

**Fitness To Stand Trial**

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**How Discourses of Rationality, Reasonableness and Culpability Inform the Law and  
Psychiatry To Create Standards of Normal**

By

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### **Abstract**

The objective of this thesis is to demonstrate the importance of the concepts of rationality, reasonableness, culpability and autonomy that inform and support our conception of both the person and the punishable subject. A critical discourse analysis tracing these concepts through both the law and psychological tools used to evaluate the fitness of a person reveals that these concepts and their implied values are inconsistently applied to the mentally disordered who come into conflict with the law. I argue that the result of this inconsistency compromises a person's autonomy which is a contradiction to this concept as a foundational principle of the law. Ultimately, this thesis does not provide a solution to be employed in policy making, but its analysis leaves open possibilities for further exploration into the ways legal and social justice can be reconciled.

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## Table Of Contents

Chapter 1 : Introduction:	p. 4
Chapter 2: The Development of the Discourses of the Rational, Reasonable, and Culpable	p. 22
Chapter 3: Construction of Fitness Through Scientific Evaluation: The FIT-R	p. 53
Chapter 4: Fitness at Work: Precedent Setting Canadian Cases	p. 69
Chapter 5: Applying the Fitness Criteria Post <i>Cooper</i> and <i>Whittle</i>	p. 87
Chapter 6: Drawing Conclusions:	p. 99
Bibliography	p. 113
Appendix A: The Charter of Rights Sections 7 – 14: Legal Rights	p. 118
Appendix B: Ontario Mental Health Act: Sections 15 – 25	p. 121

## Chapter 1 - Introduction:

The fascination of popular culture with the criminal justice system and the issues it addresses tends to suggest that justice is about properly punishing individuals who cause harm. The proliferation of storylines that deal with clever serial killers, mass murderers, and the mentally disturbed in movies like *Silence of the Lambs* and *Copcat*, fictional television shows like *Law and Order* and *CSI: Crime Scene Investigations*, and in documentaries like *American Justice* and *Crime Stories*, creates a sense of urgency that social life is dangerous and needs to be rigidly controlled. Moreover, the image of infamous characters, like Hannibal Lecter, helps to reinforce their deviant status as moral monsters lurking in the shadows.

The concern of this thesis developed out of an initial interest in the criminal law and how it punishes, how we determine who is to be punished, why, and how criminal justice intersects with social justice. A specific focus on the “insanity defence” developed out of an investigation into the justification for punishment and an interest in how the law deals with criminals who deviate from common conceptions of them (i.e. as rational actors). Popular sentiment towards the insanity defence seems to construe it as a way of “getting away with a crime”, and avoiding accountability and culpability for a criminal action. This sentiment seems particularly strong when the case is well publicized and especially heinous.<sup>1</sup>

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<sup>1</sup> For instance, in late July 2008, a man stabbed and beheaded a fellow passenger aboard a Greyhound bus headed for Winnipeg, Manitoba. On March 5, 2009, the outcome of the trial for the accused was published as he was found not criminally responsible by reason of mental disorder. The victim’s family thinks that this man “got away” with his crime since he will be serving his time in a mental institution instead of a prison and will have no criminal record (Associated Press, 2009).

Punishment has a significant role in criminal justice and has been historically justified by three main principles: deterrence, retribution, and rehabilitation. These justifications are based on some fundamental assumptions about what the criminal is, specifically, a choice maker who must be held accountable for his actions.<sup>2</sup> Historically, it has been claimed that a person who cannot comprehend his criminal acts, their magnitude, or their consequences because of mental disorder/disease (that prevents him from being a rational actor) should not be held criminally responsible for those actions.<sup>3</sup> Moreover, the goals of punishment are thwarted by this kind of accused person. First, the accused cannot be deterred by punishment because he does not comprehend what he did as wrong. Second, he cannot understand why he is being punished or that he is being punished, so the goal of retribution is futile. Finally, while rehabilitation assumes that forces beyond the control of the individual are the cause of her behaviour, the failure to comprehend the meaning of an act as wrong can also render futile the goal of rehabilitation as efforts to correct wrong behaviour will not be appreciated.

As a result, the following questions arise: how does the law deal with the mentally disordered? What happens when the mentally disordered come into contact with the law? Is the response of the law a just one? The mentally disordered person who is unable to be held criminally accountable for his actions and hence punished, may nonetheless still be thought of as a threat to society for what he has done in the past and, in some cases, for the level of risk he poses still. The law's recognition of the potential threat results in detainment or containment in psychiatric facilities where treatment may be a part of the

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<sup>2</sup> In order to overcome sexist language, I will use the pronouns him, her, he, she, etc., interchangeably throughout the course of this paper.

<sup>3</sup> This idea can be traced to Beccaria (1880) who states that punishment should be less severe for youth and the insane.

sentence regiment. This detainment is a way of segregating populations considered deviants from society to protect the social order and to keep normative behavioural standards from being questioned or changed (Arrigo, 2003). The implication of this kind of control is an emphasis on fundamental concepts of rationality, reasonableness, self constraint and impulse control. These values have been passed down to us from the Enlightenment<sup>4</sup> and are maintained by the legal and psychiatric institutions working in tandem.

Discovering this response provoked investigation into psychiatry and psychology in the sphere of criminal justice in order to ascertain their role in the course of the law and how their presence is felt in criminal law. In his book, *Insanity on Trial*, Norman Finkle (1988) provides an examination of the historic development of the “insanity defence,” the role of psychology in the law and its tensions. Finkle (1988) dedicates a single chapter to the idea of competence to stand trial. The issue of competence to stand trial is both intimately bound to the “insanity defence” and quite distinct from it. Both of these legal issues deal with persons who are mentally disordered and/or diseased, but the focus of the “insanity defence” is about whether or not the accused person understood what he was doing when the crime was committed, while the issue of competency is focussed on whether or not the accused can participate adequately in his trial.

Canadian literature in the area of psychology and the law refers to competency to stand trial as fitness to stand trial. In general, these terms are equivalent and used interchangeably by authors who are writing for both an American and Canadian audience

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<sup>4</sup> This era of thought sought to account for behaviour by investigating actual causes rather than supernatural. “the *philosophes* [in this era] were advocates of a new faith in reason, toleration, materialism and empiricism” (Deutschmann 1994, p.99).

(see for instance Zapf, 2001, Roesch, et al., 1999, Arrigo, 2003). Fitness to stand trial became an important focus because it is the first point of contact the courts have with an accused individual and the determination of fitness or unfitness has important ramifications for the course of the judicial process of the accused. The concept of fitness embodies several significant ideas about the punishable subject<sup>5</sup> and, in Canada, the legal criteria about who is fit are found in the *Criminal Code*. Literature in this area seems to have two main focuses. On the one hand, there is an attempt to demonstrate the usefulness of psychological tools designed to assess trial fitness (for instance, Zapf, 1999; Golding, et al. 1984; Bagby, et al. 1992) and an intense critique of them (Veiel & Coles, 1999, 2001). On the other hand, there are general examinations of the legal processes of questioning fitness and the consequences of being found unfit (Verdun-Jones, Simon N, 1981; Davis, Simon 1994, Arrigo, 2003).

The objective of this thesis is to demonstrate the importance of the concepts of rationality, reasonableness, culpability and autonomy that inform our conception of both the person and the punishable subject, and how these concepts inform both the law and its evaluation of the mentally disordered accused who stand before it. I argue that these concepts are important Western values that are inconsistently applied to the accused whose fitness for trial is questionable. This inconsistency stems from a lowering of standards that are normally implied by these values to create punishable subjects. The result is to process accused individuals through the court system even though they might not have an adequate understanding of that procedure or be able to act in their own best interests.

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<sup>5</sup> An exploration of these ideas to come.



This study is an examination of the way that Canadian law and legal institutions deal with accused offenders and how legal institutions rely on and reinforce fundamental concepts to evaluate and determine how accused offenders should be handled as they face the judicial process. Specifically, I explore how accused offenders are sorted by determinations of trial fitness, a conceptual construct employed by the legal institution during the initial stages of judicial processing. This process is justified by the legal institution as a way of preventing an accused person from unfair trial proceedings (Davis, 1994, p. 319). Briefly, in order to be fit for trial, an accused person must be able to understand and comprehend the proceedings of a trial, its potential consequences, and be able to assist in her own defence (Viljoen, Roesch, Ogloff, & Zapf, 2003, p. 369).

### *On Conceiving Justice:*

Starting with the premise that both criminal and social justice have something in common – the idea and pursuit of justice – this thesis makes distinctions between them in order to understand where they intersect and diverge. This theoretical exercise is important because it seems that popular ideas of justice tend to conflate them when two branches of justice are not necessarily congruent with one another.

The general concept of justice can be broadly conceived as having an ethical or moral underpinning that makes the distinction between right and wrong meaningful.<sup>6</sup> Criminal justice, however, tends to concern itself with controlling social activities to maintain social order<sup>7</sup>, and sees itself as providing the greatest good for the greatest

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<sup>6</sup> From here on, I will use the words moral and ethical interchangeably.

<sup>7</sup> See for instance, Garland (1990) *Punishment and Modern Society* p. 57.

number – a utilitarian perspective<sup>8</sup>. Moreover, the criminal justice system understands itself to be the enforcer of morals<sup>9</sup> (presumably provided by a populous and enacted by representative officials on behalf of the public) and part of its role is to mete out punishments to those who deviate from or violate those morals by harming others in some way. This conception of societal functions stems from the idea that people are bound by a social contract – one that prevents them from exacting their own justice in exchange for the protection from a collective body (Locke, 1995, pp. 350-352).

Broadly conceived, social justice is an attempt to alleviate (or eliminate) inequity among individuals and groups in a community (regardless of size), whether they are issues of redistribution (of goods) or of recognition (of status of some kind).<sup>10</sup> Given this conception of social justice and the definition of criminal justice above, it is not obvious that these two branches of justice are congruent. The utilitarian principle that informs criminal justice presumes inequalities within society and this presumption does not seem compatible with the concerns of social justice. How can these differences be reconciled? The answer lies with the connection these concepts have to the ethical realm. Thus it is necessary to analyse how social justice is connected to the ethical by way of a brief overview of its development as a concept. Outlining the notion of social justice will also demonstrate the development of important concepts like rationality, equality, and

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<sup>8</sup> The philosophy of utilitarianism and its use in law is put forth by Jeremy Bentham in his work *Introduction to the Principles of Morals and Legislation* (Bentham, 1789/2000). The idea of Utilitarianism is later refined by John Stuart Mill and revisited in contemporary literature by John Rawls. These ideas are discussed below.

<sup>9</sup> For example, “Durkheim conceives of punishment as a straightforward embodiment of society’s moral order...” (Garland, 1990, p. 25).

<sup>10</sup> See for example Iris Young (1997) and Nancy Fraser (1995) for developments of this conception of social justice. For instance, Fraser (1995) is interested in the relationship between recognition and redistribution because she thinks that they are fundamental to the idea of justice; justice cannot be achieved without including them both. Young (1997) argues from a position that both recognizes the importance of recognition and redistribution, but thinks that it is necessary to pluralize categories to “[diffuse] the starkness of redistribution...”

autonomy. It will also show how these concepts are employed in the construction of the person as a punishable subject and his connections to being responsible and culpable for his actions and behaviours. This kind of overview is best executed by examining some key philosophical theories about justice.

### ***A Brief History of the Development of Social Justice:***

Prior to Adam Smith<sup>11</sup>, distributive justice was not considered an issue of justice at all. The poor were conceived of as inferior and their plight was, in some respects, considered a divine ordinance, or a part of God's hierarchical plan for human beings. Any attempt to relieve the suffering of the poor was regarded as interfering with God's plans. As a result of this way of thinking, relief efforts became the responsibility of the Church and private individuals who used the task of nominally assisting those who suffered as an opportunity for their own moral benefit. Smith (1789/2000) has been credited with arguing that the poor were just as capable as the well off to make respectable decisions. Smith "was a virulent opponent of the notion that the poor are inferior in any way to the well off" (Flieschaker, 2004, p.65).

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<sup>11</sup> Adam Smith is best known for his work about the economy, *The Wealth of Nations*, but he also wrote extensively about moral philosophy and advocated a view of humans that equalizes them despite material wealth. He suggests in *A Theory of Moral Sentiments* that, "When he views himself in the light in which he is conscious that others will view him, he sees that to them he is but one of the multitude in no respect better than any other in it." This recognition is what Smith thinks accounts for sentiments of shame and remorse after the infliction of injustice upon another. Moreover it is also the equalizing force that allows individuals to let each other carry on in their own pursuits uninterrupted unless that pursuit causes harm to another person. The difference between people is thought to be the product of culture and education. Smith writes in *The Wealth of Nations*, "The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature as from habit, custom, and education" (Smith, 1789/2000).

Building on these arguments for the equality of people at a basic level, Immanuel Kant's moral theory specifically "proclaims the equal moral worth of all human beings" (Flieschaker, 2004, p.73) and that they are morally equal because they are rational beings. This claim sets up a theory of morality that calls for people to treat one another as ends in themselves and not merely as means to an end. The Categorical Imperative specifically calls for actions to be performed from a sense of duty rather than any kind of emotion or volition (Kant, 1988, p.25). The problem with "charity from inclination" according to Kant is that it results in a hierarchy between the giver and the recipient where the giver gets a sense of self worth at the expense of the recipient.<sup>12</sup> Charity from inclination is no virtue at all for Kant because it does not promote "... a community of *equal* rational beings, a community that respects the equal absolute worth of every individual within it." (Flieschaker, 2004, p.72) This conception provides the foundation for secular justice, and Kant's careful articulation of the equality of all rational beings is the principle that is most relied upon for the grounding of theories of justice.<sup>13</sup>

In contrast to Kant's ideas about intention and duty as requirements for moral actions is the Utilitarian theory. Utilitarianism is most interested in whether human good in general is promoted by principles of virtues.<sup>14</sup> If human good is not promoted, then those virtues can be rejected. John Stuart Mill (2000) addressed the issue of how utilitarianism can account for justice in its schema. He argued that justice is the most basic utility that must be fulfilled before any other type of utility (as cited in Mill, 2000,

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<sup>12</sup> This idea is later picked up on by Derrida (1992) who claims that a gift can never be recognized as such because to recognize a gift as such puts into play power structures.

<sup>13</sup> See also Kant, 1988, p 60.

<sup>14</sup> "The equal claim of everybody to happiness, in the estimation of the moralist and of the legislator, involves an equal claim to all the means of happiness except in so far as the inevitable conditions of human life and the general interest in which that of every individual is included set limits to the maxim; and those limits ought to be strictly construed" (Mill, 2000, p. 173).

p. 172). But justice has been contrasted with utility (i.e. human good in general) precisely because justice is thought to deal with individual rights. In his critique, Flieschaker (2004) writes, “[j]ustice is supposed to protect *individual human beings* against being sacrificed for any societal greater good” (Flieschaker, 2004, p.108). Moreover, utilitarianism is a teleological philosophy that measures the good by the end result of an action and not by the actor’s intentions. If we stretch the membership of those people involved in the utilitarian calculus to include the future, what is judged to be good in the present is not necessarily going to be viewed this way in the future and therefore rectification becomes a problem. Additionally, the *telos*<sup>15</sup> is never achieved if we include the future, so there are no grounds on which to judge the goodness of acts or for evaluating proposals to solve problems.

John Rawls, following many of his predecessors, rejects the idea of morals as having a divine nature. Instead, he sees them as products of human society. Rawls’ emphasis on the individual leads him to reject the utilitarian project<sup>16</sup> to show that there can be separate systems of ends. For Rawls, “justice ought to be concerned with the distribution of ‘primary goods’ – goods that are necessary for the pursuit of practically every human end...” (Flieschaker, 2004, p. 111). The ultimate principles to determine the good in Rawls’ work are rationally chosen by group members who are unaware of their social position, gender, material wealth, *et cetera* (the veil of ignorance). Rawls suggests that people are fundamentally self interested (“rational and mutually disinterested”) so principles chosen from this exercise will be chosen by people who hypothesize

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<sup>15</sup> *Telos* means end.

<sup>16</sup> “I shall maintain instead that the persons in the initial situation would choose two rather different principles [instead of utility]: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities ... are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society” (Rawls, 2004, p. 54).

themselves to be the least well off not knowing their actual situations (Rawls, 2004, p. 53). Rawls' achievement then is to precisely articulate what is meant by justice, and he defines what goods should be distributed and why. One of the problems with Rawls' theory is that it already presumes a liberal democracy and does not alleviate the suffering of those who really are the least well off.

Despite the criticisms of the Modern project<sup>17</sup>, Jurgen Habermas (1980/1997) attempted to extend it via a notion of communicative ethics. He suggests that justice can be produced through communication which will allow Man to both retain his individualism and also to come to a consensus without losing his autonomy in a group dynamic. Communication as a rational activity performed by equals to come to a consensus is an "ideal speech" situation and what Habermas thinks will result in social justice. This attempt is a way to resolve the conflict between deontological and teleological ideas about justice. But Habermas' emphasis on rationality is problematic for it suggests a way of developing thought in a specific pattern so as to use the force of argumentation to persuade others to accept propositions (Love, 1989, p. 273). The development of this method hinges on accepting traditional Western ideas of logic, rationality, and argumentation. While a group may be able to develop its own accepted way of achieving an ideal speech situation, this achievement will not necessarily apply by extension on a global scale. This inapplicability leads to cultural relativism and does not resolve issues of inequality or inequity as communicative ethics breaks down.

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<sup>17</sup> The Modern project, or Modernity, is one that embraces science and rationality as ways to solve the various problems facing humankind since the world is thought to be knowable and controllable. It suggests that there are in fact universals that can be discovered using science, reason and logic and that the world can be classified, ordered and measured. Contrast this understanding to the postmodern project which rejects the idea that there are universals to be discovered by reason and is suspicious of claims that suggest reason is the only way to progress and know the world. Postmodernism suggests that knowledge of "facts" is relative to individual histories.

This brief and simplified outline of the history of distributive (social) justice provides a foundation upon which criticisms of Modernity's ideas about human nature and justice are built. The theorists outlined above have found some way of dealing with problems of ethics that plague theories of justice. Most of them hinge on the Kantian conception of people with equal moral worth. While Kant's moral theory seems to avoid the power structure pitfall common to other Modern justice projects, his moral theory hinges on a conception of a community of rational beings and the Categorical Imperative can only be undertaken by said beings. Given that these various social justice theories have some kind of ethical component, it is untenable to divorce ethics from the notion of justice despite their shortcomings.

Iris Young (1990) provided a scathing critique of Enlightenment principles that have thus far been thought to be foundational for moral and social justice theories. Young broadens the scope of social justice from the distributional paradigm to one of recognition, focusing on domination and oppression. Rather than conceptualizing the plurality of social life as ultimately stemming from the universal – the logic of identity – Young demonstrates the problems with such thinking. She writes,

The logic of identity ... [is] an urge to think things together ... to conceptualize entities in terms of substance instead of process or relation ... The logic of identity constructs totalizing systems in which the unifying categories are themselves unified under one first principle (Young, 1990, p. 98).

Thus, according to Young, the logic of identity leaves no room for difference; rather it forces binaries that become hierarchal as they become associated with good and bad. The criticism of the logic of identity demonstrates the failure of the Modern ethics. Modern ethics stems from a theory of an “ideal of impartiality” whose foundation is the logic of

identity. This ideal of impartiality as an *arche* suggests that all rational subjects can apply moral principles in a fashion that is uncompromised by difference. That is, moral principles are decided upon and applied in a manner that is objective. This application is thought to be just because it treats individuals using the same basic formulas so no one finds himself or others treated in an exceptional manner. The law works in a similar fashion, by presuming both the innocence and fitness of those over whom it governs.<sup>18</sup> This criticism of social justice by Young is one that will be returned to in the next section.

### ***Theory/Methodology:***

This discussion of social justice history, while brief, provides a foundation to examine criminal justice conceptions and processes. I suggest here that criminal justice and the law have traditionally rested upon an “ideal of impartiality” and have endeavoured to treat punishable subjects in a manner that is uniform. Like crimes are thought to receive like penalties and precedent setting rulings are hard fought and won. Criminal justice is founded on the dichotomy of right and wrong, and/or good and bad for it is designed to deal with people who fail to behave in socially acceptable ways. Criminal justice purports to uphold the good, protect victims, and punish those who inflict harm within a community and it does so because it stems from both retributive and

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<sup>18</sup> Not only does the law presume certain basic characteristics of those people over whom it governs, but its ability as a set of rules by which people agree to be bound stems from the idea of a social contract of sorts. Thus the discussion of the idea of a social contract above is an important setting for an investigation into the power of the law and its functions. Markus Dubber (1998) traces the developments in the attempt to justify the state's power to punish if the social contract is entered into by rational persons who agree to limit their behaviours in exchange for state protection. He writes, “Since the social contract was said to originate from the recognition by rational persons that they would stand a better chance of developing their capacities in a cooperative system than in a war of all against all, there was something odd about the need to enforce rational rules against rational persons” (Dubber, 1998, p. 114). He points out that “the moral and political theory of the Enlightenment, in short, rested on the autonomy of abstractly identical rational persons” (Ibid.). I explore the concepts of rationality and autonomy later in this paper.



utilitarian principles. It is designed as a way to ultimately socially control people and as a result, it sets up definitions or categories of normative behaviour based on principles that are thought to lead to the greatest good. The utilitarian motivation of the criminal justice system does not concern itself with remedying the broader social ills that may cause people to turn to criminal behaviour, and so it can be argued that the goals of criminal justice are contrary to those of social justice.

