanity rather than involuntariness; and of course, once the issue is framed in these terms, the conclusion is inevitable that a mental disease might have a physical as well as a purely psychic cause. Concluding that the accused was indeed suffering from a disease of the mind, Lord Devlin left only insanity with the jury, which accorded Mr. Kemp the dubious benefit of an acquittal on that ground.

Surely, however, it is not enough to ask whether an episode of automatism is attributable to a disease of the mind. Since an acquittal because of insanity leads to detention despite innocence, one must also ask whether the mental disease was of a nature and extent that would justify the diminished respect for autonomy implied by that disposition. The facts of the case relevant to such an inquiry are mentioned by Lord Devlin only in passing. They are that the accused was, as Lord Devlin described him, a man "of excellent character" and that he and his wife had "always been thought to be a devoted couple."[25] Moreover, two doctors testified that, although arteriosclerosis might lead to a massive degeneration of brain cells amounting to a disease of the mind as they understood the term, Kemp's condition had not yet nearly progressed to that point. What had occurred, according to these witnesses, was a temporary interference with the normal supply of blood to the brain, akin to that which occurs during a concussion. Since the cause of that interference was an underlying physical disease, it is reasonable to assume that the violent behaviour could happen again. Yet Kemp was far from exhibiting the kind of mental deterioration that alone justifies the diminished respect for autonomy signified by detention following acquittal and by the possibility of indefinite confinement because of dangerousness alone.

The case of *R.* v. *Quick*[26] likewise illustrates the divergence of the criteria for insane automatism and diminished respect, although in this case the Court reached the correct result by refusing to follow the logic of Lord Devlin's position. The accused was a nurse who assaulted a paraplegic patient causing serious bodily harm. The evidence revealed that the accused was a diabetic, that he had taken insulin on the morning of the assault, and that he had consumed little food but a considerable quantity of alcohol during the day. There was also evidence that on twelve previous occa-

[25] *Kemp, supra* note 5 at 251.

[26] [1973] 3 All E.R. 347, 3 W.L.R. 26 (C.A.) [hereinafter *Quick*].

sions, the accused was admitted to hospital either unconscious or semi-conscious from hypoglycaemia, a condition produced by too low a level of blood sugar. On four of these occasions, the accused was violent. A doctor also testified that Mr. Quick's ingestion of insulin combined with his having consumed little food and much alcohol could have produced hypoglycaemia, in the advanced stages of which the sufferer may become unconscious and violent. On this evidence the trial judge ruled that the accused's only defence was insanity, whereupon the accused pleaded guilty and appealed.

Applying Lord Denning's definition of mental disease (any mental disorder that has manifested itself in violence and is prone to recur) to this case, the conclusion is inescapable that the trial judge's ruling was correct. Unconsciousness produced by hypoglycaemia is no different than unconsciousness produced by an epileptic seizure or by arteriosclerosis; moreover, the disorder had manifested itself in violence, had occurred several times before, and was likely to occur again. Nevertheless, the English Court of Appeal resisted the pull of this logic in the name of common sense. What, after all, would be the point of sending Quick to a mental hospital? Since, however, one could ask the same question about Kemp, Lord Lawton needed a principle to stop the logic of Lord Devlin. The one he devised drew a distinction between unconsciousness produced by an external factor (such as a blow to the head or the ingestion of a drug) and that caused by an internal one. The former, which is a transitory and likely isolated incident, gives rise to a defence of sane automatism; the latter, which is more likely to recur, supports only a defence of insanity. In this case, said Lord Lawton, the accused's automatic state was produced by an external factor—the injection of insulin.

From the point of view of Lord Denning's dangerousness criterion, however, the external/internal dichotomy is unstable, because unconsciousness may be produced by an external factor working upon an internal susceptibility. A thin-skulled person may be just as prone to unconsciousness from minor blows to the head as an epileptic is from internal causes. Quick himself took insulin only because he was a diabetic. To say that his unconsciousness was produced by an external factor ignores the internal condition that ensures the regular repetition of the external cause. Accordingly, the dangerousness test of insane automatism would, were its logic pursued relentlessly, detain and possibly confine indefinitely an innocent person whose brittle skull or diabetes made him a risk to others. Neither a brittle skull nor diabetes, however, fundamentally impairs autonomy. And if it is objected that this logic needn't concern us, because no purpose would be served by placing a diabetic in a mental hospital, the reply is simple: if the point is public safety, why must it be a mental hospital or, indeed, even a hospital?

