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OF LEGAL HISTORY, JURISPRUDENCE AND INSANITY – "WRONG OR CONTRARY TO LAW" IN SECTION 84 OF THE PENAL CODE RE-CONSIDERED

This article considers, from the perspectives of legal history and jurisprudence, the longstanding controversy surrounding the interpretation of the phrase "wrong or contrary to law" in section 84 of the Penal Code, and suggests that the evidence points to an interpretation that "wrong" means "legally wrong" or "contrary to law". It also considers the practical implications that follow from such an interpretation, which implications would allow for some role, nevertheless, for extralegal considerations.

I. Introduction

THE present essay exemplifies, in many ways, the continuing tension between universals and particulars.[1] The particular issue concerned is a relatively narrow one, centring on the proper interpretation to be accorded to the last part of section 84 of the Penal Code[2] which deals with the law relating to insanity as a general exception to criminal liability. In order, however, to produce as fully textured an analysis as possible, it is suggested that this relatively narrow issue has to be viewed against a much broader backdrop which would entail the application of principles derived from such diverse fields as legal history and jurisprudence. In addition, issues relating to the place of interdisciplinary studies in the study of law will (if only briefly) be also raised.[3] Finally, much will also depend on the particular culture as well as legal system concerned.

1 See, *eg*, Roberto Mangabeira Unger, *Knowledge and Politics* (1975), especially Ch 3.

2 Cap 224, 1985 Rev Ed. This provision is, in substance, the same as the corresponding provisions in both Malaysia and India. Although the title of this essay refers to the more popular rubric of "insanity", it should be noted that the actual terminology utilized in s 84 is "unsoundness of mind".

3 In this particular respect, much of the focus has centred on the legal and medical (principally, and not unexpectedly, the psychiatric) spheres which are, by and large, in tension with each other. The courts (regardless of jurisdiction) have (quite naturally) consistently asserted the need to demarcate the legal from the medical (see, *eg*, *James Frank Rivett* (1950) Cr App Rep 87 at 94; *Hazara Singh* v *State* [1958] Cr LJ 555 at 559; *Lakshmi* v *State* AIR 1959 All 534 at 536; and *cf Ramdulare Ramadhin Sunar* v *State* AIR 1959 Madhya Pradesh 259 at 260-261; *cf*, also, the Canadian Supreme Court decision of *R* v *Chaulk* [1990] 3 SCR 1303 at 1411). See also RB Tewari, "Exemptions from Liability – the Law Governing

But let us return to the specific issue at hand; and an eminently logical (if unexciting) starting-point would be to state the relevant provision (*ie*, section 84 of the Penal Code) itself:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is *either wrong or contrary to law*.[4]

The issue that is the focus of the present essay centres on the concluding wording in the section which have been italicized above. Simply put, the defence under section 84 is established by the accused if he[5] can prove, on a balance of probabilities,[6] that (*inter alia*[7]) he did not know that what

Insanity" in *Essays on the Indian Penal Code* (1962) pp 73-83, at 75; *per* the then Minister for Labour and Law (Mr KM Byrne) in *Legislative Assembly Debates, State of Singapore* vol 14 at col 1510 (24 May 1961); Abraham S Goldstein & Martin Marcus, "The McNaughton Rules in the United States" in *Daniel McNaughton – His Trial and the Aftermath* (1977, Donald J West & Alexander Walk, eds), pp 153-169, at 155; and Kok Lee Peng, Molly Cheang & Chee Kuan Tsee, *Mental Disorders and the Law* (1994) at 77 and 326-327; *cf Report of the Royal Commission on Capital Punishment 1949-1953* (HMSO, 1953, Cmd 8932) at Ch 4; *Report of the Committee on Mentally Abnormal Offenders* (HMSO, Cmnd 6244, 1975; hereafter the *Butler Report*), especially at paras 18.6-18.8; Andrew Ashworth, *Principles of Criminal Law* (1991) at 184-185; and M Sornarajah, "Some Recent Trends in the Insanity Defence" (1972) 3 Colombo Law Rev 43 at 47 and 55 (who, whilst acknowledging the conflict between the legal and the psychiatric, argues that the legal standard is "acceptable", although he simultaneously argues for a liberal interpretation of the principles laid down in *M'Naghten*, thus ensuring that the psychiatric evidence "may be given its due weight", but without detracting from the legal standard). See also the very interesting chapter by Alan Norrie in *Crime, Reason and History – A Critical Introduction to Criminal Law* (1993), Ch 9, where the author not only examines the tensions between law and psychiatry but also points to alliances that (in his view) have served to mask deeper issues of culture, society and power. Another interesting (and very recent) historical work is Joel Peter Eigen's *Witnessing Insanity – Madness and Mad-Doctors in the English Court* (1995).

4 Emphasis added.

5 Or she, of course.

6 See generally, s 107 of the Evidence Act (Cap 97, 1990 Rev Ed) and the leading Privy Council decisions of *Public Prosecutor* v *Yuvaraj* [1969] 2 MLJ 89 and *Jayasena* v *R* [1970] AC 618. See also (in a more general vein) Michael Hor, "The Burden of Proof in Criminal Justice" (1992) 4 SAcLJ 267 and Tan Yock Lin, "The Incomprehensible Burden of Proof" [1994] SJLS 29.

7 There is also the possibility of the accused invoking the earlier limb of the provision (*ie*, that he "is incapable of knowing the nature of the act"), but as this will not be the focus of the instant piece, nothing more will be said beyond what is stated in this note itself (and, on the need to distinguish between both limbs, both of which are important in their own right, see *Geron Ali* v *Emperor* AIR 1941 Cal 129 at 130, also referred to in the note following). It will suffice to note that the reference in this (first) limb is to the *physical*

he was doing was "either wrong or contrary to law"; it is, however, by no means clear whether the accused must prove that he did not know that what he did was "wrong" *and* that he did not know that it was "contrary to law" (the so-called 'conjunctive view') *or* whether it suffices if he is able to simply prove one or the other (the so-called 'disjunctive view'). As the reader would have surmised, there are cases going either way,[8] and the local position itself is far from settled.[9] As also expected, there has been no dearth of literature on the point;[10] indeed, there is, it should be mentioned, yet a *third* view to the effect that the phrase "contrary to law" in section 84 is merely *exegetical* of the word "wrong".[11] And similar (albeit not identical) problems have also arisen in other jurisdictions, notwithstanding the absence of anything like the statutory language in section 84 (which refers to both "wrong" as well as "contrary to law"); this is not, however,

nature of the act itself (see, *eg*, *Georges Codere* (1916) 12 Cr App Rep 21), although in the Canadian context, the courts have stated (in the context of a different word, *viz*, "appreciating") that perception of the physical consequences was also included (see, in particular, *R* v *Cooper* [1980] 1 SCR 1149); this approach is important insofar as it may be possible to perceive the physical nature of the act itself, without being simultaneously being able to perceive the consequences of that act (as pointed out in *Cooper* itself).
I should also stress that I do not here consider a somewhat different and broader issue, *viz*, that of capacity (or, rather, incapacity) which would also (at least possibly) involve the legal-psychiatric dichotomy or interface (depending on which approach one adopts); and see generally the judgment of Dixon J in *The King* v *Porter* (1933) 55 CLR 182.

8 The most oft-cited being the following decisions of the Calcutta High Court: *Geron Ali* v *Emperor* AIR 1941 Cal 129 (endorsing the 'conjunctive view') and *Ashiruddin Ahmed* v *The King* AIR 1949 Cal 182 (and *cf* the (also Calcutta High Court) decision of *Kazi Bazlur Rahman* v *Emperor* AIR 1929 Cal 1 which is, however, none too clear). This consistent citation is, perhaps, hardly surprising, not least because both decisions emanated from the same court and one judge, Roxburgh J, sat in both cases (which were, in turn, presided over by two judges each time)! A similar parallel may, in fact, be found in the local context as well: *cf Azro* v *Public Prosecutor* [1962] MLJ 321 with *Jusoh* v *Public Prosecutor* [1963] MLJ 84, Thomson CJ sitting in both cases as well, although, in each case, three judges sat (in fact, Hill J also sat in both cases, but Thomson CJ delivered the judgment of the court on each occasion); however, both cases are by no means *direct* authority.

9 See generally, the discussion in the literature cited in the note following. As the case law is inconclusive and the discussion in the literature fairly full, the local cases will not be further analysed in the present essay, save where new points germane to the arguments presented here are concerned.

10 See, *eg*, JK Canagarayar, "The Plea of Insanity: Some Observations on the Application of the 'Wrong or Contrary to Law' Test in Singapore, Malaysia and India" [1985] 2 MLJ iii and, by the same author, "A Tale of Two 'Wrongs' and a Veritable 'Wrong'" [1989] 2 MLJ lx; Bron McKillop, "Insanity Under the Penal Code" (1966) 7 Me Judice 65 at 70-79; M Cheang, "The Insanity Defence in Singapore" (1985) 14 Anglo-Am Law Rev 245 at 251-254; Kok, Cheang & Chee, *supra*, note 3, at 71-73 and 79-81; and WED Davies, "The Defences of Insanity and Intoxication in Malayan Criminal Law" [1958] MLJ lxxvi at lxxvii-lxxviii.

