

Phrenology and the Insanity Defence:  
Medical Jurisprudence in the *McNaughtan*  
Trial

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## **Abstract**

This thesis argues that phrenology shaped the defence argument in the *McNaughtan* trial. The role of this now-discredited science exemplifies the negotiation of scientific, legal and lay knowledge in the early nineteenth century, at a time when science was challenging the primacy of lay understandings of insanity. Phrenological ideas allowed the defence to privilege medical opinion over lay opinion, and propose a model of the mind that could account for McNaughtan's insanity. This was possible because the medical and professional communities accepted some elements of the science. They applied these principles when explaining and verifying insanity in a courtroom setting.

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Phrenology and the Insanity Defence: Medical Jurisprudence in the  
*McNaughtan* Trial

The history of the insanity defence is incomplete. Although phrenology played a part in the evolution of the insanity defence in the early nineteenth century, the significance of the discipline has not yet been fully explored. It played a key role in the argument before the court in the *McNaughtan*<sup>1</sup> trial, but it hardly appears in the standard histories of the defence. The *McNaughtan* trial, and the Rules that followed it, are considered to be one of the most significant moments in the development of the insanity defence. Adding this now-discredited science back into the history of the defence allows for a reinterpretation of the status of phrenology in the early nineteenth century. Phrenology, while now considered a dead end in Western scientific thought, was once a prominent belief among the medically trained, the professional elite, and among laypersons who wanted to understand their own character. It offered the layperson an easily comprehensible model of the human mind. To medical professionals, particularly those in command of mental asylums, phrenology offered an opportunity to emphasise the role of medical expertise in the treatment of insanity. For some in the legal community, phrenology offered the tools to understand defendants who appeared sane while performing bizarre crimes.

This thesis argues that phrenology contributed to the insanity defence after being adopted by medico-legal theorists who then went on to influence the *McNaughtan*

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<sup>1</sup> There are a number of variations of the spelling of *McNaughtan* in common usage. However, Richard Moran appears to have settled the dispute in favour of *McNaughtan*. See Richard Moran, *Knowing Right from Wrong: The Insanity Defence of Daniel McNaughtan* (New York: The Free Press; London: Collier Macmillan Publishers, 1981), pp. xi-xiii.

trial. These theorists espoused a version of phrenology that was proposed solutions to metaphysical problems. It was a philosophical system that allowed medico-legal theorists – doctors and lawyers alike – to propose distinctive answers to problems such as free will and partial insanity. It was distinct from the practical aspect of the discipline, which emphasised the insights that could be gleaned from the examination of an individual’s skull. This distinction between the practical and philosophical forms of phrenology is a thread that runs through the recent historiography of phrenology. John D. Davies, Roger Cooter and David de Giustino all emphasise the fact that phrenology was a varied and multifaceted science.<sup>2</sup> As the practical form of phrenology grew in popularity, the followers of the metaphysical aspect of phrenology began to hide the phrenological basis of their ideas. This concealment allowed phrenological concepts to exert a subtle influence on medical jurisprudence, without being explicitly cited as the inspiration for theories of partial insanity and the treatment of mania.

Phrenology began with the work of Franz Joseph Gall and his belief that discrete cranial faculties determined human character. Gall’s major work, *Anatomie et physiologie du système nerveux en general, et du cerveau en particulier*, was published in 1810 and expanded over the next decade.<sup>3</sup> His followers believed in the existence of discrete organs in the brain, each linked to a specific aspect of human character. The terms organ and faculty were used fairly interchangeably, although

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<sup>2</sup> John D. Davies, *Phrenology: Fad and Science: A 19<sup>th</sup>-Century American Crusade* (Hamden, Conn.: Archon Books, 1971); David de Giustino, *Conquest of Mind: Phrenology and Victorian Social Thought* (London: Croom Helm, 1975); Roger Cooter, *The Cultural Meaning of Popular Science: Phrenology and the Organization of Consent in Nineteenth-Century Britain* (Cambridge: Cambridge University Press, 1984).

<sup>3</sup> Davies, *Phrenology*, pp. 6-7.

faculty was generally used to refer to the character trait associated with an organ. Phrenologists believed that the size of the organ was directly related to its influence over the individual's character. The faculties included traits such as Destructiveness and Acquisitiveness, and were not necessarily linked to a specific action, but functioned differently in different theoretical situations. A person with a large organ for Benevolence, for example, was more likely to be kind to those around him- or herself. As the skull had grown over these organs, the shape of the skull was thought to indicate the size of the organs underneath. This principle meant that a phrenologist could analyse an individual's character by examining the contours of their skull or their bulging eyes. However, phrenologists did not follow a single codified doctrine. There was widespread disagreement between phrenologists regarding the number of discrete organs and their positioning within the head. This variation in opinion meant that different phrenologists could offer different interpretations of an individual's character. However, they all agreed that human character was a result of the size of these organs, even if they could not agree on their positions.

It is important to realise that phrenology was just one element of the canon of medical knowledge in the early nineteenth century. There was a range of explanations of insanity open to medical practitioners. Phrenology played a part in a number of medico-legal treatises, but phrenology was rarely the sole influence on these works. Theorists could draw on French schools, typified by Philippe Pinel, Jean-Etienne-Dominique Esquirol and Etienne-Jean Georget. They could also draw on a model that spoke of discrete faculties of the mind, but did not link these to

physical divisions in the brain, which was espoused by some Scottish thinkers.<sup>4</sup> Joel Peter Eigen has done a commendable job of contrasting the different schools that existed at the time.<sup>5</sup> Theorists took a flexible approach to these disciplines. For example, two of the theorists at the centre of this thesis, Isaac Ray and Forbes Winslow, subscribed to phrenological ideas. However, their works also cited Pinel and his colleagues. They participated in an intellectual world where concepts and examples could be borrowed from rival works and reinterpreted to make new arguments.

Some historians have already examined phrenology's role in the insanity defence. In 1954, Henry Weihofen mentioned that the doctrine shaped the way the participants in the *McNaughtan* trial understood the human mind. Specifically, he believed that they accepted a model of the mind that included discrete faculties and organs. However, he did not explain phrenology's attraction to the doctors and lawyers who were involved in the trial.<sup>6</sup> John Starrett Hughes has written a biography of the key medical authority for the defence, Isaac Ray, emphasising that he was a firm believer in phrenology. Hughes noted the influence that Ray had over the defence argument,<sup>7</sup> but did not explain the role of phrenology in the trial. More recent works on the interaction between phrenology and law have tended to portray phrenology in a

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<sup>4</sup> G.N. Cantor, 'Phrenology in Nineteenth-Century Edinburgh: an Historiographical Discussion', *Annals of Science*, 32 (1975), pp. 206-207.

<sup>5</sup> See, for example, Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (New Haven: Yale University Press, 1995), pp. 58-81; Joel Peter Eigen, "'I answer as a physician': opinion as fact in pre-McNaughtan insanity trials', in Michael Clark and Catherine Crawford, eds., *Legal Medicine in History* (Cambridge: Cambridge University Press, 1994), p. 168.

<sup>6</sup> Henry Weihofen, *Mental Disorder as a Criminal Defence* (Buffalo, New York: Dennis & Co, 1954), pp. 110-111.

<sup>7</sup> John Starrett Hughes, *In the Law's Darkness: Insanity and the Medico-Legal Career of Isaac Ray, 1807-1881* (PhD dissertation, Rice University, 1982), pp. 116-117.

uniform and reductionist manner. Joel Peter Eigen's work on the insanity defence, for example, focuses on the obvious language and ideas of phrenology, rather than examining the underlying assumptions of the doctrine.<sup>8</sup> This work aims to introduce a more nuanced understanding of phrenology to the historiographical record. In doing so, the argument relies on a number of comprehensive studies of phrenology that explored its intellectual and cultural significance, but did not approach its role in the criminal justice system.<sup>9</sup> These studies recognise the multifaceted nature of phrenology and its appeal to a variety of different groups. Finally, this study recognises that phrenologists did not all agree on the faculties of the brain or their locations. More importantly, they did not agree on the effect of these faculties. Some emphasised the role of the will in keeping these organs in check, while others accepted the determinist implications of the theory. Some left out the implications of phrenology for criminal responsibility, while others brought these to the foreground and defended a regime of incarceration and treatment. Reintroducing these subtleties allows for a more realistic assessment of the influence of phrenology, and its compatibility with contemporary ideas. Just as phrenology was one part of a wider body of medical knowledge, the science itself was amorphous and flexible. Practitioners could pick and choose the elements they wished to emphasise, allowing phrenology to interact with existing legal and medical doctrine.

The division of the organs into classes further complicated the phrenological picture of human character. George Combe, a famous British phrenologist, spoke of animal

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<sup>8</sup> Joel Peter Eigen, 'Delusion in the Courtroom: The Role of Partial Insanity in Early Forensic Testimony', *Medical History*, 35 (1991), pp. 44-45; Eigen, *Witnessing Insanity*, pp. 68-72.

<sup>9</sup> For example, Davies, *Phrenology*; de Giustino, *Conquest of Mind*; Cooter, *Cultural Meaning of Popular Science*.



propensities, moral sentiments and intellectual faculties.<sup>10</sup> If these classes were not in balance, then the animal propensities might be too powerful for the intellectual faculties to control, which could give an individual a passionate and impulsive character.<sup>11</sup> This characterisation of the cerebral faculties explained why the most violent criminals acted like wild animals, while the most civilised members of society were paragons of science and reason. However, some phrenologists offered a more sophisticated model of causality and responsibility than this short description implies. These practitioners believed that an individual with an unsatisfactory phrenological profile could improve their behaviour by exercising the diminutive organs. This added a level of complexity to the model of criminal responsibility and institutionalisation proposed by phrenologists and their followers. Despite this complexity, it is reasonable to argue that phrenologists generally favoured exculpatory determinism over culpability and rehabilitation over punishment.