At a broad level, this project is an exploration of this contrast. I have chosen a specific and limited field of inquiry, focusing on fitness and peripherally, the discourse of insanity. The limitation of the focus of this inquiry is not mean to suggest that other forms of inequality do not impact the justice system. Other inequalities within the justice system such as race, class, ethnicity, and gender present challenges in reconciling criminal and social justice<sup>19</sup>. Moreover, the limited site of this inquiry is not to suggest that these various other inequalities do not impact on the unfit in additional ways<sup>20</sup>. Thus, this study contributes, more broadly, to our understanding of inequalities within criminal justice and social justice. This field of inquiry allows for an investigation of legal, social, and psychiatric discourses with an emphasis on their language in order to understand the way the punishable subject is constructed. As constructs, the concepts of fitness and insanity have content that is subject to vagueness and interpretation, and which may be used to marginalize populations considered deviant, in need of control, or threatening. Focusing on the way language is used in this context reveals the way deviance is

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<sup>19</sup> See for example: (Wortley, 1996) (R. v. Gladue, 1999)

<sup>20</sup> “Intersectionality recognizes that systems of power such as race, class, and gender do not act alone to shape our experiences but rather, are multiplicative, inextricably linked, and simultaneously experienced” (Burgess-Proctor, 2006, p. 31).

determined<sup>21</sup> and that the medicalization of deviance<sup>22</sup> is potentially detrimental to the notion of social justice. Language is the way we express our ideas, beliefs, and perceptions about the world. Richard Quinney puts it succinctly: “As human beings we construct a language of communication charged with the moral meaning of our being. The categories of human language contain and presuppose definite forms of life” (Quinney, 1999, p. 74).

The way that language conveys the meanings of these constructed concepts (of fitness, insanity, rationality etc.), and informs the tools used to measure them, lacks scholarly investigation in the Canadian context. Influenced by work done in this area in the American context, I provide a critical analysis of fitness within the Canadian Criminal Justice System. Taking a cue from Bruce Arrigo (1993, 2003), it is necessary to investigate these concepts in order to understand how they label and categorize people and approach them as punishable subjects. Arrigo’s approach to psychological jurisprudence has taken a critical stance that demonstrates how binaries like health/illness, normal/abnormal, and competent/ incompetent are constructed and that one of them is privileged. The result is a revelation of the way “in which narratives are pre-reflectively constructed, reinforced and legitimized” (Arrigo, 2003, p. 57). This investigation into

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<sup>21</sup> Garland notes that criminal law establishes categories of persons like that of “the degenerate,” “the feeble-minded,” and “the psychopath” which define an “extended range of deviant or pathological subjectivities” and these categories “subtly modify our conceptions of the norm from which they deviate... These images of the defective self which are now projected by penal practice (as well as by psychiatry ...) have contributed to the modern tendency to view the self as a machinery to be maintained and repaired by specialists and to rethink what was once known ‘evil’ in terms of pathology rather than moral choice.” (Garland, 1990, p. 270-1).

<sup>22</sup> The approach of psychology to deviance “centred the source of deviance within the individual rather than the context [as opposed to the sociological approach]. The need was for treatment or transformation (Duguid, 2000, p. 28). Given these conceptions of the criminal deviant, it is not surprising that penal practice turned towards the medical model. Duguid notes, “the psychologically driven medical model was designed to correct in order that the prisoner could gain sufficient insight into his or her actions to be trusted once again in society” (Duguid, 2000, p. 52).

binaries has been touched on above in my discussion of Iris Young's criticism of Modernity's conception of social justice.

In order to carry out my analysis I will employ a critical discourse analysis. This methodology allows for a demonstration of the structures of power embedded in legal and psychiatric discourses about how the punishable subject should be approached. As noted above, criminal justice is already embedded in a binary of good and bad, right and wrong, and it further develops binaries by employing an ideal of impartiality. It leads us to simplify human nature and the policies designed to control it. Simply put, "wicked people exist – nothing avails except to set them apart from innocent people" (Quinney, 1999, p. 80).

But the criminal justice system has already found that impartiality is unrealistic – it cannot apply itself to those subjects who do not meet specific criteria. The criminal justice system is designed to deal with rational and "response-able" actors,<sup>23</sup> and it must sort them from those who are not. Hence binaries of normalcy and deviance, mad and bad, fit and unfit are posited. But while the language of these categories is appealing on the surface, its deeper meanings reveal what biases and/or power structures are at the foundation by examining the way legal and psychiatric institutions work together. The punishable subject is already defined by specific discourses about morality, normative behaviour and the like, and it is further refined upon entering the judicial system. A fit person goes to trial without delay, but the unfit subject is diverted to the psychiatric

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<sup>23</sup> Labelling theorists make use of the idea of a "response-able" actor. As Ericson (1975) points out, "Hence it is not only a man's external behaviour which must be considered but his awareness of that behaviour, his interpretation of it, and his purposes for engaging in it" (Ericson, 1975). In other words, in order to be "response-able" a person's actions are viewed in light of his ability to understand, engage in, and respond to his environment.

system. Being constructed as unfit has several consequences for the individual, the system, and society, and it will be by examining this concept in depth, that these consequences will be made clearer.

The examination of binaries is part of a technique known as deconstruction. Jacques Derrida used this method to “show contradictions that are structured into the various dichotomies that enable a text to make its claims, deconstruction challenges a text’s authority and coherence” (cited in Carroll, 2004, p.226). Moreover, the importance of employing “Derridian deconstruction, [is that it] helps expose the cultural roots of intolerance that breed and sustain misguided policies, procedures, and practice in civil and criminal mental health laws” (Arrigo, 2003, p. 57).

The post-modern project in the realm of the ethical is uncomfortable at best. The fluidity of meaning and the lack of uniformity reveal the chaotic nature of the world. The post-modern project of deconstruction ensures that all discourse is undertaken critically. Institutional practices become subject to scrutiny, judged by an (im)possible justice so that they may be reconfigured, redefined, and reorganized in their purposes – answering the call from the Other to recognize injustices and indifference.<sup>24</sup> In other words, the structures and policies that are practiced by institutions like the legal and the psychiatric are rethought. What is often taken for granted as common sense, best practice, and

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<sup>24</sup> “One sees this in the Derridian declaration that, ‘Deconstruction is justice,’ but also in his cautioning that one can neither speak directly about nor experience justice. In answering the sense of responsibility to otherness, one serves justice but one does so with a sense of the infinite, open ended characteristics of the task” (as cited in Harvey, 1993, p. 51).

normative is evaluated with a critical lens to see just where such policies and practices can lead us, who they affect, and whether those consequences are justified.<sup>25</sup>

In the context of this investigation, I take three discourses, the rational, the reasonable and the culpable and trace them through the legal system and the psychiatric system as it pertains to the legal. As dominant features of social life, the legal and the psychiatric institutions play significant roles in the formation and shaping of our ideas about who the punishable are, who the insane are, and who deserves to be held accountable for behaviour. Discourse analysis is an appropriate tool for this project because it reveals the power of language to construct reality (or to provide us with a sense of permanence). I have selected these concepts because they have a history associated with our understanding of the idea of the person. I argue that the construction of the punishable subject comes from the discourses of rationality, reasonableness, and culpability working in unison. As the law governs the citizens of a community, it fundamentally assumes that all those whom it oversees share the same basic qualities and are thus equally accountable to it. So, the citizen is constructed as “normal” or “fit” by the assumption of the abilities that demarcate qualities of rationality and reasonableness.

I will demonstrate this assumption in Chapter 2 and follow its importance throughout the course of this thesis. Once I establish the ideas embedded in these concepts / discourses, I show in Chapter 3 how they are reinforced by the psychiatric system by examining how they can be found in a tool designed to evaluate the way

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<sup>25</sup> “It follows then, that deconstruction as applied to psychological jurisprudence, can expose the often-hidden biases, unstated assumptions, and unconscious preferences located within the simplest of practices (i.e. hierarchical oppositions). To this end, deconstructive practice as a method of critical inquiry, ‘reveals and decentres although incompletely and temporarily... how legal arguments often disguise ideological positions’ (Arrigo, 2003, p. 62).

accused offenders fit these criteria. Chapter 4 is an overview of two precedent setting cases in Canadian legal history (*R v. Taylor* and *R v. Whittle*) that I analyze to further show how these discourses play in the shaping of legal strategies and practices. In Chapter 5, I select a few cases that have come before the Supreme Court of Canada after *Taylor* and *Whittle* to examine the consequences as they are practiced following these precedents. Finally, I speculate on the issues raised here and what they might mean for the pursuit of justice – social and criminal. If nothing else, the contribution of this project will be to reopen this topic for more public discussion in a Canadian specific context.

## **Chapter 2: The Development of the Discourses of the Rational, Reasonable and Culpable**

An understanding of the way accused offenders are moved through the criminal justice system needs to begin on the foundation of some of its fundamental principles and assumptions about the human condition. These principles and assumptions about human nature have a significant impact on the way accused offenders are navigated through the criminal justice system and provide guidelines for assessing the status and characteristics of an accused person. This chapter is an examination of the way that accused offenders are determined to be fit for trial and how the discourses of rationality, reasonableness, autonomy and culpability play significant roles in the shaping of the fit and the punishable subject. These discourses set up an understanding of humans as having static, measurable and binary characteristics of free/determined (autonomy), responsible/not responsible (culpable), thinking/ not thinking (rational), and reasonable/unreasonable. The law understands its subjects to be fit by assuming them to be free, thinking, reasonable and responsible choice-making agents<sup>26</sup>. More specifically, I argue that these discourses are unconsciously at work in and through the law and that the response of the law, despite its claim to accommodate difference, results in widening the scope of these discourses and encompasses as many punishable subjects as possible. This response results in a clash between the fundamental principles of autonomy and welfare.

Criminal laws are designed to regulate social life. The legal system claims that it is interested in fairness and that to try a person who is incapable of comprehending the

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<sup>26</sup> "... this constantly reiterated proposition – that individuals are free subjects and responsible for what they do – is a cultural message of immense power, and one which remains in place today" (Garland, 1990, p. 270).

proceedings of a trial or its consequences would be a dismal failure to uphold the fairness principle. In *Cooper v. The Queen* (1979), the Supreme Court of Canada decided that to appreciate an act, one must have an understanding of the consequences of that act.

Moreover, it was in this case that “disease of the mind” was given explicit definition, and that this concept is specifically, a legal one. Justice Dickson stated in *Cooper v. The Queen* (1979), “The guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those who are either incapable of understanding it or of conforming themselves to it” (*Cooper v. The Queen*, 1979, p. 15 at #52). Moreover, the goals of punishment are thwarted by the actor who is insane (mentally diseased / disordered) because he is incapable of appreciating not only the punishment being imposed, but also the wrongness of the action to begin with.

As noted by Meyers, “a competent defendant’s comprehension of why he is being punished makes the punishment more just” (Meyers, 1997, p. 1017). The justness of punishing a fit defendant comes from an understanding that the defendant is a rational actor who has made a decision and now bears out the consequences of it. The law brings the wrongness of the defendant’s act to his consciousness through punishment and can also then act as a means for rehabilitation. An unfit or incompetent defendant is thought to be incapable of rational thought and therefore his punishment fails to ensure his recognition of the wrongness of his actions. Without a consciousness of that wrongness, rehabilitation is thwarted. Accused persons are presumed fit for trial unless otherwise indicated and then they are evaluated for their ability to meet fitness standards. The presumption of fitness by the law is one way that it can justify its ability to punish and is



also a way of treating equally the persons who come before it. The psychiatric system has been called upon to assess these qualities in an accused person.

Understanding the concepts of fitness and insanity (mental disease/disorder) requires a deconstruction of the underlying discourses upon which these concepts are built: rationality, responsibility, and culpability. These concepts identify specific characteristics of the actions performed by the punishable subject. If an actor is assumed to be rational and responsible, then he can be held culpable for actions that are harmful to others. These concepts are not only used in the legal realm, but also in the moral realm to help enforce and inform acceptable and regulated behaviour. These key concepts have far reaching implications for accused persons and how they are approached by the criminal justice system. They assume that all persons share specific qualities that make them members of a community. These assumed qualities also make community members identical, an assumption that is fundamental to the idea of justice. Therefore, when an actor is faced with criminal justice proceedings, he is already assumed to be of equal status to the rest of the community members unless that equivalent status is challenged in some way.<sup>27</sup>

### ***The Principle of Autonomy:***

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<sup>27</sup> Of course, as Markus Dubber (1998) points out, there is a development in the rehabilitation movement of the late 18<sup>th</sup> century that viewed a person's criminal behaviour as indicative of difference. He points out that Fichte thought the criminal is irrational and by his behaviour identifies himself as inferior and in need of some form of rehabilitation in order to be reintegrated into the community (of rational actors to whom the social contract applies).

Before examining the historical development of the insanity defence and the development of the concept of “fitness” (or competence<sup>28</sup>), an overview of the broad principles of the criminal justice system is necessary as these principles inform and underscore the concepts of rationality, responsibility and culpability. One of the basic principles of the criminal justice system is that of the principle of individual autonomy. According to Ashworth, this principle states “... that each individual should be treated as responsible for his or her own behaviour” (Ashworth, 2006, p.25). This principle can be best attributed to Caesar Beccaria (1786) who argued that “... criminals have control over their behaviour, that they choose to commit crimes, and that they can be deterred by the threat of punishment” (cited in Schmallegger & Volk, 2001, p. 113). The implication of this principle is that people are assumed to be free agents who are capable of making choices with respect to their behaviour and that they should be held accountable for those choices.<sup>29</sup> The accountability of an actor for her choices is part of respect for her as a choice-making agent. Failing to have respect for this quality denies the moral agency of individuals and thereby renders the ethical realm meaningless (Ashworth, 2006, p. 26).

This particular principle emphasizes the importance of individual liberty, but the criminal law is also cognizant of the fact that individuals do not exist as independent agents outside of the social realm, and so the principle of welfare also informs the criminal justice system. The welfare principle “gives weight to collective goals,” a utilitarian principle, and seeks to provide general protections to the community (Ashworth, 2006, p. 28). The principle of welfare allows the criminal law to outline what

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<sup>28</sup> The term competence is used in the United States to denote an ability to understand the trial and its proceedings, that it has consequences and to participate in one’s own defence.

<sup>29</sup> It is this characteristic that gives this theory its name rational choice theory.

acceptable behaviours are in the community – providing the “official” goals of the collective while the principle of individual autonomy recognizes that community members choose how they will behave in their social contexts. The criminal law and governing authorities find themselves attempting to strike a balance between these competing principles. In *Swain* (SCC), Justice Lamer points out:

Parliament’s sensitivity to individual rights also expands its competence to legislate with respect to procedure for review of Lieutenant Governor warrants.<sup>30</sup> Although the protection of society rationale may not fully authorize such provisions, Parliament surely may balance individual rights against the interests of protecting society and provide for some system of review (*R v. Swain*, 1991, p. 42 at #118).

Therefore if the community is assumed to be a democratic one, the criminal laws within it will reflect the common goals of the community members. These principles seem to reiterate the idea of the social contract – individuals give up certain liberties to be protected by the collective (Locke, 1995)<sup>31</sup>. Participating in a community in this way, however, does not fundamentally change the way individuals are conceived as rational, responsible and culpable actors.

Given the classical idea that humans are motivated by the pleasure principle and self interest<sup>32</sup>, the criminal law can be thought of as outlining general behaviours that community members abhor in the main. The scope of the criminal law reaches far beyond sanctioning those behaviours that jeopardize the basic needs for the well being of citizens

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<sup>30</sup> LG Warrants were applied to accused offenders who were found to be unfit for trial and automatically remanded into custody and also to those found not guilty by reason of mental disorder. This system no longer exists and has been replaced by Review Boards that are legislated to periodically review the cases of persons who are unfit for trial and who are held in psychiatric custody as well as offenders sentenced to psychiatric custody after being found not guilty by reason of mental disorder.

<sup>31</sup> The idea of a social contract is important to social/political philosophy and is elaborated upon most famously in contemporary times by John Rawls in his work *A Theory of Justice*. (1971)

<sup>32</sup> As human nature was conceived by Jeremy Bentham (2000) – discussed below.

in a community (i.e. life, liberty, etc.). Property protection and a myriad of behaviours that may have no “victims” are also regulated by the criminal law. This scope is a way of conveying to community members their responsibility to one another in order to make social life productive and enjoyable. This liberal perspective comes from a long historical tradition starting with Socrates, who in the *Crito*, argued that a person who resides in a community and who does not agree with its laws has an obligation to either persuade the laws to change or to move out of the state to some place with laws that are more agreeable to him. Remaining in the state (community) is an implied acceptance of the laws that govern the citizens’ behaviours and violating this agreement puts the state at risk (Plato, 2002). The idea of the social contract model of citizenship and responsibility carries through the Enlightenment to contemporary times in the work of John Rawls.<sup>33</sup>

### ***Responsibility:***

As a fundamental principle, the principle of autonomy provides an avenue by which individuals can be held responsible for their choices. Responsibility is a key concept that underlies the criminal law. The concept of responsibility acknowledges the communal nature of human beings. C. B. Farrar, in his speech to the 59<sup>th</sup> Annual Congress of the American Prison Association said that “Responsibility then is an attitude of man as a social agent and concerns his relations to other social beings” (Farrar, 1930, p. 439). The relationship an individual has with others in his community as a responsible agent is guided in two ways: morally and legally. The moral and legal realms are sometimes thought of as synonymous, especially as the law tends to view itself as the

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<sup>33</sup> The post-modern critique of this idea of state formation and the power struggles embedded in this conception is beyond the scope of this discussion. See for instance Nancy Fraser (1995) and Iris Young (1990) for a discussion on the failure of this type of community to recognize diversity and to properly distribute goods.

protector of communally shared morals, but it must be remembered that these spheres are not necessarily connected in this way. While concepts of what is right and wrong sometimes expand and contract with time because they are not absolutes, it is common practice that “individual[s] shall be able to discriminate between right and wrong...” (Farrar, 1930, p. 440). The assumption of this ability by the law leaves little room for a diverse moral realm and reflects the historical assumption of ethics that there is a universal set of rules that applies to all individuals equally. Despite this assumption, freedom of choice and of will is one of the fundamental assumptions about human nature, especially for the principle of autonomy.

Humans are conceived of as free agents who are capable of making choices that result in actions and consequences. Enlightenment philosophers, like Immanuel Kant, who carry on the ancient tradition of universalized morals also ascribe to this idea of the freely choosing agent.<sup>34</sup> One of the justifications of punishment is that it will deter would-be criminals from proscribed actions by making the consequences of getting caught much more severe than the gains of the action (rational choice theory<sup>35</sup>). This argument, as put forth by Jeremy Bentham, is known as the “hedonistic calculus” or utilitarianism (Bentham, 1789). Bentham thought that humans are ruled by pleasure and pain, so the risk of pain must be greater than the pleasure one gains from engaging in proscribed behaviour. Thus, punishment should work as a deterrent by tipping the scales in favour of pain for those people considering illegal means for pleasure. Bentham wrote: “[t]he evils

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<sup>34</sup> Kant thought that as rational actors, people are equal and if they are acting in accordance of the Categorical Imperative, they are not only treating one another as ends and not means to an end, but they are also choosing, by their actions, universalizable imperatives. Thus, actions are chosen freely, but only those of them which are performed out of a respect for duty are moral (Kant, 1988).

<sup>35</sup> Rational Choice theory suggests that human beings weigh the options for action before them and choose the one that best suits their interests and needs using reason to calculate the potential outcomes.

of punishment must ... be made to exceed the advantage of the offence" (quoted in Schmallegger & Volk, 2001, p. 115). Here, the actor is also being ascribed a rational nature and it is understood that choices will be made based on the weight of probability. The choices of this actor, regardless of whether they are right or wrong, carry consequences and it is thought that the actor is responsible for those consequences whatever they might be.

The above discussion about behaviour, human nature, and responsibility provides a general framework that underscores the importance of our social context and how the multitude of ethical values can come together in general. Understanding the way the particular and the universal are related, via the shared human condition, can account for the cohesion of the criminal law. A useful theoretical perspective for this discussion of responsibility is one of existentialism as outlined by both David Harvey (1993) and Jean Paul Sartre (1975). This perspective also weaves together the principles of autonomy and welfare by demonstrating how individuals and communities are related. David Harvey, using ideas reminiscent of Jean Paul Sartre (1975), argues that we create, in fact, the universal through particular actions. He writes, "There are only particular, competing, fragmented, heterogeneous conceptions of and discourses about justice, which arise out of the particular situations of those involved" (Harvey, 1993, p. 50). Moreover,

the double meaning of universality then becomes plain: 'universality in the sense of the participation and inclusion of everyone in the moral and social life does not imply universality in the sense of adoption of a general point of view that leaves behind particular affiliations, feelings, commitments, and desires.' Universality is no longer rejected out of hand, but reinserted in a dialectical relation to particularity, positionality, and group difference (Harvey, 1993, p. 57).

This dialectical relationship between the universal and the particular recalls the image of the human and his decision-making capacity as Sartre envisions.

In his work, “Existentialism Is A Humanism” (1975), Sartre is careful to articulate the human subject as one that is situated, instantiated and framed by “facticity.”<sup>36</sup> That is, the human being finds itself already being in the world – having a historicity: a place in time, and society, and is bound by these conditioning restraints. The freedom of the human being lies at its core – specifically because there is no core to be found. That is, there is no particular essence of a human being despite the biological conditions that identify the human being as such. Sartre defines essence as “... the sum of the formulae and the qualities which make its production and its definition possible ...” (Sartre, 1975, p. 348). In other words, the essence of something is what its purpose is and Sartre argues that human beings do not have a specific purpose for which they are innately designed. The struggle of the individual is grappling with the fundamental, radical freedom that he finds at the core of his being. In addition to the facticity of the human being, the human being is also transcendence<sup>37</sup>. This transcendence is recognition of the fact that we are already instantiated in a concrete situation, but that nothing dictates to us how we must act, be, or think in a given situation. So, how does this translate to the universal and the particular?

According to Sartre (1975), we make of ourselves what we will when we act. Our actions ultimately translate to the values we hold – they are value creations and they make up part of who we are. Because the human being is aware of propelling itself

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<sup>36</sup> Facticity is the collection of facts of a person. For example, gender, age, history, and so on.

<sup>37</sup> Sartre specifically tells us that humans are transcendence, not transcendent because we are always in process, not static or stationary.

towards a future, and its “thrown-ness,” Sartre thinks that the human being is responsible for who he is. Not only this, but the human is responsible for all other humans when making choices because those choices are made in the belief that the image they create is the image that all humankind should have. In other words, when a person chooses a specific action in a situation, he is fashioning an image that humankind ought to have. As Sartre writes, “I am thus responsible for myself and for all men, and I am creating a certain image of man as I would have him to be. In fashioning myself, I fashion man” (Sartre, 1975, p. 350). This project of meaning making has a great deal of responsibility attached to it if our choices are to reflect the way we think humanity ought to be. While Sartre does not say that there is a human nature, he is careful to suggest that humans share similar conditions and that the recognition of these conditions will ultimately lead us to be ethical to the Other.

