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Crime and Punishment - Back to the Future for Sentencing and Corrections Reform

Paper to be presented in Plenary 10 – Mental Illness and the Criminal Justice System, by His Honour Judge Hugh M. Harradence of the Provincial Court of Saskatchewan

INTRODUCTION:

Every criminal justice system has experienced an increase in three phenomena over the last 25 years: 1. The prevalence and recognition of mental illness; 2. The complexity and length of trial proceedings; 3. The shortage of resources to meet the demands to be fair, accountable, and expeditious.

The core of any system of criminal justice is to protect the public within a process that is fair, independent and transparent. Where the public is not in need of protection or the process is not fair, the criminal justice system should critically examine whether the continuation of the process is appropriate or necessary. It is the objective of this paper to discuss two reforms which relate to mental illness within the criminal justice system:

1. Alternative measures or diversion allows for offences and offenders to be removed from the criminal justice system. In Canada, the Crown is the gate keeper of diversion. It is proposed that the Court have the authority to order alternative measures or diversion where it is satisfied that the act or omission was caused or substantially contributed to by the accused's mental illness and the safety of the public is not endangered.

2. The test for fitness to stand trial is applied in Canada according to a low threshold – the Limited Cognitive Capacity Test. This test permits a finding of fitness where an accused does not possess the capacity for rational choice and undermines his/her meaningful participation and the fairness of criminal proceedings. It is proposed that an essential requirement of any finding of fitness is that the accused have a demonstrated capacity for rational choice.

The increased use of diversion will focus the criminal justice system on offences and offenders where there is a requirement for the criminal law power. By removing non-violent mentally ill offenders, the increased use of diversion will provide greater efficiency for the Courts'.

A broad based application of the fitness rules to include the capacity to make rational decisions removes the potential for unfairness and allows the accused and opportunity to meaningfully participate in the criminal process.

Both of these suggested reforms have their roots in the past and a movement towards these reforms would be a step back to the future.

DIVERSION:

Beccaria in Crimes and Punishments paraphrases Montesquieu by saying:

> As the great Montesquieu says, every punishment that does not derive from absolute necessity is tyrannical. This proposition can be stated more generally in the following manner: every act of authority of one man over another that does not derive from absolute necessity is tyrannical. This is the foundation, therefore, upon which the sovereign's right to punish crimes is based: the necessity to defend the depository of the public welfare from individual usurpations; and the more just the punishments, the more sacred and inviolable the security and the greater the liberty the sovereign preserves for his subjects.[1]

Building on this theme, the 1969 Ouimet Report entitled "Toward Unity: Criminal Justice and Corrections" recognises the principle of restraint and advocates for its implementation through discretion at each step of the criminal justice process:

> To implement the Committee's proposition that the criminal law should be enforced with a minimum of harm to the offender, discretion should be exercised in cases involving individuals who are technically guilty of an offence but where no useful purpose would be served by the laying of a charge. Where a charge is laid, discretion should be exercised as to the manner in which the law is applied.
>
> This means the police should have appropriate discretion whether to lay a charge and, if a charge is laid, whether to release the accused or hold him in custody. The prosecution should have appropriate discretion to determine whether a charge is to be laid or proceeded with, and whether conviction on a lesser charge would satisfy the requirements of justice. The Court should have the power to dispose of a case without conviction and should have a wide range of alternatives open when a sentence must be imposed. The correctional services should have as much discretion as possible in planning and executing a treatment program.

[1] Cesare Beccaria, "On Crimes and Punishments and Other Writings", (1764) Part I, On Crimes ad Punishments, at page 11.