Phrenology's influence in the *McNaughtan* trial is a potent reminder of the power of scientific ideas to shape related discourses, including legal discourse. The defence arguments made in the *McNaughtan* trial were shaped by this now-discredited science. Although the Rules have emerged as the most significant element of the case, and overshadowed the trial itself, the arguments made in the trial provide a window to the way in which lawyers were beginning to understand insanity in the mid-nineteenth century. More importantly, the Rules were also shaped by the argument in the trial and the medical theories cited by the defence. These Rules are

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<sup>10</sup> George Combe, *Moral Philosophy or the Duties of Man Considered in his Individual, Social, and Domestic Capacities* (Edinburgh: MacLachlan, Stewart and Co.; London: Longman and Co., and Simpkin, Marshall and Co.; Boston, US: Marsh, Capen, Lyon and Webb, 1840), pp. 11-19.

<sup>11</sup> Combe, *Moral Philosophy*, p. 25.

still seen as the moment of codification of the insanity defence. As late as 1961, the House of Lords relied on the *McNaughtan* Rules as the correct test of insanity.<sup>12</sup> A prominent legal text, describing the legal status of the Rules in New South Wales, notes that

Notwithstanding the extensive statutory provisions governing the operation and consequences of the defence of mental illness, it is not defined in the legislation and the elements are derived from the common law *M'Naghten* rules.<sup>13</sup>

While the reinterpretation of *McNaughtan* to include phrenology does not unseat the entire theory of the insanity defence, it should give many lawyers pause to consider the origin of current legal ideas.

The first chapter of this thesis argues that the physical basis of phrenology allowed the defence to privilege the evidence of their medical witnesses. The diagnosis of insanity in criminal proceedings had long been the role of lay witnesses. In *McNaughtan*, the defence was forced to argue that their medical witnesses were qualified to diagnose insanity, while the prosecution's lay witnesses were not. These

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<sup>12</sup> *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523, [1961] UKHL 3 (House of Lords, 3 October 1961), British and Irish Legal Information Institute, <<http://www.bailii.org/uk/cases/UKHL/1961/3.html>>, viewed 24 September 2008.

<sup>13</sup> David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (Sydney, The Federation Press, 2006), p. 534. The spelling of *McNaughtan* used by Brown, Farrier, Egger, McNamara and Steel is one of many variants in common usage. Incidentally, Brown et al go on to suggest that Isaac Ray "criticised earlier theories of phrenology" (p. 535) in his *Medical Jurisprudence of Insanity*. As will be shown, Ray actually relied heavily on phrenological ideas.

medical witnesses – at least one of whom was a phrenologist – were already firm believers in the need to broaden the insanity defence. The defence framed this argument for the privileging of medical expertise by referring to phrenological explanations of insanity and the physical cause of mental illness.

The second chapter of this thesis argues that the portrayal of partial insanity in the defence argument in *McNaughtan* owes a great deal to phrenology. Partial insanity was typified by insanity in relation to only a few topics, or phases of sanity and insanity. While the idea of partial insanity was nothing new, phrenological concepts allowed the defence lawyers to argue that an insane defendant could appear sane while committing outrageous crimes. The division of the brain into discrete phrenological faculties made it much easier to believe that some sections of the brain could be diseased while others were healthy. In turn, this division explained why a defendant would be insane in relation to some topics, which were associated with the diseased regions of the brain, and sane in relation to others. In *McNaughtan*, phrenology allowed the defence to convince the court that partial maniacs should be excused, and provides an example of the power of the science to shape legal doctrine.

The third chapter of this thesis explores the path phrenology took from the work of the founders of the science, through the theories of medical jurisprudence that relied on the belief in discrete organs of the brain, and into legal argument in the *McNaughtan* trial. The division of phrenology into practical and philosophical schools is vital to this process. While the practical form of the doctrine was discredited, the philosophical form took root in the works of a number of medico-

legal theorists. From there, it was able to play a role in legal argument. However, this progression was only possible once phrenology was camouflaged, because of the continuing controversy surrounding its status and the connotations of the practical form of the science. This concealment is part of the reason why phrenology's role in the law has been left out of the historical record: an analysis of the influence of the doctrine requires a sensitivity to the negotiated nature of legal and medical knowledge. The law's incorporation of phrenology was part of medical experts' increasing role in insanity cases. It was a process that was much more likely to take place in famous cases and higher courts, where the medical experts involved had the status to be taken seriously by the court. This is not to say that practical, head-reading phrenologists were barred from the courtroom, but as will be shown, this form of the science was much less likely to be accepted by legal authorities. The key to phrenology's role in the law was its subtle, hidden influence in key works of medical jurisprudence.

This thesis brings together the historiographical consensus on the nature and meaning of phrenology and the vast body of scholarship dealing with the development of the insanity defence in the early nineteenth century. It applies existing understandings of phrenology to the role of the science in shaping legal doctrine. In doing so, it engages with scholarship on the development of the insanity defence and the role of medical expertise in insanity trials. Some of these works have briefly explored the role of phrenology in the law, but have not done so in great detail. Nor has any comprehensive study of the doctrines and arguments involved in the case linked phrenology and the *McNaughtan* defence in a detailed way. Recent scholarship on the insanity defence has emphasised the patterns emerging from

minor trials, in contrast to the classical study of the insanity defence that focussed on the evolution of principle in a number of major cases.<sup>14</sup> There is one important distinction between this work and the more recent studies of the insanity defence: because of the significance of the *McNaughtan* Rules to the subsequent development of the insanity defence, and because of the wealth of sources relating to the trial, this thesis focuses on *McNaughtan* alone. It argues that the reinterpretation of the case to include phrenology allows for a more accurate understanding of the legal doctrines involved in the trial. It also clarifies the nature of phrenology and its relationship to legal knowledge.

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<sup>14</sup> For examples of recent scholarship focussing on a range of minor cases, see Eigen, *Witnessing Insanity*. For an example of classical scholarship focussing on the major cases in the insanity defence, see Nigel Walker, *Crime and Insanity in England*, vol. 1, *The Historical Perspective* (Edinburgh: Edinburgh University Press, 1968).

## Chapter 1: Phrenology and the privileging of medical knowledge

The trial of Daniel McNaughtan is an unlikely place to begin a reassessment of the insanity defence. Countless lawyers and historians have studied the transcript of his trial and the famous Rules. These Rules are still cited as the moment when the insanity defence was codified, and therefore have an enormous significance for English legal thinkers. The case is discussed frequently in articles and books on the insanity defence, and at least one book deals exclusively with the case.<sup>15</sup> However, the status of the case also makes it the perfect place to start such a reassessment. Because it is so central, challenging the interpretation of *McNaughtan* challenges the history of the insanity defence. Phrenology has been left out of most accounts of the defence, but its presence in *McNaughtan* suggests that the science was more significant than generally acknowledged.

On 20 January 1843, McNaughtan shot and killed Edward Drummond. Drummond was the private secretary of the Prime Minister, Sir Robert Peel, who was McNaughtan's intended victim. At trial, the talented Alexander Cockburn QC led the defence. A number of lay and medical witnesses testified to McNaughtan's insanity, although he had managed to lead a relatively successful life and was certainly not a raving lunatic. Eventually, the judges stopped the trial and allowed the jury to find McNaughtan not guilty on the basis of insanity. The House of Lords then called on the judges to answer a number of questions about the insanity defence, and their answers formed the famous McNaughtan Rules. The Rules codified the

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<sup>15</sup> Moran, *Knowing Right from Wrong*.

law relating to partial insanity and directions to the jury, and help to define insanity in the English legal system.

Cockburn's argument for the defence relied on phrenological ideas. He had the difficult task of proving that McNaughtan was insane, although the defendant had made a significant amount of money in business and had managed to learn some anatomy.<sup>16</sup> Phrenology allowed Cockburn to overcome these signs of sanity and argue that medical diagnoses should be privileged over lay opinions. The lay witnesses had known McNaughtan or witnessed the crime, and some believed that he was sane. Cockburn's argument was a victory for the medical profession in their attempts to exert control over the diagnosis and treatment of insanity. It was also ironic: phrenology was enormously popular among people with no medical training, and many laypersons attended lectures on the subject. Nevertheless, phrenology played a vital role in convincing the court that they should accept the medical witnesses' opinion that McNaughtan was insane.

Phrenology allowed physicians and surgeons to assert their right to diagnose insanity. Hand in hand with this right to diagnose went the right to determine the limits of criminal responsibility. Believing that insanity was a physical disease, legal authorities increasingly accepted that medical experts should control the courtroom adjudication of insanity. This change in opinion meant that surgeons and physicians were called as expert medical witnesses and expected to testify as to the defendant's state of mind. In his defence of McNaughtan, Alexander Cockburn argued that the

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<sup>16</sup> *R v McNaughton* (1843) 4 St. Tr. 847, reproduced in Donald J. West & Alexander Walk, eds., *Daniel McNaughton: His Trial and the Aftermath* (Ashford, Kent: Gaskell Books, 1977), pp. 18-20; 29.

medical experts' testimony on the subject of the defendant's state of mind should carry a great deal of weight, because "madness is a disease of the body operating on the mind, a disease of the cerebral organisation."<sup>17</sup> 'Cerebral organisation' was a term used by phrenologists and their followers to describe brain's system of discrete organs.<sup>18</sup> Cockburn may not have been aware of the significance of the term to phrenologists, but he was certainly aware of its implications. He used phrenological ideas as a tool to privilege the testimony of medical experts over that of the lay witnesses.

By explaining insanity in physical terms, nineteenth-century surgeons and physicians were making a claim of professional knowledge. Andrew Scull has explained that these experts found themselves under threat from asylum managers without medical knowledge.<sup>19</sup> Scull argues that there was increasing distrust of medical experts' special ability to treat madness, especially in the context of increasing faith in the 'moral treatment' for insanity. Moral treatment prescribed warm baths and a lack of physical restraint as the best treatment for mental illness. Because there was nothing in this treatment that required the supervision of a doctor, asylums began to fall under the control of well-meaning lay managers. This movement was at its height in 1815-1819, when a Select Committee in the House of Lords revealed the horrendous conditions inside asylums, and led to a number of bills to place asylums under the

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<sup>17</sup> *R v McNaughton* (1843), p. 34.