Harvey (1993) makes similar suggestions about the idea of the situated human being. He tells us that all knowledge is situated and in its “vulgar” format, the idea of situatedness “dwells almost entirely on the relevance of individual biographies: I see, interpret, represent, and understand the work in the way I do because of the particularities of my life history” (Harvey, 1993, p.57). Consequently, I would argue that we act in particular ways. Harvey is careful to point out that while we might be individuated by these processes and actions, we still share the same conditions of being in the world. He writes, “Individuals are heterogeneously constructed subjects, internalizing ‘otherness’ by virtue of their relations to the world” (Harvey, 1993, p. 58). Moreover, if we are social constructs, we are shaped and changed by the dynamics of the fluidity of the social, and in turn, we shape and change the social through our meaning-making activities and value



creations. Thus, the dialectical relationship of the universal and the particular becomes evident. Harvey tells us that “[d]ialectics ... teaches that universality always exists *in relation to* particularity: neither can be separated from the other even though they are distinctive moments within our conceptual operations and practical engagements” (Harvey, 2000, p. 241).

Adopting the existentialist position is an endorsement of the principle of autonomy, but the recognition of ourselves as social creatures that are able to respond to the call of Others, speaks to the principle of welfare as well. Thus individuals are free willing and choosing creatures whose choices reflect their values and speak to the community about the values it should endorse. The emphasis on responsibility in this philosophical position demonstrates the need for accountability that can be had in a morally pluralistic world. Thus the issue of responsibility is dealt with on several levels. Treating issues of moral importance can become daunting if we accept relativism, but the fluid nature of the ethical realm and the legal one (if one accepts the idea that at least some important ethical values are embedded in the law), provides us with the opportunities to be responsible. A significant contribution to the idea of responsibility with respect to the criminal justice system can be found in the writings of H. L. A. Hart.

Hart (2008) considered the concept of responsibility in depth. He suggested that this concept is very broad and that it can be broken down into four general types. The first type is that of role responsibility, where a person’s responsibilities are directly related to the roles she plays in her life. Thus a person whose role is that of an educator, for instance, takes on and accepts responsibility for conducting herself in a specific manner, providing accurate information, and maintaining certain classroom decorum. The

second type of responsibility is that of causal responsibility and can incorporate both people, their actions, omissions, and things, conditions and events that result in outcomes. Liability-Responsibility is the third type outlined by Hart and it directly relates to the law and its ability to hold people accountable for their actions and to punish them as necessary provided they meet the legal criteria that makes them accountable. Capacity responsibility is the final type in Hart's account and it hinges on the capacities of a person that includes understanding, reasoning and control of conduct (as cited in Gross, 1991, pp. 492 - 500). These types of responsibility are not exclusive from one another; rather they are intimately intertwined with one another. However capacity-responsibility will be the focus of the current study as the capacities for understanding, reasoning and conduct control are assumed to be generally present in "normal" adults and it is this assumption that requires investigation. Capacity responsibility seems directly related to the concept of rationality as outlined above but before these links can be demonstrated by legal examples, the concept of culpability needs to be addressed.

### ***Culpability:***

The culpability or blameworthiness of a person is directly linked to that person's rational faculty and his responsibility. Given the assumptions (noted above) that people are generally free, capable, choice makers, holding them culpable for their action is the next logical step. The recognition of autonomy and the ability to choose leads to an insistence that persons accept responsibility for their actions and also that they will be culpable for them in the eyes of the community. A person is held culpable for actions that require blame, whether moral or legal. It is not necessary for a person to be legally culpable for her actions in order to assign blame to her for their consequences, but legal

culpability often reflects moral culpability. This reflection occurs because, in many instances, the law outlines proscribed activities that would normally be thought of as morally problematic. (It is important to note that not all legal proscriptions carry a moral weight and not all immoral actions cross legal boundaries). Criminal law is a “last resort” for behaviour control and it is wise to remember that there are other avenues by which unacceptable behaviour is controlled.<sup>38</sup> Actions for which someone is not legally culpable can still be morally culpable and others may pursue avenues by which to make someone pay for his actions. For example, O.J. Simpson was not culpable for the murders of Nicole Brown Simpson and Ron Goldman in the criminal courts, but he is still blamed for their deaths and was found culpable in civil court. Distinguishing between culpability and responsibility is difficult as these two terms seem to be used synonymously.

### ***Rationality:***

The concept of rationality has been an important one in the development of Modern Western civilization. Rationality has been considered the characteristic that distinguishes humankind from other animals in a fundamental way (cited in Aristotle, 1999, p. 9.). In this context, rationality implies an ability to make choices on the basis of the logical weight of potential outcomes, rather than by mere instinctual or animalistic drives. Thinking of rationality in this way has significant implications in both a moral and a legal context.

Rational thought has been conceived of in a specific way. The rational actor can demonstrate an ability to appreciate the nature, context and consequences of his actions in

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<sup>38</sup> For instance, informal social mechanisms like family, school, peers, etc.

any given situation. Moreover, the rational actor is thought to have sufficient ability to be “response-able” in his existential situations and is able to appreciate (and choose) moral behaviours. Rationality is connected to logic. A person is considered rational if she can provide a plausible argument for undertaking a certain course of action. Being able to formulate this argument requires an awareness of time, space, and place to varying degrees and the ability to relate relevant factual information in a sequence that leads to the conclusion in a logical way.

Logical thinking entails a process of being able to assess situations and think through the potential outcomes of any course of action before choosing one to execute. It involves a process of constructing arguments that justify actions based on an ability to predict or foresee the consequences of those actions. Of course no one can know the full scope of the consequences of an action for certain, but it is expected that the individual will be able to at least perceive some of the ends his actions will bring about. For instance, a person who is faced with the opportunity to hit someone else should be able to foresee that his action will potentially: 1) cause pain 2) incite anger 3) instigate a fight 4) get hit back and so on. It might not be foreseen that hitting someone will cause that person to die, but the logical process for either hitting someone else or not is assumed to be a part of the rational actor’s abilities.<sup>39</sup>

### ***The Law of Criminal Responsibility in Canada:***

The previous outline of the discourses of autonomy, rationality, culpability, and reasonableness serve to provide an outline of the kinds of qualities or characteristics that

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<sup>39</sup> I return to this idea with the discussion of appreciation below.

are called to mind when these concepts are invoked. These concepts play an important role in the way the law conceives of the punishable subject and so their exploration provides a foundation on which to take a look at the technical workings of the law. A criminal act is conceived of as having two important components: *actus reus* and *mens rea*. The former component is the action itself, while the latter is the mental component often referred to as the “guilty mind.”

The mental component of what is criminal is the focus of this study and the recognition of specific mental capacities has been important to the idea of criminal justice. Hence, an accused person facing a criminal hearing is presumed to have certain mental capacities, as well as innocence. The mental capacities assumed by the criminal justice system are those of understanding, reasoning, and conduct control. An accused offender who lacks these capacities or whose capacities are severely compromised, is one who is either deemed unfit for trial, or who is able to legitimately plead “not guilty by reason of mental disorder.”

Historically, a person incapable of rational thought has been labelled mentally disordered. This orientation has become an important factor in determining an accused person’s ability to participate in a trial to determine his guilt. Fitness and insanity were not considered distinct from one another at the time of Daniel M’Naghten in the mid 1800’s.<sup>40</sup> The M’Naghten Rule in Canada has been an important guideline established for dealing with accused offenders claiming to not be responsible for their actions or to have diminished responsibility. The M’Naghten Rule came about as the result of the trial of

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<sup>40</sup> Trial Fitness is about a person’s mental state at the time of the trial, while Insanity as a defence is about the person’s mental state at the time of the crime. This distinction was not made until the mid 1900’s.

Daniel M’Naghten who in 1844 shot and killed Edward Drummond, mistaking him for Sir Robert Peel. M’Naghten’s lawyers argued that although he intended to kill Peel, he was suffering from delusions of prosecution at the time of the shooting and was, in effect, labouring under a defect of reason. The House of Lords accepted this defence and established what is now known as the M’Naghten Rule. The principle

... holds that individuals cannot be held criminally responsible for their actions if at the time of the offence either (1) they did not know what they were doing, or (2) they did not know that what they were doing was wrong (Schmallegger & Volk, 2001, p. 188).

In other words, an accused person must know the nature and the quality of his act in order to be held criminally liable for it. This rule has had an important influence on Canadian criminal law.

Another case that did not make the distinction between fitness and insanity or used the terms competency and insanity interchangeably occurred in the United States. In *Youtsey v. The United States* (1899), the accused was thought to have committed fraud. His defence to this charge was that he suffered from an epileptic fit and his lawyer argued that the duress of a trial could bring about another attack and that for this and various other reasons, his trial should be given a continuance. It was not. In the appeal to this case, the appellate court found in favour of the defendant stating that it is “a violation of due process to try an incompetent defendant” (Fredrick, DeMeir, & Towers, 2004, p. 5). The trial judges concluded that, “it is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial or, after trial, receive judgment, or, after judgment, undergo punishment” (Fredrick, DeMeir, & Towers, 2004, p. 6).

While these two cases do not specifically make the distinction between fitness (or competence) and insanity, it is clear that these issues are distinct and separate. The *M'Naghten* rule seems to apply more directly to the mental state of the defendant while committing the act, while the *Youtsey* appeal takes into account the accused offender's mental state at the time of the trial as well as at the time of the act. The distinction between fitness and insanity becomes more evident as guidelines for criminal justice are revised over time taking into account developments in psychiatry and the problems that come with such statements from jurists.

### ***Fitness in the Law:***

The process of being determined fit for trial generally occurs before an accused is brought to court to face or answer to the charges being brought against him (i.e. a preliminary hearing). In Canada, either the Crown prosecutor or the defence may ask for a fitness hearing to determine if the accused person is oriented to time and place, is able to understand the charges he is facing, the consequences of being found guilty of them, and is able to assist his attorney in creating a defence to the charges he is facing. Moreover, fitness can be an issue from the time the accused is arraigned to the time a verdict is reached. Bill C-10, which came into effect in 1992 in Canada, states:

“unfit to stand trial” is defined in s.2 [of the *Canadian Criminal Code*] as meaning “unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered, or to instruct counsel to do so (Bill C-10, p.9).

In Canada, the concept of fitness as outlined in Section 2 of the *Criminal Code*, states that “an accused may be unfit if unable to: 1) understand the nature or object of the proceedings, 2) understand the possible consequences of the proceedings, or 3)

communicate with counsel” (Davis, 1994, pp. 324-5). Bill C-10 outlined what is meant by the “limited cognitive capacity test” in response to recommendations that a more sophisticated test be implemented. According to Bill C-10, the “limited cognitive capacity test” is:

... an accused is considered to be fit to stand trial when he or she has the capacity to understand the process and instruct counsel, but the accused is not required to be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves his or her interests (Bill C-10, p. 10).

Therefore, the accused need not be able to make a choice or decision in his own best interests when instructing counsel. A person who does not meet these criteria, as assessed by a psychiatrist, may be deemed unfit for trial in which case she could be remanded into psychiatric custody until such time as fitness is restored. The criteria outlined in Section 2 of the *Canadian Criminal Code* should be understood as the construction of fitness. Roesch and Goulding argue that “fitness must be seen as a *construct* and that ‘the meaning of a construct can never be fully reduced to a set of concrete operations and observational terms’ ... fitness is a relative term, and what constitutes fitness in one case may not be the same in a different case” (cited in Davis, 1994, p. 328).

Canada is not the only country that has provisions for fitness. In the United States, the criteria for competency can be found in the *Dusky* ruling. In *Dusky v. The United States* (1960) Dusky was found to be oriented to time, place, and person as well as seemingly capable of assisting counsel with his defence at his initial trial and as a result, was declared competent to stand trial. Thus, the criterion for competency has to do with one’s present abilities:



The test must be whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him (Fredrick, DeMeir, & Towers, 2004, p. 14).

Here the idea of a rational being is firmly assumed as a necessary condition for the accused to be considered competent to stand trial. This component is hinted at in the Canadian construct of fitness, but it is not clear that rationality or reasonableness is the driving assumed condition. It has been argued that the standards of the *Dusky* ruling in the United States “must be taken to mean no more than that the defendant is able to confer coherently with counsel and have some appreciation of the significance of the proceedings and his involvement in it” (Unknown Author, Incompetency To Stand Trial, 1967, p. 457). This interpretation of the *Dusky* ruling is designed to prevent the person of low intelligence from being declared incompetent.<sup>41</sup> However like the Canadian “limited cognitive capacity” test an accused need not be able to be rational enough to make a decision in his own best interests.

Roesch et al. (1999) provide a summary of the general rationale for taking into consideration the fitness of an accused person: “an accused individual must be protected from a conviction that could have resulted from a lack of participation or capacity to make proper judgment” (Schuller, Ogloff, & James, 2001, p. 293). This rationale stems from the idea that a person cannot be tried in absentia; she must be present to answer to the charges against her and be able to confront her accusers. General guidelines for the criteria of fitness have been provided by English Common Law:

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<sup>41</sup> Elaboration of the interpretation of the American case is useful as an indicator of the influence of the concepts of rationality and reasonableness in law. Canada’s construction of the idea of fitness is less firm with respect to these concepts and yet, their influence and importance will be demonstrated below.

The common law test of incompetency, under which the focus is upon the defendant's capacity to understand the nature and object of the proceedings against him and to make a rational defence. [...] Beyond the ability to recall and relate factual information, the common law test requires that the defendant be able to comprehend the significance of the trial and his relation to it (No Author, Incompetency To Stand Trial, 1967, p. 459).

These guidelines have been developed out of the case of *Pritchard* (1836) where the judge suggested three criteria that needed to be answered: 1) can the accused assist in his own defence? 2) does the accused understand his role in the proceedings? 3) does the accused understand the nature and object of the proceedings? (Schuller, Ogloff, & James, 2001, p. 294).<sup>42</sup> If the defendant cannot satisfactorily demonstrate that he meets these criteria, Canadian criminal law will declare him unfit for trial as per Section 2 of the *Criminal Code*.

### ***Insanity<sup>43</sup> and the Law***

In Canada, the *Criminal Code* deals with insanity in *Section 16* which reads:

- 1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
- 2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

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<sup>42</sup> See also Ashworth, A. (2006), p. 204

<sup>43</sup> Although this terminology is dated, as Canada now uses the term *Not Guilty By Reason of Mental Disorder*, or *Not Criminally Responsible* (NCR), it is commonly used in literature (e.g. Finkle 1988, Verdun-Jones, 1994). Moreover, I am not convinced by McLauchlin (1995) that this change in terminology / semantics overcomes the binary of sane/insane in terms of providing a treatment option to those not criminally responsible in the eyes of the law. The critique of binaries in this thesis does not demand a change in terminology, but does seek to question the meanings attributed to such terms, for as Arrigo (2003) notes, the deconstruction of binaries is temporary and incomplete.

3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

It must be noted here that the insanity defence<sup>44</sup> differs from the fitness test. A person can suffer from a mental disorder and still be fit for trial and it is not necessary that an unfit person has a mental disorder that qualifies him for a defence of NCR. Moreover, the determination of fitness to stand trial is an evaluation of an accused person's *current* mental state, while the person who attempts to raise the insanity defence must convincingly demonstrate that he suffered from the mental disorder *at the time* his crime was committed.

The defence of insanity, as it was called in Canada until 1992, deals with an accused person's state of mind at the time he committed the proscribed act. The concept of a mental disease has not been a clear one. In *Cooper v. The Queen* (1979), Justice Dickson defined "disease of the mind" as:

any illness, disorder, or abnormal condition which impairs the human mind and its functioning, excluding however, self induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion (Roach, 2004, p. 256).

The term "disease of the mind" is a legal one and jurists determine what type of mental conditions fall under its scope. In *Cooper v. The Queen*, Justice Dickson quoting Justice Martin, wrote:

The term "disease of the mind" is a legal concept although it includes a medical component, and what is meant by that term is a question of law for the Judge. ... It is the function of the psychiatrist to describe the accused's mental condition

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<sup>44</sup> This defence is now known as the defence of Not Criminally Responsible by Reason of Mental Disorder (NCR).

and how it is considered from the medical point of view. It is for the Judge to decide whether the condition described is comprehended by the term “disease of the mind” (as cited in Roach 2004, p. 259).

Justice Dickson noted that the ability to appreciate the nature and quality of an act as per Section 16(1) of the *Criminal Code* should be interpreted as an ability to perceive. Justice Dickson stated:

The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action (i.e. choking) without necessarily having the capacity to appreciate that, in nature and quality, the act will result in the death of a human being (*Cooper v. The Queen* 1979, p. 15).

In other words, Justice Dickson makes it clear that there is a difference between having mere cognition of a physical act and understanding what its consequences are and that this wording is significantly different from that of English Common Law where the word “know” is employed. Moreover, the McRuer Report (1956), as referred to by Justice Dickson, states:

Under the Canadian statute law, a disease of the mind that renders the accused person incapable of an appreciation of the nature and quality of the act must necessarily involve more than the mere knowledge that the act is being committed; there must be an appreciation of the factors involved and a mental capacity to measure and foresee the consequences of the violent act (*Cooper v. The Queen* 1979, p. 17).

In 1991, the case of Owen Swain brought about sweeping changes to the common law rule in Canada. Swain, who successfully pled not guilty by reason of insanity, challenged the constitutionality of the ability of the Crown to raise this defence and also the practice of indefinite incarceration in a mental institution. The result of this appeal, and the judge’s finding that it is problematic for the Crown to raise the issue of mental

disorder when the accused has no desire to raise it was a change in the common law.

Chief Justice Lamer, pointed out in his commentary that one of the fundamental principles that guides an adversarial system of justice is that a (fit) accused has the right to raise his own defence and that allowing the Crown to interject the possibility of a different defence can have devastating and detrimental effects for the accused. As noted by Justice Wilson:

The common law rule permitting the Crown to raise the issue of insanity over the accused's objections countenances too great an interference with an accused's fundamental right to advance whatever defence he or she considers appropriate. The Crown's ability to raise insanity may substantially reduce the chances of an accused's outright acquittal by defeating the strategy chosen, undermining his or her credibility, and tainting the trial with the inevitable inference that he or she, because of mental illness, is the type of person who would likely have committed the offence (*R v. Swain* 1991, p. 6).

Thus the common law rule was revised to only allow the Crown to "lead evidence of insanity" (*R v. Swain* 1991) if the accused puts her mental capacities into question but does not raise the defence.

The impact of the *Swain* case did not stop with the revamping of the common law rules. In 1992, Bill C-10 was introduced into legislation that made other important changes. The first of these changes was the renaming of the insanity defence to "Not Criminally Responsible On Account Of Mental Disorder (NCR)." In her commentary about the challenges of mental illness and the law, Justice Beverly McLachlin explains the significance of the new wording:

This change in terminology recognizes that mental illness may operate to exempt an accused person from criminal responsibility. It also signifies that we are no longer faced with a stark choice between acquittal and conviction of

mentally ill persons. The law now offers a third alternative under which mentally ill offenders are diverted into a special stream where the twin goals of protecting the public and treating the ill offender fairly and appropriately are pursued (McLauchlin 2005).

Not only did Canada do away with insanity as terminology, but as mentioned earlier, the practice of indeterminate custody under the Lieutenant Governor Warrants (LWG) system was also abolished. In place of LGW, a practical review board system was instituted, whose powers, which include ordering assessments and reviewing the status of accused persons and NCR detainees, are outlined in Bill C-10. Those persons found NCR and who are institutionalized now have their status reviewed annually by the Provincial Review Board where previously, status reviews were at the “pleasure of the lieutenant governor” and often did not take place at all (Verdun-Jones, 1981, p. 365). Moreover, prior to the introduction of Bill C-10, those persons declared unfit and remanded into psychiatric custody often spent more time in custody than they would have if they had been merely convicted of their crimes and sent to prison (Verdun-Jones 1981, p. 365).

The *Criminal Code* is not the only piece of legislation that applies to mentally disordered accused persons. Those persons whose fitness is in question or whose sanity is in question are also affected by provincial mental health laws. In Ontario, this law is the *Ontario Mental Health Act* and it governs the operation of the psychiatric system, how mentally disordered persons can enter and exit it, the role of the psychiatrist and/or psychologist in assessing patients and making orders for custodial purposes, and the rights of those people entering the psychiatric system.

Section 16 of the *Ontario Mental Health Act*<sup>45</sup> provides guidelines as to when a Justice of the Peace can make an order for a psychiatric assessment. In brief, the reasons for such an order can be made if information under oath is brought before the Justice that demonstrates the accused has threatened to harm himself or others, has attempted to cause bodily harm to another, or made another fearful of being caused bodily harm, or shows a lack of competence for his own care (R.S.O. 1990 Chapter M7, 2004).

Moreover, the Justice of the Peace must have reasonable grounds to believe the accused is suffering from a mental disorder whose nature and quality demonstrates likelihood that the accused will present these dangers. A Justice of the Peace may also issue an order if the person brought before him has previously suffered from a treatable mental disorder for which she has previously received treatment and the failure to get treatment for this disorder will likely result in personal harm or harm to others (R.S.O. 1990 Chapter M7, 2004). This Act also outlines the powers of the police officer who comes across a person whom he believes to be suffering from a mental disorder. The police officer who has “reasonable and probable” grounds to believe that a person has been behaving disorderly and has either threatened or attempted to cause himself or another bodily harm, or is behaving or was behaving violently towards another, or who demonstrates a lack of competence in caring for himself and whom the officer is “of the opinion” that the person suffers from a mental disorder whose nature and quality will “likely result in” serious bodily harm to himself or another, or “serious physical impairment” of the person can take that person into custody and deliver him to an “appropriate place for examination by a physician” (R.S.O. 1990 Chapter M7, 2004).

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<sup>45</sup> See Appendix B for relevant sections of the Ontario Mental Health Act.

