Law Reform Commission of Canada
Commission de réforme du droit du Canada

the criminal process and mental disorder

Working Paper 14

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1975

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Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street
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K1A 0L6

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Table of Contents

Table of Contents—(*Concluded*) Page

Acknowledgement

When researching and writing Commission Working Papers it is our practice to consult with interested professionals, associations and groups. The various comments and criticisms we receive are always appreciated.

In this Paper we are particularly indebted to the large number of forensic psychiatrists who, from the very outset, freely provided us with information, advice and healthy doses of criticism. While there is probably much in the Paper with which some psychiatrists will disagree, their collective contribution has been invaluable and significant.

Foreword

This is our fourteenth Working Paper, our ninth on criminal law. It examines many of the important but sometimes neglected problems of mental disorder in the criminal process. Although it may be read as a single paper standing on its own, it is consistent with and based on the previous work of the Commission.

For reasons more completely stated in the paper, we do not deal with the insanity defence here. This important and complex question will be dealt with in subsequent publications in the wider and more appropriate context of criminal responsibility. We were also concerned that due to its traditional place in criminal law theory, a full discussion of the insanity defence in this paper would distract from the many other important and too often forgotten problems created by mental disorder in the criminal process.

Various parts of the paper will interest some readers more than others. We suggest, however, that the reader approach the paper as we did its subject matter—on a broad front. In this way the many interrelationships of mental disorder at the various stages of the process will be better understood.

This paper will be followed by a background volume of more detailed supporting studies which elaborate on many of the points raised here.

I. At the Cross-Roads

"Mad" and "criminal"—two words that cause concern. Mad is something none of us want to be but something many of us are or will become: one in eight Canadians will spend time as a patient in a psychiatric institution; one in six will suffer from some form of serious mental illness. On any day in 1974 there were nearly 60,000 Canadians in psychiatric facilities and several times that many receiving psychiatric treatment in the community.

Likewise with "criminal"—a word we like to use to describe "them" but never "us". Yet there are approximately 20,000 Canadians behind bars at any point in time. This is only the tip of the iceberg; not all convictions result in imprisonment, there are three reported crimes for every conviction and for every offence reported, two are not. This is not to mention the large number of convictions for minor offences—about one and a half million last year. In reality "criminal" is a better description of "us" than "them". No wonder Canadians rate mental disorder and crime near the top of current social concerns.

Our concerns are justified, for mental disorder and crime exact a heavy price from society. With mental disorder there is the economic cost of maintaining and expanding the mental health system—more than one billion dollars last year. But this is a minor cost when compared to the suffering and irretrievable loss of human resources which mental disorder leaves in its wake.

Crime also has costs. It costs in suffering to the victim and alarm to society; it costs in punishment to the offender and loss of liberty to us all; it costs by requiring

the maintenance of the criminal justice system—more than one and a half billion dollars last year.

We have, then, two disquieting words, two costly problems and two enormous systems—this paper is about their intersection. It is about people like Ralph, who killed a friend while suffering from an insane delusion that he was trying to turn his family against him; and Edna, a new Canadian with language difficulties who turned a garden hose on a neighbour in a backyard fence argument and was subsequently sent for psychiatric evaluation; and seventeen-year-old Harry, whose trial on a charge of assaulting his shop teacher with a chisel was postponed because he was found mentally unfit to be tried; and Fred, an inmate in a federal penitentiary who became accutely depressed and tried to commit suicide; and Karen who was taken by the police to the emergency ward of a local hospital after they found her wandering naked along the streets of her fashionable neighbourhood in the early hours of the morning; and Alec, who was convicted of armed robbery but because of a history of mental illness he was sent to a mental hospital instead of prison.

These actual incidents (names changed of course) have two common elements—each straddles one of the many cross-roads of the criminal and mental health processes, and each combines two of society's most pressing social concerns. This paper considers the problems of the people—the Ralphs, Ednas, Harrys, Freds, Karens and Alecs of Canada—caught at the cross-roads. It is about how the mentally disordered are dealt with in the criminal process.

A. The Criminal Process

How the mentally disordered should be dealt with in the criminal process largely depends on what we understand that process to be and what we mean it to do. After carefully considering many aspects of the process in our earlier Working Papers, we have concluded that the crimi-

nal law—the foundation of the process—has a dual purpose. It serves partly to protect us from harm but more importantly to promote and bolster essential social values. This it does by educating and above all by furnishing a necessary response when basic values such as personal security, honesty and protection of property are infringed. Such a view treats individuals as responsible persons with rights and obligations, who may choose to do wrong and risk the consequences.* When the choice is to break the law—to infringe a social value—the offender is liable to be held accountable in public before representatives of society.

The criminal trial is the institution through which persons accused of wrongdoing are brought to account or exonerated and the threatened values reaffirmed.** Its procedure is adversarial, structured as a dispute between society and the accused and arbitrated by an impartial judge. The accused's presence and participation is essential; not only is he the reason for the proceeding, he also is an active party, answering the charge, engaging and dismissing counsel and suffering the consequences if convicted.

From conviction flows punishment and sentencing, the final stage of the process.*** In our view criminal sanctions should further underline the dignity and well-being of the individual, both offender and victim. They should be humane, proportional to the offence and treat similar cases in a like manner. As well, account should be taken of the need to reconcile the offender with the victim and society through restitution and compensation.

Underlining the entire criminal process is a principle of restraint. Because it involves society's most destructive and intrusive forms of intervention against the individual, the criminal process should only be invoked with caution and with full recognition of its moral and practical limitations. It is society's last resort to be used only when milder methods have failed.****

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* See, *The Meaning of Guilt* and *Limits of Criminal Law*

** See, *Diversion and Limits of Criminal Law*

*** See, *Principles of Sentencing and Disposition* and *Restitution and Compensation*

**** See, *Diversion* and *Limits of Criminal Law*

B. Mental Disorder in the Criminal Process

Given this view of the criminal process, when should mental illness be taken into account? The short answer is whenever relevant, and it becomes relevant whenever affecting a principle essential to the criminal process. But first, what is mental illness?

We recognize that mental illness is a medical category and properly leave its definition to the doctors. It matters not whether we believe that sanity is only mental disorder put to good uses, that we are all mad in varying degrees, or that mental illness is a myth. Nor is it necessary for criminal law to choose between various psychiatric schools of thought or diagnostic categories. These are properly left to the medical profession to define in the perspective of treatment of patients. It is not so much mental disorder as its effects that concern us in the criminal process. The nature of an accused's mental illness may not be legally significant; its repercussions may be. What, then, are the effects of mental illness that should be taken into account in the criminal process?

At the outset, mental disorder may affect the principle of *restraint* in the use of the criminal law. An individual's mental disorder might influence the decision whether the criminal law should be used at all. At the beginning of and during trial mental disorder may affect the principle that parties to a criminal proceeding be *aware* and able to *participate*. Where an accused is so mentally disordered as not to realize the personal import of the proceedings or direct his defence, the question whether he should stand trial at all arises. Mental disorder may also affect the principle of responsibility from which springs the presumption that individuals can control and be held accountable for their acts. For individuals so afflicted by mental disorder as to be unable to understand the consequences of their acts or exercise a rational minimum of control over their behaviour, it is the question whether they should be held criminally accountable in court that arises. After conviction mental disorder may affect the principle that dispositions be *humane* and *just*. A sentence depriving a mentally disordered offender of essential psychiatric services that would have otherwise been available would be both inhumane and unfair.

These, then, are the points at which mental disorder should be considered in the criminal process: first, should the criminal law be used at all? Second, is the accused mentally aware of what is happening and able to participate at trial? Third, is the accused mentally capable of being held criminally responsible? And, fourth, should the accused's mental disorder be taken into account in sentencing? Each of these questions is treated later under the headings of Diversion of the Mentally Ill, Fitness to Stand Trial, Mental Disorder at Trial, and Principles of Sentencing and Mental Disorder. There are, however, a number of important preliminary and collateral problems that should be considered.

II. Understanding the problems

Most writers recognize that mental disorder affects the pre-trial screening of offenders; they agree that fitness to stand trial and mental disorder affecting responsibility are distinct issues, raised for different reasons, using different procedures and effecting different results; and they also agree that mental disorder may influence sentencing.

But if principle is clear, practice is not. Pre-trial diversion of the mentally ill is sporadic and informal. The issue of fitness and legal insanity have been confused in the cases, mixed in psychiatric reports, avoided when they should have been raised, and raised when they should have been avoided. Collateral procedures such as the remand provisions of the Criminal Code are not related to the need for or the purpose of psychiatric examinations and are used to accomplish ends for which they were never intended. The result is a strange form of legal double-talk. "Postponement" may mean indeterminate detention or final disposition, "acquittal" as insane may mean life imprisonment. And all procedures seem to be used interchangeably to achieve the same end—the indeterminate detention of the mentally ill offender.