<sup>18</sup> Eliza W. Farnham, *Rationale of Crime: Marmaduke B. Sampson's 'Treatise on Criminal Jurisprudence Considered in Relation to Cerebral Organization'* (1846; repr., Montclair, New Jersey: Patterson Smith, 1973), p. 2; Combe, *Moral Philosophy*, pp. 271-272.

<sup>19</sup> Andrew T. Scull, 'From Madness to Mental Illness: Medical men as moral entrepreneurs', *Archives Européennes de Sociologie*, 16, no. 2, (1975), pp. 218-261.



supervision of lay inspectors.<sup>20</sup> Surgeons and physicians struck back with a physical explanation of madness. If the disorder had a physical cause, its treatment should fall to the medical experts who treated all other physical illnesses. As the nineteenth century went on, physical explanations for insanity became an important part of medical asylum managers' claims of professional knowledge.<sup>21</sup> Phrenology, as an explicitly physicalist theory, became very attractive.

Cockburn's main medical authority, Isaac Ray, supported the phrenological model of insanity. Although he did not appear in the trial, his *Medical Jurisprudence of Insanity*<sup>22</sup> formed the basis for most of Cockburn's arguments about the nature of insanity. Ray was medically trained, and became the superintendent of Maine Insane Hospital in 1841. He followed phrenological principles throughout his career, although he tried to hide their influence in his later work.<sup>23</sup> He argued that the physical condition of the brain had an enormous influence on human behaviour:

It must not be forgotten, that the author of our being has also endowed us with certain moral faculties, comprising the various sentiments, propensities

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<sup>20</sup> Scull, 'Madness to Mental Illness', pp. 228-238.

<sup>21</sup> Andrew T. Scull, 'Mad-doctors and Magistrates: English psychiatry's struggle for professional autonomy in the nineteenth century', *Archives Européennes de Sociologie*, 17, no. 2 (1976), pp. 279-305.

<sup>22</sup> Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (Boston: Charles C. Little and James Brown, 1838), created 1 September 2004, Making of Modern Law, Gale, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, viewed April-September 2008.

<sup>23</sup> Hughes, *Isaac Ray*, pp. 64-65.

and affections, which, like the intellect, being connected with the brain, are necessarily affected by pathological changes in that organism.<sup>24</sup>

This statement relied on phrenological ideas. The distinction between moral and intellectual faculties, and the use of categories such as “sentiments, propensities and affections” were shared with the works of prominent phrenologists. For example, George Combe, a lawyer and leading figure in the science, divided the faculties in animal propensities, moral sentiments and intellectual faculties.<sup>25</sup> J.G. Spurzheim, Gall’s student and heir to his authority, also spoke of propensities, sentiments and intellectual faculties.<sup>26</sup> However, some anti-phrenologists also made a distinction between moral and intellectual aspects of the mind. For example, James Cowles Prichard, who lectured against phrenology,<sup>27</sup> differentiated between the moral and intellectual, and linked them in a vague way to the physical features of the brain.<sup>28</sup> Although he has been described as an anti-phrenologist, he cited prominent phrenologists in his work, sometimes with approval, sometimes without. His references included Gall, George Combe’s phrenologist brother Andrew Combe, and Isaac Ray.<sup>29</sup> This common ground between phrenologists and anti-phrenologists

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<sup>24</sup> Ray, *Medical Jurisprudence*, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 48.

<sup>25</sup> Combe, *Moral Philosophy*, p. 11.

<sup>26</sup> J.G. Spurzheim, *The Physiological System of Drs. Gall and Spurzheim, Founded on an Anatomical and Physiological Examination of the Nervous System in General, and of the Brain in Particular; and Indicating the Dispositions and Manifestations of the Mind* (London: Baldwin, Cradock & Joy, 1815), p. 276.

<sup>27</sup> Cooter, *Cultural Meaning of Popular Science*, p. 293.

<sup>28</sup> Martin J. Wiener, *Reconstructing the Criminal: Culture, law, and policy in England, 1830-1914* (Cambridge: Cambridge University Press, 1990), pp. 166-167; Roger Smith, *Trial By Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh: Edinburgh University Press, 1981), pp. 42-43.

<sup>29</sup> James Cowles Prichard, *On the Different Forms of Insanity in Relation to Jurisprudence: Designed for the Use of Persons Concerned in Legal Questions*

reflects the flexibility of scientific understandings of the mind in the nineteenth century. Some phrenologists, including Ray, successfully modified their ideas to make them more palatable to a potentially critical legal and medical audience, which contributed to these commonalities. In Ray's *Medical Jurisprudence*, this self-regulation was manifested in a complete lack of explicit references to phrenology. Nevertheless, the model of the mind deployed in the book was fundamentally phrenological. He added to the science by expressing its ideas in a theory of medical jurisprudence.

Although he did not refer to phrenology itself, Ray drew on the work of prominent phrenologists. He accepted their studies as well as their theories, and cited Gall, Spurzheim and Combe a number of times in his *Treatise*.<sup>30</sup> For example, he noted that

The dissections of many eminent observers, among whom it is enough to mention the names of Greding, Gall and Spurzheim, Calmet, Foville, Fabret, Bayle, Esquirol, and Georget, have placed it beyond doubt; and no pathological effect is better established – although its correctness was for a

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*Regarding Unsoundness of Mind* (London: Hippolyte Bailliere, 1842), created 1 September 2004, Making of Modern Law, Gale, <<http://galenet.galegroup.com.ezproxy2.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104354714&srchtp=a&ste=14>>, viewed 30 September 2008, pp. 142-143, 179-180, 190-191, 200-202.

<sup>30</sup> Ray, *Medical Jurisprudence*, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 68-69; 72-73; 188-189; 198-199.

long while doubted – than that deviations from the healthy structure are generally presented in the brains of insane subjects.<sup>31</sup>

The fact that Ray could refer to the French physicians Esquirot and Georget alongside phrenologists such as Gall and Spurzheim is a testament to the compatibility and flexibility of explanations for insanity in the nineteenth century. Furthermore, the phrenological style of brain dissection was controversial among medical experts.<sup>32</sup> Gall and Spurzheim believed that the brain should be scraped open, while anti-phrenologists believed it should be cut open. The fact that Ray supported Gall and Spurzheim's technique indicates his support for phrenology and its techniques. On later pages, he hinted at the benefits that would flow from universal agreement on the phrenological organs and their placement.

If men had agreed to receive some particular analysis and arrangement of the affective and intellectual faculties, and to assign a particular portion of the brain as its material organ, we might then discuss the question how far disease of one cerebral organ affects the actions of the rest, with the prospect of arriving at something like definite results. But as no such unanimity exists, we can only consider the observations that have been made on the derangement of particular faculties, and thus form our opinions relative to their influence, by the general tenor of experience.<sup>33</sup>

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<sup>31</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 68-69.

<sup>32</sup> Cantor, 'Phrenology in Nineteenth-Century Edinburgh', pp. 208-209.

<sup>33</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 236.

Ray expressed regret that phrenology had not achieved greater acceptance and support, as it would greatly assist in the diagnosis of insanity. But instead, experiment and observation would have to suffice. For Ray, these observations would be grounded in phrenology. He believed in the existence of discrete organs of the brain, even if not all his colleagues agreed. He relied on a phrenological model of the brain, as well as utilising the observations of famous phrenologists. The fact that his work was Cockburn's main medical authority indicates that phrenology was far from the fringes of science.

When medical experts referred to phrenology, they used it as a philosophy of responsibility, rather than a diagnostic tool. One might have imagined that physicians trained in phrenology would use their science as a test of sanity or insanity, and in some cases, guilt and innocence. Gall and Spurzheim certainly measured criminals' heads, but they did not apply their techniques to questions of guilt and innocence or sanity and insanity. They were more interested in validating their science. They visited Spandau prison in 1805, to examine the prisoners, remarking on their enlarged organs of theft and murder.<sup>34</sup> George Combe claimed that he could predict the crimes that convicted criminals had committed after measuring their skulls.<sup>35</sup> Although their techniques could help the courts to sort the guilty from the innocent, these phrenologists preferred to apply their insights to philosophical arguments. If crime was the result of physical disease, then it seemed manifestly unjust for the courts to punish and execute criminals. George Combe

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<sup>34</sup> J.G. Spurzheim, *Phrenology, in Connexion with the Study of Physiognomy* (Boston: Marsh, Capen & Lyon, 1836), pp. 29-30.

<sup>35</sup> Combe, *Moral Philosophy*, p. 262-263.

argued that criminals were unable to prevent themselves from committing a crime because their phrenological profile determined their actions. They should therefore be treated with the sympathy extended to any person with a physical impairment.<sup>36</sup> Phrenologists incorporated this determinist model of responsibility into theories of insanity, without actually asserting their right to judge guilt and innocence. Instead of functioning as a diagnostic tool, phrenology inspired theories of responsibility. For these prominent phrenologists, their science was an opportunity to bring about a compassionate revolution in the criminal law, instead of a way to replace the jury trial with scientific inquiry.

As phrenology made its way into works of medical jurisprudence, it brought with it a theory that denied individual responsibility for crime. To phrenology-trained surgeons and physicians, phrenology implied that human action was determined. It complicated human responsibility by dismissing self-control and suggesting that the physical workings of the brain dictated action. Because the individual had no control over their own phrenological profile, these medical experts felt that it was unjust to inflict punishment on the criminally insane. Ray described the phrenological explanation of insanity, where the moral faculties are affected by “pathological changes in the cerebral organism.”<sup>37</sup> He argued that

in this, the most deplorable condition...the wretched patient finds himself urged, perhaps, to the commission of every outrage, and though perfectly

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<sup>36</sup> Combe, *Moral Philosophy*, p. 263-264.

<sup>37</sup> Ray, *Medical Jurisprudence*,

<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 48.

conscious of what he is doing, unable to offer the slightest resistance to the overwhelming power that impels him.<sup>38</sup>

This physical explanation of insanity allowed Ray to argue that the mentally ill were missing the essential elements of responsibility. Ray's work is an example of a philosophy of human responsibility that was informed by phrenology. Forbes Winslow, one of the defence witnesses, later wrote an analysis of 'Recent Trials in Lunacy.'<sup>39</sup> In one of these cases, there was a suggestion that the defendant had caused her own insanity by repeatedly giving in to temptation and vice.