11 See generally, the articles by Canagarayar, *supra*, note 10.

a real difficulty (insofar as potential applicability to the local context is concerned) since it is generally accepted that, despite the differences in wording, section 84 is based upon[12] the rules laid down in the seminal decision

[12] See, *eg*, *Queen-Empress* v *Kader Nasyer Shah* (1896) ILR 23 Cal 604 at 607; *Hazara Singh* v *The State*, *supra*, note 3, at 560; *Ramdulare Ramadhin Sunar* v *State*, *supra*, note 3, at 260; and *Lee Ah Chye* v *Public Prosecutor* [1963] MLJ 347 at 349. See also Tewari, *supra*, note 3, at 73 and Sornarajah, *supra*, note 3, at 45. More importantly – at least in the local context – is the observation by the then Minister for Labour and Law (Mr KM Byrne) when introducing the Penal Code (Amendment) Bill that ultimately resulted in the introduction, *inter alia*, of the somewhat different defence of diminished responsibility which is now embodied in Exception 7 to s 300 of the Penal Code; however, in the course of introducing the said bill, the Minister observed (of s 84) thus (see *Legislative Assembly Debates*, *State of Singapore* vol 14 at col 1510 (24 May 1961; emphasis added)):

> This provision ... is *based on the so-called M'Naghten Rules*, which summarised the advice given by the Judges to the House of Lords in M'Naghten's case in 1843.

Also of interest is the fact that when Macaulay first prepared a draft of the Indian Penal Code, he had framed the relevant provisions quite differently: see ss 66 and 67 of the draft Code (reproduced, *inter alia*, in Tewari, *supra*, note 2, at 73; see also *The Indian Penal Code as Originally Framed in 1837 with Notes by TB Macaulay, JM MacLeod, GW Anderson and F Millett, and the First and Second Reports Thereon dated 23rd July 1846 and 24th June 1847 by CH Cameron and D Eliott, Indian Law Commissioners – A Verbatim Reprint* (1888) (hereafter *The Indian Penal Code*) at 10) which read as follows (emphasis added):

> 66. Nothing is an offence which is done by a person in a state of idiocy.
>
> 67. Nothing is an offence which a person does in consequence of *being mad or delirious* at the time of doing it.

S 67, in particular, is phrased in rather wide terms (see also Tewari, *supra*, at 83). However, it should be noted that both these provisions were framed *prior* to *M'Naghten* itself.

I have, however, received quite pertinent queries as to whether or not s 84 could truly be said to have been based on the *M'Naghten* case. This prompted further research but my additional findings (albeit necessarily incomplete) have only reinforced this proposition. Before briefly mentioning these findings, however, it should first be noted that the radical change in the language between the first formulation (in ss 66 and 67 of the draft Code, set out above) and the final form in which s 84 appears suggests, very strongly, that the *M'Naghten* case was primarily (if not solely) responsible for this change: a point buttressed (it is submitted) by the closeness in the relevant wording between s 84 and the *M'Naghten* decision.

Turning to the findings proper, of interest, first, is the English *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences, with an Appendix containing a Draft Code embodying the Suggestions of the Commissioners*, *House of Commons, Parliamentary Papers, 1878-1879*, vol XX (hereafter the *Report*); the relevant provision (s 22, dealing with insanity and reproduced in the *Report* at 235-236) reads as follows (emphasis added):

> If it be proved that a person who has committed an offence was at the time he committed the offence insane so as not to be responsible for that offence, he shall not therefore be simply acquitted, but shall be found not guilty on the ground of insanity.

> To establish a defence on the ground of insanity, it must be proved that the offender was at the time when he committed the act labouring under natural imbecility or disease of or affecting the mind, to such an extent as to be *incapable of appreciating the nature and quality of the act or* that *the act was wrong*.
>
> A person labouring under specific delusions but in other respects sane shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which if it existed would justify or excuse his act: Provided that insanity before or after the time when he committed the act, and insane delusions though only partial may be evidence that the offender was at the time when he committed the act in such a condition of mind as to entitle him to be acquitted on the ground of insanity.
>
> Every one committing an offence shall be presumed to be sane until the contrary is proved.

The draft provision just quoted was an attempt to codify *M'Naghten*; in the words of the Commissioners, "[s]ection 22, which relates to insanity, expresses the existing law" (see the *Report* at 185). Its resemblance to s 84 of the Penal Code is not insignificant. Nor should, it is ventured to suggest, one make too much of the differences in language between both these aforementioned provisions. In the words of the Commissioners themselves (*ibid*), "[t]he framing of the definition has caused us much labour and anxiety; and though we cannot deem the definition to be altogether satisfactory, we consider it as satisfactory as the nature of the subject admits of". For the sake of completeness, it should be mentioned that the final form of the provision in the Criminal Code Bill itself was somewhat (albeit not altogether) different (see *House of Commons, Parliamentary Papers, 1880*, vol II at 8; emphasis added):

> No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind, to such an extent as to render such person *incapable of appreciating the nature and quality of the act or omission*, *and* of *knowing that such act or omission was wrong*.
>
> A person labouring under specific delusions but in other respects sane shall not be acquitted on the ground of insanity under the provisions herein-after contained unless the delusions caused him to beleive in the existence of some state of things which if it existed would justify or excuse his act or omission: Insanity before or after the time when he committed or omitted the act, and insane delusions though only partial, may be evidence that the offender was at the time when he committed or omitted the act in such condition of mind as to render him irresponsible for such act or omission.
>
> Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.

This final form (which, however, was never enacted into law) is, in fact, even closer to the language of s 84 of the Penal Code itself; and one should note the insertion of the word "and" in place of "or" in the crucial passage as well as the fact that the language of the 'second limb' of this later version also more closely resembles the relevant portion of s 84 compared to the first version.

But – and this is a valid point – might it not be argued that the Penal Code was enacted by the Indian Legislature in 1860, whilst all this activity takes place in England some years later? It is submitted that this difference in timeframe does not affect the central point made: which is that the attempted codification of *M'Naghten* in the English context bears a striking resemblance to the language of s 84 of the Penal Code itself. What would be of probable

in *M'Naghten*[13] which were construed in these other cases and where only the word "wrong" was interpreted.[14] In this regard, therefore, these various other cases are also of assistance to us, particularly where they deal with arguments from first principles. It will suffice for the moment to state that the English courts interpret "wrong" as meaning "*legally* wrong"[15] whereas the Australian courts interpret wrong as meaning "*morally* wrong".[16] It should be noted, however, that these two diametrically opposed approaches only broadly correspond to the 'conjunctive' and 'disjunctive' approaches, respectively. Insofar as the former approach is concerned, the correlation may be exact, but only where there is a coincidence between the legal and moral aspects; however, it has been insisted that what may be "legally wrong"

significance is the fact that one of the Commissioners was none other than Sir James Fitzjames Stephen, who is well-known for his admiration of Macaulay and the Penal Code (see the *Report* at 171; and see generally Phang, *infra*, note 50, at 54-56); it is, in fact, entirely conceivable (albeit speculative in the light of the paucity of further evidence) that Stephen may have had an earlier hand in the drafting of s 84; in any event, however, it is clear that both he and his colleagues did not view s 84 as being inconsistent with *M'Naghten* but, on the contrary, thought otherwise. Of interest, too, is W Morgan and AG MacPherson's *The Indian Penal Code (Act XLV of 1860) - With Notes* (1861) at 62, for, publishing just the year after the Code was enacted, the authors immediately linked (in their commentary) s 84 with the *M'Naghten* case (see *ibid,* at 60-62, especially at 62).

What *is* somewhat puzzling, however, from the perspective of time is this: that by the time the Indian Law Commissioners completed their First Report on Macaulay's original draft (in 1846), ss 66 and 67 were left untouched in their original form (as set out above), with brief discussion (on s 67) proceeding accordingly: see paras 118 and 119 of the Report (*The Indian Penal Code*, *supra*, at 220). It should, however, be remembered that the principles in *M'Naghten* were only handed down in 1843 and it is entirely possible that, given the context and infelicities of the time, there was insufficient time for the Commissioners to be apprised of the decision in *M'Naghten*.

13 (1843) 10 Cl & Fin 200, 8 ER 718 (hereafter, all page references will be to the latter report). But see the consistent critiques of *M'Naghten*, even in England itself: see, *eg*, the *Report of the Royal Commission on Capital Punishment 1949-1953*, *supra*, note 3, at Ch 4 and the *Butler Report*, *supra*, note 3, especially at paras 18.6-18.8 and 18.24. And for an interesting pespective from politics, see Moran, *Knowing Right from Wrong – The Insanity Defence of Daniel McNaughtan* (1981).

14 *Cf* also s 16 of the Canadian Criminal Code which has also been stated to have been based on *M'Naghten* (see, *eg*, *R* v *Simpson* (1977) 77 DLR (3d) 507 at 518; *Schwartz* v *The Queen* [1977] 1 SCR 673, at 678 and 695; *R* v *Chaulk*, *supra*, note 3, at 1408; and *R* v *Mathew Oommen* (1994) 30 CR (4th) 195 at 202), although it should be noted that only the word "wrong" was to be interpreted and, in this respect, the Canadian position is more akin to the position in *M'Naghten* itself – at least insofar as the focus of the present essay is concerned. For the latest version of s 16 (and a commentary thereon), see Edwin A Tollefson & Bernard Starkman, *Mental Disorder in Criminal Proceedings* (1993), p 16 *et seq*; the authors do point out (*ibid*, at 16) that "[t]he new s 16 is ... in substance very like its predecessor".