The breakdown of the external/internal dichotomy is the theme of *Rabey*, the leading Canadian case on psychological blow automatism. There the accused was a somewhat introverted university student who had conceived a romantic interest in a

woman with whom he shared various student activities. One day he found a letter she had written to a girlfriend in which she declared a sexual interest in someone else and described the accused as a "nothing."[27] The next time the accused saw her, he inquired as to her feelings about him, and when told that she regarded him simply as a friend, he fell (or so he said) into a semi-conscious state and began striking her with a rock and choking her. When he realized what he was doing, he stopped. At trial, the accused raised the defence of sane automatism, claiming that the psychological shock received on reading the letter induced a dissociative state that was not a disease of the mind nor symptomatic of any underlying pathology. The Crown argued that a dissociative state is itself a mental disease and that the accused's only defence on the evidence offered was insanity. Both arguments had the support of psychiatric opinion. The trial judge, however, accepted the view of the defence psychiatrist that the accused was not insane and acquitted the accused on the ground of sane automatism. The Crown successfully appealed the ruling on insanity and the accused then appealed to the Supreme Court of Canada.

A majority of the Court dismissed the appeal on reasoning borrowed from Martin J.A. of the Ontario Court of Appeal. Justice Martin distinguished between a malfunctioning of the mind caused primarily by factors internal to the accused and that attributable to an external cause. Where the event triggering a dissociative episode is a psychological blow, one must inquire into the nature of the trauma in order to locate the primary cause of the malfunctioning. If the shock were sufficiently extreme to precipitate the same reaction in an ordinary individual, then the cause is the external shock, and the appropriate plea is sane automatism. However, if the triggering event is, as in this case, part of the ordinary stresses and disappointments of life, then the primary cause is an unusual emotional sensitivity of the accused, and the only defence is insane automatism. Ritchie J., who wrote the majority judgment in the Supreme Court, found the key to the accused's extreme reaction in the latter's introversion and inexperience in amorous relationships, in which psychological setting the infatuation with the woman created an "abnormal condition" amounting to disease of the mind.[28]

In *Rabey*, accordingly, the logic of the likelihood of recurrence test that was resisted by Lord Lawton in the case of an insulin injection for diabetes was pursued in the case of a psychological shock working on an unusual susceptibility. The result was that introversion, inexperience with the opposite sex, and an infatuation were held to indicate a diseased mind for which the accused could be detained despite having been found innocent of criminal wrongdoing. Although the Crown's psychiatrist testified that a dissociative episode was itself a mental disorder, there was no evidence in *Rabey* of any underlying pathology, either mental or organic, that would warrant the diminished respect for autonomy implied by detention of the innocent for reasons of safety. In response to Justice Dickson's dissenting argument that a verdict of not guilty by reason of insanity would be unfair to an accused in whom no pathology had

[27] *Rabey*, *supra* note 7 at 517.
[28] *Ibid.* at 521.

been found, Ritchie J. pointed to the legal provisions permitting an absolute or conditional discharge of someone found by a Board of Review to be no longer dangerous. However, this response misses the point. The mere detention of an innocent person for the purpose of assessing his dangerousness as well as his subjection to a procedure that makes his liberty conditional on predictions of harm all involve affronts to human dignity for which some threshold justificatory condition must be met. Public safety cannot itself be that justification, because detention for prophylactic reasons alone is precisely the thing to be justified. Nor can it be an answer to the offence to dignity implicit in the very process of administrative review for dangerousness that the person acquitted may at the end of the process be set free.

III. Disease of the Mind Redefined

The cases of *Kemp*, *Quick*, and *Rabey* amply illustrate the possibility of divergence between the common-law criterion of insane automatism and that for diminished respect for autonomy. Both the continuing danger test and the internal cause test (which is itself ultimately concerned with dangerousness) will routinely lead to the detention and confinement of innocent persons who exhibit no marked impairment of cognitive and deliberative powers and who, though they may suffer periodic episodes of semi-conscious behaviour, are as generally capable of autonomous choice and action as anyone without their infirmity. For these people, the disrespect for their autonomy implied in continued detention for paternalistic and prophylactic reasons involves an unjustified violation of their rights, for nothing in their condition warrants it.