Nevertheless, Winslow refused to differentiate between inherent insanity and insanity caused by vice, and argued that all maniacs should be equal before the law.<sup>40</sup> His argument is another example of phrenologists' acceptance of the determined nature the actions of the insane.

In the early nineteenth century, courts were still grappling with the relationship between lay and medical evidence of insanity. Lay witnesses still played an important part in trials where the defendant claimed that they were mad when they committed the crime. Insanity had long been understood as manifest in the behaviour of the patient, and this tradition was reflected in the lay testimony of the defendant's friends and associates.<sup>41</sup> In the trial of John Chaplin for the murder of

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<sup>38</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srcht=a&ste=14>>, p. 49.

<sup>39</sup> Forbes Winslow, 'Recent Trials in Lunacy', *The Journal of Psychological Medicine and Mental Pathology*, 7 (1854), pp. 572-625.

<sup>40</sup> Winslow, 'Recent Trials in Lunacy', pp. 623-625.

<sup>41</sup> For a discussion of lay testimony in the eighteenth century, see Dana Y. Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (Hampshire: Palgrave Macmillan, 2004), pp. 111-141. For a discussion of the

his wife in 1812, a number of neighbours and lay witnesses were called to testify to his past behaviour. Although one witness declined to comment on Chaplin's mental state, preferring to leave that question to a doctor, the prosecution continued to ask the lay witnesses if the defendant had exhibited any signs of insanity.<sup>42</sup> Even in *McNaughtan*, in which the wrongful act was agreed and both sides were well aware that insanity would be the main issue, a large number of lay witnesses were called. The prosecution witnesses testified to McNaughtan's repeated appearances at the scene prior to the murder, his normal and reserved habits, and his interest in science and anatomy.<sup>43</sup> These witnesses were continuing a long tradition of judging a defendant by comparing his or her actions to the accepted standards of sane behaviour. The defence also relied on lay witnesses. They spoke of their past dealings with McNaughtan, the odd things that he had done, and his obsession with persecution.<sup>44</sup> Neither side constructed their case without employing well-worn concepts of sane and insane behaviour. Although medical witnesses were beginning to supplant the idea that anybody could identify madness in a defendant's behaviour, most courtroom participants still expected that madness could be confirmed or dismissed by the defendant's acquaintances.

Medical witnesses in the nineteenth century had a complex relationship with lay understandings of insanity. Early medical witnesses offered testimony that was indistinguishable from the evidence of lay witnesses. Joel Peter Eigen and Gregory

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expression of lay understandings of insanity in criminal procedure, see Arlie Loughnan, "'Manifest Madness': Towards a New Understanding of the Insanity Defence', *Modern Law Review*, 70, no. 3 (2007), pp. 379-401.

<sup>42</sup> Trial of John Chaplin (t18121202-32), 2 December 1812, Old Bailey Proceedings Online, <<http://www.oldbaileyonline.org/browse.jsp?id=t18121202-32-verdict183&div=t18121202-32#highlight>>, viewed 17 August 2008.

<sup>43</sup> *R v McNaughton* (1843), pp. 26-29.

<sup>44</sup> *R v McNaughton* (1843), pp. 57-66.



Andoll have observed that prior to 1825, the evidence of most medical experts centred on the defendant's behaviour, instead of providing evidence that was recognisably medical.<sup>45</sup> Often, they were testifying as a friend or neighbour of the patient, rather than as a surgeon or physician. Elsewhere, Eigen has suggested that doctors avoided technical physicalist terms because there was no consensus in favour of a single physical explanation of insanity.<sup>46</sup> Medical experts' claims of professional expertise were based on physical explanations of disease, but these were still controversial claims. Eigen suggests that medical witnesses avoided their explicit use because they knew that they were likely to be challenged in the courtroom. When discussing insanity, which had a tradition of lay explanation, medical witnesses were wary of asserting their own specialised knowledge. Eigen argues that instead, they served a legitimating function for the conclusions of the lay witnesses who also testified. This phenomenon demonstrates the complexity of the relationship between lay and medical evidence in the eighteenth and early nineteenth centuries.

By the 1840s, however, the pattern that Eigen observed had broken down. In Edward Oxford's famous 1840 trial for shooting at the Queen, the medical witnesses were asked to form their opinions on the strength of the defendant's strange behaviour as well as his physical features. One witness, Dr Hodgkin, testified that he thought the manner of the crime was enough to form a strong inference in favour of

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<sup>45</sup> Joel Peter Eigen and Gregory Andoll, 'From Mad-Doctor to Forensic Witness: The Evolution of Early English Court Psychiatry', *International Journal of Law and Psychiatry*, 9 (1986), pp. 161-162.

<sup>46</sup> Joel Peter Eigen, 'Intentionality and Insanity: what the eighteenth-century juror heard', in W.F. Bynum, Roy Porter & Michael Shepherd, eds., *The Anatomy of Madness: Essays in the History of Psychiatry*, vol. 2, *Institutions and Society* (London and New York: Tavistock Publications, 1985), pp. 44-45.

insanity, but also noted that the disease was often accompanied by physical abnormalities of the brain.<sup>47</sup> Nevertheless, he was forced to defend his special right to diagnose insanity after being asked why a medical expert's conclusion would be more reliable than any other person's. He defended his diagnosis by referring to his experience with the mentally ill, but denied that it was his role to define the limit of responsibility.<sup>48</sup> His argument suggests that medical experts were not always accepted in criminal trials, and were still wary of overstepping the boundaries of their expertise. John Conolly, the resident doctor at Hanwell Lunatic Asylum, was received more favourably in the *Oxford* trial. He diagnosed the defendant's insanity on the basis of both his behaviour and his physical features. Conolly had measured the defendant's head and found a shape associated with insanity, but also took notes on Oxford's inability to comprehend the seriousness of his crime.<sup>49</sup> A medical witness was expected to offer insights beyond those open to a lay witness. This was the experience of Dr Birt Davis, physician, magistrate and coroner,<sup>50</sup> who was willing to conclude that Oxford was insane on the basis of the circumstances of the crime alone.<sup>51</sup> The bench could hardly believe that he would offer such an opinion, and the prosecutor asked the witness whether he was testifying as an expert or as a

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<sup>47</sup> William C. Townsend, *Modern State Trials: Revised and Illustrated with Essays and Notes* (London: Longman, Brown, Green and Longmans, 1850), created 1 September 2004, Making of Modern Law, Gale, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, viewed 30 June 2008, vol. 1, pp. 135-136.

<sup>48</sup> Townsend, *Modern State Trials*, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, p. 136.

<sup>49</sup> Townsend, *Modern State Trials*, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 136-138.

<sup>50</sup> Eigen and Andoll, 'Mad-Doctor to Forensic Witness', p. 169.

<sup>51</sup> Townsend, *Modern State Trials*, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, p. 131.

layperson. This veiled insult suggests that the legal participants were expecting to hear a doctor offer a distinctively medical opinion. Arlie Loughnan has argued that legal definitions of madness are constructed in a manner that can be understood by a lay observer, in a process that preserves ideas of “manifest madness.”<sup>52</sup> As medical witnesses became involved in the courtroom diagnosis of insanity in the early nineteenth century, they were forced to explain why their opinions should prevail in the face of these lay understandings of insanity. Some justified their diagnosis by referring to signs of insanity in the defendant’s physical features. Others identified insanity in the defendant’s behaviour, but linked this conclusion with a medical explanation of insanity. Medical witnesses were faced with the difficult task of satisfying both manifest madness and an expectation that a doctor could offer something more than a lay witness.

McNaughtan’s defence team did not rely on lay witnesses alone. Because Cockburn was portraying insanity as a physical illness, it was in his interest to introduce medical evidence of McNaughtan’s insanity. The involvement of medical witnesses was far from unusual in 1843, as medical experts had been playing ever-expanding roles in legal proceedings for years.<sup>53</sup> Cockburn explained his reliance on medical expertise by referring to the physical basis of insanity:

It is now, I believe, a matter placed beyond doubt that madness is a disease of the body operating upon the mind, a disease of the cerebral organisation; and that a precise and accurate knowledge of this disease can only be

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<sup>52</sup> Loughnan, “Manifest Madness”, pp. 381-382.

<sup>53</sup> Walker, *Crime and Insanity*, vol. 1, p. 84; Eigen, *Witnessing Insanity*, pp. 25-26.

acquired by those who have made it the subject of attention and experience, of long reflection, and of diligent investigation.<sup>54</sup>

Cockburn relied on this explanation of insanity because it privileged the testimony of his medical experts. In a case where there was extensive evidence for the defendant's sanity, the medical evidence to the contrary was vital. Describing insanity as a physical illness allowed Cockburn to use the medical evidence to trump the opinions of the lay witnesses. As Ward has observed, Cockburn emphasised the right of the jury to come to a verdict based on the advice of the medical experts, although the fact that Chief Justice Tindal practically demanded a finding of insanity suggests that the jury actually had very little say.<sup>55</sup> Cockburn's portrayal of insanity as a physical disease allowed him to privilege the medical evidence. These medical witnesses played an important role in affirming *McNaughtan*'s insanity.

The medical witnesses in *McNaughtan* offered a powerful and united argument in favour of the defendant's insanity. These medical experts were permitted to offer their own assessments of the defendant's responsibility. As Moran states, where the defendant's capacity is the issue, medical experts were expected to offer an opinion as to his or her mental state at the time of the act, and the jury would then decide whether this state satisfied the legal test of capacity.<sup>56</sup> In reality, as Tony Ward has revealed, medical experts played a variety of different roles in insanity trials, from

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<sup>54</sup> *R v McNaughton* (1843), p. 34.

<sup>55</sup> Tony Ward, 'Observers, advisers, or authorities? Experts, juries and criminal responsibility in historical perspective', *The Journal of Forensic Psychiatry*, 12, no. 1 (April 2001), p. 111.