15 See, especially, *R* v *Windle* [1952] 2 QB 826. See also *R* v *Holmes* [1953] 1 WLR 686.

16 See the High Court decision of *Stapleton* v *The Queen* (1952) 86 CLR 358. See also *The King* v *Porter* (1933) 55 CLR 182 at 189-190.

may not necessarily be "morally wrong", although the insistence on proof of "legal wrong" (*whatever* the "moral" position might be) does broadly, at least, correlate with a 'conjunctive' approach.[17] Insofar as the latter (*ie*, 'disjunctive view') is concerned, the consistency with the approach centring on "moral wrong" is much stronger; indeed, proof by the accused that he did not know that what he did was "morally wrong" would, in *all* instances under the 'disjunctive view' suffice, although it would, *a fortiori*, be in the accused's favour if he could prove that he did not know that what he did was "legally wrong", since (on this view) that would suffice, *even if* he knew that what he did was "morally wrong". Returning to the situation in other jurisdictions, it should be mentioned that the position in Canada is also of interest as the Supreme Court of Canada initially adopted the English approach[18] but later overruled the prior decision and adopted the Australian approach instead.[19] The New Zealand position is also interesting, although the statutory language there is quite different.[20] But all this is not

[17] But see the discussion in the main text, *infra*, Pt II, where it is argued that it is entirely possible for the accused to obtain the 'worst of both worlds' under this ('conjunctive') approach.

[18] In *Schwartz* v *The Queen*, *supra*, note 14 (but only by a bare majority of 5 to 4).

[19] See *R* v *Chaulk*, *supra*, note 3. This position is now clearly established in the Canadian context: see, *eg*, *R* v *Landry* (1991) 2 CR (4th) 268; *R* v *Ratti* (1991) 2 CR (4th) 293; and *R* v *Mathew Oommen* (1994) 30 CR (4th) 195 (all three, incidentally, being decisions of the Supreme Court of Canada). But for an excellent critique of the holdings in *R* v *Chaulk*, see Tollefson & Starkman, *supra*, note 14, at 26-34.

[20] The operative provision is s 23 of the Crimes Act 1961, which reads as follows (emphasis added):

> 23. Insanity – (1) Everyone shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
>
> (2) No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable –
>
> (a) Of understanding the nature and quality of the act or omission; or
>
> (b) Of knowing that the act or omission was *morally* wrong, having regard to the *commonly accepted standards of right and wrong*.
>
> (3) Insanity before or after the time when he did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he did or omitted the act, in such a condition of mind as to render him irresponsible for the act or omission.
>
> (4) The fact that by virue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.

The leading decision is that of the New Zealand Court of Appeal in *R* v *MacMillan* [1966] NZLR 616, where the court pointed out that the position was as in *Stapleton* v *The Queen*, *supra*, note 16, as confirmed by legislative amendment (see above). Curiously, though, the court rejected an objective view of "moral wrong", even though, *Stapleton*, arguably,

a mere question of technical legal precedent; underlying all these decisions (as well as the pertinent literature) are issues of principle, policy, language and context (amongst others). The purpose of this article is to attempt not only a synthesis of what has gone on before but also to try to demonstrate that the view to be adopted of the "wrong or contrary to law" test under section 84 of the Penal Code depends very much on the *context* that comprises (in addition to the mere logical as well as linguistic arguments) historical and conceptual elements as well. It will be argued that the evidence points to the adoption of what is basically the English position,[21] although (in jurisdictions where there is still a jury) there would be no real difference, in substance, regardless of which approach is ultimately adopted. However, I will also attempt to show that there could, arguably, be real differences in result in jurisdictions that no longer have the jury system and courts in such jurisdictions might actually have good reason to adopt the ostensibly more liberal Australian[22] approach,[23] notwithstanding the evidence I have just briefly alluded to above; but I do argue that, in the final analysis, extralegal considerations would, in any event, necessarily inform the decision-making process, regardless of whether or not a jury is involved. I will examine each broad category of arguments in turn insofar as the former point is concerned, before returning to the latter point in the penultimate Part of this essay. It ought, at this juncture, however, to be mentioned that the broad categories of arguments are only for the convenience of exposition and analysis; as we shall see, the various arguments often straddle more than one category.

II. The Arguments from Case-Law and Language

One thing is clear: the arguments from case-law *per se* are insufficient, for it would be wholly unconvincing to argue the case for any of the suggested approaches[24] by merely totalling up the number of precedents concerned, for this would be a totally mechanistic approach devoid of qualitative (indeed, any) arguments. In this regard, therefore, the relevant case-law *overlaps* with the arguments in the other categories that would provide the more concrete qualitative arguments.

exemplifies such a view. Reference may also be made to the earlier (also Court of Appeal) decision of *Murdoch* v *British Israel World Federation (New Zealand) Incorporated* [1942] NZLR 600, which, however, interpreted the predecessor of s 23.

21 See, *supra*, note 15.

22 And, now, Canadian (see, *supra*, note 14).

23 See, *supra*, note 16. And, as already mentioned, this would correlate strongly with the 'disjunctive view'.

24 See the main text accompanying notes 5-11.

The argument from language, on the other hand, is a more substantive one. But a perusal of its treatment by the various writers[25] engenders, in the final analysis, an inconclusive answer. For example, whilst it could be argued that a plain reading, at first blush, of the last portion of section 84 suggests that "wrong" and "contrary to law" are to be read disjunctively, it could, with equal persuasion, be argued that a conjunctive reading is also possible.[26] And the *M'Naghten* case does not provide us (only at this particular juncture, though) with any further illumination either. It will be recalled that in that case, the judges were only concerned with one word, *ie,* "wrong". Could it therefore be argued that by adding the phrase "contrary to law" to section 84, the legislature intended section 84 to cover a wider field? This particular argument would be much more persuasive had the relative positions of the words concerned been reversed, *ie*, if the phrase "contrary to law" appeared first, followed by the word "wrong". Indeed, one could plausibly argue that by adding the phrase "contrary to law", the legislature actually intended the exact opposite, *ie*, that "wrong" meant "contrary to law": a position, in fact, adopted (as we have already seen) in England itself.[27] If, in fact, we accept (as is now 'customary'[28]) that section 84 is based on the rules enunciated in *M'Naghten* itself, it is the language of *that* particular decision that requires close analysis. And it is to that analysis that our attention must now (at least briefly) turn. It should, however, be observed, at this point, that the argument from language is also, in effect, an argument from historical sources – thus illustrating the point made at the conclusion of the introduction above to the effect that an argument may straddle more than one category.

Before proceeding to consider the arguments based on an analysis of the language of *M'Naghten*, however, one other point (also on language) should be briefly considered: the proposition to the effect that the proper way to approach the phrase "wrong or contrary to law" in section 84 is not by way of either the 'conjunctive' or 'disjunctive' approaches but, rather, by way of an 'exegetical' approach, which was briefly alluded to above.[29] Briefly stated, this view holds that the phrase "'contrary to law' should

[25] See generally, *supra*, note 10.

[26] See McKillop, *supra*, note 10, at 72-74, for a thorough linguistic analysis (who arrives at a conclusion in favour of the 'disjunctive view'). Interestingly, the provision in the local Penal Code on the defence of intoxication (contained in s 85) only refers to the concept of "wrong" whereas its Indian counterpart utilizes the phrase "wrong or contrary to law"; there are, however, other differences in wording. *Cf* Davies, *supra*, note 10, at lxxix, who argues that "the better view is that 'wrong' [in s 85] means 'contrary to law'".

[27] See, *supra*, note 15.

[28] And see, *supra*, note 12.

[29] See, *supra*, note 11.

be viewed as explanatory of 'wrong' for historical and judicial reasons".[30] The upshot of this view (as the author himself states) is that "wrong" would mean "contrary to law". It should be mentioned that the 'exegetical' approach is, in substance, wholly consistent with one of the basic arguments of this essay: which is that the approach to be adopted is basically the English one,[31] *ie*, that "wrong" in the context of section 84 of the Penal Code means "contrary to law". Indeed, to the extent that it takes a clear stand of not allowing any scope whatsoever for a divergence between the legal and moral aspects of "wrong" by adopting the (at least implicit) premise that the legal and moral aspects are coincident with each other (at least for the purposes of *section 84*), the 'exegetical' approach may, on one view, be a preferable one, conducing, as it does, to certainty.[32] However, one possible difficulty pertains to the assumption that the legal and moral aspects are indeed coincident with each other. In this respect, therefore, the 'conjunctive view' allows for the divergence between the legal and moral aspects, whilst simultaneously achieving what is, *in effect*, the same result as the 'exegetical' approach (*ie*, that knowledge of "*legal* wrong" would deprive the accused of the defence of insanity under section 84); however, viewed from another angle, the 'conjunctive view' might well be stricter inasmuch as (in a situation of divergence between "moral" and "legal" wrong) the absence of knowledge of "legal wrong" on the part of the accused might not be sufficient to bring him within the purview of section 84 if there is, nevertheless, knowledge of "moral wrong".[33] It is suggested, in the circumstances, that the 'exegetical' approach is to be preferred, simply because (as we shall see below[34]) this is more in accordance with the positivistic context of the Penal Code itself. Further, and as we have seen, it is (when compared to the 'conjunctive view') more favourable to the accused. More importantly, perhaps, the 'conjunctive view' arguably involves the 'worst of both worlds' for the accused, so to speak, since, for example, an ability to demonstrate that he did not know that what he did was "contrary to law" would not necessarily result in a successful pleading of section 84 if he could not *also* demonstrate that he did not know that what he did was "morally wrong"; to this extent, in fact, the 'conjuctive view' is not really consistent with the positivistic cast of the Penal Code itself (which is dealt with in more detail below).[35]

[30] See Canagarayar, "A Tale of Two 'Wrongs' and a Veritable 'Wrong'", *supra*, note 10, at lxii.