Why should there be such practical confusion when theory is said to be clear? There are many reasons. Partly it has to do with our traditional approach to mental disorder and the criminal law, partly with the state of our written law, partly with our attitudes and partly with our lack of clear social policy towards the mentally ill.

A. A Problem of Approach

First, our approach. Traditionally, mental disorder in the criminal law was seen only in terms of unfitness and the insanity defence. Even these were isolated from one another and there has been a tendency to discuss each with a minimum of cross-reference to the other. Consequently, the vast bulk of the literature focuses on either fitness or the insanity defence, usually to the exclusion of all other problems of the mentally disordered in the criminal law. We follow this tendency by considering fitness to stand trial separately later in this paper and the intricacies of mental disorder and criminal responsibility in a separate working paper. The reason is that there are problems unique to fitness and criminal responsibility; individual treatment focuses attention on those issues specific and important to each individual area. This approach, then, has advantages.

But it also has risks. The enormous amount of academic energy lavished on the insanity defence and unfitness rather than on the whole question of mental disorder and the criminal law has had its unfortunate aspects. Its volume is more impressive than its cogency and, to some extent, it further complicates already complex issues. More important and tragic, it obscures the fact that mental disorder creates many more problems in the criminal law than who shall, due to mental disorder, be relieved from criminal liability or excused from the rigors of trial. It is important to realize the extent to which the neat legal lines of theory have been blurred in practice, that the traditional distinctions are not reflected and sometimes contradicted in law and the extent to which the various concepts and procedures are misunderstood, mismanaged, or simply missed by judges, lawyers and psychiatrists.

Dealing with each separate concept as if it were self-contained means we may risk missing or, at least, not directly deal with questions of great significance to the mentally disordered in the criminal law process. It is the case of not seeing the forest for the trees. In other words, focusing on specific parts has prevented development of

rational policies for the whole. This lack of a general approach accentuates other problems.

B. A Problem of Language

At the best of times the administration of the law does not conform to its stated goals and objectives. If it did, a description of what law is would also describe what it does. This, however, is rarely the case; there is usually some difference between legal intent and actual result. Divergence of theory and practice is not only likely but inevitable where language is imprecise and incomplete. If the confusion that preceded destruction of the Tower of Babel resulted from using many words to describe the same thing, here it is at least partly caused by using the same word to describe different things. That word is "insanity".

"Insanity" or "insane" appears in twelve different sections of the Criminal Code and has at least four meanings. In one section it clearly refers to criminal irresponsibility caused by mental disorder. In another it describes the quite different mental condition of an accused being unfit to stand trial. In yet others "insane" appears to refer to any pervasive mental disorientation. As well, "insanity" is commonly used by most people—including laywers, judges and even doctors—to refer generally to any psychotic state. Inconsistent language makes understanding difficult even where social policy is clear.

C. A Problem of Attitude

But social policy is not clear and this is partly due to our attitudes toward mental illness and the mentally ill.

> "O! Let me not be mad,
> Not mad, sweet heavens,
> Keep me temperance;
> I would not be mad!"

Such was the reaction of King Lear to the suggestion that he was losing his mind. We might think it an exaggerated response from a man who accepted the loss of his kingdom, his status, his daughters and finally his health. But in some ways it reflects our own fear of becoming mentally ill—of losing our mind. True, we are also afraid of other forms of illness and disease—cancer, for example—but there is a difference of degree. Losing an organ or a limb, losing a portion of life to a protracted illness, or even losing life itself to disease are personal tragedies that can be understood, delt with, and accepted with dignity. But if, as has been said, the brain is the citadel of the soul, when we lose our mind we lose ourselves. We become, in the words of Euripides, "a body as void of mind as a statue in the marketplace". It is not surprising, then, that we fear mental illness and that this fear translates into rejection of the mentally ill. Although there is some recent evidence that public attitudes are becoming more enlightened, there is no question That the mentally ill are still stigmatized. This stigma becomes even more pronounced when mental illness is associated with criminality. The person doubly labelled as "mad" and "bad" is doubly damned. He is perceived as being uniquely dangerous, and more in need of restrictive measures than either the merely mentally ill or criminal.

This widely held fear of the mad criminal makes acceptable the confinement and lengthy detention of mentally disordered accused or offenders in circumstances in which their "sane" counterpart would be either less severely sanctioned or released outright. These attitudes are reflected in the element of preventive detention implicit in the remand and dispositional provisions of the Criminal Code and in the choice of procedures of the personnel dealing with the mentally ill in the criminal process. What other explanation is there for the inevitable remands in custody "for observation" rather than examination as an out patient, or for lieutenant governor warrants which emphasize "safe custody" rather than treatment of unfit accused or persons found not guilty by reason of insanity?

A further attitude reflected in current procedures and practice is that we pretend we are doing the mentally

disordered offender or accused a favour by sending him for long periods of time to mental institutions. We seem to think that he will be "better off" than if he were released or sent to prison.

D. A Problem of Policy

The last and perhaps the key reason for current confusion is criminal law's failure to recognize and provide for practical problems falling outside the traditional legal concepts of unfitness and insanity.

The day-to-day work of policemen and the courtroom realities of judges, prosecutors and defence counsel often go beyond the purely legal questions of whether a particular accused is fit to stand trial or criminally responsible. For them, the mentally disordered accused poses a host of collateral questions unrelated to any of the formally recognized procedures. Questions such as: Is he in need of immediate treatment? Will the local psychiatric facility take him? What are the chances of an early psychiatric release? What is the likely outcome if he goes to trial? How serious is the crime charged? Can the accused be civilly committed if the charge is dropped? Does he have any family in the community or is there a community agency which will be willing to supervise him if he is released? These and other considerations often obscure the traditional legal questions in the minds of police, lawyers, psychiatrists and judges.

Unfortunately there is at present no recognized legal framework within which these practical and often valid concerns may be resolved. Given a natural tendency to choose procedures for practical results rather than abstract purposes, it should surprise no one that available procedures are used to serve a variety of social objectives often unrelated to their apparent purpose. Nor is it surprising that a host of local *ad hoc* procedures have developed, sanctioned only by custom and often of questionable legality.

III. Dealing with the Problems

These, then, are some of the obstacles that must be overcome before reform is possible—the legacy of a narrow view of mental disorder in the criminal law, unclear language, improper attitudes, and the need for practical solutions to social problems. Each is a strand of the knotty problem of reform and each must be considered. Language is perhaps the easiest and least controversial, so we begin there.

A. Clear Language

"What can be said can be said clearly". The most humane of intentions are of little use and even dangerous unless clearly communicated. The confusion surrounding the word "insanity" is not a unique or isolated example of misunderstanding owing to language. Perhaps even more important is what is not said; the confusion resulting from the incomplete articulation of principles and procedures. Whatever the ultimate social policy adopted toward the mentally ill in the criminal process, it should be clearly expressed.

This is not to say that all problems of the mentally ill result from an inappropriate and incomplete legislative vocabulary or that they will disappear through a better choice of words. Clear expression, however, is a good

beginning to reform of this area of the criminal law. We attempt, therefore, in this and following papers on mental disorder to use clear and consistent language. And we recommend that legislative language be rationalized and clarified to clearly articulate and differentiate between the various legal concepts and procedures pertaining to mental disorder and the criminal law.

B. The Importance of Attitudes

Attitudes and the values they reflect determine the possible and impossible in law reform, for attitudes form and define the limits of human activity. More than anything else, they determine how society will treat a particular problem. Of course, attitudes are only problematical if erroneous; the implication being that in this instance they are.

(i) *How dangerous the madman?*

Our fear of persons doubly tainted with mental illness and criminality and the restrictive procedures we use in dealing with them are only justified if our perception of the uniquely dangerous criminal madman is true. The danger we fear is violence; the protection we demand is from the violent mentally ill. The vital question, then, is whether mentally ill accused or offenders represent as a group a greater social danger for violence than their sane counterparts?

Virtually all recent research and data indicate no compelling reason for the criminal process to deal automatically with the mentally ill accused or offender more harshly and restrictively than with sane people. For example, the incidence of mental disorder in prisons approximates that in society generally; released prisoners who have a history of mental disorder are less likely to return to prison than normal prisoners; nor do the mentally disordered exhibit a higher incidence of violent behaviour than is found in the community generally. No conclusive correlation has been found between mental disorder

and dangerous, violent conduct. On the contrary, some studies show the mentally ill may be less prone to violence than the general population. There is, then, no rational foundation for the element of preventive detention implicit in our system of remands for examination or in the disposition of unfit accused or accused acquitted by reason of insanity.

This is not to say that there is never any danger of violent behaviour from the mentally ill, or that the criminal law should not consider the possibility of such dangerousness when remanding for examination or determining disposition of the mentally ill. Dangerousness should and must be considered, but there should not be a blanket assumption that all mentally ill persons are prone to violence. Restriction of the freedom of a mentally disordered accused or offender should only be imposed when justified.