> Discretion should, of course, always be exercised with the protection of the community in mind.[2]

The Ouimet Committee summarized its views of the objectives of the criminal justice system in Chapter 11 entitled Sentencing, by stating:

> The overall views of the Committee may be summed up as follows: segregate the dangerous, deter and strain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition the possibility of rehabilitation should be taken into account.[3]

In 1975, the Law Reform Commission of Canada, in its working paper 14, "The Criminal Process and Mental Disorder" reiterated the importance of restraint in the criminal process:

> Underlying the entire criminal process is a principle of restraint. Because it involves society's most destructive and intrusive forms of intervention against the individual, the criminal process should only be invoked with caution and with full recognition of its moral and practical limitations. It is society's last resort to be used only when milder methods have failed.[4]

Specifically, relating to mental illness and diversion, the Law Reform Commission of Canada states at page 23:

> None of us like to be where we don't belong, even less to be thrust into ill-suited, inappropriate roles. Very simply, this is what diversion avoids. It is based on the principle of restraint and requires that before we invoke the force of the very blunt

[2] Canada, Report of the Canadian Committee on Corrections, "Toward Unity: Criminal Justice and Corrections", (Ouimet Report) (1969), p. 16-17.
[3] Canada, Report of the Canadian Committee on Corrections, "Toward Unity: Criminal Justice and Corrections", (Ouimet Report) (1969), ibid, p. 185.
[4] Canada. Law Reform Commission. The Criminal Process and Mental Disorder, Working Paper 14. Ottawa: 1975, at pp. 16-17, online: <http://www.lareau-law.ca/LRCWP14.pdf>> [LRCC, Criminal Process and Mental Disorder, Working Paper 14].

> and powerful social instrument called criminal law, we ask ourselves not only if we can use it but also if we would be wise to do so. Wisdom dictates that where appropriate methods and procedures are available and appropriate they be tried before recourse to the criminal law is considered.
>
> Diversion, then, recognizes that some of the people who find their way into the criminal process shouldn't have been let in or shouldn't be required to go further.[5]

In Canada, the use of diversion or alternative measures is formally recognized in the *Criminal Code*. Section 717(1) of the *Criminal Code* reads:

> 717. (1) Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:
>
> > (a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;
> >
> > (b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;
> >
> > (c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;
> >
> > (d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;

[5] Canada. Law Reform Commission. The Criminal Process and Mental Disorder, Working Paper 14. Ottawa: 1975, supra, online: <http://www.lareau-law.ca/LRCWP14.pdf>> [LRCC, Criminal Process and Mental Disorder, Working Paper 14].

> (e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;
>
> (f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
>
> (g) the prosecution of the offence is not in any way barred at law.

Given section 717(1)(a) of the Criminal Code, the ability to refer offenders to alternative measures has been interpreted, in Canada, to be subject to the authorization of the Crown. The Crown is the decision maker and the gate keeper of the availability of alternative measures. In each Province, the respective Attorney Generals have designed policies exempting specific charges or circumstances from the availability of alternative measures. Like any other policy, alternative measures policies are subject to change without judicial review or oversight.

These alternative measures policies differ across the country. To illustrate these differences, reference will be made to the policies in Ontario, British Columbia, and Saskatchewan.

Ontario has developed a practice memorandum specifically designed to respond to mental disordered offenders. This diversion policy does exempt certain offences such as murder, perjury, and spousal/partner offences from eligibility for alternative measures. However, overall the policy takes an enlightened approach, indicating the following in its introduction:

> To the extent possible, accused persons with mental disorders and those who are developmentally disabled should be given the same access to community justice programs, as all other accused. They should not be subjected to more onerous consequences than the general population solely as a function of their disorder/disability.
>
> In recognition of their particular circumstances, mentally disordered or disabled offenders may warrant special consideration within the criminal justice system, depending on the nature and circumstances of the offence and the background of the offender. This may require an emphasis on

> restorative and remedial measures, such as specialized treatment options, supervisory programs or community justice programs, as alternatives to prosecution. To the extent consistent with public safety, and in appropriate circumstances, offenders with mental disorders, and those who are developmentally delayed, should be given access to alternatives to prosecution.
>
> Moreover, in cases involving minor offences and no risk to public safety, where the offender is incapable of complying with a community justice initiative because of the offender's disorder/disability, it will often be in the public interest to simply withdraw the charge.[6]

The Ontario policy goes on to suggest that Crown Attorneys for each jurisdiction within the Province, develop protocols for diversion of offences involving mentally disordered offenders. While the policy suggests that prosecutors consult with the local judiciary, legal aid, and defence bar regarding timelines, the discretion to refer offences to alternative measures/diversion remains with the Crown.