<sup>56</sup> Moran, *Knowing Right from Wrong*, pp. 103-104.

mere observer of insanity to an authority who could sway the case.<sup>57</sup> Two of the medical experts implicated in the *McNaughtan* trial, Isaac Ray and Forbes Winslow, believed that the jury should follow the opinion of the medical experts.<sup>58</sup> Just like Ray, Winslow believed in phrenology,<sup>59</sup> although it was never mentioned explicitly in his *Plea of Insanity*. Although counsel in *McNaughtan* were arguing over the correct legal test of insanity, the medical experts for the defence were permitted to pre-empt the test and the jury's right to apply it to the evidence. They offered their own opinions of McNaughtan's criminal responsibility. Sir Alexander Morison, for example, testified that McNaughtan's delusion "deprived the prisoner of all restraint over his actions."<sup>60</sup> The other doctors gave similar evidence. Richard Moran has argued that the prosecution should have objected to this evidence, and their failure to do so handed the case to the defence.<sup>61</sup> Instead of limiting the medical evidence, the court lost sight of the distinction between expert testimony and the questions of fact that belong to the jury. The judges accepted these medical arguments and emphasised the fact that all of the medical evidence was in favour of the defence. In some insanity trials, the bench took a harsh attitude towards medical experts and their evidence. Joel Peter Eigen has emphasised the role of judges in framing a medical expert's testimony, which could include criticising and discrediting it.<sup>62</sup> The bench could easily cast the defence argument into doubt. In this context, Chief Justice Tindal's support for the medical evidence is particularly significant.

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<sup>57</sup> Ward, 'Observers, advisers, or authorities?', pp. 105-122.

<sup>58</sup> Ward, 'Observers, advisers, or authorities?', p. 108.

<sup>59</sup> Roger Cooter, 'Phrenology and British Alienists, ca. 1825-1845', in Andrew Scull, ed., *Madhouses, Mad-Doctors, and Madmen: The Social History of Psychiatry in the Victorian Era* (London: Athlone Press, 1981), p. 86; Cooter, *Cultural Meaning of Popular Science*, pp. 31-32.

<sup>60</sup> *R v McNaughton* (1843), p. 70.

<sup>61</sup> Moran, *Knowing Right from Wrong*, pp. 104-106.

<sup>62</sup> Eigen, 'Intentionality and Insanity', pp. 45-47; see also Ward, 'Observers, advisers, or authorities?', p. 113.

Stopping the trial, he stated that “we feel the evidence, especially that of the last two medical gentlemen...to be very strong, and sufficient to induce my learned brothers and myself to stop the case.”<sup>63</sup> Just like the medical experts who saw the assessment of responsibility as a part of their expertise, the court accepted that these doctors were qualified to assess criminal responsibility. Because they understood insanity as a physical disease, they realised that medical experts were in the best position to diagnose insanity. These medical witnesses, all convinced that McNaughtan was insane, won the trial for the defence.

McNaughtan’s defence was forced to argue that the lay witnesses’ understandings of insanity were inferior to the ideas of the medical witnesses who appeared for the defence. Cockburn’s foundation for this argument was phrenological. He relied heavily on Isaac Ray’s work, as well as calling another believer in phrenology, Forbes Winslow, as a witness. These medical opinions were enough to convince the court that insanity was a physical disease, and that its diagnosis should rest in the hands of the medical experts. The trial was a single example of the increasing courtroom role for the medical expert in the early nineteenth century. When these witnesses stepped into the courtroom, they found that they had to offer something more than the lay witnesses with whom they were compared. In McNaughtan’s trial, they responded with testimony that effectively supplanted the jury’s role and offered a conclusion about the defendant’s state of mind and responsibility at the time of the crime. The defence argument that insanity had a physical cause set the scene for the acceptance of the medical opinions that affirmed McNaughtan’s insanity.

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<sup>63</sup> *R v McNaughton* (1843), p. 71.

## Chapter 2: Phrenology and partial insanity

In the *McNaughtan* trial, the court accepted the doctrine of partial insanity on the basis of a phrenological argument. Phrenology, and phrenological ideas, enabled Cockburn to argue that McNaughtan fell within this ill-defined legal theory. Partial insanity involved delusions in relation to specific ideas and subjects, or an inability to control violent urges. The fundamental principles of phrenology lent themselves to the validation of this doctrine. Phrenologists divided the brain into discrete organs, which suggested that the each organ could be individually diseased. As each organ was associated with a different behaviour or desire, a diseased organ would manifest itself in insanity in relation to a specific topic. On a more abstract level, which ignored the organs specified by phrenologists, it suggested that a maniac would not necessarily be completely insane, as only some parts of their brain were diseased. Some legal authorities opposed the implications of this idea, and regarded partial insanity as a dangerous doctrine. They suspected that all criminals were unbalanced in some way, which meant that lowering the standard of exculpatory insanity could excuse many criminals. Under such a system, any person who committed a crime might successfully argue that they were insane. Nevertheless, the phrenologists in the medical community had gained enough influence to ensure that partial insanity was a viable doctrine. Their ideas were expressed in the defence argument in *McNaughtan*.

Other historians have noted that phrenology played a role in the doctrine of partial insanity in *McNaughtan*. Moran has written a comprehensive analysis of the *McNaughtan* case, emphasising the possibility that McNaughtan was actually sane,

but persecuted for his political beliefs. He noted that the case has already been criticised for its reliance on phrenology.<sup>64</sup> Moran was referring to Henry Weihofen's 1954 work on the development and (then) current status of the insanity defence. Weihofen briefly argued that the popularity of phrenology at the time of the decision explains why the judges were willing to recognise that the defendant could be insane on some topics and sane on others.<sup>65</sup> This thesis picks up Weihofen's argument and explores the influence of phrenology in greater depth. By way of contrast, Joel Peter Eigen has approached the problem from a different direction. He has argued that phrenologists' division of the mind into discrete organs allowed them to explain partial insanity.<sup>66</sup> Eigen's work is an admirable exploration of the interaction between phrenology and discourses of responsibility. However, Eigen does not mention the role of the doctrine in *McNaughtan*, preferring to discuss the influence of the doctrine in an intellectual sense rather than a concrete legal sense. He also emphasised the writings of famous phrenologists such as Gall, Spurzheim and the Combe brothers, rather than following their ideas into the medico-legal community. This thesis applies Eigen's fundamental arguments about the relationship between partial insanity and phrenology to a reassessment of *McNaughtan*. The key to explaining the role of phrenology in the *McNaughtan* trial is to analyse its role in the work of the medical theorists who influenced the defence argument. As these lines of influence have not been followed in depth, it is time to revisit phrenology's redefinition of the doctrine of partial insanity.

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<sup>64</sup> Moran, *Knowing Right from Wrong*, p. 3.

<sup>65</sup> Weihofen, *Mental Disorder*, pp. 110-111.

<sup>66</sup> Eigen, *Witnessing Insanity*, pp. 68-72.



Phrenologists held that the brain is divided into separate organs, each of which is associated with a human emotion or impulse. Spurzheim published a list of cerebral faculties that included Philoprogenitiveness, which was the love of one's offspring,<sup>67</sup> and Destructiveness, which was the urge to kill or destroy.<sup>68</sup> These were both propensities, which meant that they were concerned with feelings rather than intellect. The feelings were also influenced by the sentiments, which were further divided into sentiments that were present in both humans and animals and sentiments that were observed only in humans.<sup>69</sup> In Spurzheim's model, the intellect was controlled by a different set of organs. These included faculties that gave the ability to perceive individuality and form ("knowing faculties"), and faculties that gave the ability to reflect, such as Comparison and Causality.<sup>70</sup> Although phrenologists did not agree on the precise locations or names of the organs, they did agree that this was the basic structure of the brain. George Combe wrote of animal propensities, moral sentiments, and intellectual faculties, following Spurzheim's model.<sup>71</sup> The animal propensities were the organs that inspire impulsive actions and needed to be controlled by the moral and intellectual faculties. Moral sentiments controlled emotions and feelings, while the intellectual faculties allowed an individual to understand and perceive his or her surroundings. Combe explained crime by suggesting that the animal propensities of criminals were more powerful than their moral and intellectual faculties.<sup>72</sup> Because some organs controlled the violent and impulsive faculties, and others controlled the intellect and emotions, the two areas of

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<sup>67</sup> Spurzheim, *Physiological System*, pp. 286-290.

<sup>68</sup> Spurzheim, *Physiological System*, pp. 304-318.

<sup>69</sup> Spurzheim, *Physiological System*, pp. 276; 332-353.

<sup>70</sup> Spurzheim, *Physiological System*, pp. 354-394.

<sup>71</sup> Combe, *Moral Philosophy*, pp. 11-19.

<sup>72</sup> Combe, *Moral Philosophy*, p. 25.

the brain could be independently disordered. This separation implied that a person could be violent and impulsive, while their intellect remained intact.

Phrenologists explained individual behaviour by referring to specific faculties, or combinations thereof. Their model was also used to explain criminality. For example, a weak organ of Philoprogenitiveness was associated with the crime of infanticide. This organ controlled one's love of their own children, and it made sense that a woman with a small organ of Philoprogenitiveness would be more likely to kill her children. Spurzheim did not claim that a small Philoprogenitiveness drove a woman to infanticide, but instead suggested that that she would be unable "to resist those external circumstances which provoke her to commit this crime."<sup>73</sup> Similarly, Spurzheim drew a connection between the organ of Destructiveness and particularly violent and cruel murders.<sup>74</sup> Generally speaking, there was an association between crime and the propensities, while the intellectual faculties were associated with lauded character traits. A person with a large and powerful organ of Colouring, for example, would make a good artist.<sup>75</sup> Combinations of faculties could also explain some behaviours and crimes. George Combe illustrated this phenomenon with an example drawn from a major contemporary criminal trial. John Bellingham had murdered the Prime Minister because he thought that he had been refused assistance while incarcerated overseas. Combe argued that Bellingham's desire for revenge had sprung from powerful propensities of Destructiveness and Self-esteem. Because Bellingham's higher faculties of Benevolence and Conscientiousness were small,

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<sup>73</sup> Spurzheim, *Physiological System*, p. 289; see also Eigen, *Witnessing Insanity*, p. 70 on this distinction in Gall's work.