(ii) *The danger of dangerousness*

But when is detention justified? While acknowledging that there are instances in which preventive detention of the mentally ill is called for in both the civil and the criminal process, the limitations of our predictive ability in this area must be frankly faced.

In the last few years legal and medical journals have been inundated with reports of studies considering various aspects of the reliability and predictive accuracy of psychiatric assessments of dangerousness. More remarkable than the bulk of this literature is its unanimity—it concludes that clinical predictions of dangerousness are at best, suspect and, at worst, totally unreliable. Representative of these studies are those based on an incident in the United States now known as "Operation Baxstrom".

John Baxstrom was detained in a maximum security mental hospital beyond his legally imposed sentence without an assessment of his present dangerousness having been made. This, said the Supreme Court of the United States, denied him his right to equal protection and treatment under the law and they ordered his release. A further

consequence of this decision was the release or transfer to civil hospitals of 967 other prisoners whose extended detention had been justified on the basis of their clinically assessed dangerousness. There was an immediate official and public fear of violence.

But very little happened to justify either the public's fears or the prisoners' detention. In a series of follow-up studies over a four-year period it was found that levels of violence in the Baxstrom group were not significant, that those transferred to ordinary hospitals quickly adapted to the new setting with a minimum of problems and that of 121 released immediately or eventually into the community only nine were convicted of any crime and only one of a crime of violence. Many other studies confirm the limitations of psychiatric prediction of dangerousness which "Operation Baxstrom" so dramatically highlights.

In this instance, we are our own victims. Why should we (or psychiatrists) expect prediction of what is essentially unpredictable? Dangerousness is not usually a continuing state. It depends on the situation and is usually triggered in individuals by a complex and sometimes over-powering cobwed of circumstances. We are not dealing with one known factor meeting another known factor in a controlled experiment. Here, the laboratory is all society, the variables vastly outnumber the constants and the controls are determined by that blind technician chance. Accurate prediction is extremely difficult.

C. Social Policy toward the Mentally Disordered in the Criminal Law

Social policies toward mentally ill accused and offenders need to be fully thought through and clearly articulated. Only then can problems be defined and practical solutions developed. To be effective, procedures must be predicated on clearly expressed and consciously developed social policies. Until basic policy questions are answered, treatment of the mentally disordered in the criminal process will be dominated by often irrational and

unacknowledged social objectives, and confused and inappropriate procedures. Policy questions such as: What is the role of mental disorder in the criminal law? When should a person's mental disorder be a bar to or a postponement of criminal proceedings? When is psychiatric examination necessary and what form should it take? What kinds of dispositions are appropriate? When does a person's mental disorder justify depriving him of his liberty? When is therapeutic or preventive custody called for and for how long? Where should the balance between freedom of the mentally disordered and protection of society be struck?

There is not one social policy to answer all the above questions, nor is there one policy maker in one process who could implement it. Here we are not faced with a single or even a group of problems that can easily be isolated and resolved. Rather, the problems stemming from mental disorder line the length and breadth of the criminal process. The appropriate social response depends on the particular case and a host of other factors. The problems also cut across departmental jurisdictions within governments and constitutional jurisdictions between governments. In the result we must consider many policies, policy makers, government departments and governments.

However, while it is difficult to outline at the outset the policies that should be adopted and the procedures that should be developed in every instance, we can indicate certain broad guidelines based on our earlier discussion. Taking into account the aims of the criminal process and the role of mental disorder in it, the principle of restraint in using the criminal process, the lack of positive correlation between mental disorder and criminality or mental disorder and violence, and the well-documented limitations on our present ability to assess, predict or treat dangerousness, we make the following recommendations:

First, that the criminal process be invoked for the mentally disordered only when no other viable social alternative is available. Implicit in this recommendation is the assumption that increased emphasis will be placed on the pre-trial diversion of the mentally ill.

Second, that mentally disordered persons be entitled to the same procedural fairness and benefit from the same protections of personal liberty as any other person. In this regard, extreme caution should be exercised before a person is deprived of his liberty, however short the period, for a psychiatric examination.

And third, in those instances where some form of detention is felt necessary, it must be subject to review and in no circumstances should it be indeterminate.

D. Our Approach

In the following sections we consider the problems of the mentally disordered as they arise in the three basic divisions of the criminal process—before trial, at trial and after trial. This is followed by a section on psychiatric evidence relating to all stages of the process. This approach, we trust, will allow an overview of the forest of mental disorder in the criminal process without losing sight of the individual trees.

IV. Mental Disorder before Trial

The mental problems of most people begin before they come into contact with the criminal process; they bring their mental disorder with them. It is important therefore, that the mentally disordered be identified as early as possible in the process to assure that they will be treated in legally and medically appropriate ways. One way of dealing with the mentally disordered before trial is to divert them from the criminal law altogether.

A. Diversion of the Mentally Ill

None of us like to be where we don't belong, even less to be thrust into ill-suited, inappropriate roles. Very simply, this is what diversion avoids. It is based on the principle of restraint and requires that before we invoke the force of the very blunt and powerful social instrument called criminal law, we ask ourselves not only if we *can* use it but also if we would be *wise* to do so. Wisdom dictates that where appropriate methods and procedures are available and appropriate they be tried before recourse to the criminal law is considered.

Diversion, then, recognizes that some of the people who find their way into the criminal process shouldn't have been let in or shouldn't be required to go further.

Sometimes the mentally disordered fall into this group. In the following paragraphs we focus briefly on two points in the process at which diversion should be considered: first, contact with the police and, second, contact with the prosecution.

B. Police Screening of the Mentally Ill

When people feel threatened or annoyed by the bizarre or irrational conduct of another, they usually call the police. So the mentally ill's first official contact with the criminal process is often in the person of a police officer. The traditional police response, where the evidence is sufficient, is to dispose of the incident through charging. This should not always be the case; in appropriate circumstances the police should divert the mentally ill away from the criminal process.

Sometimes they do. Police can exercise their discretion (as they do in many other instances) not to charge a mentally ill person who has apparently committed an offence. As well, most provinces empower police to take persons "apparently suffering from mental disorder" into custody without charging and to take them to a hospital. Here, our concern is not that police screening of the mentally ill never happens, but that it is not happening uniformly or with sufficient frequency. The decision whether to charge a person who appears mentally unbalanced is important and one the police should be helped to make. The difficulty of implementing and formalizing police screening at the point of arrest is treated in more detail in our Working Paper *Diversion*; here we consider some aspects of the problem of police screening of the mentally ill.

Successful police diversion requires more than the possibility of the police exercising their charging discretion and the existence of legislation allowing them to take custody of the mentally ill without arrest for delivery to a hospital. Policemen must be trained to recognize and deal with the mentally ill offender, to know what community

resources are available, and to encourage the consensual, community-based solution of marginal cases. There should be procedures, preferably simple, expeditious and developed in consultation with local hospitals and psychiatric facilities, to assist the police and interested parties to get needed medical services. And, most important, the internal policy of the individual police forces should encourage diversion of the mentally ill.

We are not suggesting that policemen become lay-psychiatrists, just better prepared to seek non-criminal dispositions to a range of troublesome incidents. It may be unfair and perhaps dangerous to expect police officers to make snap decisions to divert a mentally disordered offender in some of the more difficult cases. They could be helped with this responsibility through a number of different devices. An approach that has been successful elsewhere has been the use of police panels to centralize the decision to divert. Difficult or questionable cases are brought to police headquarters where the final decision is made in committee.

Quebec is currently trying another technique. In Montreal, with the help of the Philippe Pinel Institute of Psychiatry, there is a consultation service (Centre de Consultation Psychiatrique) to which police may refer persons they suspect suffer from mental illness. In 1974 the Centre received almost 1,000 referrals of which approximately three-quarters were diverted out of the criminal process, usually back into the community either directly or after a short period of hospitalization.

Both the above examples presuppose a relatively large community. The procedure adopted in a particular area will of course depend on a host of local factors such as the size of the police force, the availability of psychiatric facilities, the cooperation of local hospitals, not to mention the temperament and make-up of the community. It would be foolish to suggest that a uniform system be adopted for the entire country. It is necessary, however, that experiences be shared, general guidelines established, and model procedures developed. The appropriate bodies to initiate and encourage an exchange of ideas and development of guidelines and model procedures are the Fede-

ral Department of Justice and the Solicitor General and their provincial counterparts.

C. Prosecutorial Diversion of the Mentally Ill

Once an information has been sworn before a justice of the peace and process issued, control over the criminal process passes from the police to the prosecution.

Again, the general question of diversion by the prosecution at the pre-trial level is considered in our Working Paper, *Diversion*, but, there are a number of considerations particular to the mentally disordered accused.