The Ministry of Justice in British Columbia has adopted a policy which provides guidance for Crown Prosecutors regarding alternative measures for adult offenders. This policy indicates that the Crown has the discretion to refer an offence to alternative measures. As well as listing a number of offences and circumstances where alternative measures should not be considered, the British Columbia policy indicates that alternative measures should be considered if it can achieve the "most important objectives of a criminal prosecution". The policy recognizes that these objectives will vary in individual cases.

> The overriding principle is that, except where an offence is expressly excluded from alternative measures consideration by this or another Branch policy, alternative measures should be considered for all cases in which the successful completion of an alternative measures program can achieve the most important objectives of a Court prosecution.
>
> The most important objectives of a Court prosecution will vary with each case, based on its facts. Where, for example, a Court prosecution is intended to result in the separation of a violent offender from society by a period of imprisonment or

[6] Ontario Ministry of the Attorney General Criminal Law Division, Practice Memorandum (PM [2005] No. 22), March 31, 2006, Subject: "*Mentally Disordered/Developmentally Disabled Offenders: Diversion",* at page 2 of 13.

> in the imposition of Court supervised probation programs, alternative measures will likely be unsuitable. On the other hand, where the most important objectives are to promote a sense of responsibility in the offender and to obtain an acknowledgement of the harms done to victims, alternative measures will likely be able to achieve these objectives.
>
> Crown Counsel should adopt a principled and flexible approach to the determination of this issue and should consider all of the available alternative measures programs with can achieve the most important objectives of a Court prosecution in a particular case. Crown Counsel should also bear in mind that referral for an assessment of the suitability of alternative measures does not obligate Crown Counsel to approve the recommended program if it turns out to be unsuitable and that it is sometimes difficult to determine the suitability of alternative measured without obtaining an assessment.[7]

The Saskatchewan policy regarding alternative measures is more blunt, providing the Crown with wide ranging discretion to refuse alternative measures by stating, "The Crown, in its discretion, does not think that the offender or offence is suitable for alternative measures". The Saskatchewan policy elaborates on Crown discretion as follows:

> Crown prosecutors have discretion about whether to refer cases to alternative measures programs. Crown prosecutors are encouraged to refer appropriate cases except where the offence is expressly excluded from eligibility. In the exercise of this discretion, some of the factors to be considered by the Crown include:
>
> - The seriousness or triviality of the alleged offence;
> - Significant mitigating or aggravating circumstances;
> - The age, intelligence, and physical or mental health or infirmity of the person involved;
> - The accused person's circumstances and needs;
> - The victim's attitude and interests;

[7] British Columbia Criminal Justice Branch, Ministry of Attorney General, Crown Counsel Policy Manual, Subject: *"Alternative Measures for Adult Offenders"*, effective October 12, 2010 (ARCS/ORCS file number 55360-00), at page 2 of 10.

- The availability and appropriateness of alternatives to conventional prosecution;
- The prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
- The prevalence of the alleged offence in the community, whether the alleged offence is of considerable public concern, and the need for general and specific deterrence;
- Whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- Whether it would otherwise be in the public interest to refer the matter to alternative measures.[8]

None of these provincial policies contemplate the Court ordering an offence or offender to be referred to alternative measures where the Crown objects. The retention of this authority by the Court is supported by Beccaria's thesis, the Ouimet Report and the report of the Law Reform Commission of Canada. The failure of the law to recognize the Court's ability to refer an offender to alternative measures likely means that a mentally disordered offender who pushed his spouse in Ontario, shoplifted in Saskatchewan more than once, or repeatedly violates a term of his probation order in British Columbia, will be excluded from eligibility for alternative measures.