[31] See, *supra*, notes 15 and 21.

[32] See Canagarayar, *supra*, note 10.

[33] See also JL Montrose, "The M'Naghten Rules" (1954) 17 MLR 383 at 385-386 and Eric Colvin, "Ignorance of Wrong in the Insanity Defence" (1981) 19 Univ Western Ontario Law Rev 1 at 10.

[34] Pt III, Section B, *infra*.

[35] See, *infra*, Pt III, Section B. As the leading decision of *Geron Ali* v *Emperor*, *supra*, note

Finally, it is submitted that the 'exegetical' approach is, in the final analysis, one of construction not only of the specific language in question but also of the *context* taken as a *whole*;[36] this means, of course, that much will turn on other substantive arguments, many of which will be canvassed in the pages that follow.

III. The Arguments from History and Theory

A. *The M'Naghten Case*

The rules enunciated in *M'Naghten* are, it is suggested, of the first importance in aiding us in our interpretation of the words "wrong or contrary to law" in section 84 of the Penal Code. It bears repeating that section 84 is based on the *M'Naghten* case itself. If it were otherwise, there would be little point in examining the language in *M'Naghten* since it would, *ex hypothesi*, have no bearing on our interpretation of the language of section 84.

What, then, of *M'Naghten* itself? It is submitted that a close perusal of the decision will reveal that the judges concerned actually construed "wrong" as meaning "*legally* wrong" – or, in the terminology of section 84, "contrary to law".[37] Indeed, it is expressly stated, with reference to an accused knowing that he was "acting contrary to law", that "by [this] expression [*ie*, "acting contrary to law"] we understand your Lordships *to mean the law of the land*";[38] more importantly, perhaps, the judges were making this statement in the context of the *non*-availability of the defence (of insanity) where the accused knew that what he did was "contrary to law" – although it might be argued that this proposition should be confined only to a situation where the accused *in fact* had such knowledge which, however, would appear to be at variance with the *general* tenor of the *answer* itself, as we shall see below. However, commentators have, instead, chosen to adopt a quite different interpretation; the principal passage often prayed in aid reads as follows:

8, itself demonstrates (at 130), a positivistic view is also accompanied by an approach toward morality (albeit from an ostensibly objective point of view, as to which see the discussion at Pt III, Section B, *infra*).

36 This is, it is suggested, the general thrust of the principal authority relied on for this approach (see Canagarayar, *supra*, note 10), *viz*, the House of Lords decision of *Chichester Diocesan Fund and Board of Finance (Incorporated)* v *Simpson* [1944] AC 341.

37 Interestingly, Lord Brougham adopted this approach in his speech before the House of Lords (and prior to the actual ruling in *M'Naghten* itself): see *Hansard's Parliamentary Debates*, 3rd series, vol LXVII at cols 729-732 (13 March 1843).

38 *Supra*, note 13, at 722 (emphasis added).

> If the accused was conscious that the act was one which he ought not to do, *and if that act was at the same time contrary to the law of the land*, he is punishable...[39]

The passage just quoted has often been construed as supporting the more liberal Australian approach.[40] It is, however, suggested that the better interpretation is one that accords with a plain reading of the passage itself; in particular, any reading to the contrary at least implies an omission to give due emphasis to the phrase "at the same time", for it is this particular phrase that actually links the concept of an act "contrary to the law of the land" with the normative injunction contained in the phrase "ought not to do". Or, to put it another way, the judges concerned were actually *equating* what "ought not" to be done with what was "contrary to the law of the land". Looked at in this light, the later decision in *R* v *Windle*[41] is wholly consistent with *M'Naghten* itself.

There is, however, yet another reason (also arising from a close analysis of the language utilized in the *M'Naghten* case) that buttresses the point (made above) to the effect that "wrong" means "*legally* wrong". The crucial passage reads as follows:

> ... the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was *wrong*. The *mode of putting the latter part of the question* to the jury on these occasions has generally been, whether the accused at the time of doing the act *knew the difference between right and wrong*: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect of the very act with which he is charged. *If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law*

[39] *Ibid*, at 723 (emphasis added).

[40] See, *supra*, note 16. And see, *eg*, *per* Dickson J in *Schwartz* v *The Queen*, *supra*, note 14, at 683.

[41] *Supra*, note 15.

> *of the land was essential in order to lead to a conviction whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it*. If the accused was conscious that the act was one which he *ought not* to do, *and if* that act was *at the same time contrary to the law of the land*, he is punishable;[42] and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was correct, accompanied with such observations and explanations as the circumstances of each particular case may require.[43]

It is suggested that the language just cited *in extenso* clearly points to the fact that the main reason for phrasing the test by way of reference to the ostensibly ambiguous word "wrong" centred on the need not to unnecessarily confuse the jury.[44] It is clear (and has, indeed, been argued thus far) that "wrong" means "legally wrong" or "contrary to the law of the land". However, the judges in *M'Naghten* were at pains to point out that notwithstanding this principle, the direction to the jury (who are not legally trained) was to be encompassed within the word "wrong" instead, lest they be under the (erroneous) impression that the accused had to be shown to have had "*actual* knowledge" of the law of the land before he could be deprived of the defence of insanity; this would, presumably, be to accord the accused excessive flexibility, not least because "the law is administered upon the principle that every one must be taken conclusively to know [the law], without proof that he does know it". It might be argued that this presumption may be too harsh, when viewed in the context of its application in the law relating to insanity. It may be worth pointing out, however, at

[42] This particular sentence was, in fact, cited earlier: see, *supra*, note 39.

[43] *Supra*, note 13, at 722-723 (emphasis added).

[44] This point is, unfortunately, not often made: it is but briefly alluded to (and not developed) by McKillop, *supra*, note 10, at 70; though *cf* Montrose, *supra*, note 33, at 384-385; Canagarayar, "The Plea of Insanity: Some Observations on the Application of the 'Wrong or Contrary to Law' Test in Singapore, Malaysia and India", *supra*, note 10, at x-xi and Tollefson & Starkman, *supra*, note 14, at 30-31. Oddly enough, the Australian High Court in *Stapleton* v *The Queen*, *supra*, note 16, at 371-372, did refer to this point, but arrived at a different interpretation altogether: one which, with respect, is at variance with the plain meaning of the language utilized in *M'Naghten* itself. But *cf per* Thomson CJ in *Lee Ah Chye* v *Public Prosecutor*, *supra*, note 12, at 348, where he observed thus: "Some sections of the Penal Code are extremely abstruse and it would be wrong to expect a jury or any other body of laymen to come to any very definite conclusion regarding the meaning without considerable assistance from the Judge. In our view, however, section 84 is not one of these sections and the reading of it is a course which is followed again and again by Judges in dealing with this particular subject." It is respectfully suggested that this is far too sanguine a view to take, especially in the context of the present essay.

this preliminary juncture, that if one adopts a *positivistic* approach towards the law, such a presumption becomes much less potentially objectionable: even in the context of the defence of insanity. A positivistic approach would, whilst acknowledging the *subjective* importance of morality, nevertheless hold that there could, in the final analysis, be no *necessary* connection between law and morality as such. Such a conceptual separation of the law as a distinct entity in itself would, it is suggested, make the presumption less objectionable. In this regard, it is worth noting that the leading English decision on the point, *R* v *Windle*,[45] expressly adopted a positivist approach.[46] Indeed, the argument from positivism is taken up again later in this essay, albeit from a slightly different (albeit related) perspective.

There remains, however, one major obstacle to the argument from language based on the *M'Naghten* case and it is this: that the law prior to *M'Naghten* actually equated the concepts of "right" and "wrong" with "good" and "evil", respectively; if so, this means that "wrong" must mean "*morally* wrong". Indeed, this was the major pillar of argument relied upon by the Australian High Court in *Stapleton* v *The Queen*.[47] This is, in fact, a rather powerful argument, but can, it is suggested, be met in one of three ways. First, it could simply be argued that the *M'Naghten* case, in attempting to set out the principles that were to be followed thereafter, actually redefined the law, and this argument does, in fact, garner support from the linguistic analysis tendered above.[48] Secondly – and this is, in fact, a related point – the very direction by Tindal CJ at the trial of M'Naghten himself demonstrates

[45] *Supra*, note 15.

[46] *Ibid*, at 833, *per* Lord Goddard CJ ("Courts of law can only distinguish between that which in accordance with law and that which is contrary to law. There are many acts which ... are contrary to the law of God and man.... The law cannot embark on the question [where an act may be contrary to the law of God but *not* the law of man], and it would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law"). But *cf* the views tendered below with regard to the role of the jury which would necessarily embrace extralegal considerations. For another leading English decision endorsing a positivistic approach, see *Georges Codere*, *supra*, note 7, at 27-28. The positivistic approach is, in fact, not peculiar to the English criminal law: see, *eg*, Andrew Phang, "Positivism in the English Law of Contract" (1992) 55 MLR 102.