Although it is evident that Crown prosecutors have discretion to withdraw the charge, refer the accused for psychiatric examination or proceed to trial, there are no formal criteria for dealing with a mentally disordered accused. But how a prosecutor deals with the accused can be vitally important. He may, for example, consider withdrawing the charge on condition that the accused seek psychiatric help. Or he may use withdrawal of the charge as *quid pro quo* for the voluntary civil commitment of the accused. Because such decisions dramatically affect the liberty of the subject they should only be made in consultation with the accused and his counsel—and they should be made consistently. That is to say, that criteria for diversion should be established to encourage the uniform treatment of like cases.

Increased defence discovery as recommended in our working paper on pre-trial discovery, would help encourage consistency and openness in the pre-trial diversion of mentally ill accused. In the absence of a formal discovery procedure, there should be pre-trial diversionary discussions to encourage consensual dispositions. A prerequisite to the success of such discussions would be the early availability to both sides of psychiatric assessment of the accused. This is taken into account later in our consideration of the proper role of remands and psychiatric examinations. It is also essential that the prosecutor undertake an early assessment of the case. At present many cases

are not seen by the Crown until the day before the preliminary hearing or trial.

D. A Word of Caution

It is not enough to say that the mentally ill should be diverted from the criminal process. Every departure implies an arrival and persons who leave the criminal process arrive somewhere else—possibly the community or another process. For the mentally disordered accused the other process is the mental health system and the vehicle of introduction can be involuntary civil commitment.

Diversion is intended to encourage community based solution of problems. This implies something more than simply shuffling individuals from one form of detention (criminal) to another (medical). It implies the use of community resources and community understanding to resolve problems within the community. The effect of diverting from the criminal process should not be to increase the use of civil commitment.

V. Mental Disorder at Trial

At trial an accused's mental disorder has traditionally been considered in two ways: first is the accused mentally fit to stand trial; secondly, is he mentally capable of being held responsible for his acts. Mental fitness to stand trial we consider in the next part; mental disorder affecting responsibility we briefly consider here.

A. The Question of Responsibility

Responsibility is at the base of the criminal law and, for the purposes of that law, we are all presumed criminally responsible. It is as if we all have tickets to the criminal process, but tickets which may be revoked or temporarily suspended. Soldiers, for example, have a ticket to a different system—a military process. Foreign diplomats have no ticket, but may be asked to leave. The very young don't get a ticket until seven years of age, only conditionally until fourteen and up to sixteen their ticket usually provides for only juvenile entrance with reduced privileges and obligations. For various policy reasons all the above are not considered responsible and are not allowed into the criminal process.

The mentally disordered may also be refused admission. The reason is that in our view of criminal law it

would be unjust to punish an accused who, for whatever reason, does not understand the consequences of his acts or is unable to exercice the required rational minimum of control over his behaviour. Individuals so afflicted will not be held criminally accountable by the courts. Or, to follow our earlier analogy, their ticket is declared null and void.

The principle is clear; its elaboration is not. Little in criminal law engenders as much or as heated debate as the effect of mental disorder on criminal responsibility. Some consider an insanity defence to be absolutely essential to the criminal law; others strongly recommend that it be abolished; yet others suggest that it be tempered with a half-way house of diminished responsibility. There are, we suggest, five alternatives:

(1) Abolish the insanity defence, and with it the present notion of criminal responsibility while providing for therapeutic disposition of mentally disordered offenders at sentence.

(2) Abolish the insanity defence but consider the effect of mental disorder on the mental element required by the offence.

(3) Retain an insanity defence but add a further, partial defence of diminished responsability.

(4) Retain an insanity defence but with different criteria.

(5) Retain the present insanity defence as articulated in section 16.

In light of the principles set out in this paper the need for a special defence based specifically on mental disorder is open to serious question. Because this question is vital to the whole consideration of responsibility in the criminal law we feel it would be inappropriate to consider it in a paper focusing on the problems of the mentally ill in the criminal process. Rather, the whole concept of responsibility taken not in the relative isolation of one group of persons, (e.g. the mentally disordered) but in the context of a rational criminal justice system, will be considered in subsequent publications.

There is also a practical reason for not considering this issue here. For all its therectical importance, the insanity defence—whatever its form—is now of little practical consequence. Probably as a result of the virtual abolition of capital punishment, the decreasing severity of sentences and the introduction of parole and probation, the insanity defence is now raised so infrequently as to be statistically unimportant. If the trend in Canada follows that recommended in this paper and that of other countries which have encouraged pre-trial diversion of the mentally ill and the possibilities of therapeutic alternatives in sentencing, the few cases now heard will be still further reduced. Last year in England, for example, with two and one half times our population, there were only *two* successful insanity pleas.

It can, of course, be argued that if the insanity defence is changed to avoid the present consequence of indeterminate detention in a mental hospital, it will assume more practical importance in the future. What we feel is more likely, however, will be the increasing use of pre-trial diversion and civil procedures rather than raising the insanity defence in court.

This in no way depreciates the great theoretical importance of mental disorder as it effects criminal responsibility, but it does illustrate why a working paper on the problems of the mentally ill in the criminal process need not discuss the insanity defence at length.

B. Fitness to Stand Trial

Canadians, says the commercial, know better than most what it means to be unfit. It means being overweight, short of breath, long of leisure, and out of shape. This kind of unfitness may prevent us from running upstairs two steps at a time or from winning the Boston marathon, but it can never prevent us from standing trial. However, another kind of unfitness—unfitness to stand trial—can and does.

"Is the accused fit to stand trial?" This is the question asked when a person awaiting or standing trial shows signs of mental disorder. If the court answers the question negatively there is no trial and the accused is exempted from the proceedings until he regains sufficient mental ability to participate. This exemption is the fitness rule and the process of initiating and implementing it is the fitness procedure.

Much has been said recently about the fitness rule and its application: all legal commentators and committees agree that substantial change and revision is necessary. Most studies assume that, despite its faults a fitness rule is necessary, its purpose is known, and that it should be restricted to mental disorder. This, however, leaves unexamined two considerations basic to any attempt at reform. First, the need for any such rule—why have a fitness rule? and second, the rule's scope—to whom should it apply? We begin by considering these.

(i) *The Need for a Fitness Rule*

To reform the fitness rule without questioning the need for its existence is much like renovating and old and dilapidated house at great cost and discomfort without first asking if we wouldn't rather live elsewhere. Our initial question, then, must be: Is the fitness rule really necessary?

The fitness rule is closely linked to our system of criminal justice and any basic change in the nature of that system would affect the need for such a rule. If, for example, it were no longer thought important that persons accused of crimes understand the nature or potential consequences of trial and participate in proceedings, then a procedure intended to promote and protect understanding and participation would not be necessary. But we suggest no such fundamental change. In our view the criminal law should continue to be based on notions of responsibility and accountability and criminal procedure should continue to be adversarial. It follows that the historical antecedents that originally gave rise to the fitness rule will continue to apply.

This however, is not proof conclusive of the present need for a fitness rule. There may be other, more effective, less complicated means of accomplishing the ends for which the rule was designed without resorting to the rather drastic step of exempting the accused from trial. It could be argued, for example, that an accused's personal participation at the trial is now less important than it once was. In most cases the participation of the accused is vicarious—everything is done through counsel. If, then, the accused is adequately represented his personal involvement is unnecessary and the fitness rule is, therefore, unnecessary.

To this we reply that in spite of increasing use of counsel and legal guarantees of representation, the active participation of the accused in court remains essential. There are certain decisions—for example, the plea, election as to the mode of trial, retention and dismissal of counsel—that he and he alone must make. A mentally disordered accused unable to make such decisions is not suffering from minor disability that may be compensated for by procedural devices; he is bereft of all ability to participate in the proceedings. In such circumstances fairness demands that the accused be exempted from trial.

(ii) *Rationale of the Fitness Rule*

The rationale of the fitness rule, then, is this: it promotes fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings.

The accused has the right to make full answer and defence to the charges brought against him. Fairness demands that he be aware of what is going on at trial so as to take whatever steps available to avoid the potential consequences of being found guilty. A trial at which the accused is mentally unable to exercise his rights is really a trial at which these rights do not exist. Exempting him from trial, therefore, protects his rights to make full answer and defence.

As well, our notions of responsibility, punishment and specific deterrence are based on the accused's involvement in his trial. He must know if convicted, for what crime and if punished, for what reason. It would be wrong to convict or sentence a person who does not appreciate what is happening to him. The fitness rule prevents this.

It is important not to confuse this rationale of the fitness rule with other benefits which may flow from its use. Benefits such as promoting the accuracy of the trial and maintaining the decorum of the proceedings. Such consequences, although beneficial, are but incidental and the fitness rule should never be used to promote them. It follows that a mentally disordered accused who may disrupt the proceedings or whose mental disorder may in some way affect the accuracy of the trial should not be found unfit if he otherwise understands the meaning and object of the proceedings and if his ability to participate is unimpaired.

To reiterate, then, the purpose of the fitness rule is to promote fairness to the accused by protecting his rights to defend himself and by ensuring that he is an appropriate subject for a criminal proceeding.