A preferable approach, and the reform suggested, would be to empower the Court to refer offenders and offences to alternative measures. This referral should be made on objective criteria. In relation to mentally disordered offenders, the criteria could be stated as follows:

> Where the Court is satisfied on reasonable and probable grounds that the act or omission forming the offence was caused or significantly contributed to by the accused's mental illness and the safety of the public is not endangered, the Court may require the offender to participate in an alternative measures program.

A reform of this type requires a process to be followed by both the Crown and the accused. Presently, in Canada, if the Crown declines to refer a matter to alternative measures, the Court does not have the authority to order alternative measures. Normally, under the present model, if alternative measures is successful, the Crown withdraws the charge. It is proposed with this reform that if the Crown declines to refer an offence to alternative measures, the accused could apply or the Court, of its own motion, could hold a hearing to determine whether a referral is appropriate given the above noted criteria. If

[8] Government of Saskatchewan, *"The Alternative Measures and Extrajudicial Sanctions Policies"*, Ministry of Justice, January 2013, at pages 11-12.

alternative measures is successful a judicial stay would be entered giving the Crown a right of appeal.

The increased use of diversion, including Mental Health Courts, is advocated by the Mental Health Commission of Canada in their 2012 Report "Changing Directions, Changing Lives: The Mental Health Strategy for Canada". The commission identifies the use of diversion as a priority:

> PRIORITY 2.4
> Reduce the over representation of people living with mental health problems and illness in the criminal justice system, and provide appropriate services, treatment and supports to those who are in the system.
>
> The vast majority of people living with mental health problems and illnesses are not involved with the criminal justice system. In fact, they are more likely to be victims of violence than perpetrators. Nevertheless, they are over-represented in the criminal justice system; that is, there is a much higher proportion of people living with mental health problems and illnesses in the criminal justice system than in the general population. The reasons for this over-representation are complex. Clearly, people are involved in the criminal justice system because of criminal behaviour. However, lack of access to appropriate services, treatments and supports have also had a powerful influence on this situation. This over-representation has increased as the process of deinstitutionalization of people living with mental health problems and illnesses, coupled with inadequate reinvestment in community-based services, has unfolded. Estimates suggest that rates of serious mental health problems among federal offenders upon admission have increased by 60 to 70 per cent since 1997.
>
> First and foremost, efforts to reduce this over-representation should focus on preventing mental health problems and illnesses and providing them timely access to services, treatments and supports in the community. This is particularly important for youth, because of the great potential for prevention and early intervention to keep them out of the criminal justice system and to recoup initial investments through saving costs of incarceration in the future.

> Diversion programs (including mental health courts and restorative justice programs) are the next line of defence. They can redirect people who are about to enter the criminal justice system by providing access to needed services, treatments and supports. They do not work, however, unless there are services in the community to support the people who are being diverted. It is also important to ensure that people working in the justice system are aware of the value of diversion programs and know how to refer and encourage people to access services. In addition, people with complex combinations of mental illness and developmental disabilities ('dual diagnoses') should also be able to benefit from diversion programs.[9]

Inevitably, an increased use of alternative measures will result from the Courts' ability to make referrals. In many jurisdictions, Mental Health Courts are already involved in this process. These Courts require the direct ongoing oversight by the Court of the offender's progress. A program of alternative measures would remove the offence and the offender from the criminal justice system and allow the community to respond. There are many examples of communities, large and small, that have responded to complement the criminal justice system.[10] [11] [12] [13] [14]

In his 1964 article, "Two Models of the Criminal Process", Herbert L. Packer contrasts a due process model with the crime control model. He concludes, at the time of his article, that the American justice system is moving towards a due process model. Today, that shift is complete. Packer does note that this shift requires a re-examination of the use of the criminal sanction:

> The alternative that I would commend to the rational legislator is to re-examine the uses now being made of the criminal sanction with a view toward deciding which uses are

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[9] Mental Health Commission of Canada. (2012). Changing *Directions, Changing Lives: The Mental Health Strategy for Canada*. Calgary, AB: Author.