[47] *Supra*, note 16. See also Anthony Platt and Bernard L Diamond, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey" (1966) 54 California L Rev 1227; indeed these two writers argue (*ibid,* at 1258) that "[t]he 'knowledge of right and wrong' test, in the form of its earlier synonym ('knowledge of good and evil') is traceable to the *Book of Genesis*", and this raises issues with regard to legal history as well as legal theory that, as will be argued below, point in the *opposite* direction (of *positivism*: see, *infra*, Pt III, Section B).

[48] But *cf* the court in *Stapleton* v *The Queen* itself where it is stated (*supra*, note 16, at 370) that "[t]he judges [in the *M'Naghten* case] were not asked to improvise a rule but to formulate the rule that existed and that is all they purported to do".

that "right" and "wrong" were by no means utilized as being equivalent to "good" and "evil" respectively, simply because the learned judge phrased his direction in varied terminology;[49] and it is significant to note that Tindal CJ later delivered the opinion of the judges before the House of Lords itself, which opinion we have already considered in some detail. Thirdly, even if the equation (of "right" and "wrong" with "good" and "evil") just mentioned is correct, there is (as will be argued below) ample historical as well as theoretical evidence that this was not the intention of the legislature when section 84 of the Penal Code was promulgated, and it is to this evidence that our attention must now turn.

B. *The Historical and Theoretical Underpinnings of Section 84 of the Penal Code*

It would, ideally, have been appropriate to have dealt with the historical and theoretical underpinnings of section 84 of the Penal Code separately. However, as we shall see, both strands are inextricably linked to each other, and will thus be better discussed together.

Although there is ample evidence demonstrating that the Indian Penal Code (on which the Singapore and Malaysian Codes are based) was quite different from the then existing English law,[50] section 84 was the exception to this rule; as we have already seen, this particular provision was premised on the English law as embodied in the *M'Naghten* case.[51] And, as has been argued in the preceding Section, the word "wrong" in the *M'Naghten* case meant "*legally* wrong" or "contrary to the law of the land". The burden of this Section is to buttress this lastmentioned argument by reference to the wider context under which the Penal Code itself was drafted. Or, to put it another way, what was the general philosophical context under which the Penal Code was drafted (of which section 84 was a part)? At this juncture, a potential (and preliminary) objection should first be considered: that section 84 (as already mentioned) was based on English law and was therefore a possible exception to the general philosophical context just referred to.

[49] *Eg*, "a wicked and a wrong thing", "a violation of the law of God or of man", and "distinguishing between right and wrong": see (1843) 4 St Tr 847 at 925; see also *supra*, note 13, at 719-720, which, however, is less comprehensive (and where the language utilized is somewhat different: *eg*, "a wrong or wicked act" and "violating the laws both of God and man"). This difference in language is probably due to the attempt to summarize (in the latter report), but also (it is suggested) re-emphasizes the limitations of attempted linguistic analysis as the sole (or even main) tool (and see, *supra*, Pt II).

[50] See Andrew Phang, "Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore" (1989) 31 Mal LR 46, especially at 48-50.

[51] See *supra*, note 12.

However, this potential objection may be met by two points. First, it is by no means clear that the *English* law itself was inconsistent with the general philosophy of the Code that we will be shortly considering; indeed, it bears repeating that it was precisely the exact opposite that was sought to be argued in the preceding Section of this essay. Secondly – and perhaps more importantly – it is submitted that the Indian legislature had made a conscious effort to make it clear that the content of section 84 was to be in accordance with the general philosophy behind the Code itself. It will be recalled that the primary concept utilized in *M'Naghten* itself was that pertaining to "wrong". In section 84, however, there is, in addition, a reference to the phrase "contrary to law".[52] Further, it is submitted that it would, as a matter of general principle, have been rather odd for the legislature to have subsumed an English principle had it been at variance with the general philosophy of the Penal Code itself – especially if (and as we shall see) the variance was one that would have been radical in the extreme.

What, then, was the general philosophy behind the Penal Code? It is now clearly established that the principal (if not sole) drafter of the Code, Thomas Macaulay, was influenced by Benthamite principles.[53] And it is equally clearly established that Jeremy Bentham was, in many ways, responsible for laying the foundations of modern positivism.[54] Indeed, Bentham's legal positivism is to be contrasted with the emphasis on natural law by his

[52] Although, as we have seen, the judges do also refer to acts "contrary to the law of the land", this is *not* (having regard to the language as well as syntax utilized) the *primary* focus as such: unlike the express statutory language of section 84 itself.

[53] See, *eg*, Eric Stokes, *The English Utilitarians and India* (1959) at 192, 198-201 and (especially) 219-233. See also Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (2nd ed, 1895) at 247 ("Macaulay ... prepared the penal code. One of his assistants, CH Cameron, was an ardent Benthamite, and the code, in any case, was an accomplishment of Benthamite aspirations.") and SG Vesey-FitzGerald, "Bentham and the Indian Codes" in *Jeremy Bentham and the Law – A Symposium* (George W Keeton and Georg Schwarzenberger, eds, 1948), Ch 11 at 230 ("Macaulay was an admirer, Cameron a professed disciple of Bentham: and we should certainly look for traces of Bentham's influence in their work. Such traces there undoubtedly are."). It should, however, be pointed out that, unlike Bentham, Macaulay was much less concerned with the transformation of society through law than with "the urgent necessity to make the law rational and efficient" (see Stokes, *supra*, at 192). In addition, however, it should also be noted that Macaulay's debt to Bentham lay not so much in the details but, rather, in the more general spirit and jurisprudence that lay behind the Indian Penal Code itself (see Stokes, *supra*, at 225, 232 and 233). Indeed, Bentham's own conception of the content as well as role of insanity appears somewhat different from that ultimately embodied in the Code itself: see his *An Introduction to the Principles of Morals and Legislation* (JH Burns & HLA Hart, eds, 1970), especially at 58, 69, 161 and 245 as well as Vesey FitzGerald, *supra*, at 231.

[54] See, *eg*, HLA Hart, *Essays on Bentham – Studies in Jurisprudence and Political Theory* (1982), especially at 17-20; Philip Schofield, "Jeremy Bentham and Nineteenth-Century English Jurisprudence" (1991) 12 J Leg Hist 58; David Lieberman, *The Province of*

'nemesis', William Blackstone.[55] But if the Penal Code was imbued with a positivistic outlook, then it is entirely possible (even probable) that section 84 of the Code was to be accordingly construed as effecting a conceptual separation between law on the one hand and morality on the other – although it should be noted that the substance of section 84 was not, in fact, drafted by Macaulay who had inserted somewhat different provisions;[56] nevertheless, this does not detract from the *general* philosophy behind the Code which

Legislation Determined – Legal theory in eighteenth-century Britain (1989), especially at 222 *et seq*; and Gerald J Postema, *Bentham and the Common Law Tradition* (1986), especially Pt II thereof.

55 There is some controversy as to whether Blackstone, by his simultaneous emphasis on the sovereignty of parliament, had actually contradicted his ostensible natural law approach; for cogent arguments to the effect that he did not, see JM Finnis, "Blackstone's Theoretical Intentions" (1967) 12 Natural Law Forum 163 and Lieberman, *supra*, note 54, at 36-55; but *cf* HLA Hart, "Blackstone's Use of the Law of Nature" [1956] Butterworths South African L Rev 169. Indeed, it is clear (assuming a natural law approach) that although human laws ought to be consistent with the general precepts of natural law, they may not, in fact, be so; these latter precepts, however, remain the *normative* standard by which human laws are evaluated.

And, of the conflict between Bentham and Blackstone, much has been written; for a sampling, see Rupert Cross, "Blackstone v Bentham" (1976) 92 LQR 516 and Richard Posner, "Blackstone and Bentham" (1976) 19 J Law & Economics 569 (which also emphasizes the positivistic character of the Benthamite enterprise: see, *supra*, note 54).

56 See the discussion at, *supra*, note 12. Indeed, between the Reports of the Indian Law Commissioners (see *supra*, note 12) and the final enactment of the Code in 1860, Macaulay's original draft nearly did not see the light of day. Drinkwater Bethune, who was extremely dissatisfied with Macaulay's draft, redrafted it completely. Had Bethune's version of the Code been enacted instead, the argument here would have been severely undercut, if not totally undermined. As it finally turned out, however, the Select Committee of the Indian Legislative Council ultimately opted in favour of Macaulay's draft. In the *First Report of Her Majesty's Commissioners Appointed to Consider the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India*, where (in considering what type of Code of Criminal Procedure was to be adopted), the Commissioners set out the following extract from the Board of Control whom they had consulted as to what the *substantive* criminal law would be (which would, in turn, influence their recommendations as to the *procedural* law required, the very content of their present brief); because of its importance and relative inaccessibility (it is set out substantially in Stokes, *supra*, note 53, at 262), the extract is set out in full (see *Parliamentary Papers, House of Lords, 1856*, vol XXV at 94; emphasis added):

> We have come to the conclusion to recommend to the Council, that the Penal Code, *as originally prepared by the Indian Law Commissioners when Mr Macaulay was the president of that body, should form the basis of the system of penal law to be enacted for India*. We are accordingly taking into consideration the various alterations therein and additions thereto that have been proposed to be made; and we intend to submit to the Legislative Council a revised code embodying such of the proposed alterations and additions as may appear to us to be improvements, and such other amendments as may suggest themselves to us in the course of our revision. *We do not intend to recommend any substantial alteration in the framework or phraseology of the original code*. Any Code of Criminal Procedure which would be generally

the legislature must have been well aware of at the time section 84 was drafted. And if the argument from positivism is accepted, the centrality, indeed indispensability, of the concept of a "*legal* wrong"[57] follows accordingly; in other words, the accused cannot avail himself of the defence of insanity under section 84 of the Penal Code if he cannot prove (on a balance of probabilities[58]) that he did not know that the act he committed was "*legally* wrong", whatever his moral perceptions may have been.[59] But this does not conclude the matter, and some further elaboration is necessary. One possible interpretation of the phrase "wrong or contrary to law" is (as we have seen) the 'conjunctive view', in which case the accused has to prove (in order to bring himself within the purview of section 84) that

> applicable to the original Penal Code will be generally applicable to such a revised code as we intend to recommend.
>
> In view of this, the Commissioners stated thus (*ibid*):
>
> In accordance with this, our system refers throughout to the Penal Code as originally prepared. If any substantive alterations shall have been introduced into the code, it will probably not be difficult to make any modifications of the Code of Criminal Procedure that may be necessary to accommodate it to the change.