(iii) *Scope of the Fitness Rule*

To whom should the rule apply? It seems reasonable that all accused with communication or comprehension difficulties should benefit from the fitness procedure. But not all do, since the fitness rule now applies only when those disabilities are caused by mental disorder. This was not always the case. At one time the fitness exemption extended to all physical impairments and cultural differences affecting an accused's ability to communicate or participate. Deaf-mutes, for example, were historically the first group to be found unfit to stand trial, and there are other examples of the rule being applied to persons who, for causes other than mental disorder, were unable to fully participate. A case can be made for restoring these non-mental categories and focusing the rule on the consequences rather than the causes of unfitness.

It is arguable that any accused unable to understand the proceedings or to communicate with his lawyer because he either does not speak or understand the language of the court or because of some physical impairment or for any other reason, is in the same position as a mentally unfit accused. As such, he also should be exempted from trial until his ability to participate is ensured.

In reply it may be said that the present distinction between mental and other kinds of disabilities is valid. With the mentally disordered accused the problem is with the accused himself. For this reason he is exempted from trial and treated. But with cultural or linguistic "unfitness" there is nothing wrong with the accused. His inability to participate and communicate is caused by an easily remediable external situation. In such cases, rather than treating an accused as unfit, it would be preferable to furnish him the rights and means to participate at trial. The Bill of Rights, for example, gives everyone who cannot speak the language of the court the right to an interpreter and the right to a fair hearing in accordance with the principles of fundamental justice.

Interesting as this question is, we must leave it unresolved. This working paper deals specifically with mental disorder and any wider consideration of the scope of the fitness rule would be inappropriate here. We therefore restrict our discussion to unfitness as it relates to mental disorder, without suggesting that the rule be limited to this cause only. We raise the problem here to provoke comment and discussion.

To recap briefly, our preliminary consideration of fitness leads us to three conclusions. First, there is a continuing need for a fitness rule. Second, the rationale of the rule is to promote fairness to the accused by preserving his rights to defend himself and by ensuring that he is an appropriate subject for a criminal trial. And, third, mental disorder should continue to be one cause of unfitness, that other causes of unfitness merit consideration, though it is beyond the scope of this paper. Having determined the need for the rule, its rationale and its immediate

scope, we may now consider the problems of its application in Canada.

There are many problems, most of which are considered in detail in our background paper *Fitness to Stand Trial.* Here, we consider what are in our opinion the three major concerns. They are: the criteria of unfitness; the present impossibility of fully considering the merits of the charge before fitness is determined; and disposition of unfit accused.

(iv) *The Criteria of Unfitness*

The criteria of unfitness, although generally agreed upon by most academics and judges, are not spelled out in the Code. Consequently, they are sometimes misunderstood. There are examples of appellate court decisions that confuse unfitness with mental disorder affecting criminal responsibility and psychiatric reports that equate the criteria of unfitness with those of civil commitment. Much of this confusion would abate if the criteria of fitness were clearly articulated in the law.

After carefully considering Canadian case-law and criteria used in other jurisdictions, we recommend the following three-pronged test of unfitness. A person is unfit if, due to mental disorder:

(1) he does not understand the nature or object of the proceedings against him, or
(2) he does not understand the personal import of the proceedings, or
(3) he is unable to communicate with counsel.

Of these three only the third—communication with counsel—requires elaboration. Instructing counsel is tied to the accused's participation at trial and implies the ability to communicate rationally. But it does not include the ability to recount everything that transpired before, during or after the offence. If loss of memory is accompanied by or results in mental inabilities falling within the other criteria, the accused may be found unfit. But lack of recollection alone should not result in unfitness.

(v) *Unfairness of unfitness—Trial on the Merits*

Although ostensibly intended for his benefit, a finding of unfitness may be unfair to the accused—especially when it is in his interest that trial proceed. Present law does not adequately consider the accused who, although perhaps unfit, has grounds for attacking the criminal charge on its merits. Consider, for example, the following case.

The accused was charged with theft. He pleaded not guilty and was prepared through counsel to meet the charge with a defence of alibi. But because he was congenitally retarded he was found unfit and his trial postponed. Assuming his defence was valid, being found unfit placed him in an untenable position. If he could proceed to trial he would be acquitted, but he couldn't be tried because he was unfit. So he was detained in a mental hospital until he became fit. But he would never be fit. He would never be returned to trial and therefore never be acquitted. The net effect was to condemn without trial a person not convicted of a crime to a lifetime of psychiatric detention—all in the name of fairness to him. The injustice is obvious and must be avoided. Present procedures, however, afford only limited protection.

The judge may presently postpone the issue of fitness to the close of the case of the prosecution, allow the defence to present legal objections to the charge and require the prosecution to establish at least a *prima facie* case of guilt. Therefore, where the prosecution is legally barred (e.g. for lack of jurisdiction) or where the charge is defective in law (e.g. an invalid indictment of lack of an essential element of the offence), the accused or counsel acting on his behalf may obtain an acquittal. In these cases there is no inquiry into his fitness to stand trial. But this protection is imperfect because it does not go far enough. An accused with a defence, such as the accused in our earlier example, is precluded from presenting it because the postponement is only to the close of the prosecution's case. We recommend therefore that there be the possibility of full adjudication on the merits before an accused risks detention as unfit.

Postponing unfitness—The possibility of complete adjudication would lessen the chance of detaining as unfit an accused who would not be convicted on the merits. It would also discourage using the fitness hearing as a disposition of the trial or as a means of avoiding the defence of insanity. Some say, however, that postponement violates the fitness rule because it allows us to "try" an accused who may be "unfit to stand trial". But this is not a trial in the true sense; we must draw a distinction between "trying the accused" and "adjudication" in the way we use it here.

The purpose of the unfitness exemption is to protect the accused from the consequences of trial, that is to say, conviction and punishment, rather than the adjudication of the merits. Where adjudication is divorced from conviction and sentence, it become compatible with both the purpose of the fitness rule and the right of the accused to make full answer and defence. Even under the present law we permit an unfit accused to be "tried" up to the end of the case for the prosecution. But this is adjudication of a very special kind, where the only possible consequences are acquittal or a finding of unfitness—never a conviction.

When should the merits be considered?—There are two alternatives. The merits may be tried either before or after resolution of the fitness issue. In England and Canada postponement provisions permit some consideration of the charge before fitness is determined. Some American states, on the other hand, have adopted a post-unfitness hearing. After considering both possibilities we recommend that the merits be tried before resolution of the fitness issue.

Postponing the fitness hearing has the advantage of not interrupting the trial if fitness is raised. If the accused is acquitted he would not first have been committed as unfit and no fitness hearing is necessary.

Postponing the issue also avoids the danger inherent in a post-unfitness hearing that the hearing would be treated more lightly than a regular trial because the accused has already been found unfit. Trial of an unfit accused should be the same as for any other accused, except for the ultimate consideration of fitness if the

accused is not acquitted. We recommend, therefore, that adjudication on the merits precede consideration of the accused's fitness as fully as is consistent with the protection of the rights of the accused. This would include, in appropriate circumstances, that the issue of the accused's fitness be postponed until the end of the trial.

The fitness procedure—In principle, fitness should not be considered if the accused has some defence to offer. Full adjudication on the merits could be assured by giving the trial judge the power to postpone consideration of the fitness of the accused until the very end of the trial. This he would do only after having first postponed the issue of fitness to the end of the case of the prosecution, and only after having heard arguments by defence counsel as to why, in the interests of justice, he should do so. Such a procedure is relatively simple for a trial by judge alone. But because the issue of fitness is currently determined by the finder of fact, postponing fitness to the end of a jury trial is very complex.

The trial judge would have to direct the jury as follows: they should first consider whether the accused should be acquitted on the merits and, if not, whether he is fit to stand trial and, if fit, whether he is guilty.

This could be simplified if the accused's fitness were decided in every case by the judge and if the jury were able to deliver a conditional verdict. The procedure would be as follows: the trial judge would postpone the issue until all the evidence at trial had been heard. He would then direct the jury to consider the guilt or innocence of the accused. If the jury delivers the verdict of not guilty the accused is acquitted and there is no fitness hearing. If the jurors think the accused is guilty of the charge, they would deliver a conditional verdict that on the evidence presented to them they are unable to acquit the accused. The verdict is conditional in the sense that it is a verdict of guilty if the accused is fit. The judge would then dismiss the jury and a hearing on the accused's fitness would be held. If the accused is found fit the conditional verdict is made absolute and the judge would sentence the accused. If unfit, the judge would set aside the verdict and the trial

proceedings and make an order for the disposition of the unfit accused.

The above procedure is put forward as one possible way of implementing our recommendation. Criticism will probably focus on its workability and another, more simple procedure may be found. Unassailable, however, is the principle that full adjudication on the merits be possible before the accused risks the consequences of being found unfit.