[10] City of Surrey's Crime Reduction Strategy 2012 Annual Report "Reporting Back on Community Safety".

[11] Community Mobilization Prince Albert. (2013). *The Case for a Prince Albert and Region Alcohol Strategy: A Call to Action for All Community Sectors to Collectively Develop and Implement a Comprehensive Alcohol Strategy*. Prince Albert, SK: Community Mobilization Prince Albert.

[12] Editorial, *The New York Times*, April 6, 2014 "The Mentally Ill, Behind Bars".

[13] Steering Committee of the Citywide Justice and Mental Health Initiative, *"Mayor Bloomberg Announces New Mental Health Initiative to Provide Intervention and Resources for Court-involved New Yorkers as they Return to the Community"*, December 23, 2012, New York City, New York, Untied States.

[14] The City of New York Department of Correction, Justice Centre, The Council of State Governments: "Improving Outcomes for People with Mental Illnesses Involved with New York City's Criminal Court and Correction Systems". December 2012.

> relatively dispensable and which might with safety (and perhaps even with some net gain to the public welfare) be restricted or relinquished. There is nothing inherent in the nature of things about the penal code of any time and place. The behavior content of the criminal law has expanded enormously over the past century, mainly because declaring undesirable conduct to be criminal is the legislative line of least resistance for coping with the vexing problems of an increasingly complex and independent society. As a result we have inherited a strange melange of criminal proscriptions, ranging from conduct that offers the grossest kind of threat to important social interests to conduct whose potentially for harm is trivial or nonexistent.
>
> It is always in order to question the uses made of this most awesome and coercive sanction. It is especially appropriate to do so at a time when the processes that are invoked to apply the criminal sanction are undergoing a profound change that renders them unsuitable for being lightly employed. What we require is a set of criteria for distinguishing the "mandatory" uses of the criminal sanction from the "optional" ones. Particular attention need be paid to that large group of consensual offenses in which it is not always easy to say who is being injured and by whom. Offenses of that kind-narcotics, gambling, and alcoholism are the three statistically conspicuous examples-afford a special opportunity to canvass the important question of alternatives to the criminal sanction. And through that kind of examination, the foundation that we do not now have for a jurisprudence of sanctions may eventually be laid. It may be predicted that the change in our model of the criminal process will provide not merely a reason for pressing an inquiry into the appropriate criteria for legislative invocation of the criminal sanction, as has been argued in this Article, but also the source of some valuable clues to what some of those criteria ought to be.[15]

Although Packer's approach is different, he reaches a similar conclusion to the Canadian Law Reform Commission: The criminal sanction should be the sanction of last resort. Diversion permits conduct not requiring criminal sanction to be removed from the process. Packer's conclusion applies with equal force to the Courts' as well as

[15] *University of Pennsylvania Law Review*, Vol. 113, No. 1 (Nov., 1964), pp. 67-68.

legislators. Allowing courts to order diversion ensures that decisions to refer will be made on objective criteria and not subject to the vagaries of policy.