And for the background on the delay generally as well as the attempted abrogation and substitution of Macaulay's draft Code by Bethune, see *Correspondence between the Government of India and the Court of Directors in transmitting or returning the proposed Codes and Consolidation of the Laws of India* in *Parliamentary Papers, House of Lords, 1852*, vol XII at 680, 729-732, 734-735, 736-738, and 759-760; *First Report from the Select Committee on Indian Territories; together with the Minutes of Evidence and Appendix* in *Parliamentary Papers, House of Commons, 1852-1853*, vol XXVII at 100-101 and *Report from the Select Committee of the House of Lords appointed to inquire into the Operation of the Act 3 & 4 Will 4, c 85, et al* in *Parliamentary Papers, House of Commons, 1852-1853*, vol XXX at 187-188 as well as 337-342. And for good overviews, see SV Desika Char, *Centralised Legislation – A History of the Legislative System of British India from 1834 to 1861* (1963) at 180-187; Stokes, *supra*, note 53, at 261-262; and Stephen, *A History of the Criminal Law of England*, vol III (1883) at 299-300 (who argues that the Indian Mutiny as well as the transfer of the East India Company to the Crown had provided the impetus for the enactment of, *inter alia*, the Penal Code).

57 This may well be a preferable way of stating the point, given the possible factual variances between the 'conjunctive' and 'exegetical' approaches, which variances, however, do not affect the key issue in question, *ie*, whether the accused must nevertheless prove that he did not know that the act he committed was "*legally* wrong" in order to bring himself within the defence of insanity under s 84 of the Penal Code. However, as has already been suggested above and as will be discussed below, the 'exegetical' approach is to be preferred.

58 See, *supra*, note 6.

59 Interestingly, the prior governing legislation was Indian Act No IV of 1849 ("An Act for the Safe Custody of Criminal Lunatics"), s 1 of which read as follows (emphasis added):

> "No person, who does an act, which, if done by a person of sound mind, is an offence, shall be acquitted of such offence for unsoundness of mind, unless the Court or Jury, as the case may be, in which according to the constitution of the Court, the power of conviction or acquittal is vested, shall find that, by reason of unsoundness of

he not only did not know that what he did was "*morally* wrong" but *also* that he did not know that what he did was "*legally* wrong". Another possible interpretation of the phrase (as we have also already seen) is the 'exegetical' approach, in which case the accused must prove that he did not know that what he did was "*legally* wrong" simply because the latter phrase ("contrary to law") explains what the former word ("wrong") is. It is submitted that the 'exegetical' approach is more consistent with the positivistic Benthamite cast of the Penal Code, although it should be noted that the 'conjunctive view' is not inconsistent with such positivism either; to the extent, however, that the 'conjunctive view' also entails arguments of morality, it is, at bottom, inconsistent with the positivistic outlook just mentioned.[60] To recapitulate the central thrust of the argument just made, the Indian legislature, whilst basing section 84 on the rules enunciated in the *M'Naghten* case, nevertheless added the phrase "contrary to law" in order to make it clear what it meant by "wrong", thus bringing the provision into line with the general positivistic ambitions of the Code itself. Indeed, as I have argued earlier,[61] this was, in all probability, what the judges in *M'Naghten* intended in any event.

There are further general conceptual reasons that buttress the interpretation proffered here, which reasons are also entirely consistent with the positivism surrounding the Penal Code itself. Whilst positivists generally argue that there is no *necessary* connection between law and morality, they do (as briefly referred to earlier) acknowledge that matters of morality do still matter, but on a purely *individual* level. This acknowledgment is not in the least surprising, since it would militate against commonsense (if nothing else) to have argued otherwise. There is, however, an at least implicit assumption by positivists that morality is *subjective*, being one of personal preference only. But, as also acknowledged by commentators,[62] this difficulty centring on subjectivity is *simultaneously* a *practical* problem, the degree

> mind, not wilfully caused by himself, he was unconscious, and incapable of knowing, at the time of doing the said act, that he was doing an act *forbidden by the law of the land*."

This Act was, however, repealed by Indian Act No XVII of 1862, consequent on the passage of the Indian Penal Code in 1860, but which came into force on 1 January 1862 (see s 2 read with the Schedule).

60 See the concluding portion of Pt II, *supra*.

61 See, *supra*, the preceding section.

62 See, *eg*, Canagarayar, "The Plea of Insanity: Some Observations on the Application of the 'Wrong or Contrary to Law' Test in Singapore, Malaysia and India", *supra*, note 10, at x; Colvin, *supra*, note 33, at 12; and Tollefson & Starkman, *supra*, note 14, at 31.

A possible problem might arise with respect to the test adopted in relation to the defence of provocation under Exception 1 to s 300 of the Penal Code. There, the test adopted is an objective one, but which relates to that class of society to which the accused belongs. Might it not, in other words, be aruged (applying the principle to the defence of insanity) that there could be sub-groups which could each have objective conceptions of what was

of difficulty of which is exacerbated in multi-religious, multi-ethnic and multi-cultural societies such as Singapore and Malaysia. And the *theoretical* problems are *also* intractable. Indeed, this assumption of subjectivity is deeply entrenched in the preferred conception of law operating in Anglo-American common law systems today – at least in societies which do not have strong indigenous (and non-Western) legal systems. Under the broad banner or label of 'liberalism', many philosophers have sought to posit what is, in the final analysis, a *procedural* '*framework*' which, crudely and somewhat simplistically put, comprises ground rules that prevent individuals (in their respective quests to achieve their individual conceptions of the good) from waging a Hobbesian war of all against all. And the various 'frameworks' posited have come from philosophers whose theories are otherwise in conflict with each other; in this respect, the work of John Rawls[63] and Robert Nozick[64] may, for example, be noted.[65] Other (more radical) views would, however, argue (and again put at some risk of oversimplification) that law comprises political value choices and that there is, in the final analysis, no *objective* means of mediating the *subjectivity* that pervades, *inter alia*, the law; these views are to be found in the work of the Critical Legal Scholars,[66] although it ought to be pointed out that one

morally wrong? This is a not unattractive argument, but (with respect) does not really advance the issue. It could, for example, be argued that the argument from subjectivity is so powerful that it should result in a change in the law relating to provocation (and *cf* Brown, "The 'Ordinary Man' in Provocation: Anglo-Saxon Attitudes and 'Unreasonable Non-Englishmen'" (1964) 13 ICLQ 203, especially at 228-231 and 234; see also the interesting argument in Yeo, "Lessons on Provocation from the Indian Penal Code" (1992) 41 ICLQ 615 at 625-630). Indeed, the defences of both provocation and insanity have a commonality: the balancing of societal interests with human frailty. If this is so, then there is no reason, in principle, to object to a subjective approach. Such an approach would, however, militate against the interpretation proffered here, but (as I venture to argue below) the subjective factors will nevertheless figure in the sphere of *application* in any event. Indeed, the present writer would venture to suggest that there is no such 'entity' as a 'purely objective approach' in any event; the inquiry (in virtually every area of the law) is always partly subjective and partly objective, with the degree of difference being based on the various policy as well as other considerations thought germane to that particular area of the law and/or the facts of the case at hand. *Quaere*, also, whether the adoption of an objective standard *vis-à-vis* sub-groups in multi-religious, multi-ethnic and multi-cultural societies such as Singapore and Malaysia at least potentially conflicts with the broader quest for national identity and unity: a topic that is obviously beyond the scope of the present essay.

63 See generally, *A Theory of Justice* (1971) and, especially, *Political Liberalism* (1993) which collects together many of Rawls's articles that have re-emphasized the idea of the 'framework'.

64 See *Anarchy, State and Utopia* (1974), especially Pt III thereof.

65 Reference may, in this regard, also be made to John Finnis's work: see his *Natural Law and Natural Rights* (1980), especially at 154-156.