(vi) *Disposition of the unfit accused*

Most of us would rather be found guilty than unfit because the consequences of unfitness are less predictable and potentially more restrictive. If guilty our sort is known and our sentence specific. If unfit, we would be certain of very little beyond the inevitability of detention in a mental hospital. This, even if our crime (which has never been tested in court) would ordinarily result in no imprisonment or imprisonment for a short period, even if our condition is one that would be better treated outside an institution. We would be involuntarily held in a mental hospital where, by law, we would be treated differently from the other patients with fewer rights and fewer therapeutic options. There we would remain indefinitely at "the pleasure" of the lieutenant governor without the possibility of judicial review of our detention. Given these potential consequences, it is not surprising that most accused and their counsel would rather risk conviction than unfitness.

We feel the automatic detention of unfit accused under lieutenant governor's warrants in psychiatric facilities for indeterminate periods is unjustified. If the purpose of disposition of unfit accused is to facilitate recovery and allow them to return to trial with a minimum of delay, then commitment to a psychiatric facility with its resultant deprivation of liberty is only justified for two reasons.

From a therapeutic point of view it may be justified if the treatment available within the institution is more likely to help the accused become fit and if no similar treatment not involving the detention of the accused is available. Commitment may also be justified where the charge is one

for which bail would not be ordinarily granted. But where committal will not therapeutically benefit the accused, the accused is not sufficiently mentally disordered to be committed by civil criteria and when the offence charged is one for which bail would normally be granted, society and the accused would be best served if the disposition did not involve detention. We therefore recommend that a finding of unfitness not always lead to detention and that there be a range of dispositional alternatives, some involving little or no deprivation of individual freedom. We also recommend that it be required that the least intrusive form of disposition be used unless there are compelling reasons for doing otherwise.

Presently, the disposition of unfit accused—a federal power—has been delegated to the lieutenant governor of the provinces. We recommend that this power no longer be delegated and that it be exercised by the trial judge. No one is in a better position to do so. He either has or may obtain a full medical report, psychiatric testimony and may draw upon his own experience with the accused at trial. As well, an unfit accused could have his treatment or detention reviewed in an open, reviewable judicial hearing rather than being subject to a non-reviewable executive decision as is presently the case.

If it is thought necessary that an accused be detained in an institution, such detention should never, never, be indeterminate. Because the detention is for therapeutic reasons, its length should be determined by the prospects of recovery. Psychiatrists tell us that in the vast majority of cases an accused who is not fit to stand trial within two years is unlikely to ever regain fitness. If the accused's committal is being justified on the basis of preventive detention, when the length of time spent in the institution is equal to the usual period of imprisonment served by offenders convicted of the crime for which he was charged, he should be released and the criminal charge dropped. If further psychiatric treatment is deemed necessary it should be justified on the basis of the accused's mental illness, not by the existence of the criminal charge. If he is sufficiently mentally disordered to be committed

pursuant to civil standards, his detention may be continued through certification under the appropriate provincial legislation.

VI. Mental Disorder after Trial

Trial normally results in conviction or acquittal. If acquitted the accused is free to go and the criminal law has not further interest in him or his mental health. But if convicted, the offender's mental health may be taken into account. Certainly not if he is absolutely discharged or merely fined, but if he is discharged conditionally, released on probation or imprisoned, his mental health may be considered.

A. The Principles of Sentencing and Mental Disorder

How a person's mental disorder should be considered when he is imprisoned or on probation depends on the view taken of sentencing and disposition. Our view is set out in our third Working Paper, *The Principles of Sentencing and Dispositions*. We must here consider the implications of that paper for mental disorder in sentencing.

If, as we said in our Working Paper, *The Meaning of Guilt*, criminal law has to do with bringing offenders to justice, then sanctioning offenders has to do with righting of wrongs and protecting basic values as an expression of

that justice. The role of sentencing is an educative one. It makes clear the responsibility of the offender for the injury caused the victim and reaffirms the importance of the values infringed. Sentencing must try to ensure that: "(1) the innocent are not harmed, (2) dispositions are not degrading, cruel or inhumane, (3) dispositions and sentences are proportional to the offence, (4) similar offences are treated more or less equally, and (5) sentencing and disposition take into account restitution or compensation for the wrong done."

Such a sentencing policy relegates rehabilitation and treatment to a secondary role; the primary concern is the determination of a sentence that is just and fair in the circumstances. Sentences therefore cannot be based on estimates of the length of time required to treat or rehabilitate offenders.

This is not to say that treatment of an offender's mental disorder has no place in sentencing policy; its place though limited is important nonetheless. Treatment within the framework of a just sentence is an obligation of society to the offender, which some feel he may demand as a right. Certainly a humanitarian claim can be made. Although there are serious doubts as to the effectiveness of therapeutic programs in reducing recidivism, to the extent that treatment renders punishment more humane and reduces (however marginally) the likelihood of reoccurrences, it has a place in a just sentence.

This view has two implications for psychiatric treatment of offenders. First, the perceived need for treatment may not affect the length or the form of sentence. Second, treatment administered within the context of the prescribed sentence must be consented to by the offender. In regard to the latter, we must bear in mind that an offender who has reached the sentencing stage has been found both criminally responsible and fit to stand trial. He is considered responsible for his acts and should be entitled to make his own decision whether he wants to avail himself of existing medical support.

B. Mental Disorder and Probation

We feel that psychiatric treatment sometimes is and can properly be a condition of probation. This may include an order to follow a particular treatment program, involving periodic visits to a psychiatric out-patient facility or even part-time residence in an institution which provides some form of psychiatric supervision. For the most part, conditions of probation are unrestricted in the Criminal Code. Although this allows for flexibility and change, it can lead to abuse.

To check such abuse we recommend the same safeguards here as we have for sentencing generally: openness, reviewability, and treatment only with consent. The offender and his counsel should actively seek and suggest the appropriate treatment and try to secure the agreement and cooperation of the treatment personnel. Probation orders with conditions of psychiatric treatment should be made only where: (1) the offender understands the kind of program to be followed, (2) he consents to the program and, (3) the psychiatric or counselling services have agreed to accept the offender for treatment. If the conditions are accepted then breached, the offender may be charged with breach of a condition of probation or be returned to court for re-sentencing. So long as such conditions entail the agreement and cooperation of the offender, they are quite compatible with our suggested sentencing policy.

C. Mental Disorder and Imprisonment

It is perhaps surprising to many persons to learn that an accused may be charged, brought to trial, convicted and sentenced to imprisonment notwithstanding that he is mentally disordered. But this only underlines what was pointed out earlier in this paper—the criminal law is concerned not with mental disorder *per se* but with its legal consequences. If the accused's mental illness does not cause him to be diverted before trial, or render him unfit or criminally irresponsible, he not only may, but should, continue in the process through to its conclusion—acquittal or conviction and sentence.

Frequently, sentencing judges realize that some offenders suffer from mental disorder, but under present law they have no power to order that the term of imprisonment be spent in whole or in part in a psychiatric facility. Judges sometimes do make recommendations for psychiatric treatment hoping that prison authorities will do something as a result. Sometimes such recommendations are followed, often they are not. Although it is theoretically possible for prison authorities to transfer mentally disordered offenders to mental hospitals, in practice such transfers are rare. Because of the sparse facilities for psychiatric treatment in prisons generally, many prisoners suffering from serious mental disorders are detained without the prospect of treatment.

This situation should not be allowed to continue. After thoroughly examining the problem of sentencing mentally disordered offenders to prison and after exploring alternate methods of providing psychiatric treatment to those offenders, we recommend that judges be given the power to order that a term of imprisonment be spent in whole or in part in a psychiatric facility. This sentencing alternative we call a hospital order. A similar approach has been used in England since 1959 and has been recommended previously in Canada by two national research bodies.

(i) *Hospital Orders*

The essence of our proposal is this:

(1) Where a person is convicted of a crime and has been sentenced to a fixed term of imprisonment, the accused or his counsel may raise the question of whether a hospital order would be appropriate.

(2) Before a hospital order may be made, several criteria must be met:

—the offender must be convicted of a criminal offence and have been sentenced to a term of imprisonment;

—the court should, unless extensive psychiatric information is available, remand the offender under the

Criminal Code to a psychiatric institution to determine whether he is suffering from a psychiatric disorder that is susceptible to treatment and whether the institution to which he has been remanded or another institution is able and willing to provide a program of treatment, if any.

(3) After having considered the psychiatric report and the representations of both defence counsel and the prosecution the presiding judge may, with the consent of the accused, and the agreement of the appropriate psychiatric insitution, order that the accused spend part or all of his sentence in a hospital or psychiatric institution.

(4) An offender who has lawfully consented to the hospital order may request that the balance of his sentence be served in the correctional system even if he could still benefit from further treatment in the hospital. He should perhaps also have the right to apply to a review board to be transferred to another hospital if he is not receiving the anticipated treatment.