FITNESS TO STAND TRIAL[16]:

Historically, two approaches to the rule for fitness to stand trial have been recognized. The first approach, the Rationality Test, involves a requirement by the accused to have a rational understanding of the proceedings. The Rationality Test was advocated by the United States Supreme Court in the 1966 decision *Dusky v. United States*:

> We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test, must be whether he 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."?[17]

The second approach, the Narrow Application of the fitness rules, has long been applied in England. It is articulated in *R. v. Pritchard*[18] which Paul Lindsey, in his article "Fitness to Stand Trial in Canada", distils to three questions:

> (1) Does the accused understand the nature and object of the proceedings? (i.e., does he understand that this is a criminal trial; does he understand what an oath is; does he know what the offence is etc.?)
> (2) Does the accused understand what his relationship is to the proceedings? (i.e., does he understand that he and not somebody else is on trial; that he has the right to rebut the charges; that he may be incarcerated if he is found guilty etc.?)
> (3) Is the accused able to assist in his defence? (i.e., can he communicate with his counsel; is he capable of giving

[16] This portion of the paper is a condensed version of a previous paper written by the author and published in the Criminal Law Quarterly, 2013 59 CLQ 511.
[17] *Dusky v. United States* (1959), 362 U.S. 402 (U.S.S.C.) , at p. 402.
[18] *R. v. Pritchard* (1836), 7 C.P. 303, 173 E.R. 135, [1836] EWHC KB 1 (Eng. Nisi Prius), at p. 135 [R. v. Pritchard].

> evidence himself, if necessary; can he make strategic decisions with respect to the conduct of his defence etc.?)[19]

The Law Reform Commission of Canada, in 1975, recommended a rationality approach to the fitness rules:

> The rationale of the fitness rule, then is this: it promotes fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings.
>
> The accused has the right to make full answer and defence to the charges brought against him. Fairness demands that he be aware of what is going on at trial so as to take whatever steps available to avoid the potential consequences of being found guilty. A trial at which the accused is mentally unable to exercise his rights is really a trial at which these rights do not exist. Exempting him from trial , therefore, protects his rights to make full answer and defence.
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> . . . . .
>
> To reiterate, then, the purpose of the fitness rule is to promote fairness to the accused by protecting his rights to defend himself and by ensuring that he is an appropriate subject for a criminal proceeding.[20]

Both the British Columbia Court of Appeal and the Quebec Court of Appeal adopted a rationality approach to the fitness rules. Justice Carruthers, of the British Columbia Court of Appeal, in *R. v. Roberts*[21], a 1975 decision, describes the application of the fitness rules as follows:

> It is prerequisite to any criminal trial that the accused be capable of conducting his defence. Subject only to disruptive conduct on his part, he must be physically, intellectually, linguistically and communicatively present and able to

[19] Paul S. Lindsay, "**Fitness to Stand Trial** in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada", (1976-1977), 19 Crim. L.Q. 303, at pp. 306-307. [Lindsay, ***Fitness to Stand Trial*** *in Canada*].

[20] LRCC, Criminal Process and Mental Disorder, Working Paper 14, supra, at pp. 33-34.

[21] *R. v. Roberts* (1974), 21 C.C.C. (2d) 93, [1975] 2 W.W.R. 742, 1974 CarswellBC 301, 1974 CLB 66 (B.C. S.C.) [*R. v. Roberts*].

> partake to the best of his natural ability in his full answer and defence to the charge against him.[22]

Justice Fish (as he then was), in *R. v. Steele*[23], a 1991 decision of the Quebec Court of Appeal, identifies a number of criteria to be applied to the fitness rules which include the accused's ability to have a rational conversation with his counsel:

> The rationale of the fitness rule, then, is this: it promotes fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings.
>
> The accused has the right to make full answer and defence to the charges brought against him. Fairness demands that he be aware of what is going on at trial so as to take whatever steps available to avoid the potential consequences of being found guilty. A trial at which the accused is mentally unable to exercise his rights is really a trial at which these rights do not exist. Exempting him from trial, therefore, protects his rights to make full answer and defence.[24]

In summary, Justice Fish delineates the criteria upon which an accused should be found to be incapable of conducting a defence:

> (a) cannot distinguish between available pleas;
> (b) does not understand the nature or purpose of the proceedings, including the respective roles of the judge, jury and counsel;
> (c) does not understand the personal import of the proceedings;
> (d) is unable to communicate with counsel, converse with counsel rationally or make critical decisions on counsel's advice; or
> (e) is unable to take the stand , if necessary.[25]