66 The literature is (as is the case, in fact, with most theories) rather voluminous and is not made easier by the fact that there does not (much as was the case with American Realism) exist a clear and unambiguous school of thought as such. A useful overview is Mark Kelman's *A Guide to Critical Legal Studies* (1987).

particular scholar's work does attempt to posit more positive proposals, albeit in a context of continued plasticity.[67] Whichever view one takes, there are, it is suggested, immense theoretical as well as practical problems centring on subjectivity, which problems militate against the adoption of a test of "*moral* wrong" under section 84 of the Penal Code. This is not to state that adoption of a test of "*legal* wrong" is inherently preferable, although it would appear to generate more certainty, albeit at the expense of individualized justice.[68] However, as I shall attempt to argue in the next Part of this essay, the problem of individualized justice is mitigated in legal systems where the jury system still exists – and, arguably, even where it does not. There would, of course, be fewer difficulties if we could argue that a "legal wrong" was coincident with a "moral wrong", *ie*, that what the law frowned upon was precisely what society at large[69] frowned upon as well.[70] Unfortunately, however, whilst there may well be an overlap (especially where the more serious crimes such as murder are concerned[71]), this need not always be the case.[72]

Before leaving the issue of subjectivity, one other (related) point should be considered: that the argument for "*moral* wrong" is not one that is premised on the *subjective* perceptions of the *accused* himself[73] but, rather, on the *objective* view of the *society* at large; in other words, would the *society* in which the accused lives consider what he did to be "*morally* wrong"?[74] Such a proposition presupposes, however, that it is both theoretically *and* practically possible to have as well as to ascertain a set of *objective societal* values in the first place. As we have seen in the preceding paragraph, this is not an assumption that can be easily made: whether on a practical and/or a theoretical level.[75]

67 See generally the following works by Roberto Mangabeira Unger: "The Critical Legal Studies Movement" (1983) 96 Harv Law Rev 561 (subsequently reproduced in monographic form by Harvard University Press in 1986); *Passion – An Essay on Personality* (1984); and *Politics, a Work in Constructive Social Theory* (a trilogy of books spanning over one thousand pages). See also Andrew Phang, *Toward Critique and Reconstruction. Roberto Unger on Law, Passion and Politics* (1993).

68 *Cf* Sornarajah, *supra*, note 3, at 48.

69 And see the paragraph following.

70 See *Schwartz* v *The Queen*, *supra*, note 14, at 701, *per* Martland J ("Surely, according to the ordinary principles of reasonable men, it is wrong to commit a crime.")

71 And see *ibid*. See also (to like effect) *per* Dickson J, *ibid*, at 678 (notwithstanding his strong dissent) and *Georges Codere*, *supra*, note 7, at 27. See, further, Goldstein & Marcus, *supra*, note 3, at 159 and Colvin, *supra*, note 33, at 5 and 7.

72 See *Stapleton* v *The Queen*, *supra*, note 16, at 375.

73 Which might *unduly* favour him: see, *eg*, *Lakshmi* v *State*, *supra*, note 3, at 536 and *Georges Codere*, *supra*, note 7, at 27.

74 See *Stapleton* v *The Queen*, *supra*, note 16 and the *Report of the Royal Commission on Capital Punishment 1949-1953*, *supra*, note 3, especially at paras 281 and 283. *Cf* Sir James Fitzjames Stephen, *supra*, note 56, vol II at 167-168.

75 But *cf* the approach of the High Court of Australia in *Stapleton* v *The Queen*, *supra*, notes

IV. The Arguments from Policy

The arguments from policy basically centre, first, on which general perspective of punishment one takes and, secondly, whether an interpretation which favours the accused should, in the final analysis, be adopted.

Insofar as the first point is concerned, a view of punishment from the perspective of deterrence would result in adoption of the stricter view that holds that in order to bring himself within the purview of the defence of insanity under section 84, the accused has to prove that he did not know that what he did was "*legally* wrong",[76] *ie*, that it was "contrary to law";[77] this is consistent with the *positivist* approach considered in the preceding part.[78] On the other hand, a view of punishment from the perspective of rehabilitation would result in adoption of the more liberal view insofar as the accused is concerned, because he would only be required to prove that he did not know that what he did was "*morally* wrong",[79] albeit in accordance with the standards of the *society* in which the accused lives.[80]

Insofar as the second point is concerned, *viz*, whether the interpretation that best favours the accused should be adopted, it is clear that adoption of the more liberal view (*ie*, that centring on "*moral* wrong") would be most consistent with such an approach.[81] Indeed, one of the main reasons for the majority adopting such an approach in the Canadian Supreme Court

16 and 74; of the minority of the Supreme Court of Canada in *Schwartz* v *The Queen*, *supra*, note 14; and of the majority of the same court in *R* v *Chaulk*, *supra*, note 3, at 1357 (*contra per* McLachlin J (dissenting) at 1412-1413; Sopinka J agreeing: see *ibid*, at 1415).

76 As already mentioned, the 'exegetical' approach is preferable, although the 'conjunctive view' would also be consistent with such a view.

77 See McKillop, *supra*, note 10, at 77 and Cheang, *supra*, note 10, at 253-254. See also *per* McLachlin J (Sopinka J agreeing) in the Canadian Supreme Court decision of *R* v *Chaulk*, *supra*, note 3, at 1411 ("In most cases, law and morality are co-extensive, but exceptionally they are different. Where morality fails, the legal sanction should not be removed as well. To do so is to open the door to arguments that absence of moral discernment should excuse a person from the sanction of the criminal law, *and thus remove one of the factors which deters inappropriate and destructive conduct*. That should *not* be done *lightly*." (emphasis added)); see also *ibid*, at 1413.

78 See, specifically, Pt III, Section B, *supra*.

79 See McKillop, *supra*, note 10, at 77 and Cheang, *supra*, note 10, at 254.

80 See, *supra*, note 74.

81 See McKillop, *supra*, note 10, at 78 and Cheang, *supra*, note 10, at 254. But *cf* Goldstein & Marcus, *supra*, note 3, at 159 who argue that such an approach might even be more detrimental to the accused, at least where serious crimes are concerned, since "it might even be argued that in such cases society's moral condemnation will be more apparent to the accused than the fact that he violated the law, so that the use of a standard or (*sic*) 'moral' wrong would narrow the defence" (see also, *supra*, note 71).

82 *Supra*, note 3.

decision of *R* v *Chaulk*[82] was precisely because it was felt that the previous decision (which adopted the stricter "*legal* wrong" approach[83]) "had the effect of expanding the scope of criminal responsibility unacceptably" and was thus "unfavourable to an accused".[84]

It will be seen that the more liberal view (*viz*, "wrong" as "*moral* wrong", and which is consistent with the 'disjunctive view') is more concerned, at a broad policy level, with favouring the accused as much as is possible. Two points, however, need to be considered in this regard.

First, because of the social stigma as well as confinement entailed, one cannot assume that an accused would automatically opt for the defence of insanity under section 84 of the Penal Code – save, perhaps, in extreme situations, *eg*, capital cases or cases involving life imprisonment.[85]

Secondly, in legal systems which have jury trial, it is suggested that the jury could, quite conceivably, provide the counterpoint to any perceived harshness that might result from the utilization of the stricter test (*viz*, "wrong" as "*legal* wrong"). This is the pith and marrow of the idea of 'jury equity'. Indeed, I would go so far as to argue that it is precisely in the context of 'jury equity' that one has the best opportunity, if at all, to apply the concept of the *objective* morality of *society*[86] in a practical context. If this be the case, then it would appear that there would be little objection to application of the stricter test of "wrong". Further, it might be argued that if the stricter test were the operative one, the jury would apply it liberally. This is precisely why the judges preferred to utilize the rubric of "wrong" (only) in *M'Naghten* – a point discussed previously.[87] It is, in summary, suggested that the jury, notwithstanding their status as intelligent laypersons, are nevertheless untrained in the law and that this (amongst other points) would ensure that *extralegal* considerations would *inevitably* influence the jurors' respective decisions.[88] But, if so, the concept of "*moral* wrong" would inevitably figure, albeit (and perhaps ironically) not by way of section 84

83 *Viz*, *Schwartz* v *The Queen*, *supra*, note 14.

84 *Supra*, note 3, at 1353.

85 And see, *eg*, *per* Dickson J in *Schwartz* v *The Queen*, *supra*, note 14, at 677. See also the *Butler Report*, *supra*, note 3, at para 18.9 and Norrie, *supra*, note 3, at 194.

86 See, *supra*, note 74. And *cf Lee Ah Chye* v *Public Prosecutor*, *supra*, note 12.

87 See, *supra*, Pt III, Section A as well as the *Report of the Royal Commission on Capital Punishment 1949-1953*, *supra*, note 3, at paras 232-243, 275, and 323.

88 Reference may also be made to Goldstein & Marcus, *supra*, note 3, at 163. But cf Norval Morris, "'Wrong' in the M'Naghten Rules" (1953) 16 MLR 435 at 440, where he argues that adopting the approach in *R* v *Windle*, *supra*, note 15 (instead of that in *Stapleton* v *The Queen*, *supra*, note 16) would result in a stifling of the power of the jury to be flexible. It is, however, respectfully submitted that this danger is more theoretical than real, especially having regard to the absence of legal knowledge and training on the part of the jurors themselves.

itself but via the jury's *practical deliberations* instead.