(5) The hospital administration may discharge the offender back to the correctional system at any time before the expiration of the hospital order. Before such a discharge is made, however, the offender should be informed in writing of the reason for the discharge and have the right to apply to a review board for transfer to another hospital.

(6) An offender sentenced to a hospital order shall be entitled to parole in the same manner as all other offenders. In addition, the hospital authorities may recommend, for psychiatric reasons, that the offender be released on parole rather than returned to prison.

(7) An offender serving his sentence under a hospital order is deemed to be serving his sentence in prison for the purposes of escapes and being at large without lawful excuse. Other rights and privileges such as recreation, visiting, correspondence, or temporary absences will be governed by the rules and regulations of the psychiatric institution and such criteria of fairness and decency as may be provided for in the law.

(8) The judge's decision to impose or not to impose a hospital order may be appealed in the same manner as any other sentence of the court.

(ii) *The need for hospital orders*

Do we really need hospital orders? Could not a prisoner's psychiatric needs be adequately provided for within the prisons or through transfers to outside psychiatric hospitals? At present psychiatric services within prisons generally and transfer procedures are inadequate and ineffective. But even if, as we recommend, psychiatric services and transfers are improved, there would still exist a need for hospital orders. In our view hospital orders will improve the sentencing process and provide needed psychiatric treatment for offenders without first sending them into the correctional system.

(iii) *The need for consent*

The most contentious aspect of our proposal is that the offender must consent to the hospital order. This is in contrast to the position taken in two earlier Canadian studies recommending a similar disposition and is also at odds with present practice in England. Nonetheless, we feel such a requirement is essential. Compulsory treatment conflicts with our previously stated sentencing policy that within the context of a just sentence the offender should not only have access to adequate psychiatric treatment but should also have a right to refuse such treatment. We feel that an offender who has been found responsible for his acts and capable of being tried should also be capable of consenting to or refusing medical treatment. His status as a prisoner should not deprive him of the right to make this decision any more than it does his right to decide whether he will have his tonsils removed or his wisdom teeth pulled.

We realize that there are problems in requiring hospital orders to be made by consent only, especially where the offender's refusal stems directly from his disorder. For example, a person paranoid about doctors and hospitals

would always refuse treatment. Notwithstanding this possibility, we feel that there are other values at stake and that the requirement of consent is too important to waive even in these special cases. Here, it should again be noted that we are dealing with an offender who was fit to stand trial and responsible enough to be sentenced. Is it not only fair that he also be considered fit and responsible enough to make his own choice with regard to treatment? As well, we feel there is great danger in opening the door even slightly to non-consensual treatment. Exceptions might soon become the rule and could result in the imposition of hospital orders in virtually all cases on the basis that an offender who refuses help is obviously irrational and unable to exercise rational choice.

As is often the case in criminal law, this is a question of choosing between competing values. Some feel that society is justified in imposing any treatment on offenders if it will reduce the possibility of further criminality. This is an assumption, however, which is not supported by clinical evidence. Others take the view that the involuntary treatment of offenders is an unwarranted interference with basic individual rights. The position adopted by the Commission is that conviction of a criminal offence may warrant, as a last resort, the deprivation of an offender's liberty, but not deprivation or interference with other basic rights one of which is the right not to be subjected to treatment without consent. Our position is further reinforced by the well-documented failure of many compulsory treatment programs in other jurisdictions.

(iv) *Conclusion on hospital orders*

Hospital orders should improve sentencing policy and practice. It is not, however, to be regarded as a "cure-all" and may, indeed, be restricted to relatively few offenders. There will still exist a need for diversion of the mentally ill at the pre-trial stage, the traditional concept of fitness to stand trial and to consider the effects of mental disorder on criminal irresponsibility. There will also continue to be need for psychiatric services within prisons themselves; this we discuss in the following paragraphs.

D. *Mental Disorder in Prisons*

(i) *Transfers to mental hospitals*

There are currently several statutory provisions authorizing the transfer of mentally disordered prisoners to psychiatric hospitals. But these provisions have been ineffective for years. Examples of inefficiency, neglect and official indifference were first cited in official investigations in 1938, again, in 1956 and, most recently, in 1969. There has been little indication that this situation has significantly improved.

Why is this the case? Although the written law could be improved the real problem here is with practice. In the jurisdictional game between departments and governments the players have lost sight of the objective—the needs of the mentally ill prisoner. It is inexcusable that such inmates are neglected while federal and provincial governments argue over who has responsibility for their custody, care and treatment, and who should foot the bill. The various governments and departments need to sort out their respective jurisdictions and cooperate to provide expeditious and efficient transfer provisions from prisons and penitentiaries to psychiatric facilities. As with hospital orders, such transfers should require the consent of the prisoner and the agreement of the psychiatric facility which is to receive him. Either the prisoners or the hospital may request his return to the correctional system subject, in the case of the hospital, to review by a review board. As well, what was said concerning hospital orders with respect to privileges, remission, parole etc., apply equally here.

(ii) *Section 546 of the Criminal Code*

There is one transfer provision that must go. It is section 546 of the Criminal Code which provides that a prisoner apparently suffering from mental disorder may be transferred to a psychiatric facility under a lieutenant governor's warrant. This section is redundant where there are similar provisions for transfers in the provincial and federal correctional legislation. It is also repugnant because it is of indefinite length and not subject to appeal

or review. We therefore recommend, as has been recommended in other studies, that section 546 be repealed.

(iii) *Psychiatric services within prisons*

There is a need for increased psychiatric services within penitentiaries and provincial correctional facilities. Inadequacies of present services are well-documented elsewhere and need not be rehearsed here. It must be said, however, that there is also recent indication that such services are being considerably up-graded in some areas.

By recommending that present psychiatric services in prisons be improved we acknowledge that society should provide basic psychiatric treatment for those it imprisons. This obligation is part of society's wider obligation to respect basic human rights of all members of the society. It follows that prisoners should not be deprived of health services that would have been available to them had they not been in custody.

VII. Psychiatric Evidence, Reports and Remands

Common to all stages of the criminal process where an accused's mental disorder becomes relevant is the need to call upon psychiatric experts to assess the presence and effect of an accused's mental disorder. Although psychiatric advice is sought for different reasons at each stage, the procedure followed in each is similar. The accused or, after trial, the offender is remanded to a psychiatric expert, usually a psychiatrist who prepares a report and may ultimately be called upon to testify in court. In the following paragraphs we briefly consider the role of psychiatric experts in the criminal process, the form and delivery of medical reports and remands for examination.

A. Psychiatric Experts* and the Criminal Process

Lawyers often criticize psychiatry for lack of precision and psychiatrists as being paid partisans in court. Psychiatrists are often irritated by the arbitrary and diagnostically irrelevant distinctions seemingly sacred to the law and the general indifference of lawyers to the medical needs of a mentally disordered accused. For them the

*Although it is usually psychiatrists who appear in court, our remarks are directed at all professionals working in the field of psychiatry.

adversarial climate of the criminal law is unresponsive to the realistic presentation of psychiatric evaluations and, at times, personally degrading. For these and other reasons, few would describe the relationship between forensic psychiatrists and criminal lawyers in most jurisdictions as one of uninterrupted harmony—it is a difficult relationship.

But as with many difficult relationships the problem is lack of understanding: lack of understanding of psychiatrists' role in the criminal process; lack of understanding of the limitations of psychiatric expertise; lack of understanding of the character—whether legal or medical—of the questions in issue.

First, consider the psychiatrist's role as a witness. He is an expert witness like any other. He did not observe or directly participate in the disputed incident; his evidence is by way of opinion based on special knowledge, training and experience. His role is to *advise* the court on matters outside its own general knowledge and experience.

His advice and guidance is intended to aid judicial decision making, not to cloud or usurp it. This is not always what happens and both judges and psychiatrists must understand that it is not the function of the expert witness—psychiatrist or otherwise—to decide the question in issue. Whether an accused is unfit or criminally irresponsible are decisions to be made by the court.

This is only possible if the issues before the court are reaffirmed as judicial, but with an important psychiatric element. It must be recognized that terms such as "fit to stand trial" and "criminally responsible" are medically meaningless and that it would be unwise to expect or (as is sometimes the case) demand that psychiatrists express their opinions in such legally conclusive terms.

It is also important that the legal profession understand the nature and focus of psychiatric expertise. Diagnosis is not framed in absolute terms; it is always a question of degree. This is because its aim is to ascertain the psychiatric needs of patients, not to define their legal rights and obligations. Rather than forcing psychiatric

evidence into medically meaningless '"yes-no" answers to questions on which psychiatrists are no more expert than anyone else, we should encourage psychiatrists to give evidence on what they know best—the psychiatric state of the accused.