As a result of the 1991 Supreme Court of Canada decision in *R. v. Swain*[26], the mentally disordered person's provisions of the *Criminal Code of Canada* were revised

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[22] *R. v. Roberts*, *ibid*, at para. 12.
[23] *R. v. Steele* (1991), 63 C.C.C. (3d) 149, 4 C.R. (4th) 53, 36 Q.A.C. 47, 12 W.C.B. (2d) 235, 1991 CLB 223 (Que. C.A.) [*R. v. Steele*].
[24] *R. v. Steele*, *ibid*, at p. 173 (C.C.C.).
[25] *R. v. Steele*, *ibid*, at p. 181 (C.C.C.).

dramatically. These revisions included the definition of unfitness to stand trial in section 2 of the *Criminal Code*:

> "unfit to stand trial" means 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, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings,
> (b) understand the possible consequences of the proceedings, or
> (c) communicate with counsel.[27]

Section 2 was applied by the Ontario Court of Appeal in *R. v. Taylor*[28], using a narrow approach. This resulted in the Court adopting the Limited Cognitive Capacity Test. Under this test, the existence of delusional thoughts and the inability to make rational judgements, does not render and accused unfit to stand trial. Rather, the test is described by Justice Lacourciere, in *Taylor*, in the following way:

> Under the "limited cognitive capacity" test propounded by the amicus curiae , the presence of delusions do 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 that 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 into 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 and counsel have an amicable and trusting relationship, whether the accused has been cooperating with counsel, or whether the accused ultimately makes decisions that are in his/her best interests.[29]

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[26] *R. v. Swain*, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481 , 5 C.R. (4th) 253, 12 W.C.B. (2d) 582, 1991 CLB 241 (S.C.C.), at p. 501 (C.C.C.) [*R. v. Swain*]

[27] *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 2 defining "unfitness to stand trial".

[28] *R. v. Taylor* (1992), 77 C.C.C. (3d) 551, 17 C.R. (4th) 371, 11 O.R. (3d) 323, 18 W.C.B. (2d) 74, 1992 CLB 66 (Ont. C.A.) [*R. v. Taylor*].

[29] *R. v. Taylor*, *supra,* at p. 564 (C.C.C.).

Despite consistent criticisms, the Limited Cognitive Capacity Test has been applied by Canadian Courts and Review Boards, without significant analysis, on a regular basis. The Limited Cognitive Capacity Test has reached near iconic status in Canadian criminal procedure, even though it represented a dramatic shift from the decisions in *Steele, supra and Roberts, supra*.

In 2007, the Ontario Court of Appeal in *R. v. Morrissey*[30] did not deviate from the Limited Cognitive Capacity Test, but expanded this test by incorporating both *Steele* and *Roberts*:

> An accused must be mentally fit to stand trial in order to ensure that the trial meets minimum standards of fairness and accords with principles of fundamental justice such as the right to be present at one's own trial and the right to make full answer and defence: see *R. v. Steele* (1991), 63 C.C.C. (3d) 149 , 12 W.C.B. (2d) 235, 1991 CLB 223 (Que. C.A.) at pp. 172-173 and 181; *R. v. Roberts* (1975), 24 C.C.C. (2d) 539 , 1975 CLB 1623 (B.C.C.A.). Meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness.[31]

In *R. v. Adam*[32], Justice Trotter interprets meaningful participation to include rational thought:

> 29 …for an accused person in a criminal trial, *meaningful* participation can only mean the ability to defend oneself. This is reflected in the opening words of s. 2, which bear repeating: ”unfitness to stand trial’ means unable on a count of mental disorder *to conduct a defence ... or to instruct counsel to do so*.” It cannot seriously be contended that rationality has no role to play in this determination. Moreover, the three arms of the fitness test (in s. 2 (a) to (c)) are not freestanding fitness criteria to mechanically applied; instead, they are tools to assist in determining whether a mentally ill accused person is able to defend him or herself.