What, then, about jurisdictions where there is no jury? It is suggested that the approach one adopts depends, in the final analysis, on the perceived *social needs and context* of the jurisdiction concerned. This is not in the least remarkable since judicial policy towards punishment, for example, will be moulded to meet the needs of the particular society at a given point in time. The difficulty with such an argument, however, is the uncertainty that would be generated – a difficulty that is exacerbated by the very nature of the insanity defence under section 84 itself; it would obviously be highly undesirable that the approach the courts adopt towards the section (*ie*, whether "legal wrong" or "moral wrong") would depend on, say, the prevailing judicial attitude towards punishment (whether deterrence, retribution or rehabilitation, for instance) at a given point in time since such attitudes have to change to accommodate changing circumstances. But this, perhaps, is the very nature of policy itself and decisions would have to be made – one way or the other. The safer course, however, might be to adhere to the original parliamentary intention. As I have sought to argue, this would entail adopting the stricter approach towards the concept of "wrong" as meaning "*legally* wrong". However, even in such a situation, it is suggested that the judge(s) concerned would also probably consider broader extralegal factors simply because they would have to grapple not with the strict law as such but, rather, the accused's knowledge of the law. What, then, about the proposition to the effect that the accused is presumed to know what the law of the land is?[89] It is submitted that this presumption ought to viewed in context. In the context of a jury, the jurors (as I have already mentioned in the preceding paragraph) would inevitably take into account extralegal considerations which would then mitigate any excessive harshness that might otherwise result insofar as the accused is concerned. Further – and as we have already seen – such a presumption is consistent with a positivistic approach that has, in fact, been argued was the case in *M'Naghten* itself.[90] However, in the context of a trial without a jury, no direction is obviously involved. Further, it is submitted that the judges would not, in any event, apply the presumption in its full force simply because they would (not unlike jurors) necessarily have to weigh the medical evidence as well in order to ascertain whether or not the accused did or did not know that what he had done was "legally wrong". It may well be the case that the accused was so incapacitated by unsoundness of mind that he did not know that what he did was contrary to law. The real issue, it is suggested, is a slightly different (albeit related) one: how are the courts to reconcile the legal principles with the medical principles and, in this respect, much more

[89] And see, *supra*, note 43.

[90] See generally *supra*, Pt III, Section A.

interdisciplinary research is required; but, such research is notoriously difficult to effect successfully, particularly where both disciplines seek to zealously protect their respective 'territories'.[91] However, it is this writer's tentative view that the very process of seeking to integrate the medical evidence with the legal in order to arrive at a decision as to whether or not the defence of insanity under section 84 of the Penal Code applies will necessarily involve the judge(s) concerned in extralegal considerations, as briefly mentioned above; to this extent, therefore, the concept of "*moral* wrong" does not become wholly irrelevant. Finally, however, the following remarks of McLachlin J (albeit in a dissenting judgment in *R* v *Chaulk*[92]) are worth noting, if nothing else, for the very strict approach adopted:

> To hold that absence of moral discernment due to mental illness should exempt a person who knows that legally he or she ought not to do a certain act is, moreover, to introduce a lack of parallelism into the criminal law; generally absence of moral appreciation is no excuse for criminal conduct. When the moral mechanism breaks down in the case of an individual who is sane, we do not treat that as an excuse for disobeying the law; for example, in the case of a psychopath. The rationale is that an individual either knows *or is presumed to know* the law, and the fact that his or her moral standards are at variance with those of society[93] is not an excuse. Why, if the moral mechanism breaks down because of disease of the mind, should it exempt the accused from criminal responsibility where he or she knows, or was capable of knowing, that the act was illegal and hence one which he or she "ought not to do"? Why should deficiency of moral appreciation due to mental illness have a different consequence than deficiency of moral appreciation due to a morally impoverished upbringing, for example? I see no reason why the policy of the law should differ in the two cases.[94]

[91] See, in particular, Norrie, *supra*, note 3. See also, in a more general vein, Andrew Phang, "Legal Theory in the Law School Curriculum – Myth, Reality, and the Singapore Context" (1991) 6 Connecticut J Int'l Law 345 at 354-355.

[92] *Supra*, note 3 – a judgment with which Sopinka J agreed.

[93] It could, however, here be argued that the general thrust of the argument in favour of "moral wrong" is not to be viewed from the accused's perspective in any event (and *cf per* McLachlin J herself in *R* v *Matthew Oommen*, *supra*, note 19, at 206); but we have seen that even this lastmentioned argument is plagued with difficulties centring on subjectivity: see, *supra*, Pt III, Section B.

[94] *Supra*, note 3, at 1411-1412 (emphasis added). *Cf per* Martland J in *Schwartz* v *The Queen*, *supra*, note 14, at 701 ("If ... it could be contended that the commission of a particular crime, though known to be illegal, was considered to be normally justifiable in the opinion of ordinary men, I do not see why a person who committed a crime in such circumstances should be protected from conviction if suffering from disease of the mind, and not protected if he committed the crime when sane.")

V. Conclusion

The present essay is, in many ways, a tentative and preliminary one. It is tentative because many of the arguments tendered throughout the course of the essay concern both legal history and/or theoretical arguments: often, a combination of both; and in the spheres of both history and theory, many reasonable disagreements on interpretation are often the order of the day. It is preliminary because I believe that much more interdisciplinary research needs to be done in order to throw more light on what have hitherto been considered, in the main (if not solely), as legal issues. It is, however, acknowledged that this call for interdisciplinary research necessarily undermines the positivistic origins of the insanity test under section 84 of the Penal Code. As I have already briefly mentioned at appropriate points in the preceding Part, it might well be the case that, regardless of whether a not the jury is involved, extralegal considerations will necessarily be involved. But a clarification is in order: to state that extralegal considerations will be involved in the process of ascertaining whether or not section 84 applies is not (at least exactly) the same thing as stating that "wrong" in the provision means "*moral* wrong", simply because the *starting-point* is *quite different*; the point of departure is that of "*legal* wrong", although in the *process of application*, at least some extralegal considerations will necessarily come into play. It is, however, suggested that the process of application is more likely to approximate the test of "moral wrong" in a jury trial than in a non-jury one, although everything is, at bottom, a question of degree – not least because jurors will naturally have more recourse to their own value systems than the law itself, being untrained in the law. This might not always be desirable since, as we have seen, moral values may not necessarily be reflective of an objective societal moral framework but may, instead, be merely based on subjective or personal preference. It is suggested that adopting what has been here argued to be the approach originally conceived (*viz*, the 'exegetical' view that views "wrong" as meaning "contrary to law") is not undesirable simply because some measure of extralegal considerations will be involved, even in a non-jury trial context; a balance is struck, with certainty being achieved with the option of flex-

[95] This would appear to be minimally consistent with the approach adopted by McLachlin J, who was one of the minority in *R* v *Chaulk*, *supra*, note 3, where she adopted (Sopinka J agreeing) an approach which did not accord primacy to either legal or moral wrongness for, in her view, "all that is required is that the accused be capable of knowing that the act was in some sense 'wrong'" (see *ibid*, at 1407; see also at 1410-1411); the inconsistency with the approach advocated here is obvious because no real stand is taken as to the concept of "wrong", but to the extent that there is acknowledgment of the need for a *holistic* approach,

ibility.[95] To this extent, however, the positivist ambitions underlying the Penal Code in general and section 84 thereof in particular would be undermined somewhat. But it is submitted that this is no bad thing, especially since the principal critique levelled against positivism generally has been its inability to be flexible. But one thing is clear: the historical and conceptual evidence is too overwhelming to argue for a much looser conception of "wrong" (as "moral wrong") which would also create, it is submitted, excessive uncertainty in the process.[96] It could, of course, well be argued that there may, in the final analysis, be no undermining of the positivism embodied in section 84 if one draws a distinction between the provision on the one hand and its application on the other.[97]

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there is some minimal correlation with the approach advocated here. It is, however, submitted that a closer perusal of McLachlin J's judgment will reveal that she in fact advocated, in the final analysis, the stricter approach centring on "*legal* wrong", albeit with ostensible qualification ("The question is whether the accused was capable of knowing that he or she ought not to do the act, and knowledge that it is *illegal suffices* to meet this test, *making further enquiry into moral awareness unnecessary*. It *may be* that Lord Goddard CJ [in *Georges Codere*, *supra*, note 7] went *too far* in saying that *all* that could ever be relevant is *legal* wrong. One can imagine a case, although it must be *rare*, where an accused is incapable of appreciating that an act is legally wrong but capable of appreciating that it is morally wrong. In such a case, he or she arguably should be criminally responsible on the *M'Naghten* 'ought to have known' test.": *ibid*, at 1410 (emphasis added); see also *ibid*, at 1413). Ironically, perhaps, the general approach by Dickson J in *Schwartz* v *The Queen*, *supra*, note 14 is also quite general, focusing as it does on the general concept of *capacity*; however, he arrived at a quite different proposition altogether, firmly endorsing the concept of "*moral* wrong" (but *cf* Colvin, *supra*, note 33, at 4 who pertinently observed that the concept of 'incapacity' could be viewed from both moral as well as legal points of view; but *cf*, in turn, the same author's present views in *Principles of Criminal Law* (2nd ed, 1991) at 301-303, which appear to very similar to those adopted by McLachlin J). *Cf* also, in this regard, *Lakshmi* v *State*, *supra*, note 3, at 536, where a distinction is drawn between objective incapacity and subjective beliefs).

96 This is clearly the case for a subjective approach towards morality (and see, *supra*, note 73) and, at least arguably, for an objective approach towards morality (and see, *supra*, note 74).

97 *Cf* Postema, *supra*, note 54, at Ch 13.

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