Although we recognize that it will sometimes be necessary for psychiatrists to appear in court, we recommend that whenever possible this be avoided. Increasing demands are being made on already over-taxed psychiatric services and frequent, unnecessary court appearances add significantly to this burden. Complete and understandable psychiatric reports and a provision to allow the deposition of written rather than *viva voce* testimony would greatly reduce the number of courtroom appearances of psychiatrists. As well, exchange of psychiatric information and communication between examining psychiatrists as part of general pre-trial discovery would reduce the possibility of contradictory testimony when psychiatrists do appear in court.

We also recommend that the present adversarial confrontation between psychiatrists be re-examined. Although it is outside the ambit of this paper to consider the role of the expert witness in court, we note that many American states and European countries have adopted a system of court lists from which psychiatrists are randomly chosen. This has greatly reduced the possibility of conflicting psychiatric testimony in court and is the stated preference of most psychiatrists. Others contend, however, that a single psychiatric report may give a false impression of the unaniminity of psychiatric opinion and, although it may prove embarrassing to some, the adversarial confrontation more accurately reflects the present unsettled state of the science.

B. Psychiatric Reports

Basic to effective use of psychiatric expertise is a complete and understandable report. At present, however,

psychiatric reports are the subject of mutual medical, judicial recrimination. Psychiatrists complain that the courts won't tell them what they want, while the judges complain that they don't know what the psychiatrists are trying to say. Both accusations are often justified.

(i) *What do the courts want?*

What do the courts want? Hard to say, by looking at the Code. The Code not only doesn't specify what psychiatric reports should contain, it doesn't even require that a report be made at all. The only directive is that the accused be remanded "for observation". In practice this means that the accused will be sent to a psychiatric facility, be examined and the results of the examination forwarded to the court. But usually nothing is said about the reasons for the examination or the form of the report. The remanded accused just appears at the hospital for evaluation without further explanation. Attempts by psychiatrists in some provinces to obtain more information from the courts has met with very limited success.

So the psychiatrists are obliged to guess. If the remand is made under the Code the logical assumption is that the judge wants help on the issue of fitness to stand trial. But if the patient is obviously fit (as is usually the case) it is likely that the judge really wants to know something else. For example, he may want to know if the examining institution can do anything for this particular accused, in effect, he is asking the institution, "Would you like him back?" Or the judge may want to know if the institution could keep the accused as an involuntary, civil patient, in effect, "Could you keep him?" The psychiatrist tells the judge what he thinks the judge wants. But many judges and lawyers complain that the psychiatrists don't express themselves in ways readily understandable to non-medical persons.

(ii) *What are the psychiatrists trying to say?*

What are the psychiatrists trying to say? Hard to say, by looking at many psychiatric court reports. The reports

are often short, conclusive on the legal issues and lacking in detail.

Semantics are a problem here. "Psychotic", "neurotic", "schizophrenic", "paranoid" and the like don't even have consistent meanings within the medical profession. Not surprising, then, that they are misunderstood and distorted by lawyers and judges. Much of this language problem would be resolved if psychiatric reports were carefully designed to require psychiatrists to define their terms and explain the effect of mental disorder on the accused's personality and behaviour in a way that could be understood by an intelligent lay-person.

There are, then, two basic requirements for all psychiatric reports. The judge must decide what information he needs and then clearly communicate this to the psychiatrist. The psychiatrist must then communicate his professional knowledge to the judge in a complete and understandable report.

We therefore recommend:

(1) that the Criminal Code should specifically state that psychiatric remands are for the purpose of preparing a psychiatric report.

(2) that the form and content of the report be designed to encourage the understandable presentation of psychiatric evidence. It should also discourage psychiatrists from testifying in legally conclusive terms.

All psychiatric reports, however, will not be the same. Different issues arise and are decided at different stages of the criminal process. It follows that the form and content of the report will vary. Indeed, there are some kinds of information that should *not* be communicated to the judge before guilt or innocence is established.

Examination before trial—An accused suspected of a mental disorder should be examined as early as possible to provide information to both the defence and the prosecution as to how that particular case should be handled. The

relevant issues before trial are the accused's fitness to stand trial and the possibility of diversion from the criminal process. Pre-trial reports should focus on these two issues and not contain information potentially prejudicial to the accused. For example, there should be no reference to the psychiatric likelihood of the accused committing an offence similar to that charged. This and other kinds of information could create the risk of convicting the accused for what he might do rather than for what he actually did.

Examination at Trial—At trial the relevant issues are fitness to stand trial and criminal responsibility. If fitness is the issue then that should be the only question to be considered by the report. The report on criminal responsibility should also be designed to limit the psychiatric evidence to that specific issue. When both issues are raised, they could be considered in the same report.

Examination after Trial—Examination after trial would only be ordered where the accused has been convicted and sentenced to a term of imprisonment. The purpose of the report would be to provide the judge with psychiatric information that is helpful in deciding whether a hospital order is appropriate. It would be comprehensive, considering the severity of the mental disorder, the possibility of treatment, the time required and whether the examining institution would receive the offender back as a patient or if they would recommend some other institution.

Generally, the Code should clearly indicate when psychiatric reports are to be prepared, why they are to be prepared and to whom the should be sent. The preparation of detailed report forms, however, should be worked out and continually reviewed by psychiatrist, lawyers and judges in various communities and jurisdictions. This would allow the adjustment of reports to changing scientific developments and local court and psychiatric facilities. It would also foster communication and understanding between psychiatry and the law. It would also be helpful if model report forms and check lists could be developed by either the Ministry of the Solicitor General or the Ministry of Justice in consultation with the provinces.

C. Remands for Examination

Remands are used to get the accused from the court to the psychiatrist for examination. Present law provides for remands of up to 30 or 60 days. But these provisions are used in only a fraction of the psychiatric examinations which occur. Most "remands" are made following provincial procedures or procedures developed through custom in a particular jurisdiction. Some provincial lock-ups, for example, have consultant psychiatrists who examine persons suspected of having mental disorders. This is usually done without any Code remand being made. In 1972, for example, there were more of these informal assessments in one Ontario jail than the total number of formal remands made under the Code for the entire province. There are also a large number of remands made under provincial mental health legislation, sometimes simultaneously with a Code remand. Discussions with psychiatrists and court officials reveal the following problems.

(1) Although the mentally ill usually manifest the symptoms of their illness at the early stages of the criminal process, the Code provides for no remand before the preliminary hearing.

(2) No attempt is made to tailor existing remand provisions to their purpose or to communicate the purpose to the examining psychiatrist.

(3) The present remand system doesn't take into account the different kinds of information and expertise required for the various legal issues to be decided.

(4) Although the Code now provides for flexibility as to the length of remands (up to 60 days) most remands are for the maximum periods and there is no provision for non-custodial examination.

When the need for psychiatric examination flows from an individual's involvement in the criminal process, it is important that the remand for such examination be made under provisions of the Criminal Code. Informal and provincial remands may have the effect of depriving the accused of the safeguards provided for by the Code. But

this will only be possible if the Code's remand provisions are dramatically improved.

There must be flexibility in the remand system with a choice of remands appropriate for the different legal questions in issue. For example, psychiatrist tell us that of all the various things courts ask them to do, unfitness is the easiest and quickest to assess. Some authors have even suggested that lay assessment would suffice in most instances. This being the case, the remand for an examination to determine fitness should be short. Also because unfitness does not entail dangerousness, the examination should be made with no more restriction on the accused's freedom than if no examination were required. That is to say, if the accused would ordinarily be released pending trial, the examination should be on an out-patient basis. If, however, the accused is awaiting trial in custody, the examination could also be made in custody, either in the correctional facility or the psychiatric hospital.

As a general principle, examinations before or during trial should not entail detention in a mental hospital. The customary 30 or 60 day commitment for examination may have unnecessarily detrimental effects on the accused. Quite apart from the social stigma and personal trauma involved in being involuntarily detained in a mental institution, the accused may also face separation from family and friends and loss of employment. Often the examination is no more intensive, takes no more time, and is no more useful than if it was done with the accused as an out-patient. If detention is felt necessary as preventive measure or for therapeutic reasons, it must be justified by the person or authority alleging its necessity. Otherwise, the last intrusive remand should be used.

This, however, does not apply to post-trial examination for the purposes of hospital orders. At that time detention of the offender is inevitable and the examination would usually require observation for longer period of time within an institution. This allows the staff of the institution to fully consider possible therapy programs, the degree to which the offender could benefit, and whether they would accept him as a patient. It also allows the offender to become familiar with the institution and help

him decide if he would rather spend his sentence there than in prison. As was indicated in the earlier section on hospital orders, the decision to enter therapy is his and the hospital's.

We therefore recommend:

—that remands of accused or offenders suspected of being mentally disordered be made under the Criminal Code

—that the Criminal Code provide for a variety of remand possibilities, some involving no or minimum detention

—that the remand ordered be specifically linked to the nature of the psychiatric expertise sought and that this be clearly communicated to the psychiatrist

—that wherever possible all pre-trial and trial remands no involve deprivation of the accused's freedom. Where detention is thought necessary, it must be justified by the person alleging its necessity.