In 2010, the English Law Commission in its consultation paper #197 recognizes the fundamental importance of meaningful participation in the trial process. The

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[30] *R. v. Morrissey* (2007), 227 C.C.C. (3d) 1 , 54 C.R. (6th) 313, 87 O.R. (3d) 481, 76 W.C.B. (2d) 259, 2007 CLB 1 (Ont. C.A.), leave to appeal refused (2008), 231 C.C.C. (3d) vi (note), 255 O.A.C. 395, 387 N.R. 399 (note) (note) (S.C.C.) [*R. v. Morrissey*].

[31] *R. v. Morrissey*, *supra*, at para. 36.

[32] *R. v. Adam*, (2013) 294 C.C.C. (3d) 464.

Commission further indicates, without an accused having the ability to make rational decisions, the requirement of meaningful participation is not effective. The Commission recognizes a four prong approach, which is similar to that recommended by the Law Reform Commission of Canada:

> (1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial ,
> (2) to retain that information,
> (3) to use or weigh that information as part of decision making process, or
> (4) to communicate his or her decisions.[33]

In the Canadian context, the Limited Cognitive Capacity Test should be abandoned. In applying a narrow interpretation into the fitness test, it has deprived the accused of the potential to participate in a meaningful way in the trial process. In its place, should be an application of s. 2 of the *Criminal Code* which requires the capacity to make rational decisions.

Recently, Mr. Justice Colvin of the Ontario Superior Court, reiterated and approach to the fitness assessment which required meaningful participation by the accused in *R. v. Triano*[34], Justice Colvin noted the evolution of our system of criminal justice and the essence and fairness to the application of the fitness rules:

> In the past our legal system has dug up the dead, convicted them, hanged them, and beheaded them. Oliver Cromwell is an example in 1660. We have advanced a great deal since then. Fitness now requires fairness.

Where an accused is found to be unfit, the Court should either on application, or by its own motion, be permitted to examine the circumstances of the offence and offender. In appropriate cases where there are reasonable grounds to believe the accused is permanently unfit and not a significant risk, the Court should be able to order a stay of proceedings either immediately or after successful completion of an alternative measures program. The ability to enter a stay of proceedings is provided in the *Criminal Code of Canada*. However, section 672.851 does not appear to permit this to occur immediately after a finding of unfitness, nor does it permit a Court to refer an unfit accused to alternative measures on the objective criteria discussed above.

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[33] The Law Commission Consultation Paper No 197, Unfitness to Plead, A Consultation Paper (London, England, 2010), at para. 3.13, p. 54 [Law Commission Consultation Paper NO. 197, Unfitness to Plead].
[34] *R. v. Triano*, Ontario Court of Justice, March 12, 2014 Transcript of Proceedings, at page 23.

CONCLUSION:

Restraint in the use of the criminal law power and fairness of the criminal law process are cornerstones of any system of criminal justice. In Canada, there is a rich history underpinning these fundamental values.

The gatekeepers of the use of the criminal law power are the Courts, particularly in circumstances of offenders affected by mental illness. Restrain in the use of the criminal law power should not be subject to the exclusive authority of one of the parties to criminal proceedings. Diversion or alternative measures should, subject to objective criteria and appellate review, be available to be ordered by the Court. This not only ensures restraint in the use of the criminal sanction, it empowers community resources and enables efficiency within the administration of the Courts without compromising their independence.

The essence of the criminal process is fairness. A criminal law process which does not allow the accused to meaningful participate, by the ability to understand and rationally respond, is unfair. The United States Supreme Court has recognized the necessity of capacity for rational thought in the criminal law process as has the Law Reform Commission of England. It is time for Canada and other jurisdictions to adopt a similar application to the rules of fitness.