<sup>74</sup> Spurzheim, *Physiological System*, pp. 308-315.

<sup>75</sup> Spurzheim, *Physiological System*, pp. 362-364.

they were unable to keep the larger animal propensities under control.<sup>76</sup> Thus phrenologists were able to use the division of the brain and mind into discrete organs to explain why specific crimes had been committed. Even if their explanations now seem naïve, they offered an explanation of one of the most troublesome philosophical problems of the period. The phrenologists explained odd behaviour, delusion and obsession – the classic signs of partial insanity – by simply dividing the mind into separate organs, and associating each organ with a specific impulse or pattern of behaviour.

Phrenology had a more problematic relationship with periodical insanity. While phrenology could easily explain insanity in relation to specific topics, it struggled to account for temporary insanity. If madness resulted from a disorder of the physical structure of the brain, then changes in the patient's condition would suggest that the brain was also changing during these periods of insanity. Phrenologists found this difficult to accept. Isaac Ray, attempting to reconcile periodic insanity and phrenology, argued

that the intermissions of mania are ever so complete, that the mind is restored to its original integrity, would seem scarcely probable, from the fact, that the very seat of the pathological changes is the material organ on which the manifestations of the mental phenomena depend.<sup>77</sup>

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<sup>76</sup> George Combe, 'On Human Responsibility, as Affected by Phrenology', *Minutes of the [Edinburgh] Phrenological Society*, 2 February 1826, p. 4.

<sup>77</sup> Ray, *Medical Jurisprudence*, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 321.

Ray attempted to explain these periods of apparent sanity by denying that the patient had made a complete recovery. Phrenologists could not believe that the brain could be healed so quickly only to descend into mania again. Although the patient may appear healthy, his “mind is weak” and a wise observer would suspect that he is still unwell.<sup>78</sup> This rule made the attribution of criminal responsibility in these situations problematic. Ray believed that a crime committed during a period of lucidity was likely to be the result of a sudden recurrence of disease. He appealed to the concept of temporary “cerebral irritation” in arguing that the temporary cure had given way to insanity at the moment of the crime.<sup>79</sup> Accordingly, a maniac suffering from periodic insanity should not be responsible for their crimes as they were doubtless caused by a momentary attack of mania. Ray’s solution to the problem of periodic partial insanity was to simply deny that the periods of lucidity were periods of full recovery. Ray’s argument for the non-existence of temporary sanity is a good example of phrenology’s struggle to explain lucid periods and periodic insanity.

Phrenologists could more readily explain partial insanity was it based on a delusion in relation to one or more topics, rather than when it was periodical. Joel Peter Eigen has explored the link between the discrete organs of the brain and phrenological accounts of partial insanity.<sup>80</sup> The essential compatibility of these ideas is exemplified in Ray’s *Medical Jurisprudence*. The greater part of his discussion of the disease was dedicated to partial insanity manifested in delusion. His ideas were

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<sup>78</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 320.

<sup>79</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 334-336.

<sup>80</sup> Eigen, *Witnessing Insanity*, pp 68-72.

subsequently cited by the defence in *McNaughtan*, and created a junction between phrenological theories of mania and the *McNaughtan* trial. As his work was the bridge between phrenology and the insanity defence, it is worth examining in detail. The most obvious feature of his argument regarding partial insanity was the distinction between partial mania of the intellectual faculties and partial mania of the moral faculties. As noted above, the distinction between these two types of faculties was a common feature of both Spurzheim and Combe's models of the brain. Partial intellectual mania was characterised by delusion and misperception affecting the intellectual faculties.<sup>81</sup> Sufferers appeared to be sane on all other topics, but would maintain a specific idea that was clearly insane. Ray referred to patients who believed that their legs were made of glass or that they had the devil or a family of snakes living inside them.<sup>82</sup> Intellectual mania was contrasted to moral mania, which took up a much larger portion of Ray's work. Moral mania was disease of the affective or moral faculties. Ray emphasised that this disease was not an illness of the ability to understand or to reason, but was instead a disease that led to wild and uncontrollable fury.<sup>83</sup> In another example of the potential for different schools of thought to interact, Ray acknowledged Pinel had first diagnosed moral insanity.<sup>84</sup> Ray argued that the increase of "vital forces" in any organ of the brain could lead to

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<sup>81</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 162-167.

<sup>82</sup> Ray, *Medical Jurisprudence of Insanity*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 163.

<sup>83</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 168-169.

<sup>84</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 168.

overwhelming instinctive impulses.<sup>85</sup> By way of comparison, Spurzheim and Combe argued that overactive cerebral faculties would create overwhelming desires to please those organs.<sup>86</sup> Ray had transformed Spurzheim and Combe's theories of human action into a theory of insanity, incorporating Pinel's work along the way. The phrenological influences on Ray's work are clear. Partial moral mania was a disease of just a few of the moral faculties. He illustrates partial moral mania with a number of cases of uncontrollable kleptomania, and emphasises that the patients in question had distinctive cerebral organisation.<sup>87</sup> In some of these cases, the Gall and Spurzheim had personally diagnosed the phrenological abnormality. Ray's work represents the junction between phrenological theories of mania and medico-legal arguments in favour of the recognition of partial insanity.

Before partial insanity could be fully recognised by the courts, medico-legal experts advocating for the doctrine had to overcome the similarities between partial insanity and criminality. In cases of total insanity there could be no confusion between a maniac and a criminal. When the total maniac spoke in tongues or failed to comprehend an ordinary conversation, he or she was easy to distinguish from a scheming criminal with an ordinary motive. However, partial insanity blurred this boundary. Partial insanity was typified by sanity co-existing with insanity on specific topics. A person suffering from partial insanity could appear to be perfectly normal until they committed a ferocious and violent crime. Legal authorities were

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<sup>85</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 186-187.

<sup>86</sup> Spurzheim, *Physiological System*, pp. 498-500; Combe, *Moral Philosophy*, p. 19.

<sup>87</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 187-191.

understandably reluctant to recognise a doctrine that shrunk the gap between sanity and insanity. Sir Matthew Hale, one of the most famous English legal authorities, declared in the seventeenth century that a person had to be wholly insane to benefit from the insanity defence. Acknowledging that some people could be insane on certain topics or subjects, Hale argued that

this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons that are felons of themselves, and others are under a degree of partial insanity, when they commit these offences: it is very difficult to define the indivisible line that divides perfect and partial insanity.<sup>88</sup>

This passage demonstrates the feared link between partial insanity and criminality, and the refusal to recognise the doctrine because of the danger that it would exculpate a great number of criminals. As early as the seventeenth century, authorities were aware that maniacs were not always obviously and clearly insane, but this did not convince them that partial insanity should be recognised.

Isaac Ray, sensitive to this obstacle to the doctrine of partial insanity, challenged Hale's argument in his own *Medical Jurisprudence of Insanity*. Recognising that Hale's rule was still persuasive, he believed that it was the duty of a modern medical

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<sup>88</sup> Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown: Published From the Original Manuscripts by Sollum Emlyn: With Additional Notes and References to Modern Cases Concerning the Pleas of the Crown by George Wilson* (London: T. Payne, 1800), created 1 September 2004, Making of Modern Law, Gale, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104811645&srchtp=a&ste=14>>, viewed 21 August 2008, vol. 1, pp. 29-30.

expert to dispel the old-fashioned ideas of the legal authorities. Ray argued that the similarity between partial insanity and criminality actually suggested that criminals should be treated with greater compassion. After all, if all criminality proceeded from partial insanity, then compassion for the insane should extend to criminals.<sup>89</sup> Nevertheless, Ray knew he was on slippery ground, and was careful to outline the differences between criminals and partial maniacs. For example, he argued that there was a material difference between the actions of the passions in cases of insanity and criminality. That is,

Madness is the result of a certain pathological condition of the brain, while the criminal effects of violent passions merely indicate unusual strength of those passions, or a deficient education of those higher and nobler faculties, that furnish the necessary restraint upon their power.<sup>90</sup>

Ray emphasised the distinction between mania and criminality by arguing that each involved a wholly different relationship between the will and the faculties.

Criminals merely had strong animal propensities or weak intellectual faculties, whereas maniacs were diseased. Forbes Winslow published a similar discussion of the differences between partial maniacs and criminals. These differences included factors such as motive, premeditation, and attempts to escape from the scene, all of which would be observed in criminals but not in the homicidal maniac. Finally, Winslow claimed that physical changes were often observed before a homicidal

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<sup>89</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 51-52.

<sup>90</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 53.



maniac struck, and argued that when these changes were not found in confirmed cases of homicidal mania, it was simply because the examination of the maniac had been unsatisfactory.<sup>91</sup> The similarity between criminality and partial insanity was a major obstacle for phrenologists, but it was one that both Ray and Winslow were keen to address. The *McNaughtan* trial would be their opportunity to convince a court that partial insanity was a valid and exculpatory form of the disease.

At the start of the nineteenth century the legal test of insanity was quite incompatible with the idea of partial insanity. The threshold was often stated to be one of total insanity or deprivation of reason. As noted above, Sir Matthew Hale emphasised that total madness was required before the insanity defence could be made out.

Partial insanity was possible, but the defence would only be open to a defendant who lacked the understanding of a fourteen year old.<sup>92</sup> This test was a cognitive one, which emphasised the defendant's ability to understand and reason. Another popular test of insanity was whether the defendant could distinguish between right and wrong. This criterion first appeared in physicians' works in the thirteenth century, was eventually recognised by lawyers in the seventeenth century, and was offered in a trial as the threshold of insanity in the eighteenth century.<sup>93</sup> In Arnold's 1723 trial for attempted murder, the judge made it clear that the defendant must be "totally

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<sup>91</sup> Forbes Winslow, *The Plea of Insanity, in Criminal Cases* (Boston: Charles C. Little and James Brown, 1843), created 1 September 2004, Making of Modern Law, Gale,

<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F103000048&srchtp=a&ste=14>>, viewed 27 September 2008, pp. 76-79.