Summing up from the *Ontario Mental Health Act* and the Canadian Centre for Addiction and Mental Health, the steps involved in the process for assessing a person who is thought to have a mental disorder are as follows: 1) a police officer encounters a person who has threatened himself or someone else with physical bodily harm or who has caused violence to another person or who seems to be unable to competently care for himself. If the officer has reasonable and probable grounds to believe that this individual is suffering from a mental disorder to such a degree that he presents a significant threat to himself or another, the officer may take that person into custody placing him in an “appropriate” facility for a mental assessment. A doctor who makes the assessment may fill out a specific form to involuntarily keep the person in the institution for up to 72 hours if the doctor thinks that this person presents a significant threat to himself or someone else or if he is incapable of competently caring for himself. After 72 hours, if the patient remains, in the opinion of the doctor, unstable his stay can be extended if the doctor fills out the necessary forms. If the patient does not meet the requirements for an involuntary commitment on his initial presentation by the officer, the officer may release him, or charge him and place him in jail. Regardless of the place of custody, the accused is entitled to the counsel of a lawyer. If the person remains in the custody of the forensic psychiatric system, he is examined by a forensic psychiatrist or other designated person as to his mental condition for fitness to stand trial and/or his mental condition at the time of his alleged offence. Similarly, if the accused makes it to court for a preliminary hearing and his fitness is questioned, he is remanded into the psychiatric system for assessment. If the accused is found fit to stand trial, he proceeds to court. In order to be found fit, the Centre for Addiction and Mental Health’s (CAMH) information guide says:



To decide that you are fit to stand trial, the judge must believe that you are able to do the following:

- You must be able to describe the roles of the people in a courtroom, such as the Crown counsel the defence counsel (your lawyer) and the judge.
- You must have a general understanding of what happens in court. For instance you must understand what the possible verdicts (or outcomes) are and what and oath is.
- You must be able to instruct your lawyer and take part in your own defence. (Barbaree, 2004, p. 17)

If he is found unfit, he is remanded into the psychiatric system for a period not exceeding 60 days for a Treatment Order to make him fit (i.e. with medication). If it is doubtful that he will ever be fit, the accused can be placed under the authority of the Ontario Review Board and remains in the psychiatric system where his status is reviewed annually. In this instance, the Crown must continue to prove there is a *prima facie* case against the accused every year and if it cannot, the accused is acquitted (but this does not necessarily mean that he is released from the psychiatric system).<sup>46</sup>

While all these processes seem to be straightforward and are written in such a way as to be clearly outlined, the practical application of these policies and how they are implemented needs to be questioned. For example, while it is the judge who determines broad concepts that require interpretation of what mental conditions fall under the notion of “mental disease,” the courts do rely on medical testimony about persons before the court. It is not clear how much reliance and weight is given to the testimony of people

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<sup>46</sup> In *R v. Demers* (2004), the Supreme Court of Canada held that when an accused is determined to be permanently unfit he should be granted a stay of proceedings within 30 days of this determination. Since fitness and dangerousness are two different issues, an unfit accused can be assessed for dangerousness within this thirty days to allow for a proper application for detention under provincial mental health laws since the criminal law will no longer have powers with respect to the accused's detention. See *R v. Demers*, page 41 section 106.

who are involved in the forensic psychiatric process. Grisso (2003) points out: “that judges are free to accept or reject the clinician’s opinion, after clinicians have explained the logic and reasons for arriving at the decision” (Grisso, 2003, p. 82).

***Psychiatry and the Social Construction of the Unfit:***

The role of the forensic psychiatrist is complex, and at times, ambiguous. The discipline of psychiatry claims to follow rigorous scientific methods and principles of modernity. Certain conditions must be met in order for a discipline to be called a ‘science’. First, consistent, reliable data agreed upon by members of the discipline must make up its body of knowledge. There must also be agreement as to the methodology for the collection of data that can be replicated by other members in order to be considered worthy of addition to the core body of knowledge. Third, this knowledge must be cumulative, and integrated into the core body of knowledge. Finally, “the discipline must be predictive ... and therefore falsifiable” (Coles and Veiel 2001, p. 609). In other words, a science must be able to produce a body of knowledge using data collection methods that make the approach to a problem repeatable and with reliable, consistent results.

Psychiatry (and psychology<sup>47</sup>) tends to present its findings in quantifiable formats (i.e. statistics, charts, etc.) and this presentation tends to give the impression that this data is a fair and accurate representation of the reality of the issues being investigated.<sup>48</sup> In order

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<sup>47</sup> Psychiatry and psychology differ in that psychiatrists are medical physicians and as such have been designated to evaluate fitness issues because mental disorder is thought to be an illness (and in the Canadian context, “the assumption of medical dominance has persisted”). Psychologists have been gaining more ground in their ability to participate in courts and in fitness assessments as their discipline becomes more regulated and recognized as valuable and reliable. Viljoen et al., note that psychologists are more likely to use “objective tests more frequently than psychiatrists in fitness and criminal responsibility evaluations”. Forensic training is something that enables the evaluator of fitness to better understand the legal criteria involved in fitness assessments (Viljoen, Ogloff, & Zapf, 2003).

<sup>48</sup> This authoritative presentation of findings gets its power from our faith in mathematics and numbers.

to obtain such data, members of the psychiatric discipline devise standardized tests in order to meet the requirements of what it means to be a science.

In its pursuit to be called a science, psychiatry reduces the human element to sliding scales, controlled environments, and provides generalizations about how human behaviours can be understood. For example, psychiatric profiling is one tool employed by the criminal justice system that can be seen as an example of how powerful this discipline can be in the fight against crime. This tool is utilized by providing a forensic psychiatrist the raw data of a set of crimes that are suspected to be related. The psychiatrist then identifies behavioural patterns in the evidence and generates a profile of the kind of criminal likely to have committed the crimes that police can use to focus their efforts (Douglas & Olshaker, 1997). Other uses for forensic psychiatrists in the criminal justice system include predicting recidivism, and predicting dangerousness. Forensic psychiatrists are also utilized by the criminal justice system to evaluate the mental states of accused offenders to determine whether they are able to participate in the judicial process or not, and/or whether their mental states at the time of their crimes are of a nature that allows them to present a defence of not criminally responsible. It is this function of forensic psychiatry that will be focused on here.

The forensic psychiatrist is called upon to make an assessment of the mental states of an accused offender when his fitness is in question or when his criminal responsibility is questioned. Assessing the fitness of an individual in Canada can occur on an inpatient or an outpatient basis. Generally, these assessments are done in a psychiatric facility where the accused is detained. In order to make this assessment, the Canadian forensic psychiatrist employs the Fitness Interview Test-Revised (FIT-R; Roesch, Zapf, Webster

& Eaves, 1999). This test is divided into three sections to help the psychiatrist determine if the accused 1) understands the nature and object of the proceedings, 2) understands the possible consequences of the proceedings, and 3) assesses the ability of the individual to communicate with counsel (Schuller, Ogloff, & James, 2001, p. 297). This test is designed to examine the accused person's current mental state and allows the psychiatrist to present his findings to the trier of facts (judge) at an assessment hearing. If the accused is deemed unfit by the judge, he can be remanded into custody for treatment to restore him to fitness whereupon his trial will proceed.

A similar process occurs for an accused who wants to plead not criminally responsible by reason of mental disorder (s. 16 *C.C.C.*), except the mental state to be investigated is one that occurred at the time of the crime and not before or after. A couple of tools have been developed to assist forensic psychiatrists with this more difficult task of assessing a person's criminal responsibility. These tools are mostly employed in the United States and they are known as the Mental State at the Time of the Offence Screening Evaluation (MSE) and the Rogers Criminal Responsibility Assessment Scales (R-CRAS). They were developed to standardize the way assessments are conducted. It must be remembered here that while these tools allow a mental health professional to make statements about an accused person's mental health, it is ultimately a jurist's decision, as a trier of fact, to decide if the accused has a mental disorder in law that would affect criminal responsibility.

The role of forensic psychiatry and its importance to the criminal justice system has not been without its criticism. Coles and Veiel (2001) suggest that equating legal and psychological concepts is problematic. They argue that "[w]hen psychologists become

expert witnesses, they similarly recast legal concepts in the mould of their conceptual framework” (Coles & Veiel, 2001, p. 610). It is not the case that the legal and psychological concepts are directly equivalent to one another and their conflation can be misleading. Moreover the concept of fitness, according to Coles and Veiel, is one that is relational but it is often “conceptualized as an absolute, a characteristic of the individual rather than a product of the interaction of the individual with his or her legal environment” (Veiel and Coles 1999, p. 356) . Practically, the consideration of fitness as an individual’s character suggests that there is a fit character and an unfit character. This way of conceiving the individual may stem from the idea that the law presumes individuals to be fit, just as the law presumes the individual to be innocent until proven otherwise. The concept of fitness cannot be reduced to a quantifiable number and to do so is to conceive of it in a manner that is inappropriate (Veiel and Coles 1999).

Chapter 3 is an examination of one of the tools used to examine or evaluate accused offenders whose fitness for trial is in question. In this chapter I argue that the FIT-R test is a rigorous tool that attempts to closely mirror the legal concept of fitness as found in Section 2 of the *Canadian Criminal Code*. In doing so, this tool uses the concepts of rationality, reasonableness and culpability to inform its evaluative process and these concepts or discourses support one another and work in tandem to construct the fit subject.

### **Chapter 3: The Construction of Fitness Through Scientific Evaluation – The FIT-R**

The preceding chapter served to provide a foundation on which to trace the discourses of rationality, reasonableness and culpability by outlining the kinds of characteristics associated with them. These combined characteristics serve to construct the fit and therefore punishable subject. In this chapter, I explore how these discourses function in a test designed to evaluate a person's fitness for trial. I argue that these discourses work together and support each other in this construction to provide an understanding of the abilities a person is assumed to possess by the law.

The fit person is thought to be one who acts autonomously when making choices. This choice-making ability is what fundamentally distinguishes humans from other creatures, according to Sartre (1975), and is the way we inhabit our existential situation. The discourses of rationality, reasonableness and culpability reinforce the idea of the autonomous subject by sketching out the important and desirable traits that are thought to be possessed by the fit and autonomous subject. The law assumes these characteristics to be standard amongst the citizens over whom it rules. When a person's fitness is in question, the law often turns to psychiatry for assistance in determining how to proceed. The Fitness Interview Test – Revised is a tool designed to evaluate how a person can respond to the law. As a result, the discourses of reasonableness, rationality and culpability are present within it and are at work to distinguish the fit from the unfit.

#### ***The Fitness Interview Test – Revised:***

I chose the Fitness Interview Test – Revised because its original development in 1984 was specific to the Canadian context and its current edition remains primarily

focussed on the Canadian legal system, even though the authors express an expanded applicability and usage. Moreover, the revised edition (1998) employed here reflects significant changes in Canadian law<sup>49</sup> and also includes a review of US law and procedure as its applicability extends to both countries and Great Britain. The developers of the FIT-R claim that the content of the interview itself has not changed significantly (Roesch, Zapf, & Eaves, 2006, p.xi).

It is a necessary condition, but not a sufficient condition that a person whose fitness is questioned has a diagnosed mental disorder (Roesch, Zapf & Eaves, 2006, pp. 9-10). That a person has a mental disorder, however, does not automatically make that individual unfit for trial, and therefore the FIT-R is employed to determine whether or not the accused can adequately participate in his trial. In other words, the FIT-R is designed to measure a person's psycho-legal abilities and the impact of an existing mental disorder on them. Its design specifically reflects the three general psycho-legal components found under Section 2 of the *Canadian Criminal Code* per *R. v. Taylor*: 1) understanding the nature or object of the proceedings, 2) understanding the possible consequences of the proceedings, and 3) communicating with counsel.

The criteria outline what it means to be legally fit for trial and the FIT-R test is organized into three sections that correspond to these criteria after an initial section of four questions designed to obtain background information about the evaluatee. Moreover, the FIT-R is a semi-structured interview without closed-ended choice answers designed to "evaluat[e] a defendant's competence to stand trial" (Roesch, Zapf, & Eaves, 2006,

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<sup>49</sup> Especially changes in 1992 as reflected by Bill C-30.

p.10). It does so by taking into consideration questions that would demonstrate the evaluatee's understanding/interpretation of these three legal criteria.

The first section is correspondingly labelled, "Understand the Nature or Object of Proceedings: *Factual Knowledge of Criminal Procedure*" and has six subsections with a series of corresponding questions. These subsections examine different elements of the proceedings. For instance, Subsection 1 is titled "Understand the Arrest Process," and includes questions like "What happened when the police came?" and "Did the police read you your (Miranda/arrest) rights?".

The second section is labelled, "Understand the Possible Consequences of the Proceedings: *Appreciation of Personal Involvement in and Importance of the Proceedings*." This section consists of three subsections whose headings are: "Appreciate the range and nature of possible penalties," "Appraisal of available legal defenses [*sic*]," and "Appraisal of likely outcome." This section includes questions like: "Will you plead guilty or not guilty at your trial? Why?", and "How do you think you can be defended against these charges?".

The final section, "Communicate With Counsel: *Ability to Participate in Defense* [*sic*]" has seven subsections whose titles include: "Capacity to communicate facts to lawyer," "Capacity to plan legal strategy," and "Capacity to manage courtroom behavior [*sic*]." The evaluator is free to probe the respondent further and also to personalize the interview in order to "determine the defendant's understanding of the questions and to assess his or her cognitive abilities" (Roesch, Zapf & Eaves, 2006, pp. 10-11). The responses that are provided to the administrator of this interview are ranked 0 -2 with



zero being classified as “no impairment” and two being classified as “definite/serious impairment.” A score of one as “possible or mild impairment” is ambiguous and persons scoring one or two are “referred for a more detailed investigation of their competence” (Roesch, Zapf & Eaves, 2006, p. 25).

Each question in each section is ranked in this manner with the exception of the first four questions which seek only to get a sense of the evaluatee’s background. The rankings of the assessor are supposed to be based on the individual’s abilities. Each item is given its own careful consideration and is not to be influenced by previous category ranks. Once the interview is complete the assessor is to make a decision with respect to the fitness (“final competency”) by taking into account the presence of mental disorder “in the legal sense,” and his overall impression of the psycho-legal abilities of the evaluatee. This impression is gleaned from a coding sheet that the evaluator fills out after the interview with the scores taken for each section. The exact structure of this process is not detailed by the authors of the FIT-R. As Grisso (2003) notes:

The FIT-R system does not provide any “formulas” for combining the item ratings to arrive at this final judgment... (Grisso, 2003, p.103);

And:

Rating criteria for the various items are in the form of a paragraph description of the concept covered by each item, but without specific guides for 2, 1, or 0 ratings (Ibid, p. 105).

Grisso concludes,

The FIT-R manual does not offer specific instructions to consider the degree of the defendant’s abilities in relation to the demands of the defendant’s legal situation. However, the flexibility of the rating system would allow for such judgments to be made, given that the examiner has some knowledge of the defendant’s trial circumstances (Ibid., p. 107).

If the evaluator concludes that the evaluatee is, in fact impaired, the evaluatee will be “referred for a more thorough evaluation of competence to stand trial” (Roesch, Zapf, & Eaves, 2006, p. 36) in order to determine whether or not the mental disorder causes the legal impairment.

The FIT-R is designed “for use as a screening instrument” (Roesch, Zapf, & Eaves, 2006, p. 25) in addition to inpatient evaluations of persons whose fitness is questionable. This application of the FIT-R, as a screening instrument, is “... to identify as early as possible those individuals who are clearly competent to proceed ... so that they can continue their legal proceedings...” (Roesch, Zapf, & Eaves, 2006, p. 25).<sup>50</sup> The authors of the FIT-R are aware that fitness is a fluid construct and note that, “[t]his instrument is designed to reflect the status of a defendant at the time *of examination*. It is not a predictive instrument” (Roesch, Zapf, & Eaves, 2006, p. 24, original italics). In other words, they seem to be aware that trial fitness can and does change over time and that the fitness of a person cannot be predicted. While measuring these abilities is reflective of the fairness principle that operates in the law, this test also operates to reinforce discourses of rationality, reasonableness and culpability.

### ***Constructing Ir/Rationality: The “Thinking Being” Within the FIT-R:***

I argued in Chapter 2 that the discourse of the rational entails several key abilities of what it means to think. In order to be thought of as rational, a person must be collected, impartial, sensible, reflective, systematic and analytical. Moreover, the rational person is logical and able to justify arguments, provide the conditions for actions and plausibly

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<sup>50</sup> This usage is one that addresses the issue of due process and trial expediency, an issue to be dealt with in the following chapters.

explain the arguments or situations to another person. This discourse of the rational takes these qualities for granted, assuming that the ‘normal’ person possesses these abilities. The legal realm assumes this characteristic of a person because it assumes that those people who come into contact with the law are “fit” by definition. Rationality has historically been the defining characteristic that separates humans from other animals (Aristotle 1999, p. 9.) and the consequence of this distinction is a fundamental assumption that rationality is a characteristic of all humans. The FIT-R test asks several questions that require the respondent to explain, provide an account of, or justify actions as well as express them in a logical and impartial fashion. The questions employed by the FIT-R test are designed to get the respondent to demonstrate how capable he is of formulating logical arguments or explanations without being coached.

In Section I of the FIT-R, the respondent is asked several questions about pleading guilty and not guilty. For instance, the respondent is asked, “What does it mean when a person pleads not guilty?”<sup>51</sup> Here he is being asked to rationalize the meaning of pleading not guilty. This question probes for an initial distinction to be made between pleading not guilty and pleading guilty. It is followed up with several questions that deal with events in a courtroom following a not guilty pleading and the possible outcomes thereof.<sup>52</sup>

This line of questioning establishes how a person logically connects together the meaning of innocence with the way such a plea would unfold in the courtroom and what kinds of things the respondent might expect of a lawyer if pleading not guilty is a chosen

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<sup>51</sup> Section 1 subsection 5 – Understanding Of Pleas first question (Q1) page 42.

<sup>52</sup> Questions in Section 1 Subsection 5 include: Q2 What happens in court to someone who pleads not guilty?, Q3 What are the consequences of pleading not guilty?, and Q4 What things might a lawyer do when someone wants to plead not guilty? See page 42.

option. Similar questions about pleading guilty are also found in this section of the FIT-R. Not only is the respondent asked to make distinctions between these types of pleas, but these questions also attempt to get a sense of the respondent's sense of reality (for instance, does he think pleading not guilty will result in *being* not guilty?), to rationalize the plea by describing outcomes, explain what he thinks a lawyer should do, and to explain what he understands of the judicial process.

In Section II subsection 8<sup>53</sup> of the FIT-R, there are two questions that attempt to measure a person's rational capability: "How do you think you can be defended against these charges?" (Question 1) and "How can you explain your way out of these charges?" (Question 2). These questions have been highlighted because they seek an explanation, justification or rationalization of a defence strategy and they are fundamental to the Section 2 requirement of understanding the nature of the proceedings and their possible consequences. They reveal to the interviewer the respondent's thought process in terms of how he thinks about his situation with respect to the charges he faces. The response provided may reveal that person's connection to reality by reflecting how he understands the charges and what ways he thinks he can justify his actions. It may also reveal the way he understands how various defence strategies can be deployed, providing the interviewer with a sense of how this person can make choices with respect to the selection of a defence. Another question that will elicit how the respondent thinks about a lawyer's obligations or job, his orientation to reality and his ability to employ a strategic defence is, "What do you think your lawyer should concentrate on in order to defend you best?" (Question 3) This question provides the assessor with ideas about how the

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<sup>53</sup> See page 45 of FIT-R for all of the questions that follow.

respondent views his case and analyses the situation to deduce what to focus on in terms of a defence.

Section III, subsection 12<sup>54</sup> of the FIT-R asks questions that are reflective of how the respondent might understand his lawyer's advice and how he can analyze the strategies his lawyer might suggest to him. These questions are fundamental to the Section 2 requirement of communicating with counsel. Questions such as, "If your lawyer can get the DA (prosecutor) to accept a plea bargain wherein you plead guilty to a less serious charge in return for the DA dropping a more serious charge, would you agree to it? Why or Why not?" (Question 1), and "What will you do if you disagree with your lawyer about how to handle your case?" (Question 3), ask the respondent to hypothetically evaluate his lawyer's performance. The respondent is being asked to provide a justification for accepting or rejecting his lawyer's advice. He is also being asked to explain his understanding of what is meant by a plea bargain and what kind of impact that might have on him.

These questions are situational and ask for an analytical or deductive justification for potential avenues of behaviour the respondent can take with respect to his lawyer. These questions also probe the way the respondent understands his role with respect to his lawyer and what he perceives his options to be in terms of communicating with his lawyer. These questions seek the reasons the respondent has for strategies that involve his lawyer and whether or not the person can justify potentially self-serving strategies.

***The Reasonable Subject:***

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<sup>54</sup> See page 49 of FIT-R for all the questions that follow.

While it is somewhat difficult to separate from the discourse of rationality, the discourse of reasonableness plays an important function in the creation of a “normal” person. What distinguishes the discourse of reasonable from that of the rational is that to be considered reasonable, a person generally demonstrates characteristics of being agreeable, perceptive, thoughtful, and reflective, and is consistent in his responses and behaviours. Moreover, the reasonable person is able to make connections, identifying steps or stages and think them through. The ability to reason something may be intimately linked to being rational in the sense that building an argument or being logical necessarily entails being able to identify steps or stages and make connections between them, but being able to do these things does not necessarily mean that the connections being made can be rationalized. The way a person makes connections between steps or stages reveals something about his ability to reason, and the way those connections are made demonstrates how the thought process is employed. The FIT-R test also seeks this quality as an element in its investigation of a person’s psycholegal abilities.

Section I subsection 1<sup>55</sup> of the FIT-R test asks for the person to recount the events that led up to the respondent’s current situation and establishes requirement 2 of Section 2. Questions such as “Can you tell me how you came to be here (in jail)?” (Question 1), and “What happened when the police came?” (Question 2) ask the respondent to tell her story as she sees it from beginning to end. It reveals the way she makes connections between various events and the current outcome of those events. It might demonstrate her ability to recall events in a collected and thoughtful and reflective manner. The former question provides the assessor with information about how the respondent contextualizes

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<sup>55</sup> See page 38 of FIT-R.

the events leading up to her arrest and also can provide a context for the charges the respondent is facing. This line of questioning may also reveal the respondent's connection to time as it can establish a time frame surrounding the events leading up to her arrest and subsequent interview. How this person is able to make historic connections allows the assessor insight to the respondent's perception of events, and how they relate the various events or stages to one another chronologically and logically.