Accordingly, we need a new definition of disease of the mind to distinguish insane from sane automatism. Like the present one, this definition should be a legal rather than a purely medical one, because its work is normative rather than diagnostic. Its purpose is to screen those innocents whose liberty the state may, without violation of right, severely restrict for the good of others or for their own good as others see it. Though novel, the definition should nonetheless be indigenous to the legal tradition, akin to the criterion of incapacity recognized in other statutes governing the mentally incompetent. The definition I propose, which adapts language from section 16 of the *Criminal Code* and from Ontario's *Substitute Decisions Act*[29] and *Consent to Treatment Act*,[30] is this: a disease of the mind is any impairment of the powers of cognition, foresight, deliberation, and judgment that renders the individual generally (and not merely episodically) incapable of appreciating the reasonably foreseeable consequences of his actions or of understanding information relevant to executing his conception of well-being. Anyone whose condition satisfies this definition of mental disease commands a diminished respect for autonomy, because such a person will habitually produce outcomes and face consequences he did not choose.

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[29] S. O. 1992, c. 30, ss. 6, 45.

[30] *Supra* note 17, s. 6.

Several objections to this definition may be anticipated. First, if the criterion of insane automatism were narrowed to mental impairment destructive of autonomy, many more people would win absolute acquittals whose dissociative episodes are likely to recur and who thus pose a continuing danger to others. This would not only increase the risk of harmful behaviour but also undermine public confidence in the administration of justice, which will be seen to favour the rights of the accused over the security of the public. Second, it might be argued that the proposed definition, with its requirement of a general and not merely episodic incapacity for autonomous action, would counter-intuitively exclude those whose automatic episodes occur frequently as well as those whose severe psychiatric disorders are normally controllable by medication. These people would, it seems, go free if morally innocent of wrongdoing. Third, it could be argued that the definition is incongruent with the language of section 16, which nowhere speaks of an incapacity to execute a conception of well-being. And finally, the definition is arguably too broad, for everyone has a nephew whose plans always seem to misfire through lack of judgment and foresight.

To the first concern there are at least two responses, one that staunchly invokes principle and one that meets the concern on its own ground of expediency. The principled response is that any decrease in public safety that might result is in itself no argument against the narrower criterion, for a society of free and equal persons is entitled only to as much public safety as is consistent with its moral premises. From a public safety standpoint, there is as much reason to subject every convict whose prison term has expired to a review for likelihood of recidivism as there is to hold innocent people in custody under the present criterion of insane automatism. Yet we would all recognize such a practice as inconsistent with a liberal legal order. Moreover, if public opinion ridicules the administration of justice for being true to its principles of freedom and equality, then, as Justice LaForest observed in *Parks*,[31] the opinion may be discounted.

However, there is also a response that more directly meets the concerns for safety and public confidence and that, realistically, a legislative body responsible to the public is entitled to make. The risk of freeing the dangerous can be lowered without any compromise of principle if those knowingly prone to unconscious episodes were charged with criminal negligence if they failed to take reasonable precautions for others' safety, and if the evidentiary burden on the accused to raise a reasonable doubt about the voluntariness of his actions were toughened.[32] The presumption that human agents act voluntarily is, after all, a strong one and should not be capable of being easily rebutted. Accordingly, trial judges could be instructed by legislation on the kinds of considerations that weigh against putting automatism of any kind to the jury.

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[31] *Supra* note 4 at 908, (1992), 140 N.R. 19.

[32] In *R.* v. *Shaw*, [1938] O.R. 269, 3 D.L.R. 140 (C.A.), the Court ordered a new trial because the judge dismissed the charge of criminal negligence at the end of the case for the Crown, where the accused drove a car knowing he was subject to fainting spells and killed two passengers. The accused in *Quick*, *supra* note 26 would seem to have been an obvious candidate for such a charge as well.

Bastarache J. listed a number of such considerations in *Stone*.[33] An expert witness adds little to the accused's bare assertion of involuntariness if he simply testifies to the plausibility of the accused's account of events and to the general nature and aetiology of dissociative states rather than to the actual psychiatric condition and history of the accused. If there is no witness to the event to corroborate the accused's account, then the absence of personalized expert testimony should be fatal to any plea of involuntariness. Also, the fact that the accused has an obvious motive for the assault or that the victim is the very person whose insult triggered the alleged dissociative episode casts serious doubt on a claim of involuntariness, since we would expect violent acts committed while reason is asleep to be inexplicable in terms of clear and evident motives.