<sup>92</sup> Hale, *Pleas of the Crown*,

<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104811645&srchtp=a&ste=14>>, vol. 1, pp. 29-30; Walker, *Crime and Insanity*, vol. 1, p. 38; Eigen, 'Intentionality and Insanity', pp. 36-38.

<sup>93</sup> Walker, *Crime and Insanity*, vol. 1, pp. 28; 40-41.

deprived of his understanding and memory, and doth not know what he is doing.”<sup>94</sup>

The knowledge of right and wrong was essentially another cognitive test, but with the added complexity that it was testing the patient’s cognition of moral norms instead of their reason. However, both these tests of partial insanity were ignored in Earl Ferrers’s 1760 trial for murder, where the Solicitor-General, conducting the prosecution, emphasised that a legally insane defendant must be suffering from total insanity. Even total temporary lack of reason would be sufficient, but partial insanity would not. Furthermore, if the defendant could tell the difference between good and evil and understand the nature of his or her actions, then he or she could be held responsible.<sup>95</sup> These opinions indicate that the legal test of insanity was quite narrow at the start of the nineteenth century. Total insanity was the threshold, and partial insanity was expressed in relation to understanding, rather than self-control.

This narrow doctrine was challenged in a series of cases of partial insanity in the early nineteenth century. These cases broadened the law of insanity to recognise the emerging doctrine. One of the most famous of these cases was Hadfield’s 1800 trial for shooting at the King. Hadfield was an ex-soldier who had sustained a serious head wound in battle. Believing that he should be executed for the good of humanity, he conspired to shoot at the King, for which he would surely be tried and hung.<sup>96</sup> His defence counsel, Thomas Erskine, had the difficult task of proving that a

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<sup>94</sup> *R v Arnold* (1724) 16 St. Tr. 695 per Tracy J, quoted in Walker, *Crime and Insanity*, vol. 1, p. 56.

<sup>95</sup> *R v Ferrers* (1760) 19 St. Tr. 885, quoted in Walker, *Crime and Insanity*, vol. 1, p. 62.

<sup>96</sup> Thomas Erskine, *The Speeches of the Right Hon. Lord Erskine, at the Bar and in Parliament: With a Prefatory Memoir by the Right Hon. Lord Brougham: Collected by the Late James Ridgway* (London: James Ridgway, 1847), created 1 September 2004, The Making of Modern Law, Gale,

man who had planned his crime was insane. One factor in his favour was Hadfield's brain injury, and Erskine managed to find medical experts willing to testify that Hadfield's state was a consequence of this injury.<sup>97</sup> However, Erskine was forced to contend with Hale's theory of partial insanity, which set the bar for responsibility at the understanding possessed by a fourteen year old.<sup>98</sup> Even if the test of ability to distinguish right from wrong were applied, Hadfield had clearly understood that his act was wrong, as he planned it as a route to execution. In *Hadfield*, Erskine abandoned the challenge of trying to fit his client within these legal rules, and instead attempted to show that Hale's doctrine was too narrow. He argued that very few defendants would fall within Hale's expression, which he described as "a total deprivation of memory and understanding."<sup>99</sup> Erskine noted that a literal application of this rule would rule out any defendant who could remember his own name, that he was married or had children. Since the courts had already excused people who fell outside this test, the threshold could not be literally applied.<sup>100</sup> Erskine thus argued that the insanity defence should be broadened to include partial insanity based on delusion instead of understanding. Hadfield's acquittal on the grounds of insanity was theoretically significant because of this broader test of insanity. However, Walker has argued that the acquittal rate remained roughly the same following the

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<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F100585913&srchtp=a&ste=14>>, viewed 21 August 2008, vol. 4, pp. 137-141.

<sup>97</sup> Rabin, *Legal Responsibility*, p. 155.

<sup>98</sup> Hale, *Pleas of the Crown*,

<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104811645&srchtp=a&ste=14>>, vol. 1, pp. 29-30.

<sup>99</sup> Erskine, *Speeches*,

<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F100585913&srchtp=a&ste=14>>, vol. 4, p. 124.

<sup>100</sup> Erskine, *Speeches*,

<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F100585913&srchtp=a&ste=14>>, vol. 4, pp. 124-125.

decision.<sup>101</sup> His research clearly suggests that *Hadfield* was less significant in the evolution of the insanity defence than is usually suggested. Walker's conclusion was a product of his social research into the circumstances of insanity trials. The present essay, however, is concerned with the intellectual development of the defence. The precedents that define the insanity defence were developed in a series of key trials, rather than in the larger number of smaller and less serious cases.

The doctrine of partial insanity was further broadened in the trial of Edward Oxford in 1840. Oxford had shot at the Queen as she rode past in her carriage, and had made no attempt to avoid capture and arrest.<sup>102</sup> He had some papers in his possession that suggested he might have been a member of a group of young men who carried pistols and met in secret, although there was a strong suggestion that these were simply a fiction created by Oxford himself.<sup>103</sup> The major obstacle for the defence was that the prosecution could argue that Oxford's recent decision to purchase a pair of pistols indicated that he premeditated his crime.<sup>104</sup> However, Oxford's counsel were able to refer to earlier trials, including *Hadfield*, to show that premeditation was not necessarily an obstacle to a successful insanity defence.<sup>105</sup> Various acquaintances of the defendant testified to his strange behaviour and to the history of

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<sup>101</sup> Walker, *Crime and Insanity*, vol. 1, p. 68.

<sup>102</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 113-116.

<sup>103</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 118-121; 123-124; 129.

<sup>104</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 116-117.

<sup>105</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 123-124.

mental illness in his family.<sup>106</sup> However, the evidence that was most relevant to partial insanity came from the medical witnesses. The first doctor to testify, Dr Birt Davis, affirmed that the circumstances of the crime gave rise to a strong suspicion of insanity. As noted in Chapter 1, the court challenged this evidence. The bench asked incredulously whether he thought “every crime that is plainly committed is committed by a madman?”<sup>107</sup> Judging insanity from the circumstances of the crime itself blurred the boundary between criminality and insanity. The judges in *Oxford* were unsettled by the implications of Davis’s testimony, and saw it as a threat to the sanctity of individual criminal responsibility. Legal authorities reacted with suspicion when confronted with a medical doctrine that conflated partial insanity and criminality. Ray and Winslow were aware of this phenomenon, but some doctors were not.

The test of insanity proposed by the medical witnesses in *Oxford* also challenged the legal principles of the period. The medical witnesses were clear that the problem was one of self-control. Borrowing from French psychiatric theory, Dr Hodgkin testified that Oxford’s insanity was a “lesion of the will”, or a “moral irregularity”.<sup>108</sup> Another medical expert, Dr Chowne, testified that he had often seen patients who possessed a strong impulse to commit specific bizarre acts, but who were aware of the strangeness of their impulses. These ideas were similar to Ray’s extensive

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<sup>106</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 125-130.

<sup>107</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, p. 131.

<sup>108</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 135-136.

discussion (also inspired by French theorists) in *Medical Jurisprudence of Insanity* that explained disease of the moral faculties and the resulting loss of self-control.<sup>109</sup> Despite the use of the term “moral”, these doctors were describing a form of insanity that affected a patient’s ability to control their own actions. While a modern audience would associate morality and the knowledge of right and wrong, these medical experts associated “moral irregularity” with a diseased will. This test of insanity focussed on the defendant’s self-control, or lack thereof. The established legal test of knowledge of right and wrong presumed self-control and focussed instead on the defendant’s cognition and choices. The prosecution summation in *Oxford* exemplified the traditional legal understanding of insanity. The Solicitor-General, who conducted the prosecution, emphasised that Oxford had never been treated as a maniac. In addition, the medical evidence of subtle degrees of delusion was ignored in favour of a test of insanity that focussed on the defendant’s reason.<sup>110</sup> Lord Denman, one of the judges, summarised the evidence for the defence. It was an unusual summation: he did not specifically mention the doctrine of partial insanity, and declared that the defendant would have to show delusion that prevented him from knowing the effect of his act. Furthermore, even if forced by his “morbid desire” to commit the act of shooting, he would still be responsible if he knew the likely result.<sup>111</sup> Finally, Denman emphasised the role of the jury, rejecting the idea that the medical experts had any special expertise, and noting also that the diagnosis

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<sup>109</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 168-234; 258-278.

<sup>110</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 144-147.

<sup>111</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srchtp=a&ste=14>>, vol. 1, pp. 147-148.

of insanity on the basis of the enormity of a crime alone would be an undesirable and dangerous rule.<sup>112</sup> This situation served as the medico-legal context of the *McNaughtan* trial: a legal test of knowledge of right and wrong, or alternatively, the effect of the crime, both of which were in direct contrast to a medical test of self-control. The vital issue in *McNaughtan* was which of these tests would become recognised legal doctrine.

Given the narrow nature of the established legal principle, and McNaughtan's knowledge that his act was wrong, the defence in *McNaughtan* was forced to argue for a broader test of partial insanity. The prosecution, anticipating the defence of insanity, had attempted to uphold the right-wrong test of partial insanity. The Solicitor-General insisted that a defendant would have to be unable to tell right from wrong in order to benefit from the doctrine.<sup>113</sup> Cockburn had to challenge this test and broaden the definition of partial insanity. He argued that the right-wrong test should be replaced by one of delusion alone. He referred to Erskine's argument in *Oxford*, where the barrister had claimed "delusions, therefore, where there is no frenzy or raving madness, is the true character of insanity."<sup>114</sup> He accordingly portrayed McNaughtan's actions as those of a man who had delusions of persecution. He drew the jury's attention to Ray's claim that some madmen are aware of the distinction between good and evil, but are deluded about the nature of the specific act that they commit.<sup>115</sup> Even more significantly, Cockburn relied on Ray to dismiss Lord Hale's opinion that the understanding of a fourteen year old should prevent a

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<sup>112</sup> Townsend, *Modern State Trials*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F104890120&srcht=a&ste=14>>, vol. 1, p. 148.