Section III subsection 10 of the FIT-R seeks similar information with questions such as: "Tell me how you got arrested. What do the police say that you did?", "What actually happened?"(Question 1), "When and where did all of this take place?"(Question 2), and "Why did the police arrest you?"(Question 3)<sup>56</sup> are asking the respondent to repeat her story. The questions establish consistency, seek reflectivity and attempt to establish how connections between various events are being made. These kinds of questions seek to establish the respondent's orientation to time, place and space, as events are recounted, which will reveal that person's perception of reality. This line of questioning also seeks information from the respondent that may or may not be consistent with police reports.

"How can you explain your way out of these charges?"(Question 2) and "What do you think your lawyer should concentrate on in order to defend you best?" (Question 3) are questions found in Section II subsection 8 of the FIT-R<sup>57</sup>. While these questions ask the respondent to provide an explanation or an analysis (qualities of being rational), they ask the respondent to be thoughtful and reflective in order to answer them. The former

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<sup>56</sup> Also in section 3 is the following question: "What did you see, hear, do, or think?" which is a follow up question to "Tell me how you got arrested." See page 47 of FIT-R.

<sup>57</sup> See page 45 of FIT-R.

question can be used to establish consistency in the respondent's account of events by asking her to demonstrate how her version of events allows for her defence. In order to instruct her lawyer or at least participate in her defence strategy, the respondent must be reflective of the events leading to her arrest. She must also be able to talk about what she thinks her lawyer should focus on to strategize a defence reveals. These communicative acts reveal thoughtfulness and also consistency between excuse and defence.

Other questions in Section II subsection 9<sup>58</sup>, such as "What do you think your chances are of being found not guilty?"(Question 1), "Does the court you are going to be tried in have authority over you?"(Question 2), and "Do you have to abide by the court's decision?" (Question 3) attempt to establish the respondent's connection to reality by asking about her relation to the court in terms of whether she thinks the court has authority over her, if she feels bound to the court's decision and what chances she thinks she has of being found not guilty. These kinds of questions also reveal the ability of the respondent to think things through and make connections between events even if they have not yet occurred.

While the discourses of the reasonable and rational have been distinguished here, it is important to note that they also work together, support each other, and this distinction is subtle and tends to be overlooked. The characteristics of being reasonable (i.e. agreeable, reflective and consistent) are also found in the rational subject who is collected, sensible and systematic. Together they serve to construct the binary of fit/unfit, and formulate the hallmark of the "fit" or "normal" person that the law presumes in its principles. Moreover, it is the person who is recognized as possessing these important

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<sup>58</sup> See page 46 of FIT-R.



attributes that is the ideal punishable subject because it is easier to justify holding them culpable (responsible) for their decisions and consequences.

### ***Assessing Culpability:***

The determination of culpability is a direct result of being responsible and reasonable. It is the place where people coming into contact with the law are made into punishable subjects. Being culpable means being blameworthy or responsible, and in the legal realm, is a requirement of being found guilty. A person who is reasonable and responsible can be held culpable for his actions. This premise is at work in the law, and it is one of the reasons why a person whose fitness is questioned finds himself being assessed by the psychiatric system. The FIT-R test seeks to assess culpability in addition to a respondent's reasonableness and rationality. But investigating this aspect is relatively different than assessing the latter two. Questions in the FIT-R are self-positioning. While the responses to questions of rationality and reasonableness come from indirect methods, those questions related to culpability are fashioned in such a way as to make the respondent specifically identify himself in relation to his own culpability. The following outline of the test's three sections will best illustrate this distinctive style of questions.

Section I of the FIT-R asks the respondent, "Do you think people might be afraid of you because of what you are charged with?"(Subsection 2 - Question 5 p. 39). This question seeks self-perception as being harmless or dangerous. It may be followed up with probing questions that reveal why this person sees himself in this way, and this revelation may in turn dictate how he places himself as blameworthy. Another question found in Section I asks, "What questions would you ask your lawyer before you decide

whether or not to plead guilty?” (Subsection 6 – Question 5, page 43). This question may reveal how the respondent sees himself as culpable by the kinds of questions he says he will ask. It reveals his ability to analyse his situation, understand consequences and possibly act in his own best interest.

Questions in Section II of the FIT-R become more obvious to how the respondent reveals himself as a culpable and therefore a punishable subject. In this section the respondent is directly asked, “Will you plead guilty or not guilty at your trial? Why?” (Subsection 7, Question 1, p. 44). This question will uncover how the person intends to plead and also the reasons for that choice. The reasoning process or explanation for his choice will show the assessor how he places himself in direct relation to his culpability. Other questions require the respondent to elaborate upon this answer in a way that demonstrates his feeling of culpability or responsibility. For instance: “If you are found guilty as charged, what are the possible sentences a judge could give you?” (Ibid, Question 2), “If a jail sentence is received, how long might it be?” (Ibid, Question 3), and “What do you think the chances are to be found not guilty?” (Subsection 9 – Question 1, page 46) are probative of how the respondent understands culpability as it applies to his situation. They may also reveal the way the respondent perceives the applicability of guilt to himself and the meaning of guilt that the respondent has.

Section III consists of some hypothetical situational questions like: “If your lawyer can get the DA (prosecutor) to accept a plea bargain wherein you plead guilty to a less serious charge in return for the DA dropping a more serious charge, would you agree to it? Why or why not?” (Subsection 12 – Question 1, page 49) and “Suppose your lawyer finds a way of getting your charges dropped. Would that make you happy? Would you go

along with his or her plans?" (Subsection 13, Question 1, page 50). These questions ask for the respondent's reaction. This reaction can reveal how the respondent sees himself as culpable for his actions and how he sees his situation. Clearly, the questions being asked are self positioning for the respondent because they reveal something important about how the person relates himself to his situation.

***The Intimate Relationship between Rationality, Reasonableness & Culpability:***

The concepts and discourses between reason, rationality, and culpability are intimately related. These discourses work together, and support each other to provide the criteria of what is meant by "fit" as the defining characteristic of the punishable subject. The law takes special care to ensure the worthiness of the subjects who come before it as punishable subjects. This care stems from the recognition that an accused must be able to fully participate in a trial by being able to adequately participate in the process and to confront his accusers. This requirement has its roots in the fairness principle.

The law assumes that the people who are governed by it and come into conflict with it are equal. In this assumption of equality, the ideas of innocence and fitness are embedded. Thus all accused persons coming before the law are assumed to be both innocent and fit. Fitness is a necessary requirement of being a punishable subject as it establishes the accused person as a specific kind of punishable subject, namely a calculating, rational actor who has control over himself and who makes specific choices.<sup>59</sup>

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<sup>59</sup> Cesar Beccaria (1995), for instance, thought that criminals commit crimes by choice and are able to control their behaviour.

I argue that the construction of fit/unfit and therefore punishable subject comes from the discourses of rationality, reasonableness and culpability working in unison. As the law governs the citizens of a community, it fundamentally assumes that all those whom it oversees share the same basic qualities and thus are equally accountable to it. So, the citizen is constructed as “normal” or “fit” by the assumption of the abilities that demarcate qualities of rationality and reasonableness. In other words, the citizen is assumed to be logical, impartial, sensible and analytical, able to assess his existential situation and undertake actions using these abilities. This assessment implies the ability to connect steps or stages and events together, thinking them through and generally being consistent in his thoughts and actions. The reasonable and rational person embodying these abilities can be held culpable for his actions and their outcomes because his existential understanding is predicated on them and their use.

The combination of the concepts and discourses of the reasonable, the rational and the culpable reinforce the principles of fairness, welfare and autonomy. These principles work together to construct the fundamental basis of the law. Their reinforcement by these discourses helps to give the law its authority because they construct the kind of citizen who will be responsive to the law and its governing powers. The normal, idealized individual is constructed using these concepts. As a result, the law assumes people are equally capable decision makers. Moreover, as part of a liberal western tradition, the individuality of people is held in the highest regard and so the principle of autonomy expresses the desire for treating others as equal citizens capable of making personal decisions for which they can be responsible.<sup>60</sup> The law is used to ensure the welfare of

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<sup>60</sup> Here is where I see the usefulness of existentialism as a philosophy.

people who are collected in society because it is thought that, as hedonistic choice makers, people will sometimes hurt others in an attempt to maximize their own pleasure.<sup>61</sup>

The FIT-R is a test designed with the law in mind. It specifically takes the three criteria of Section 2 of the *Criminal Code* and uses them to construct questions that will enable an evaluator to see how a person's abilities match up with the ideal citizen. In other words, the FIT-R is an attempt to measure how a person evaluates her own existential situation and also to demonstrate the kinds of processes that she employs to make decisions. This examination allows the evaluator to make comments about how the subject fills the expectations of the law and whether or not the accused will be able to make existential decisions in the context of the legal realm. If an accused demonstrates an inability to make decisions that are thought to be credible, then her ability to do so in the legal context becomes questionable and may put the law into a position of unjustness. The rigor of the FIT-R seems to be detailed enough so as to make the evaluation as comprehensive as possible.

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<sup>61</sup> Assuming the argument from Jeremy Bentham is correct.

#### Chapter 4: Fitness At Work – Precedent Setting Canadian Cases

I have selected two cases that have been significant to the development of the legal processes in Canada which affect the mentally disordered in order to demonstrate how the discourses of rationality, reason, and culpability are at work in the law and how they help create the fit and therefore punishable subject. Before I turn my attention to these two cases, it is important to acknowledge the significance of the case of *R. v. Swain* (1990) in the development of the law with respect to the mentally disordered. In 1990, the outcome of this case revolutionized the way the Canadian legal system approaches the mentally disordered accused. It was after this case that the *Canadian Criminal Code* was revised to change the terminology of the insanity defence to that of “not guilty by reason of mental disorder”. It also reaffirmed the rights of an accused to not be unduly incarcerated and to choose his own defence.<sup>62</sup> The decision to allow a fit accused to choose his own defence regardless of whether or not it serves his own best interest reaffirmed the principle of autonomy in Canadian law. This principle has had a long standing tradition in Western thought. Both the Kantian (deontological) and Millian (utilitarian) ethical traditions have emphasized respect for persons as rational and autonomous creatures because dignity is grounded in these qualities.

In this chapter I trace the concepts of rationality, reasonableness, and autonomy as they can be found in the cases of *R v. Taylor* (1992) and *R v. Whittle* (1994). I chose *Taylor* because this case has had a lasting and important impact on the way the Canadian legal system deals with accused individuals whose fitness is in question. The case of *Taylor* highlights some of the difficulties unfit accused can present to the court system. I

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<sup>62</sup> See chapter one above.

chose to examine *Whittle* because the issue of fitness in this case is broadened to encompass pre-court procedures and how an accused's fitness *before* trial can be important to the way it is handled in the trial. The analysis of these two cases also serves to demonstrate some of the inconsistencies and contradictions that can be found in their application as the courts attempt to create punishable subjects out of the mentally disordered. These concepts and principles are important elements of the culpable subject who is therefore punishable. The normative standard for culpability includes meeting the criteria of a reasonable, rational and autonomous subject. The qualities of this type of person have been outlined in Chapter 2 and, in Chapter 3 their import and application are presented in the evaluation of a person's psycho-legal abilities. Meeting these criteria means that a person who is being held accountable, culpable or blameworthy for an action, is also potentially punishable and subject to some form of legal sanction. The following examination of the *Taylor* and *Whittle* cases illustrates the struggle of the courts to utilize the understanding of these discourses in order to ensure that the accused individuals who are facing the judicial system are "qualified" to do so.

As noted earlier in Chapters 1 and 2, the law provides special provisions for dealing with those people whose actions are thought to be performed unknowingly, or out of duress, and the like. The logic used to justify these provisions is that only an actor who fully intends his actions can be held truly culpable for them. Thus an actor who undertakes an action that is contrary to the law and whose intentions are impaired in some way is not held to the same level of culpability as an actor whose behaviour is unimpaired. In its attempt to recognize the situations that are unique or rare, the law makes provisions to except certain individuals from being held culpable for their actions

and thus exculpates them from punishment, or at least metes out punishments that are tempered with the consideration of an impairment. Despite the attempt to recognize these unique circumstances, starting with the determination of the “fit” subject, the law seems to contrarily be using examinations of difference, in this case, mental disorder, to lower the standards generally held to be normative in order to have people moved through the criminal justice system as culpable, and therefore punishable, subjects. The cases of *Taylor* and *Whittle* will bring these inconsistencies and contradictions to light.

***R. v. Taylor:***

The case of *R. v. Taylor* is a significant one in Canadian legal history as the Supreme Court of Canada established that the cognitive requirements of a fit defendant do not have to be any more than “limited.” This means that an accused defendant must only be aware of the nature and objective of the proceedings and be able to assist counsel in coming up with a defence by relating facts to counsel. It is not necessary that the defendant be able to foresee consequences or choose a strategy that is in his own best interests but only that he is aware that punishment may be an outcome. I argue that there are important contradictions and inconsistencies in how the concepts of rationality, reasonableness, culpability, and autonomy are considered in these two leading cases, *Taylor* and *Whittle*. Moreover, these inconsistencies make the application of the limited cognitive test difficult to implement as I will demonstrate in Chapter five.

In 1987, Taylor was arrested and charged with aggravated assault and possessing a weapon. After his arrest, he was psychiatrically assessed and found unfit to stand trial. In April 1987, he was found fit to stand trial after a review by the Lieutenant Governor’s Board of Review (LGBR) and a preliminary trial was held on August 19. At his first



appearance in the District Court of Ontario on November 9, he was found unfit to stand trial and remanded into the custody of the Oak Ridge Division of the Mental Health Centre. In June 1988, the LGBR found Taylor to be fit for trial and the judge agreed. The outcome of Taylor's original trial was delivered on October 14, 1988; Taylor was found not guilty by reason of insanity and was "ordered detained in strict custody."

This verdict was set aside on August 21, 1991 and a new trial was ordered on the basis of *R. v. Swain* (1990)<sup>63</sup> because the Crown introduced evidence of the appellant's insanity. On February 12, 1992, Taylor brought an application of habeas corpus<sup>64</sup> with certiorari<sup>65</sup> in aid and pursuant to S. 10(c) and 24 of the *Charter of Rights and Freedoms*<sup>66</sup> seeking to quash his committal to trial and the certificate of involuntary committal. Habeas corpus was dismissed on February 12, 1992 and on March 24, 1992, Justice Wren found Taylor to be unfit for trial. On May 7, 1992, Taylor was also found unfit by the Ontario Criminal Court Review Board. Taylor appealed these judgments.

The appeal court examined several documents relating to the fitness of Taylor stemming from the proceedings of March 24, 1992. At this time, Taylor dismissed his court-appointed counsel claiming that counsel was "an incompetent fraud" and was then arraigned and did not have to plead. Psychiatric reports were provided to Taylor about himself and the hearing proceeded. Psychiatric reports from Dr. Cameron, who had Taylor in his care for almost two years, indicated that Taylor was diagnosed as suffering

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<sup>63</sup> For details of *R v Swain*, see Chapter 1 above, pp. 20-1.

<sup>64</sup> A writ issued to bring somebody who has been detained into court, usually for a decision on whether or not the detention is lawful.

<sup>65</sup> A writ of certiorari is a form of judicial review whereby a court is asked to consider a legal decision of an administrative tribunal, judicial office or organization (e.g. government) and to decide if the decision has been regular and complete or if there has been an error of law.

<sup>66</sup> See Appendix A (*Charter of Rights and Freedoms*).

from paranoid schizophrenia and was thought to be dangerous and unable to care or provide for himself.<sup>67</sup> Dr. Cameron thought Taylor was unfit to stand trial because he thought Taylor would be unable to instruct counsel given his delusions and paranoia.<sup>68</sup>

Both Drs. Cameron and McDonald admitted that Taylor was “technically fit” in the sense that he understood the nature and object of the proceedings, the role of the various players in the process and the judicial process, but noted that Taylor would be “unable to instruct counsel in a manner that would be in his best interests” (*R v. Taylor*, 1992, p. 7). Taylor was advised by his counsel that it was not appropriate to testify at the fitness hearing, but he insisted on doing so any way stating that he was able to work with his counsel, that they agreed on a defence strategy and that he did not believe there was any kind of conspiracy against him. Ultimately, Justice Wren found Taylor unfit to stand trial concluding that while Taylor (who was a lawyer at one time) understood the proceedings, was articulate and bright, could not “perceive his own best interests and how those interests should be addressed in the conduct of a trial” (*R v. Taylor*, 1992, p. 8). Thus the judge concluded that, “I am content that the accused person in this case is not capable to rationally instruct counsel, or rationally conduct a case, or rationally communicate with counsel because of his mental disorder” (*R v. Taylor*, 1992, p. 8).

In May 1992, a disposition hearing was held by the Ontario Criminal Court Review Board (OCCRB). The result of this hearing ultimately found that Taylor, while

<sup>67</sup> See Appendix B (Ont. Mental Health Act – conditions for involuntary commitment.)

<sup>68</sup> Other psychiatric reports came to the following conclusions:

Dr. Jones, Oct 30, 1991 – “... unable to participate meaningfully in the proceedings as his delusional thinking would preclude accurate perception of the events occurring before him” Dr. McDonald, Mar 10, 1992 – “I do not believe he is fit to stand trial. He cannot be dealt with rationally.” (*R v. Taylor*, 1992, p. 6)

intellectually capable of instructing counsel, would, because of his delusions, act in a manner counterproductive to his own best interests. The Board further “held that, as a result of the appellant’s mental disorder and his delusions with respect to the criminal justice system, he could not communicate meaningfully with counsel nor participate in his own defence” (R v. Taylor, 1992, p. 8). Thus the board found Taylor unfit to stand trial. Taylor was given ample time during his appeal of *habeas corpus* to present his case, but the court found his submissions wholly unhelpful and eventually turned its attention to the *amicus curiae*<sup>69</sup> portion of the appeal. Taylor refused to attend this portion of the proceedings claiming that he was not being provided enough time to finish his argument of habeas corpus. The appeal continued without Taylor, and the limited cognitive test was developed:

Under the ‘limited cognitive capacity’ test propounded by the *amicus curiae*, the presence of delusions does not vitiate the accused’s fitness to stand trial unless the delusion distorts the accused’s rudimentary understanding of the judicial process. It is submitted under this test, a court’s assessment of an accused’s ability to conduct a defence and to communicate and instruct counsel is limited to an inquiry whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. *It is not relevant to the fitness determination to consider whether the accused... ultimately makes decisions that are in his/her best interests* (R v. Taylor, 1992, P. 12 Section 44, emphasis added)

### **The Court’s Justification for Limited Cognitive Capacity**

The logic that is used to justify these conclusions by the Court is that the higher threshold of possessing analytical reasoning abilities might result in more people being declared unfit for trial and this outcome would conflict with the notion of due process.

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<sup>69</sup> Somebody whose counsel provides information to a court on legal issues involved in a case.

The court stated that, “The adoption of too high a threshold for fitness will result in an increased number of cases in which the accused will be found unfit to stand trial even though the accused is capable of understanding the process and anxious for it to come to completion” (R v. Taylor, 1992, p. 13). Moreover, such a criterion would interfere with the ability of an accused person to choose her own defence because she would be excluded from the trial process as an unfit person. The court also argued that:

In addition, adopting a high threshold of fitness, including a “best interests” component, derogates from the fundamental principle that an accused is entitled to choose his own defence and present it as he chooses. In *R. v. Swain* ... Lamer C.J.C., for the majority, stressed the importance of the accused person’s S. 7 right to liberty, which allows him to control his own defence. An accused person who has not been found unfit to stand trial must be permitted to conduct his own defence, even if it means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved (Section 51).

And,

The “limited cognitive capacity” test strikes an effective balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable time (Section 52).

The reasoning employed in Section 51 has existential implications in the sense that the adversarial system assumes a “fit” person who is able to choose her own defence. Not only does the accused get to choose the defence that will be presented to the court in answer to the charges against her, but it is also assumed that the accused will be able to accept the consequences that may follow from such a defence whether successful or not.

This assumption has embedded in it ideas of autonomy and choice making that are

clearly outlined in Sartre (1975)<sup>70</sup> and are to be viewed as important to the way the human condition is conceived. Sartre's existentialist philosophy embraces the idea of the human being as fundamentally a choice-making agent that is always in the process of becoming and is responsible for the consequences of its choices (Sartre, 1975, p. 350). The law too assumes this of the accused; the accused knew what he was doing when he contravened the law and is therefore accountable for the consequences. It is contradictory, however, to use the court's reasoning to justify a lower threshold of cognitive capacity because the assumption of being a choice maker demands an ability to choose on the basis of potential foreseen consequences and then acting, presumably in one's own best interest. The logic of claiming that the adoption of a higher threshold of cognitive capacity to include a "best interests" component somehow derogates from the ability of an accused to choose his own defence is also contrary to the idea of autonomy. If an accused person launches a defence that *others* think is detrimental to her own best interests, it does not mean that she is not acting in what she believes to be her own best interests.

The limited cognitive ability test is also contradictory to the principles of justice. Having a higher threshold is something that encourages autonomous behaviour and is a part of our understanding of the "normal" or "fit" accused person. I argue that lowering this threshold for the mentally disordered in order to include them in the category of "fit" is contradictory to the principles of justice. While the reasoning behind these statements of the court is likely designed to avoid a paternalistic undertone to the way the law approaches mentally disordered subjects, it is highly problematic that the same standard

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<sup>70</sup> See chapter one above.

is not applied to all accused persons entering the criminal justice system, since the principles upon which the criminal justice system is based assume the equality of all accused persons to begin with. “Fit” persons are presumed to have a basic understanding of the court proceedings and are able to participate in their trials in a meaningful way, but they are also assumed to have an ability to act autonomously by choosing strategies that are presumably in their own best interests. The threshold of cognitive capacity for non-mentally disordered accused persons is, then, in reality, much higher than that outlined by the “limited cognitive capacity” requirement sketched out here.