The second objection voices a concern that those who have frequent periods of automatic behaviour or who generally control their severe symptoms with medication will, under the proposed definition of mental disease, go free once acquitted. The response is that they will go free only if their illnesses do not seriously interfere with their capacity to carry out their life goals. Someone who experiences automatic episodes that occur (or are expected to occur) so frequently as to significantly impair his overall capacity for autonomy will not go free under the proposed definition, nor will someone who repeatedly neglects to take his medication. Of course, it is impossible to determine with precision the frequency of unconscious behaviour at which someone may be said to suffer from a general incapacity for self-directed action, but indeterminacy of this kind is no stranger to the law, and juries are well enough equipped with common sense to deal with it, or so we assume.

The third objection (that the proposed definition is foreign to the langnage of section 16) we have already implicitly answered. Section 16 says nothing about an incapacity to execute a conception of well-being, because its criterion of diminished respect functions also as a criterion for innocence of the criminal charge, whereas the proposed definition is not hampered by this requirement; whether the act is involuntary and whether the involuntariness manifests a disorder of the required severity are separate questions. However, *incapacity* to appreciate the nature and quality of one's act or to know that it is wrong is the best available proxy for an incapacity for autonomous action, given that the criterion of diminished respect is here tied to the conditions of innocence. Finally, we need not be concerned that the proposed definition will sweep in every ne'er-do-well, since it requires an incapacity to execute a conception of well-being rather than a mere failure to do so—one attributable to a severe impairment of mental faculties.

IV. Exclusivity of Pleas and Burden of Proof

Adopting the proposed definition of mental disease (or one like it) would have implications for two problems that have arisen ancillary to the one concerning the

[33] *Supra* note 8 at 428-30.

criterion of insane automatism: whether the defences of sane and insane automatism should be conjunctive or mutually exclusive and where the burden of proof should lie. As long as a policy of controlling the dangerous underlies the definition of insane automatism, there will be an impetus to ensure that the category of insane automatism is inescapable for those who qualify for it. Thus, in *Bratty*, the House of Lords ruled that once the jury had rejected a plea of insane automatism, the accused could not plead sane automatism on the same evidence. This ruling, however, carried implications embarrassing for the courts. Since the burden of proving insanity is on the party raising the issue, while the burden of proving voluntariness (an element of the *actus reus*) is on the Crown, the rule in *Bratty* meant that the jury, having rejected the accused's insanity defence, would be forced to convict even if they had a reasonable doubt about the voluntariness of the accused's actions. This, however, would violate the accused's right to be presumed innocent and (since the judge has withheld from the jury a defence logically open to him) his right to a trial by jury. To render the category of insane automatism logically airtight, therefore, one further adjustment was necessary. If the presumption of innocence were abolished in cases where involuntariness is pleaded (that is, if the accused had to prove involuntariness on a balance of probabilities), then disallowing recourse to sane automatism on the same evidence upon which the jury had already concluded that the accused's actions were probably voluntary would no longer seem anomalous.

In *Stone*, the Supreme Court of Canada took this step. The accused had stabbed his wife forty-seven times after he had been subjected to a stream of verbal abuse from her. His defence was that the psychological shock he received induced a dissociative state during which his physical movements were entirely independent of his conscious will, and two psychiatrists testified to the plausibility of this explanation. The trial judge left insane automatism and provocation with the jury, which rejected the former but accepted the latter and convicted the accused of manslaughter. The accused appealed the conviction, arguing that his rights to be presumed innocent and to a trial by jury had been violated by the judge's refusal to leave sane automatism with the jury.

Writing for a 5-4 majority, Justice Bastarache finessed the accused's constitutional challenge to the mutual exclusiveness of the defences of sane and insane automatism by shifting the burden of proving involuntariness on a balance of probabilities to the accused.[34] This infringement of the accused's right to be presumed innocent is justified, he argued, because a burden of proof on the Crown would be too onerous given that automatism is easily feigned and that "all knowledge of its occurrence rests with the accused."[35] According to Bastarache, J. there exists a presumption that human agents act voluntarily, one that reflects a policy of relieving the Crown of too heavy a burden of proof. This policy would be defeated, he argued, if the accused

[34] Neither the respondent Attorney-General of British Columbia nor any of the intervening Attorneys-General (Canada, Ontario, and Alberta) proposed a reversed onus.