***R. v. Whittle:***

This case is important to the mentally disordered because it establishes that fitness does not change with respect to different aspects of the trial process. In other words, one’s competency to waive counsel is the same standard as waiving the right to silence and also to stand trial. The limited cognitive test in fitness is the same as the “operating mind” test<sup>71</sup> employed in the confession rule which occurs prior to the trial.

Douglas Whittle was arrested based on warrants for outstanding fines. He appeared to be mentally unstable to the officers who arrested him and while he was in custody, Whittle claimed that he wanted to confess to the murder of Frank Dowson. Officers informed Whittle of his right to counsel who indicated that he understood this right, but did not wish to exercise it. Whittle offered to show the officers the place where he disposed of the murder weapon and agreed to make a videotaped statement. His rights

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<sup>71</sup> Page 19: “The operating mind test, therefore, requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused.”

were reiterated to him, and his videotaped statements ceased when he indicated he wished to consult with a lawyer. Although he was advised to remain silent by his lawyer, Whittle claimed he needed to continue his confession because of the voices in his head and resumed his videotaped statement. Although some of his statements were bizarre, Whittle's evidentiary statements were supported by physical evidence. Prior to going to trial, Whittle was assessed for fitness and the results supported his fitness.

A *voir dire*<sup>72</sup> was held at Whittle's trial on a charge of first degree murder at which both Crown and defence psychiatrists testified that Whittle suffers from schizophrenia, a symptom of which is auditory hallucinations. The defence psychiatrist testified that Whittle was able to understand what he was saying, what was said to him and the court process. Whittle was also said to be fit to instruct counsel, but that the voices in his head demanding that he "unburden himself" made the consequences of his statements irrelevant to him. The trial judge found that while Whittle's statements were voluntary in the traditional sense, they should be excluded because his rights under s. 10(b) of the *Charter* were violated<sup>73</sup>. The trial judge, who accepted the defence psychiatrist's evidence, concluded that Whittle's "psychological condition prevented him from an awareness of the consequences which would flow from giving the statements, and that this inability to appreciate what was at stake nullified any alleged waiver of his right to counsel" (R v. Whittle, 1994, p . 3). Statements made by Whittle after his psychiatric evaluation were found to be in violation of s. 10(b) of the *Charter* and were also excluded by the trial judge. Whittle was acquitted after the Crown declined to call

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<sup>72</sup> The preliminary examination of a witness or juror to determine his or her competency to give or hear evidence.

<sup>73</sup> The Canadian Charter of Rights guarantees the right to legal counsel in section 10 b.

further evidence. The Court of Appeal ordered a new trial after finding that the statements were admissible and that the trial judge erred.

Justice Sopinka stated:

... the accused had the requisite degree of mental competence to make the choices inherent in the confession rule, the right to silence and the right to counsel. The “operating mind” test, which is an aspect of the confession rule, includes a limited mental component which requires that the accused have sufficient cognitive capacity to understand what he is saying and what is being said. This [capacity] includes the ability to understand a caution that the evidence can be used against the accused. The same standard applies with respect to the right to silence in determining whether the accused has the mental capacity to make an active choice. In exercising the right to counsel or waiving the right, the accused must possess the limited cognitive capacity that is required for fitness to stand trial. The accused must be capable of communicating with counsel to instruct counsel, and understand the function of counsel and that he can dispense with counsel even if this is not in the accused’s best interests. It is not necessary that the accused possess analytic ability. ... Inner compulsion, due to conscience or otherwise, cannot displace the finding of an “operating mind” unless, in combination with a conduct of a person in authority, a statement is found to be involuntary (*R. v. Whittle*, 1994, pp. 3-4).

Both of the cases above suggest that the law needs to employ a “limited cognitive test” in order to meet the requirements of due process and the autonomy of an individual to choose her own defence. I argue that the limited cognitive test is employed not for reasons of expediency or due process as identified by these cases, but to create punishable subjects. The focus of the FIT-R is to investigate the abilities of an accused to make decisions as well as to assess his abilities to understand the judicial process. Christopher Slobogin (2004), following an argument by Richard Bonnie (1992/1993), suggests that competence (fitness) can be divided into two aspects: adjudicative competence and decisional competence. He describes these two types of competence in the following way:



Adjudicative competency requires that the person understand the criminal process and be able to communicate relevant facts to the players in the system. Decisional competence, in contrast, is only required when the defendant is entitled to make a decision about his or her case, such as whether to plead guilty (Slobogin, 2006, p. 192).

The *Whittle* case conflates decision making ability with adjudicative understanding by equating the operating mind test with the limited cognitive ability test. Of course *Whittle* deals with pre-trial decisions, but the result of suggesting that the capacity of a person making decisions about how to proceed prior to trial is equated to that of decisions made during trial has implications that are far reaching in terms of how one proceeds in his defence strategy. The limited cognitive test reduces decision making to a mere understanding of the criminal process and the ability to relate facts to a lawyer. This means that a person does not have to be able to act in his own best interest and a person's decisional competence is neglected in favour of a more rudimentary kind of fitness that may render more subjects culpable by understanding them as fit subjects.

I argue that the law ought to include the appreciation of acting in one's own best interest since that kind of action seems to be embedded in the idea of what it means to be autonomous and therefore results in justice. If being able to act in one's own best interest is a reflection of the exercise of one's autonomy (regardless of success or failure of outcome), then conflating merely understanding of the judicial process with the ability to make decisions in one's own best interests (as reflected by an ability to at least consider alternatives) is highly problematic. If a person is decisionally incompetent, then he should not be held culpable for actions that are contrary to the law, since presumably that person cannot make rational choices with respect to actions. It should not be assumed that an individual is acting autonomously when contravening the law if his decisional capacity is

compromised, even if the issue of fitness is specifically related to an accused's mental abilities with respect to the trial. Therefore it is problematic to separate the ability to make decisions specifically for trial issues from being able to make decisions in general, since there does not appear to be a significant qualitative difference with respect to the decision making process. It could be argued that specific decisions for legal purposes differ from making decisions in general, but it is not clear what criteria one would apply to make that distinction.

Decision making abilities are relational in nature to circumstances and, as Veil and Hoff (1999 pp. 6-7) argue, so too should fitness be regarded. In other words, the idea that fitness or competence as a characteristic is further problematised by attempting to incorporate the ability to make decisions into a test designed along the lines of adjudicative competence as outlined in Section 2 of the *C.C.C.* Clearly in the case of *Taylor*, the trial court found that being unable to act in one's own best interest meant that Taylor was thought to be decisionally incompetent. Both the psychiatrists and the trial court judge make the distinction between adjudicative understanding and decision-making abilities. They agreed that because Taylor's delusions about the legal system stemmed from his schizophrenia he would be unable to effectively cooperate with counsel and ultimately would act to his own detriment. The Supreme Court reversed this decision, effectively stating that these criteria (of higher cognitive functions or best interests), interfere with due process and would potentially create large numbers of unfit persons. Persons who are unfit cannot be tried, and therefore they are not able to be held culpable and therefore punishable for their actions.

The Supreme Court of Canada also reversed the decision made in the case of *Whittle* where the Appeal court judge rendered inadmissible several statements that Whittle made to the police about his guilt with respect to murder. The Supreme Court of Canada ultimately decided that Whittle demonstrated adjudicative competence and that it was unnecessary to take into consideration his compulsion to confess that stemmed from his mental disorder. Therefore, in effect the *reasons* for Whittle's course of action are not taken into consideration in any way. The statements he made were supported by physical evidence and the court chose to make Whittle a culpable subject even though his decisions to confess were influenced by a mental disorder.

The analysis demonstrates that the limited cognitive test conflicts with the principle of autonomy and its assumptions with respect to the ideal punishable subject. The principle of autonomy assumes that individuals have the ability to make choices based on their ability to weigh the consequences of those choices. It is also implied in this principle that people are acting in their own best interests when they are making those choices. The limited cognitive test does not require accused individuals to possess any analytic or higher reasoning capability in order to be fit to stand trial. This criteria means that acting in one's own best interest<sup>74</sup> is not a requirement for being processed in the

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<sup>74</sup> Acting in one's own best interests means that choices and their potential outcomes can be logically assessed and a position or decision is made, irrespective of whether or not the decision or defence is successful. In other words, the ability of a person to choose a course of action as he/she reacts to his/her existential situation is important to the concept of autonomy; the failure of a certain course of action or decision does not render the decision-maker incapable, rather it reveals the ability to make mistakes in the assessment of one's situation and this too is an important part of autonomy. This idea is returned to in Chapter 5.

criminal justice system even though the actor is assumed to have been working on a similar kind of principle when he chose to commit an act that contravenes the law.<sup>75</sup>

Moreover, the deployment of the concepts of rationality and reasonableness in the two cases outlined above presents a conflict of practice with theory. The FIT-R is designed to establish the ability of an accused individual to participate in a trial. The design, as traced in Chapter 3, demonstrates that a higher level of analytical reasoning is embedded in the notion of the autonomous individual. The questions that comprise the FIT-R drive at how much understanding an individual has of the criminal process and his awareness of what it means to be processed in the criminal justice system. These questions probe for an accused individual's ability to participate in the trial process. In the case of *R v. Taylor*, the accused was found initially unfit for trial, then fit and then unfit and finally was found able to stand trial with the result of being found not guilty by reason of insanity.<sup>76</sup> When the *Swain* case was heard, the rules surrounding common law practice for the mentally disordered changed. It was decided that a defendant needs to be able to present his own defence regardless of whether or not it is in his own best interests.<sup>8</sup> Thus, it was also decided during *Swain* that the Crown could not introduce evidence of a mental disorder to the court unless the accused who is not pleading insanity puts into question his mental abilities. The result meant that the *Taylor* case was revisited in 1992, since it was decided that the Crown's introduction of evidence of mental disorder was a reversible error.

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<sup>75</sup> This assumption of best interests in terms of acting criminally to begin with is appealing to Rational Choice theory.

<sup>76</sup> Original trial was held in 1987/8 and therefore "insanity" was the operational term used to currently describe Not Guilty By Reason of Mental Disorder (S. 16) 1991.

Expert witnesses called upon to assess Taylor's fitness in his 1992 trial, concluded that he was unfit for trial because he was unable to participate meaningfully in the trial, be dealt with rationally or instruct counsel because of his delusions. Justice Wren agreed with this assessment of Taylor and deemed him unfit to stand trial because he would not be able to rationally instruct counsel, conduct a case, or communicate with counsel and this decision was reaffirmed by the OCCRB in its assessment of Taylor. Fitness is understood here as something that requires the autonomous capability to foresee the consequences of an action and accept responsibility for them by acting in one's own best interests. It appears that the court and OCCRB understand rationality as being collected, impartial, reflective, analytical, systematic and sensible. These qualities, according to the assessments of Taylor are missing or impaired by Taylor's mental disorder and paranoia. Presumably, it is expected that communicating with counsel must occur in a logical, systematic and sensible way if one is to present a defence in his own best interest. Dr. Jones' testimony in 1991 at Taylor's fitness hearing states: "... in my view, he would be unable to participate meaningfully in the proceedings as his delusional thinking would preclude accurate perception of the events occurring before him" (*R. v. Taylor*, 1992, p. 6).

In 1992, Dr. McDonald stated that "he [Taylor] cannot be dealt with rationally" since he refused to cooperate with a defence psychiatrist and believed himself to be the victim of a conspiracy" (*R. v. Taylor*, 1992, p. 7). Moreover, Dr. McDonald stated that despite the technical understanding Taylor had of the judicial process, he was unable to distinguish reality from fantasy and that "his thinking is rambling and disjointed and at times thoroughly irrational" (*R. v. Taylor*, 1992, p. 7). Justice Wren concluded that the

evidence put forth by these experts was satisfactory to render a judgment to the effect that Taylor was unfit for trial. In May 1992, a review of Taylor's case was held by the OCCRB where upon Dr. Cameron, in cross examination stated that Taylor "lacks certain abstractions and is unable to reason on higher cognitive levels" with the result that "he will inevitably act in a way that's counterproductive or not in his best interest" (*R. v. Taylor*, 1992, p. 8).

Taylor's behavior could not be categorized as reasonable if we take into consideration the characteristics of being agreeable (he refused to cooperate with counsel and psychiatrists), thoughtful, reflective and consistent (first claimed a conspiracy against him and then insisted he had no such delusions and that he was prepared to assist counsel as assigned to him). If being reasonable and rational are requirements of being culpable, and therefore punishable, as argued above, then it appears that Taylor should be found unfit for trial and that the criteria of higher reasoning and the ability to act in one's own best interest was being carefully considered in the initial reassessment of his case. In other words, it appears that Justice Wren's decision to declare Taylor unfit is consistent with the discourses of rationality and reasonableness as well as in accord with the principle of autonomy.

The Court of Appeal undermines this understanding of what it means to be fit by rejecting the requisite for a higher analytical ability. This rejection may be an unconsidered consequence of the *Swain* case, since the focus of *Swain* was on violations of *Charter* rights. It was in *Swain* that the practice of indefinite incarceration for persons found not guilty by reason of mental disorder was abandoned. Moreover, the issue of the Crown raising evidence of mental disorder to obtain a verdict it believes was in the best

interests of the defendant, resulted in the statement that a defendant must be able to present his own defence regardless of whether or not it is in his own best interest. The logic used to justify this declaration was the principle of autonomy. Here in the *Taylor* case, this proclamation that one need not act in one's own best interest when choosing a defence works to undermine the principle of autonomy, and also to render punishable subjects who may not be able to participate meaningfully in their own trial. The Court of Appeal found that cooperation between the accused and his counsel, or making decisions that are ultimately in one's own best interests are not a requirement of being fit (*R. v. Taylor*, 1992, p. 12).

In the following chapter I explore a selection of cases dealing with the issue of fitness after *Taylor* and *Whittle*. These cases serve to further demonstrate the conflicts of competing principles at work in the law, as well as to show how the discourses of rationality, reasonableness and culpability are practically deployed by and through the law. This critical analysis helps to make clear the way binaries are reinforced by these discourses and how the punishable subject is created or maintained by them.

## **Chapter 5: Applying Fitness Criteria Post *Taylor* and *Whittle***

The previous chapter provided an analysis and overview of two Canadian legal cases that have had a significant impact upon the way fitness is defined or thought about by the law. In the case of *Taylor* it was established that “limited cognitive ability” is all that is required to be considered fit to stand trial. The *Whittle* case is significant because it is here that the Courts declared that there is no difference in mental capacities or abilities during pre-trial encounters with the law. Conflating these limited abilities is contrary to the notion of the autonomous, responsible, culpable being. The concept of autonomy draws to mind the idea that a person who is autonomous makes decisions based on specific abilities to weigh options and perceive outcomes that will, in the selection of a course of action, be in one’s own best interest. The courts have determined that acting in one’s own best interest is not a requirement for proceeding in legal matters even though the law presumes this ability as a characteristic of the accused’s actions which have brought him into conflict with the law. The only requirement for proceeding with trial matters is a rudimentary understanding of one’s legal predicament, but no deeper cognitive capacity or appreciation is needed to be processed in the legal system from the time of arrest until the time of trial. As noted above, the court’s justification for taking this position is grounded in the principle of fairness which embraces the issue of due process or a speedy trial. In Canada, the right to a speedy trial is guaranteed by Section 11(b) of the *Charter of Rights and Freedoms*.

In this chapter, I examine a small selection of provincial Court of Appeal cases that demonstrate the way *Taylor* and *Whittle* have been applied. These cases were selected from a variety of cases provided to me by a legal expert familiar with fitness



issues. My decision to use these three cases was made for several reasons: 1) the cases were not limited to Ontario, demonstrating that this problem is not localized, 2) these cases were the most detailed of the selection providing me with more material to readily analyse, not that an analysis of the others was inapplicable, 3) the Xu case most poignantly demonstrates the continuing challenges faced by jurists who must preside over fitness cases, and 4) the commonality of the mental disorder does not obscure the intelligence of the accused which further problematizes the idea of the meaning of “unfitness.” In this examination, the continuing and problematic contradictions between trial expediency and fitness at work in the law will be exposed. This analysis illustrates that a determination of fitness is often at the expense of trial expediency, and that administrative pressures in the Court and the *Charter* right to a speedy trial is privileged over the needs of the accused. These cases expose the necessity for balancing the issue of trial fitness against that of expediency in order to ensure that justice (both criminal and social) is properly executed.

The first case I will examine is that of *R v. Pietrangelo* (2001). This case came before the Ontario Court of Appeal after Pietrangelo was convicted of attempted murder and assault with a weapon after he attacked and beat the mayor of Niagara Falls in his office. Pietrangelo’s conviction was appealed on the grounds that he was not fit to stand trial, and that he was not afforded an opportunity to question jurors about the influences of the media exposure of his case on them (challenge for cause<sup>77</sup>). Pietrangelo, acting as his own lawyer, wanted to question the jurors about their potential media bias. The nature

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<sup>77</sup> A challenge for cause is a party’s request that the judge dismiss a potential juror from serving on a trial jury by providing a valid legal reason for why that person shouldn’t serve. For example, potential bias – in this case the publicity of the case could have unfairly influenced the jurors.

of this case was such that the Court of Appeal determined that the only proper way to determine this bias was to get individualized statements from the jurors, rather than the general query the trial judge used to excuse jurors from duty.<sup>78</sup>

The Crown raised the issue of fitness during the trial where it presented a psychiatric report that made it “unequivocally clear” that Pietrangelo was not fit to stand trial. The trial judge did not hold a fitness inquiry when the issue was presented to him. The trial judge dealt with the issue by asking Pietrangelo if he was fit to stand trial and continued when Pietrangelo answered affirmatively.<sup>79</sup> The Court of Appeal found that the trial judge erred by proceeding in this fashion and determined that there were ample grounds on which to hold a fitness hearing before proceeding with the trial. The grounds to warrant a fitness hearing included Pietrangelo’s behaviour and the psychiatric report submitted by the Crown at his original trial. Pietrangelo did not appear to understand the nature and object of his trial as he insisted that he be allowed to call the “entire body of the City of Niagara Falls as witnesses” and that the reason he understood to be in court at all had to do with addressing his father’s will. Pietrangelo insisted that he would not participate in the trial process until his own witnesses had come to court and his father’s will was addressed in court (*R v. Pietrangelo*, 2001, p. 4).

Although the overview of this case is brief, the concepts of rationality, reasonableness and culpability are at work here. The Appeal court is suggesting that

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<sup>78</sup> “In the circumstances of this case the impact of the pre-trial publicity on prospective jurors could only be determined by the individualized inquiry contemplated by the challenge for cause provisions in the *Code*” (*R. v. Pietrangelo*, 2001 p. 3).

<sup>79</sup> “The response of the trial judge was to ask the appellant whether he was fit to stand trial. When the appellant answered affirmatively, the trial judge simply indicated that the trial would proceed, but would not be thwarted by any tactic such as the appellant’s refusal to cross-examine because his witnesses were not there” (*R. v. Pietrangelo*, 2001, p. 4 at 13).

Pietrangelo's behaviour does not fit into the notion of a rational and reasonable actor, and therefore holding that person culpable (which is the result of the initial trial) is not in accordance with the principle of fairness which protects the unfit from being prosecuted for something he does not understand and therefore cannot adequately respond to. The Appeal court's review of this case, without directly using these terms, applies concepts of rationality and reason to its findings. Pietrangelo's behaviour in court did not appear to be rational, and although he gave reasons for his presence in the court system, those reasons were not congruent with the actual issue being tried. The original trial's judge seems to have been more interested in the maintenance of due process and having a speedy trial than in the defendant's welfare. I suggest this because the judge did not hold individualized juror inquiries, preferring instead to ask about prejudice and media influence of them as a group. He also used the appellant's self assessment of his own fitness instead of holding a formal fitness hearing to address the Crown's concern. This decision demonstrates some of the conflicting forces at play in the court system since due process is also a part of the principle of fairness.

In the case of *R v. Gero* (2000), the issue of fitness was raised by the defence counsel who had some concerns that his client was not able to adequately communicate with him or give him instructions as to the direction or approach he should take on behalf of his client. In light of this concern, defence counsel attempted to have his client assessed for fitness, but was unsuccessful in accomplishing this task before the trial.<sup>80</sup> The defence counsel acknowledged that his client understood that he was in court on

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<sup>80</sup> Mr. Lister, the accused's lawyer stated to the Court of Appeal: "The reason the matter was adjourned last time, sir and the continuing problem I have is my continuing concern as to whether or not he is capable of giving me instructions or dealing with this matter" (*R. v. Gero*, 2000, p. 1).

charges of robbery and that his client understood him to be his representative, but the defence counsel was not satisfied that his client could instruct him with respect to proceeding with the trial. In response to this concern, the trial judge found that the accused was satisfactorily fit for trial on the basis that he acknowledged he instructed his counsel to appear at the trial and to defend the charge (*R. v. Gero* 2000, p. 3). Subsequent to the trial and prior to the appeal, the appellant was found to suffer from a mental illness although it did not render him unfit.

The Alberta Court of Appeal found that during his trial, the appellant Gero conducted himself as “coherent and rational” and that although unsuccessful, his defence was not abnormal or bizarre (*R. v. Gero* 2000, 4). The Court of Appeal reaffirmed the appellant’s fitness, but allowed the appeal because it found that the original trial judge should have held an inquiry into the appellant’s fitness in order to address defence counsel’s concerns about his client’s fitness. The relevance of this case is that it reveals the latitude and flexibility that trial judges have<sup>81</sup> to discern what constitutes fitness (within the legal parameters of Section 2 of the *Code*), and that the failure to address the issue of fitness and his needs with adequate care has the potential to result in a miscarriage of justice. Moreover, it appears that the Court of Appeal in this case also uses the concepts of rationality and reasonableness to make conclusions about the fitness of an individual.

In this case, the court found the appellant’s defence strategy to be a plausible one. The defence that was presented to the court was thought to be “normal” in the sense that

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<sup>81</sup> “In his response to a request for written submissions, the Appellant emphasizes the considerable discretion that is reposed in trial judges in matters of this kind” (*R. v. Gero*, 2000, p.4).

it was reasonable, even if it was not successful in defending the charge. Clearly, the success or failure of a defence strategy is separate from the characteristics that define it as either rational or irrational and reasonable or unreasonable. In other words, the employment of a particular strategy for defence is not the same as its result. This finding would indicate that the court determined this defence to be a rational one in that it conceivably explains the situation, and also a reasonable one in that the connections or steps of the argument of the appellant's defence were not completely incongruent with the situation. Although there is no explicit mention of the appellant's court behaviour, the characterization of the appellant as "coherent and rational" seems to indicate that he at least participated with an expected amount of courtroom decorum. Thus, the absence of any significant mention of the appellant's behaviour would indicate that he was stable, collected, and level headed (rational), and that he was also agreeable, consistent and perhaps exhibited thoughtfulness or reflectivity (reasonable). The Court of Appeal allowed an appeal of this case because it is necessary to hold an inquiry into a person's fitness if the issue is raised.<sup>82</sup> It is important to ensure that an accused individual is afforded all of the protections of the law, especially if her ability to participate adequately in the trial process is in question.

The case of *R. v. Xu* (2007) has remarkable similarities to the case of *R. v. Taylor* in that the appellant suffered from delusions of a prosecutory nature and also

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<sup>82</sup> "Nonetheless, we are of the view that the learned trial judge erred in law in concluding that Mr. Lister's affirmative response to the question, "But he has given you instructions to appear at this trial and defend the charge?" was dispositive of the fitness issue. In fact, in our respectful opinion, the inquiry was not responsive to the "concerns" that Mr. Lister had articulated.

We are unable to sustain a conviction, even with the concurrence of counsel, where we are persuaded that there was a miscarriage of justice attributable to a failure to conduct a proper inquiry on the issue of fitness to stand trial. In such circumstances, appellate interference is warranted" (*R. v. Gero*, 2000, p.4).

demonstrated intelligence and coherence in her behaviours and speech. But the inconsistencies and the contradictions in the law with respect to the unfit are much more transparent.

Ms. Xu had been ordered to undergo a 60 day treatment order to restore her to fitness, and although she was declared fit under the parameters of Section 2 of the *Code*, the treatment was not successful in controlling her delusions. These delusions seem to stem from a car accident after which she made hundreds of “nonsensical and rambling” phone calls to the complainant which did not stop after police warnings that they must. Xu’s delusions led her to believe that the insurance company (dealing with her accident), and the governments of Canada and China were conspiring against her to prevent her from receiving the settlement payment due to her from the accident.

Although her delusions were largely unresponsive to pharmacological treatment, Dr. DeFreitas opined that Xu was fit for trial as she met the “limited cognitive capacity test” standards that resulted from *Taylor*. This opinion was supported by another psychiatrist, Dr. Wilkie, and after this pronouncement, Xu “commenced a bail hearing.” Dr. Wilkie’s observations of Xu’s behaviour during her bail hearing led him to change his opinion with respect to her fitness despite her “rudimentary factual understanding of her legal predicament” (*R v Xu*, 2007, p. 3). Although Xu was able to speak intelligibly, her delusions rendered her unable to communicate with counsel. It was determined that her refusal to cooperate with the court was not volitional, but rather a result of her mental disorder. Xu was attempting to demonstrate her mental health by discarding her lawyer: “In other words, she is using the court process as a vehicle for the demonstration of her sanity” (*R v. Xu*, 2007, p. 3).

In his overview of the case, Justice Schneider makes the comparison to and provides a critique of *Taylor*. He argues that while the court, in rendering its decision in *Taylor*, took into consideration the right to choose one's own defence (which came out of *R. v. Swain*), Schneider points out that this right must be understood as "rational choice" (*R v. Xu*, 2007, p. 5). If the accused does not have a rational understanding of her legal predicament, the notion of a right to choose is empty. This way of understanding choice-making is embedded in the discourse of autonomy. Justice Schneider's argument here is that a rational choice is also a product of an autonomous actor who is able to examine the possibilities before her and think through the potential consequences of a particular course of action. Thus, a rational choice is also a product of an unencumbered thought process that allows a person to examine her existential situation and make choices based on her own best interest.

Justice Schneider uses dictionary definitions of the term rational to classify Xu's thinking as irrational, thereby reproducing the dichotomy supporting the punishable subject. He concludes that Xu's paranoid delusions render her irrational because she becomes "fixated upon irrelevancies that are a direct product of her mental illness." Xu "is not able to conduct her own defence... She is motivated by her mental disorder to behave within the process in a manner that is not consistent with its objectives" (*R v. Xu*, 2007, p. 5). This critique also highlights the need for the participants in the legal process to understand it well enough beyond a "limited cognitive" capacity, and to act in accordance with its objectives. If the accused cannot adequately participate in the process, she should be protected from it.

I argue that Justice Schneider's cautionary advice in the case of *Xu* is reflective of two things. First, there is a specific way of thinking about the punishable subject that is embedded in the assumptions of the law, and second, these assumptions are problematic and need to be considered with care so as not to push citizens through the criminal justice system when they are incapable of acting in their own best interests because they do not understand the process. While Justice Schneider employs a standard dictionary definition to make the distinctions between that which is rational and that which is not, I argue that he does so to provide a way of demonstrating how the "limited cognitive test" is inadequate. In the case of *Xu*, as in the case of *Taylor*, the accused individuals were highly articulate and intelligent, but the approach they took in their defences was hampered by mental disorder. While these two accused could easily pass the "limited cognitive test", the decisions they were making and the focus of their understanding of their circumstances was of such a nature as to be counterproductive to their own best interests.

The balance here is delicate; the law focuses on the autonomy of the individual, but when this autonomy is compromised by mental disorder, it is necessary to prevent the law from exacting punishments that would be unfair given the inability of an unfit person to adequately respond to the law. Justice Schneider seems keenly aware of this fine point, but he does not appear to be offering here a definitive solution to apply to every case. Indeed, it does not appear that such a solution is possible to have, for each case before the law that raises the issue of fitness is unique. To apply a single solution to such a variety of abilities would suggest that fitness can be categorized and defined in a way that reifies the binaries of fit and unfit. I argue that despite the inability and inappropriateness of a



“one size fits all” solution, the issue of fitness needs to be addressed on an individual basis. The prevention of the kinds of injustice or potential injustice demonstrated by these three cases and the cases of *Taylor* and *Whittle* can be had by giving the issue of fitness more careful attention. If the issue of fitness is raised for an accused, I think a formal inquiry into the matter will help jurists to uphold the principles of autonomy and fairness.

Being mentally disordered does not automatically make a person unfit for trial, but where the issue is raised, a more serious inquiry into the issue than the defendant’s own self assessment is a more appropriate way to proceed. I argue that tools like the FIT-R which help to place individuals on a continuum with respect to the ideal individual provide a clearer, but not definitive picture of whether or not a person is capable of enduring the rigors of the trial process. I do not think that this approach is paternalistic; rather I think it helps to preserve the autonomy of the individual. Fitness hearings that are tailored to the individual allows for the expression of that individual’s unique abilities. The *Xu* and *Taylor* cases demonstrate that unfit *legal* subjects have a wide range of mental abilities but the possession of them does not readily assist them or prepare them for the demands of a criminal trial.

The case of *Pietrangelo* is another significant case of an intelligent yet unfit subject. Pietrangelo was aware enough of some of the aspects of participating in a trial as his appeal was partially based on a challenge for cause, but the subject of the trial was not the issue he insisted on attempting to address. The rationality of a legal subject has varying degrees and there does not appear to be a definitive point at which a person can be said to be able to meaningfully participate in a trial. The fluctuation in a person’s mental abilities with respect to the law seems to make the critique of the FIT-R, as put

forth by Veiel and Coles (1999, 2001), strong. Fitness is not merely a characteristic, but it is a combination of abilities that allows a person to meaningfully participate in the legal process by making decisions based on an understanding of the nature or object of the trial and being able to think through the possible consequences of choosing certain defence strategies. Having said this, I do think that tools like the FIT-R can have the flexibility to provide jurists and lawyers with an insight as to how a defendant might respond to his criminal proceedings. The binary of fit/unfit may not be entirely eliminated here, but an awareness of how it is constructed can lead to a better appreciation of the importance of maintaining the same standard of autonomy for everyone.

It is apparent from these three cases that some judges do not seem to take the problematic nature of fitness into consideration with the kind of care that they should. This lack of consideration stems from conflicting goals embedded in the fundamental principles upon which the justice system is built. It seems that oftentimes, trial judges place more weight on the importance of the expediency of a trial and the issue of due process that is embedded in the fairness principle than a true consideration of fitness.<sup>5</sup> This lack of deep consideration of fitness comes at the expense of the notion that one needs to understand the process before one can be subject to it and be rendered culpable for her actions. The preoccupation with due process reduces fitness issues in their importance, and results in the creation of punishable subjects who are held culpable for behaviour when they are not in a position to adequately participate in the legal process.

In reviewing these select cases where fitness is at issue, provincial Courts of Appeal have applied concepts of rationality, reasonableness and autonomy. They look at evidence of the behaviours of the appellant during his trial as well as the arguments from

both counsel and the reasoning or behaviour of the trial judge. In cases where the behaviour of the defendant / accused is somehow outside of the scope of “normal” courtroom decorum, the behaviour is noted in the case as a factor indicating potentials for unfitness. The provincial Courts of Appeal are not saying that abnormal behaviour is a prerequisite for a fitness hearing or that this kind of behaviour will render a person unfit for trial. The indication is that if the issue of fitness is raised, a person’s courtroom behaviour can provide some insight into whether or not he is rational and/or reasonable. The analysis of these cases suggests that the “limited cognitive test” is problematic because it, in an attempt to maintain fundamental principles of justice such as due process and trial within a reasonable time, violates other fundamental principles of justice like autonomy and fairness.

In terms of methodology and drawing general conclusions, the selection and small sample of cases was drawn because of their relevance to how *Taylor* and *Whittle* were applied. The cases I examined were appealed and heard by provincial Courts of Appeal. There are likely numerous cases that could have been examined, but these cases were chosen as examples of the application of *Taylor* and *Whittle* to examine the roles of the nature and results of fitness within the broader legal contexts of rights and principles of law. My intention was neither to make broader conclusions about these cases, nor to generalize to the wider statistical population of accused.

## **Chapter 6: Drawing Conclusions:**

The purpose of this project has been two-fold: 1) to examine how the law responds to the mentally disordered who come into conflict with it, and 2) to see if that response is congruent with the notion of social justice. In order to accomplish this, I took the discourses of rationality, reasonableness, and culpability as markers for understanding who the “ideal” punishable subject is. These discourses, I argue, have had fundamental and lasting impacts on our conception of who the “normal” person is and why she is someone who is punishable by the law. The focus of this thesis is specific to the idea of “fitness to stand trial,” since an accused individual’s first contact with legal proceedings that are designed to determine her guilt or innocence is an interest in whether or not she is able to proceed with the trial. While people whose fitness for trial is not at issue proceed immediately with their legal dramas, people for whom fitness is an issue find themselves scrutinized by the law with the help of the psychiatric institution. This scrutiny is justified by the law as a way of protecting the unfit from unfair trial proceedings (Davis, 1994, p. 319).

### ***Theoretical Considerations:***

In order to accomplish this task, several theoretical areas required exploration. Assuming that both criminal justice and social justice are linked by the pursuit of justice, I found it necessary to briefly explore what is meant by justice. Ultimately, it appears that justice, in a broad sense, is that which makes the distinction between right and wrong meaningful. Thus, justice is a moral or ethical concept. Criminal justice, I argue, is

concerned with controlling social order so that social life can be productive and happy<sup>83</sup>. Moreover, the law gets its power by having the ability to punish those people who violate it and cause unhappiness within the community. Conceiving the formation of society by mutual consent – the social contract – provides the law with the power to punish.<sup>84</sup> The power to punish serves as an expression of the moral order of society.<sup>85</sup> In contrast, the concern of social justice is occupied with alleviating or eliminating inequity among individuals whether these issues are of recognition or redistribution (see for instance, Fraser, 1995 and Young, 1997).

The goals of these two branches of justice do not appear to be directly compatible. In order to account for the apparent discrepancy, I examined the development of the idea of social justice from Adam Smith to Iris Young. From this examination, two important and influential concepts emerged, stemming from Immanuel Kant. These concepts were the ideas of rationality and equality. Kant argued, following an historical tradition stemming from Aristotle<sup>86</sup>, that human beings are rational creatures. Moreover, for Kant, being rational creatures means that human beings are equal creatures and as such deserve to be treated equally with respect (Kant, 1988, pp. 25, 60). Hence, the Categorical Imperative became a foundation on which the “equal and absolute worth of every individual” (Flieschaker, 2004, p. 72) would be respected. This idea became a foundation

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<sup>83</sup> This function is justified by Utilitarianism, a theory that the greatest good for the greatest number is the most just way to promote human good (Mill, 2000, p. 173). See also Garland, 1990, p. 57.

<sup>84</sup> The idea of a social contract has its roots in Plato's *Crito* where Socrates argued that being a part of a community after reaching an age to make the choice is an indication of one's assent to the law and its power (Plato, 2002). This notion has been further refined by John Locke (1995) who argued that the social contract is one that prevents individuals from taking vengeance on those people who are perceived to have wronged them (Locke, 1995, pp. 350-352). See also Markus Drubber, 1998.

<sup>85</sup> For example, “Durkheim conceives of punishment as a straightforward embodiment of society's moral order...” (Garland, 1990, p. 25).

<sup>86</sup> Aristotle (1999) argued that the distinguishing feature of human beings from other animals is their rational faculty.

for secular justice and is an important Enlightenment ideal. The theory of impartiality that comes from these ideals suggests that moral principles can be applied in an objective fashion to all people using the same basic formulas, thus promoting fairness. The law works on this principle of impartiality and its two main tenants, innocence until proven guilty and the presumption of fitness, stem from it. But this kind of “impartiality” is not without its criticisms. Iris Young (1990) offers a scathing critique of this Enlightenment principle. She claims that this “logic of identity” is a way of refusing to acknowledge differences among people by “think[ing] things together... conceptualiz[ing] entities in terms of substance instead of process or relation...” (Young I. M., 1997, p. 98). Using the “logic of identity” then, creates binaries like good/bad, fit/unfit, health/sickness, and the like, and fails to see that there is a continuum on which things can be understood.

In order to undertake the task of understanding how and where, if at all, criminal justice and social justice intersect, I selected the idea of trial fitness as a specific area of focus. This site of inquiry is only one of several that could be used to examine the intersection of criminal and social justice. Some of the other sites of inquiry could include, race, gender, and ethnicity. Examining fitness however, contributes to a broader understanding of inequalities within criminal and social justice. Moreover, this selection provides an entrance into some of the fundamental principles at play in the law, namely, autonomy, welfare, and fairness. These principles are not only concerns for criminal justice, but they are also, more broadly, the concerns of social justice. Trial fitness is specifically concerned with these fundamental and foundational principles of the law. The law purports to support the autonomy of the people over whom it rules by providing acceptable limitations on social life presumably agreed upon by mutual agreement. By

doing so, the law also promotes the welfare of communities, since people agree abide by the law's rules in order to make their communal living more productive and enjoyable. Finally, the law offers itself as a set of fair rules, rules that because they are assented to, are common goals to all community members and can therefore be applied with impartiality to those community members. The criminal justice system, however, has found that impartiality is unrealistic, and that the actors to which it applies must meet certain criteria; otherwise, it finds itself in violation of these principles.

The kind of actor that the law assumes to be governed by it is one that is rational, reasonable, and therefore culpable. The assumption of this kind of actor reinforces certain kinds of binaries: normalcy/deviance, fit/unfit, good/bad, and I use the discourses of the rational, reasonable and culpable to uncover these binaries. Thus, my investigation is critical discourse analysis since language has the power to construct reality and provide it with a sense of permanence.<sup>87</sup>

In Chapter two, I examine the development of the discourses of the rational, reasonable, and culpable. I argue that the law's assumptions about human nature set up an understanding of the human being as having static, measurable and binary characteristics of free/determined (autonomy), responsible/not responsible (culpability), thinking/not thinking (rational), and reasonable/unreasonable. Moreover, the law assumes the actors over whom it rules to be free, thinking, reasonable and responsible choice-makers. This assumption allows the law to presume the fitness of people and helps to justify its ability to punish by treating those who come into conflict with it equally.

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<sup>87</sup> "As human beings we construct a language of communication charged with the moral meaning of our being. The categories of human language contain and presuppose definite forms of life" (Quinney, 1999, p. 74).

I argue that the concept of fitness is predicated on three discourses: rationality, reasonableness, and culpability. These discourses identify specific characteristics of the actions performed by punishable subjects. If an actor is assumed to be rational and reasonable, then he can be held culpable for actions that harm others. An investigation into what exactly these discourses are and how they relate not only to the principles of autonomy and welfare, but how they are found in the law and in psychiatry became important.

One of the foundational principles of law, according to Ashworth (2006), is that of the autonomy of the individual. This principle states, “that each individual should be treated as responsible for his or her own behaviour” (Ashworth, 2006, p. 25). This principle is embraced by classic criminology and is best attributed to Caesar Becarria (1880). Treating the individual as responsible for her own actions demonstrates respect for her as a choice-maker and encourages the moral agency of individuals (Ashworth, 2006, p. 26). But autonomy is not the only foundational principle in the law; welfare too, is a principle that has import. While individuals are thought to be autonomous, there is no denying that they are also social creatures who must find ways to exist (generally in communities) with one another. As social creatures, human beings must find ways to cooperate with one another and ensure the welfare of their social situations. As a set of rules of conduct, the law helps to facilitate the welfare of all community members by preventing and/or punishing those people who disrupt communal harmony. It is assumed that “individual[s] shall be able to discriminate between right and wrong...” (Farrar, 1930, p. 440) and conduct themselves accordingly.



Embedded in the concept of autonomy is an important notion of responsibility. The value of this concept is best demonstrated by existentialist philosophy where the full scope of a person's responsibility is drawn out. Jean-Paul Sartre (1975) declares that humans are special in that they do not have a particular purpose for which they are innately designed. He claims that we are like works in progress, our choices giving our art the details (Sartre, 1975). While humans are always grappling with making themselves, Sartre (1975) is adamant that our choices are not only a reflection of ourselves, but of how we think humankind in general should be (Sartre, 1975, p. 350). The result of this line of thinking is an emphasis on the responsibility that comes with making choices whether or not the consequences are foreseen.

David Harvey (1993) makes Sartre's ideas more clear. He too acknowledges the individuating life experiences of the human, but he is careful to point out that humans share the same kinds of conditions of being in the world. He writes, "Individuals are heterogeneously constructed subjects, internalizing 'otherness' by virtue of their relations to the world" (Harvey, 1993, p. 58). Thus, we are shaped and changed by the dynamics and fluidity of the social, and in turn, we shape and change the world through our meaning-making activities. The existential position is an endorsement of the principle of autonomy – emphasizing the human ability to make choices and take responsibility for them, and also recognizing the fact that humans are not isolated creatures, that humans live in a world with one another and their shared condition is what helps them to recognize the need to take responsibility for their choices. The emphasis on autonomy and the assumption that humans are free, capable, choice-makers leads to an insistence

that persons accept responsibility for their actions and be held culpable for them in the eyes of the community.

As a distinguishing characteristic of the human being (Aristotle, 1999, p. 9), rationality is an important discourse for this project. The rational actor demonstrates several key abilities; he is “response-able”<sup>88</sup>, able to provide plausible arguments for engaging in certain courses of action, has an awareness of time and place, and is able to logically connect events together. These characteristics are assumed by the law as normal to the punishable subject.

### *Analysing Fitness:*

Once the legal criteria were examined, I wanted to know how a person could be assessed for fitness. Ultimately, a judge makes the decision as to whether or not a person meets the legal criteria outlined above, but psychiatrists and psychologists (Viljoen, Ogloff, & Zapf, 2003) are often called upon to evaluate a person’s mental condition and used as “expert witnesses.” The tool that I examined in this endeavour is the Fitness Interview Test – Revised. I chose this tool because its initial design was specific to the Canadian legal realm and the revised edition reflects the changes embodied by Bill C-10 in 1992.

In Chapter 3, I take the concepts of rationality, reasonableness, and culpability and trace them through the FIT-R. I argue that these concepts are embedded in our concept of the fit person and that they play a significant role in the way we determine whether or not a person is fit for trial. I argue that the discourse of the rational entails

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<sup>88</sup> In order to be “response-able” a person’s actions are viewed in light of his ability to understand, engage in, and respond to his environment. (Ericson, 1975).

several key abilities including the abilities to be logical, justify arguments, and plausibly explain actions or events to another person. Behavioural cues of the rational person include being collected, impartial, sensible, reflective, systematic and analytical. The FIT-R provides the evaluatee with opportunities to demonstrate his abilities as a rational (thinking) being as it asks several questions that require the respondent to explain, provide an account of, or justify actions, and explain them in a logical and impartial fashion. In the course of the evaluation, the FIT-R seeks to determine how reasonable the evaluatee is.

The discourse of the reasonable is difficult to distinguish from that of the rational, but I argue that the reasonable subject can make connections, identify steps/stages of an event, and think them through. I argue that this process does not have to be based in logic in the way the discourse of rationality would demand. The way a person makes connections between steps and stages reveals something about his ability to reason and how his thought processes are employed. The behavioural characteristics of a reasonable subject include being agreeable, perceptive, thoughtful, consistent, and reflective.

The discourses of the reasonable and the rational are hallmarks of the “fit” or “normal” and therefore punishable subject. Possessing these qualities lays the foundation for holding her culpable for her actions. The FIT-R seeks to determine how the evaluatee sees herself as a culpable subject and it does so by asking questions that get the respondent to specifically identify herself in relation to her own culpability. The questions that reflect the idea of culpability in the FIT-R provide the evaluator with an idea of the respondent’s self perception of his culpability or blameworthiness.

Important aspects of autonomy and fairness are revealed by the discourses of the rational, reasonable and culpable. The rational person is a logical thinker who makes choices and can justify them. The reasonable person is able to connect steps together and think them through. These traits are extremely important to the idea of autonomy. The autonomous person examines options, weighs consequences and chooses a course of action. Jeremy Bentham (2000) thought that people were mainly hedonistic, and self interested. He argued that people need to be curbed from harming others by making punishments more painful than the pleasure that could be gained from injurious actions (Bentham, 2000). Thus the ideas embedded in existentialism come to play in the understanding of the autonomous subject (i.e. choice-making, weighing options, acting in one's best interest).