[35] *Stone*, *supra* note 8 at 425.

need only introduce sufficient evidence to raise a reasonable doubt about the voluntariness of his actions.[36]

Bastarache J.'s reasons for violating the right to be presumed innocent take up one short paragraph of his judgment. In this passage he overrides a constitutional right to be presumed innocent for the sake of a consideration—ease of prosecution—that the right is specifically meant to trump (proving guilt beyond a reasonable doubt is always onerous), reflecting as it does a societal commitment to minimize the risk of punishing the innocent even at the cost of incurring a high risk of freeing the guilty. As *Woolmington* v. *D.P.P.*[37] long ago decided, the presumption of voluntariness is not a legal presumption reflecting a policy of solicitude for the Crown nor any other policy for that matter; it is a common-sense presumption rooted in an everyday understanding of the nature of human agents. Thus, it may be dislodged by evidence raising a reasonable doubt as to whether the accused conforms to that general understanding. Moreover, automatism is not more easily feigned nor is knowledge of its occurrence more exclusively the property of the accused than other mental conditions such as mistake of fact or drunkenness. Hence Bastarache J.'s reasoning carries an implicit threat to the presumption of innocence whenever the accused claims that a mental element of the offence is lacking—an implication so at odds with the values of a liberal legal order as to render extravagantly purchased any resultant advantage to prosecutors.

The violation of the rights to be presumed innocent and to trial by jury is the end-result of a law of automatism based on a policy of controlling the dangerous. If an impaired capacity for autonomy rather than dangerousness were the criterion of insane automatism, there would be no need for mutually exclusive pleas nor for a uniform burden of proof as between sane and insane automatism. No policy would be subverted and no principle violated if a jury, having decided that the accused probably did not evince a mental disorder warranting diminished respect, nevertheless acquitted because they held a reasonable doubt as to whether the accused's actions were voluntary. And because there would be no need for mutually exclusive pleas, there would be no need to place the burden of proving involuntariness on the accused in order to remove the anomaly of disparate burdens created by exclusivity.

Conclusion

In their concern for controlling dangerous persons, courts applying the common law have produced a law of automatism that massively violates constitutional rights. Not only does it deprive acquitted persons of their liberty without proper justification; it also runs a high risk of convicting the innocent and violates the accused's right to a trial by jury. In *Stone*, the policy of controlling the dangerous has reached its zenith; for that case all but abolishes the defence of sane automatism, while producing the

[36] *Ibid.*

[37] [1935] All E.R. 1, [1935] A.C. 462 (H.L.).

spectacle of a Court legislating on its own initiative a reverse onus in automatism cases and then, judging in its own cause, declaring its violation of rights to be justified in a free and democratic society (even though the United States, The United Kingdom, Australia, and New Zealand apparently do well with the ordinary evidential burden). The common-law jurisprudence on automatism is perhaps too solidly entrenched to allow hope for reform by the courts. However, in a constitutional democracy characterized by co-operation between courts and legislatures, it may not be too naive to hope that Parliament will in this case initiate the changes required by the Charter.

Accordingly, legislation is needed to put the law of automatism on a principled footing independent of a policy of controlling the dangerous. This is all the more possible now that public safety concerns are given full play where they belong—in the legislative scheme for the post-trial disposition of mentally disordered individuals. Since the acquittee's continuing dangerousness is decided on all the evidence at the post-trial stage, the law of insane automatism can focus exclusively on the question of principle, namely, who among innocent persons is properly subject to detention and confinement for public safety and paternalistic reasons alone? The answer, I suggest, is those whose capacity for autonomy has been severely impaired by disease.

The law of automatism should therefore be reformed along the following lines. Where the accused raises sufficient evidence to render a plea of automatism plausible, the judge should put the defence of insane automatism to the jury only if he concludes that the evidence for the unconscious episode would, if believed by a jury, warrant a finding that the accused was probably suffering from a mental disorder that renders him generally incapable of appreciating the reasonably foreseeable consequences of his actions or of understanding information relevant to executing his conception of well-being. It would be irrelevant whether such a disorder had a psychic or physical cause. It would then be for the jury to determine whether they had a reasonable doubt that the action was voluntary and, if so, whether the episode probably manifested a mental disorder of the required severity. If they find the action voluntary, the accused is guilty. If they have a reasonable doubt about voluntariness but there is insufficient evidence to establish mental disorder on a balance of probabilities, the verdict is an absolute acquittal. If they have a reasonable doubt about voluntariness and conclude that the accused probably has a disease of the mind in the sense proposed, the verdict is that the accused is not criminally responsible because of mental disorder. Under this scheme, there would be no exclusivity in the pleas and no burden on the accused to prove involuntariness. Whenever insane automatism is put to the jury, a verdict of sane automatism would also be available, for the jury may decide that the accused behaved involuntarily but did not have a disorder of the severity needed to justify diminished respect.