### ***Fitness in Practice:***

Having explored the legal criteria for fitness and one way that fitness can be evaluated, I turned my attention in Chapter 4 to two precedent setting cases in Canadian legal history to see how the discourses of the rational, reasonable and culpable play out in the courtroom. The two cases I chose were *R. v. Taylor* (1992) and *R. v. Whittle* (1994). Both of these cases came after the groundbreaking case of *R. v. Swain* (1990) in which the Court reaffirmed the rights of a fit accused to choose his own defence (regardless of whether or not it serves his best interests). This decision also reinforced the principle of autonomy in Canadian law.

The law has provisions within it to deal with the accused person whose actions are thought to be performed unknowingly, out of duress, and the like. The justification for

these provisions is that only an actor who fully intends his actions can be truly held culpable for them. Thus, an actor whose intentions are somehow impaired is not held to the same kind of accountability as someone whose actions are not (although it is clear that self-induced circumstances of impairment – drunkenness, for example – are not excused in terms of culpability<sup>89</sup>). The case of *Taylor* established the “limited cognitive capacity test” whereby it is only necessary for an accused person to have only the most rudimentary understanding of the trial, its proceedings and possible outcomes. It is not necessary for the accused to be able to process his circumstances and foresee varying possible outcomes; he only needs to know that punishment may be an outcome of the proceedings. Further, the case of *Whittle* expanded the legal criteria of “limited cognitive ability” to encompass decision making abilities prior to trial, i.e. while in police custody.

The case of Taylor was initially tried in 1988 and Taylor was found not guilty by reason of insanity and was remanded into custody. After the case of *Swain* (1990), Taylor’s case was reopened because the Crown had raised the issue of insanity. During his appeal, psychiatric evidence indicated that Taylor was suffering from paranoid schizophrenia and was thought to be unable to instruct counsel because he had paranoid delusions that led him to believe there was a legal conspiracy at work around him. During his fitness hearing, Taylor insisted on testifying against the advice of his counsel who argued that while he could meet the basic fitness requirements, he would be “unable to instruct counsel in a manner that would be in his best interests” (*R v. Taylor*, 1992). This argument was accepted by Justice Wren and the Ontario Criminal Court Review Board agreed with this decision in May 1992. In the end, however, the appeal of Taylor’s case

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<sup>89</sup> “Disease of the mind” has been given the following definition by Justice Dickson in *Cooper v. The Queen* (1979): “... any illness, disorder, or abnormal condition which impairs the human mind and its functioning, excluding however, self induced states caused by alcohol or drugs...” (Roach, 2004, p. 256).

resulted in the “limited cognitive capacity test” whereby a person’s abilities to act in his own best interests is not relevant to the determination of fitness. The court justified this position by declaring that any higher threshold of fitness would be contrary to the idea of due process (*R. v. Taylor*, 1992) since adopting too high a threshold would result in more people being declared unfit for trial.

I argue that the Court’s reasoning to maintain a “limited” test is problematic. The lowering of the threshold for the mentally disordered in order to include them in the category of “fit” (and thereby punishable) is contrary to the principles of justice. I argue that “fit” persons are presumed to have a basic understanding of court proceedings and are able to participate in their trials in a meaningful way. But “fit” persons are also assumed to have an ability to act autonomously by choosing strategies that are in their own best interests. The threshold of cognitive capacity for non-mentally disordered accused persons, then, in reality, is much higher than that outlined by the “limited cognitive capacity” requirement sketched out in *Taylor*.

The case of *Whittle* (1994) is significant because it establishes that the “operating mind test” is essentially the same as the “limited cognitive test” and therefore widens the scope of fitness to include competency to waive counsel and to waive the right to silence in pre-trial legal proceedings. Distinctions between “adjudicative competence” and “decisional competence” as outlined in Slobogin (2006) demonstrate why the conflation between the operating mind test and the limited cognitive test are problematic. These two types of competence are distinguished as follows:

Adjudicative competency requires that the person understand the criminal process and be able to communicate relevant facts

to the players in the system. ... Decisional competence, in contrast, is only required when the defendant is entitled to make a decision about his or her case, such as whether to plead guilty (Slobogin, 2006, p. 192).

While there might be a rudimentary understanding of what is happening prior to trial (i.e. while in police custody), not being able to act in one's own best interests during this time can have significant ramifications for how the trial later proceeds. The "limited cognitive" test reduces decision making to a mere understanding of the criminal justice process and the ability to relate facts to a lawyer. This means that a person's decisional competence is neglected in favour of a more rudimentary fitness that may render more people punishable by understanding them as fit. I argue that acting in one's own best interest is a reflection of one's autonomy and that conflating a mere understanding of the judicial process with the ability to make decisions is highly problematic. This conflation diminishes the importance of autonomy despite this foundational principle having utmost importance in the conception of the human being. The principle autonomy is one that has provided respect for persons as rational creatures and supplied dignity to the ethical realm. The violation of this principle with respect to the mentally disordered denies the mentally disordered their dignity and further emphasizes their deviant status.

The difficulties outlined above carry into cases of fitness after *Taylor* and *Whittle*. In Chapter 5, I explore three cases where fitness is at issue. In the cases of *R. v. Pietrangelo* (2001), *R. v. Gero* (2000) and *R. v. Xu* (2007) the issue of trial fitness brought them before the Court of Appeal. While all three cases had defendants who appeared to possess rational and reasonable faculties, their use of those faculties seems to have been employed in ways that were contrary to the nature and object of the

proceedings. In these three cases, the Court of Appeal determined that a more in depth inquiry into the defendant's fitness was required by the original trial.

In the case of *R. v. Xu* (2007), Justice Schneider provides a critique of fitness to stand trial. He argues that the right to choose one's own defence must be understood as a rational one. That is, if a person does not have a rational understanding of her legal predicament, choosing a defence strategy is void of meaning. Justice Schneider is arguing that rational choice making is the product of an autonomous actor who is able to examine her existential situation, weigh the various choices before her and make a decision based on her own best interests. In other words, a person needs to be "response-able" in order for her participation in a trial to be meaningful and for the outcome of the trial to be just.

The achievement of this goal is one that presents no easy solutions. I argue that Justice Schneider raises the difficulty of ensuring that defendants are able to assess their existential situations and act in their own best interests. He does not offer a "one size fits all" solution, and indeed, there does not appear to be such a solution that would not reproduce binaries. Even the process of assessing fitness is mired in these binaries, and I argue in Chapter 5 that it may not be possible to completely eliminate them. However, as I noted in Chapter 2, the deconstruction of binaries is temporary and incomplete. The process of deconstruction then, serves to bring to light "incompletely and temporarily... how legal arguments often disguise ideological positions" (Arrigo, 2003, p. 62).

Theoretically, then, this thesis serves to demonstrate how the discourses of rationality, reasonableness and culpability are at work in the law as they work together and support one another in the construction of the fit and ideal punishable subject. The



law itself assumes the fitness of individuals in the same way it assumes their innocence and their sanity and these assumptions allow it to apply itself to citizens equally. But the mentally disordered do not neatly fit into this dichotomy and the law finds that it is necessary to make provisions in order to avoid unjustly punishing them. The attempt to accommodate difference here becomes problematic as finding the limitations of just “how much” one can be mentally disordered before participating in the legal process becomes detrimental to the fundamental pursuit of justice. Canada’s answer to this dilemma is the “limited cognitive” test, but as revealed in Chapters 4 and 5, this test does not prevent a mentally disordered individual from being tried and punished when he does not have the autonomy to act in his own best interests. The small sample of cases I have presented in these two chapters are not meant to be representative of wider populations of accused people, rather they demonstrate some of the ways fitness has been handled in the wake of *Taylor* and *Whittle* and serve as an indication of the need to further investigate the issue of trial fitness. The valuation of autonomy, fairness, and welfare is compromised by the widening of the scope of what it means to be fit by lowering the thresholds of rationality and reasonableness via the limited cognitive test.

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## Appendix A

[http://laws.justice.gc.ca/en/const/annex\\_e.html#I](http://laws.justice.gc.ca/en/const/annex_e.html#I)

### Legal Rights

- |  |   |
|--|---|
| <b>Life, liberty and security of person</b>      | <p>7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p>  |
| <b>Search or seizure</b>                         | <p>8. Everyone has the right to be secure against unreasonable search or seizure.</p>   |
| <b>Detention or imprisonment</b>                 | <p>9. Everyone has the right not to be arbitrarily detained or imprisoned.</p>  |
| <b>Arrest or detention</b>                       | <p>10. Everyone has the right on arrest or detention</p> <ul style="list-style-type: none"> <li>(a) to be informed promptly of the reasons therefore;</li> <li>(b) to retain and instruct counsel without delay and to be informed of that right; and</li> <li>(c) to have the validity of the detention determined by way of <i>habeas corpus</i> and to be released if the detention is not lawful.</li> </ul>  |
| <b>Proceedings in criminal and penal matters</b> | <p>11. Any person charged with an offence has the right</p> <ul style="list-style-type: none"> <li>(a) to be informed without unreasonable delay of the specific offence;</li> <li>(b) to be tried within a reasonable time;</li> <li>(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;</li> <li>(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;</li> </ul> |

- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

#### **Treatment or punishment**

- 12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

#### **Self-crimination**

- 13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

#### **Interpreter**

- 14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to



the assistance of an interpreter.

## **Appendix B**

### **Mental Health Act**

#### **R.S.O. 1990, CHAPTER M.7**

**Consolidation Period:** From November 1, 2004 to the e-Laws currency date.

Last amendment: 2004, c.3, Sched.A, s.90.

#### **Application for psychiatric assessment**

**15.(1)**Where a physician examines a person and has reasonable cause to believe that the person,

(a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself;

(b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; or

(c) has shown or is showing a lack of competence to care for himself or herself,

and if in addition the physician is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,

(d) serious bodily harm to the person;

(e) serious bodily harm to another person; or

(f) serious physical impairment of the person,

the physician may make application in the prescribed form for a psychiatric assessment of the person. R.S.O. 1990, c. M.7, s. 15 (1); 2000, c. 9, s. 3 (1).

#### **Same**

**(1.1)**Where a physician examines a person and has reasonable cause to believe that the person,

(a) has previously received treatment for mental disorder of an ongoing or recurring nature that, when not treated, is of a nature or quality that likely will result in serious bodily harm to the person or to another person or substantial mental or physical deterioration of the person or serious physical impairment of the person; and

(b) has shown clinical improvement as a result of the treatment,

and if in addition the physician is of the opinion that the person,

(c) is apparently suffering from the same mental disorder as the one for which he or she previously received treatment or from a mental disorder that is similar to the previous one;

(d) given the person's history of mental disorder and current mental or physical condition, is likely to cause serious bodily harm to himself or herself or to another person or is likely to suffer substantial mental or physical deterioration or serious physical impairment; and

(e) is incapable, within the meaning of the *Health Care Consent Act, 1996*, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained,

the physician may make application in the prescribed form for a psychiatric assessment of the person. 2000, c. 9, s. 3 (2).

#### Contents of application

(2) An application under subsection (1) or (1.1) shall set out clearly that the physician who signs the application personally examined the person who is the subject of the application and made careful inquiry into all of the facts necessary for him or her to form his or her opinion as to the nature and quality of the mental disorder of the person. R.S.O. 1990, c. M.7, s. 15 (2); 2000, c. 9, s. 3 (3).

#### Idem

(3) A physician who signs an application under subsection (1) or (1.1),

(a) shall set out in the application the facts upon which he or she formed his or her opinion as to the nature and quality of the mental disorder;

(b) shall distinguish in the application between the facts observed by him or her and the facts communicated to him or her by others; and

(c) shall note in the application the date on which he or she examined the person who is the subject of the application. R.S.O. 1990, c. M.7, s. 15 (3); 2000, c. 9, s. 3 (4).

#### Signing of application

(4) An application under subsection (1) or (1.1) is not effective unless it is signed by the physician within seven days after he or she examined the person who is the subject of the examination. R.S.O. 1990, c. M.7, s. 15 (4); 2000, c. 9, s. 3 (5).

### Authority of application

(5) An application under subsection (1) or (1.1) is sufficient authority for seven days from and including the day on which it is signed by the physician,

(a) to any person to take the person who is the subject of the application in custody to a psychiatric facility forthwith; and

(b) to detain the person who is the subject of the application in a psychiatric facility and to restrain, observe and examine him or her in the facility for not more than 72 hours.

R.S.O. 1990, c. M.7, s. 15 (5); 2000, c. 9, s. 3 (6).

### Justice of the peace's order for psychiatric examination

16.(1) Where information upon oath is brought before a justice of the peace that a person within the limits of the jurisdiction of the justice,

(a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself;

(b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; or

(c) has shown or is showing a lack of competence to care for himself or herself,

and in addition based upon the information before him or her the justice of the peace has reasonable cause to believe that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,

(d) serious bodily harm to the person;

(e) serious bodily harm to another person; or

(f) serious physical impairment of the person,

the justice of the peace may issue an order in the prescribed form for the examination of the person by a physician. R.S.O. 1990, c. M.7, s. 16 (1); 2000, c. 9, s. 4 (1).

### Same

(1.1) Where information upon oath is brought before a justice of the peace that a person within the limits of the jurisdiction of the justice,

(a) has previously received treatment for mental disorder of an ongoing or recurring nature that, when not treated, is of a nature or quality that likely will result in serious

bodily harm to the person or to another person or substantial mental or physical deterioration of the person or serious physical impairment of the person; and

(b) has shown clinical improvement as a result of the treatment,

and in addition based upon the information before him or her the justice of the peace has reasonable cause to believe that the person,

(c) is apparently suffering from the same mental disorder as the one for which he or she previously received treatment or from a mental disorder that is similar to the previous one;

(d) given the person's history of mental disorder and current mental or physical condition, is likely to cause serious bodily harm to himself or herself or to another person or is likely to suffer substantial mental or physical deterioration or serious physical impairment; and

(e) is apparently incapable, within the meaning of the *Health Care Consent Act, 1996*, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained,

the justice of the peace may issue an order in the prescribed form for the examination of the person by a physician. 2000, c. 9, s. 4 (2).

#### Idem

(2) An order under this section may be directed to all or any police officers of the locality within which the justice has jurisdiction and shall name or otherwise describe the person with respect to whom the order has been made. R.S.O. 1990, c. M.7, s. 16 (2); 2000, c. 9, s. 4 (3).

#### Authority of order

(3) An order under this section shall direct, and, for a period not to exceed seven days from and including the day that it is made, is sufficient authority for any police officer to whom it is addressed to take the person named or described therein in custody forthwith to an appropriate place where he or she may be detained for examination by a physician. R.S.O. 1990, c. M.7, s. 16 (3); 2000, c. 9, s. 4 (4).

#### Manner of bringing information before justice

(4) For the purposes of this section, information shall be brought before a justice of the peace in the prescribed manner. 2000, c. 9, s. 4 (5).

#### Action by police officer

**17.**Where a police officer has reasonable and probable grounds to believe that a person is acting or has acted in a disorderly manner and has reasonable cause to believe that the person,

(a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself;

(b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; or

(c) has shown or is showing a lack of competence to care for himself or herself,

and in addition the police officer is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,

(d) serious bodily harm to the person;

(e) serious bodily harm to another person; or

(f) serious physical impairment of the person,

and that it would be dangerous to proceed under section 16, the police officer may take the person in custody to an appropriate place for examination by a physician. 2000, c. 9, s. 5.

#### Place of psychiatric examination

**18.**An examination under section 16 or 17 shall be conducted by a physician forthwith after receipt of the person at the place of examination and where practicable the place shall be a psychiatric facility or other health facility. R.S.O. 1990, c. M.7, s. 18.

#### Change from informal or voluntary patient to involuntary patient

**19.**Subject to subsections 20 (1.1) and (5), the attending physician may change the status of an informal or voluntary patient to that of an involuntary patient by completing and filing with the officer in charge a certificate of involuntary admission. R.S.O. 1990, c. M.7, s. 19; 2000, c. 9, s. 6.

#### Duty of attending physician

**20.(1)**The attending physician, after observing and examining a person who is the subject of an application for assessment under section 15 or who is the subject of an order under section 32,

(a) shall release the person from the psychiatric facility if the attending physician is of the opinion that the person is not in need of the treatment provided in a psychiatric facility;

(b) shall admit the person as an informal or voluntary patient if the attending physician is of the opinion that the person is suffering from mental disorder of such a nature or quality that the person is in need of the treatment provided in a psychiatric facility and is suitable for admission as an informal or voluntary patient; or

(c) shall admit the person as an involuntary patient by completing and filing with the officer in charge a certificate of involuntary admission if the attending physician is of the opinion that the conditions set out in subsection (1.1) or (5) are met. R.S.O. 1990, c. M.7, s. 20 (1); 2000, c. 9, s. 7 (1).

#### Conditions for involuntary admission

(1.1) The attending physician shall complete a certificate of involuntary admission or a certificate of renewal if, after examining the patient, he or she is of the opinion that the patient,

(a) has previously received treatment for mental disorder of an ongoing or recurring nature that, when not treated, is of a nature or quality that likely will result in serious bodily harm to the person or to another person or substantial mental or physical deterioration of the person or serious physical impairment of the person;

(b) has shown clinical improvement as a result of the treatment;

(c) is suffering from the same mental disorder as the one for which he or she previously received treatment or from a mental disorder that is similar to the previous one;

(d) given the person's history of mental disorder and current mental or physical condition, is likely to cause serious bodily harm to himself or herself or to another person or is likely to suffer substantial mental or physical deterioration or serious physical impairment;

(e) has been found incapable, within the meaning of the *Health Care Consent Act, 1996*, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained; and

(f) is not suitable for admission or continuation as an informal or voluntary patient. 2000, c. 9, s. 7 (2).

#### Physician who completes certificate of involuntary admission

(2) The physician who completes a certificate of involuntary admission pursuant to clause (1) (c) shall not be the same physician who completed the application for psychiatric assessment under section 15. R.S.O. 1990, c. M.7, s. 20 (2).

#### Release of person by officer in charge

(3)The officer in charge shall release a person who is the subject of an application for assessment under section 15 or who is the subject of an order under section 32 upon the completion of 72 hours of detention in the psychiatric facility unless the attending physician has released the person, has admitted the person as an informal or voluntary patient or has admitted the person as an involuntary patient by completing and filing with the officer in charge a certificate of involuntary admission. R.S.O. 1990, c. M.7, s. 20 (3).

#### Authority of certificate

(4)An involuntary patient may be detained, restrained, observed and examined in a psychiatric facility,

(a) for not more than two weeks under a certificate of involuntary admission; and

(b) for not more than,

(i) one additional month under a first certificate of renewal,

(ii) two additional months under a second certificate of renewal, and

(iii) three additional months under a third or subsequent certificate of renewal,

that is completed and filed with the officer in charge by the attending physician. R.S.O. 1990, c. M.7, s. 20 (4).

#### Conditions for involuntary admission

(5)The attending physician shall complete a certificate of involuntary admission or a certificate of renewal if, after examining the patient, he or she is of the opinion both,

(a) that the patient is suffering from mental disorder of a nature or quality that likely will result in,

(i) serious bodily harm to the patient,

(ii) serious bodily harm to another person, or

(iii) serious physical impairment of the patient,

unless the patient remains in the custody of a psychiatric facility; and

(b) that the patient is not suitable for admission or continuation as an informal or voluntary patient. R.S.O. 1990, c. M.7, s. 20 (5); 2000, c. 9, s. 7 (3, 4).

#### Change of status, where period of detention has expired



(6)An involuntary patient whose authorized period of detention has expired shall be deemed to be an informal or voluntary patient. R.S.O. 1990, c. M.7, s. 20 (6).

*Idem*, where period of detention has not expired

(7)An involuntary patient whose authorized period of detention has not expired may be continued as an informal or voluntary patient upon completion of the approved form by the attending physician. R.S.O. 1990, c. M.7, s. 20 (7); 2000, c. 9, s. 7 (5).

Examination of certificate by officer in charge

(8)Forthwith following completion and filing of a certificate of involuntary admission or of a certificate of renewal, the officer in charge or his or her delegate shall review the certification documents to ascertain whether or not they have been completed in compliance with the criteria outlined in this Act and where, in his or her opinion, the documents are not properly completed, the officer in charge shall so inform the attending physician and, unless the person is re-examined and released or admitted in accordance with this section, the officer in charge shall release the person. R.S.O. 1990, c. M.7, s. 20 (8); 2000, c. 9, s. 7 (6).

Judge's order for examination

21.(1)Where a judge has reason to believe that a person who appears before him or her charged with or convicted of an offence suffers from mental disorder, the judge may order the person to attend a psychiatric facility for examination.

Senior physician's report

(2)Where an examination is made under this section, the senior physician shall report in writing to the judge as to the mental condition of the person. R.S.O. 1990, c. M.7, s. 21.

Judge's order for admission

22.(1)Where a judge has reason to believe that a person in custody who appears before him or her charged with an offence suffers from mental disorder, the judge may, by order, remand that person for admission as a patient to a psychiatric facility for a period of not more than two months.

Senior physician's report

(2)Before the expiration of the time mentioned in such order, the senior physician shall report in writing to the judge as to the mental condition of the person. R.S.O. 1990, c. M.7, s. 22.

Condition precedent to judge's order

**23.**A judge shall not make an order under section 21 or 22 until he or she ascertains from the senior physician of a psychiatric facility that the services of the psychiatric facility are available to the person to be named in the order. R.S.O. 1990, c. M.7, s. 23.

#### Contents of senior physician's report

**24.**Despite this or any other Act or any regulation made under any other Act, the senior physician may report all or any part of the information compiled by the psychiatric facility to any person where, in the opinion of the senior physician, it is in the best interests of the person who is the subject of an order made under section 21 or 22. R.S.O. 1990, c. M.7, s. 24.

#### Detention under the *Criminal Code* (Canada)

**25.**Any person who is detained in a psychiatric facility under Part XX.1 of the *Criminal Code* (Canada) may be restrained, observed and examined under this Act and provided with treatment under the *Health Care Consent Act, 1996*. 2000, c. 9, s. 8.

#### Communications to and from patients