<sup>113</sup> *R v McNaughton* (1843), pp. 15-16.

<sup>114</sup> *R v McNaughton* (1843), p. 44.

<sup>115</sup> *R v McNaughton* (1843), p. 45.

defendant from benefiting from the insanity defence. In his *Medical Jurisprudence of Insanity*, Ray challenged this test, arguing that it was the product of a time when insanity was treated very differently. In modern times, insanity was far more common and different degrees of delusional insanity were recognised. Ray had contrasted the madhouses of Hale's day with the asylums of his own, arguing that they were much better suited to the diagnosis and treatment of the insane:

In the time of this eminent jurist, insanity was a much less frequent disease than it now is, and the popular notions concerning it were derived from the observation of those wretched inmates of mad-houses, whom chains and stripes, cold and filth, had reduced to the stupidity of idiot, or exasperated to the fury of a demon. Those nice shades of the disease, in which the mind, without being wholly driven from its propriety, pertinaciously clings to some absurd delusion, were either regarded as something very different from real madness, or were too few, too far removed from the modern gaze, and too soon converted by bad management into the more active forms of the disease, to enter much into the general idea entertained of madness.<sup>116</sup>

For Ray, medical expertise and asylum management had progressed to such a point that a failure to recognise partial insanity could only be regarded as old fashioned and out of date. Modern medical experts and asylum keepers were well aware that partial insanity could exist, and had pioneered new methods of treatment and diagnosis. As John Starrett Hughes has argued, Ray's argument allowed Cockburn

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<sup>116</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 16.



to cast partial insanity as the discovery of a new generation of medical experts, who had greater experience in asylums and who were open to the subtleties of the disease.<sup>117</sup> In doing so, he adopted these experts' test of insanity, which focussed on delusion instead of the ability to tell right from wrong.

However, Cockburn's argument relied on more than a simple contrast between modern medical arguments and outdated legal ones. He also used phrenological principle to support a broader definition of partial insanity and the abandonment of ancient legal rules. "The mistake existing in ancient times," he said,

Which the light of modern science has dispelled, lay in supposing that in order that a man should be mad – incapable of judging right and wrong, or of exercising that self-control and dominion, without which the knowledge of right and wrong would become vague and useless – it was necessary that he should exhibit these symptoms which would amount to a total prostration of the intellect...<sup>118</sup>

On one side of the balance, therefore, lay old legal ideas of right versus wrong and total insanity. Modern science was on the other side, represented by some distinctively phrenological ideas:

...whereas modern science has controvertibly established that any one of these intellectual and moral functions of the mind may be subject to separate disease, and thereby man may be rendered the victim of the most fearful

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<sup>117</sup> Hughes, *Isaac Ray*, pp. 116-117.

<sup>118</sup> *R v McNaughton* (1843), p. 42.

delusions, the slave of uncontrollable impulses impelling or rather compelling him to the commission of acts such as that which has given rise to the case now under your consideration.<sup>119</sup>

The division of the mind into intellectual and moral functions and the irresistible control exerted by the mind were central to Cockburn's argument. These were, of course, ideas that were central to phrenology, and they appeared in Cockburn's argument because of his acceptance of Ray's *Medical Jurisprudence*. A test of delusion implied some cognitive impairment, although as the quote above shows, Cockburn's argument also hinted at a disease of the volition. That is, the test was a hybrid of reasoning ability and self-control. It embraced Ray's test of intellectual insanity, which was indicated by delusions, and his test of moral insanity, with centred on self-control. Although there are enough features of Ray's book to establish that he was a firm believer in phrenology, it is more difficult to establish that Cockburn was aware of the source of his ideas. As noted above, phrenology was not the only nineteenth century science that suggested that the mind was divided into individual faculties. Regardless of this commonality, phrenology was the basis of Ray's argument, and its role in shaping the *McNaughtan* defence indicates its place in mainstream nineteenth century science.

Cockburn's medical witnesses were, of course, in total agreement with his model of the mind and of partial insanity. These witnesses were not all phrenologists, but many of their ideas were compatible with phrenology. They favoured the same tests of partial insanity as the phrenologists. For example, Dr Monro, manager of the

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<sup>119</sup> *R v McNaughton* (1843), p. 42.

Bethlem mental asylum, observed that monomania (or partial moral insanity) could exist alongside sanity. Furthermore, he believed that the ability to tell right from wrong was a poor test of insanity.<sup>120</sup> He stated that

I have frequently known a person insane upon one point exhibit great cleverness upon all others not immediately associated with his delusions. I have seen clever artists, arithmeticians, and architects, whose mind was disordered on one point. An insane person may commit an act similar to the one with which the prisoner is charged, and yet be aware that of the consequence of such an act.<sup>121</sup>

Not only did Monro affirm that delusion was the best test in these situations, but agreed that some parts of the mind could be disordered and others sane. The other medical witnesses also spoke of delusion, and not of the knowledge of right and wrong.<sup>122</sup> In his *Plea of Insanity*, published in the year of the trial, Winslow also emphasised that the right-wrong test was inferior to one that emphasised delusion and the loss of self-control.<sup>123</sup> When the judges stopped the trial, there was no doubt that delusion had won over the right-wrong test, and that partial insanity had been accepted as a legitimate legal doctrine. The court had been convinced that the mind was divided into discrete faculties, each of which could be independently disordered, and that these faculties could exert an uncontrollable influence over the individual.

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<sup>120</sup> *R v McNaughton* (1843), pp. 67-70.

<sup>121</sup> *R v McNaughton* (1843), pp. 67-68.

<sup>122</sup> *R v McNaughton* (1843), pp. 70-71.

<sup>123</sup> Winslow, *Plea of Insanity*,

<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F103000048&srchtp=a&ste=14>>, pp. 92-93.

Although delusion was the test adopted by the defence and accepted by the court in *McNaughtan*, Isaac Ray did not believe that delusion was an exhaustive test of partial insanity. He accepted that it could be a suitable criterion in some cases, such as where the intellect was diseased.<sup>124</sup> He believed that the delusion criterion was a cognitive test that focussed on the intellect and reason. Because phrenology made a distinction between the intellectual faculties and the moral sentiments, a disease of the moral part of the brain would require a different test. Patients with partial moral mania might have no signs of delusion, but were still controlled by the physical abnormalities of their brain.<sup>125</sup> A disease of the moral faculties was more difficult to diagnose, and Ray suggested that a doctor should consider the subject's eccentricity, recent changes in behaviour, and any singular obsessions.<sup>126</sup> Although Cockburn mentioned Ray's account of partial moral mania in his defence of *McNaughtan*, he did not reproduce Ray's argument in full. Perhaps he felt that *McNaughtan* was suffering from a disease of the intellectual faculties, and that delusion was the appropriate diagnostic test. It is more likely, however, that he felt that it was easier to prove *McNaughtan*'s delusion than prove a disease of the moral sentiments. After all, *McNaughtan*'s delusion was clear to the entire court, and they were much more likely to accept that he was deluded than accept that his eccentricities should excuse his crime. Certainly, it took the medical opinions of Ray, Monro, Winslow and the other doctors to convince the court that delusion was the appropriate test, but this test

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<sup>124</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 47-48.

<sup>125</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 48-49.

<sup>126</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 170-173.

had a fundamental compatibility with lay understandings of madness. Delusion was easy for a layperson to spot and similar to the behaviour one would expect of a raving total maniac. Cockburn relied on a medical model of insanity, and called medical witnesses to diagnose his client, but he was careful to ensure that his argument was acceptable to the judges and jury who did not share this medical perspective.

Presented with Cockburn's argument, and the concurring evidence of the medical experts, Chief Justice Tindal stopped the trial. He observed that the medical evidence was all on the side of the defence, and practically directed the jury to return a verdict of not guilty on the grounds of insanity.<sup>127</sup> This verdict caused some concern. Newspapers published critical reports of the trial and verdict, particularly the role of the medical experts. Even Queen Victoria herself expressed displeasure with the result.<sup>128</sup> However, at least some phrenologists supported the verdict. Roger Cooter has noted that before McNaughtan's trial, a number of phrenologists wrote to Lord Brougham, previously the Lord Chancellor, calling for McNaughtan's pardon. These phrenologists explicitly referred to the principles of their science in asserting McNaughtan's irresponsibility.<sup>129</sup> Unswayed by these arguments, the House of Lords debated the outcome of the trial and the dangers of the principles that had been established. The Lords' main concern was the appropriate test of partial insanity. Although Lord Chancellor Lyndhurst stated that he believed there was no doubt as to the correct law, he felt it necessary to discuss – at length – the most famous cases of criminal insanity in the eighteenth and early nineteenth centuries.

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<sup>127</sup> *R v McNaughton* (1843), pp. 71-73.

<sup>128</sup> Moran, *Knowing Right from Wrong*, pp. 19-21.

<sup>129</sup> Cooter, 'Phrenology and British Alienists', p. 61.

He concluded that the proper test of partial insanity was delusion combined with an inability to tell right from wrong.<sup>130</sup> That is,

If a man, labouring under some mental delusion, acts under the influence of that delusion, and the influence of the delusion is so powerful as to render him incapable of distinguishing right from wrong, in that case he cannot be considered in law as responsible for his act.<sup>131</sup>

This test echoed the one offered by McNaughtan's prosecutors. By incorporating the proviso that the defendant would have to be unable to tell right from wrong, the Lords were advocating for the narrower test of partial insanity. Although the medical experts in *McNaughtan* had suggested that an understanding of right and wrong was irrelevant to insanity, the Lords were effectively undermining their opinions. When combined with the Lords' statements of regret that the trial had been concluded by the medical evidence, and not by a judicial summation,<sup>132</sup> it is clear that the Lords were deeply troubled by the medical definition of exculpatory insanity. The House of Lords debate and subsequent questions to the judges must be viewed as an attempt to narrow the doctrine of partial insanity in the wake of the *McNaughtan* trial.

In order to resolve their concerns with the insanity defence, the Lords called the trial judges and their colleagues on the Supreme Court of Judicature to answer five

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<sup>130</sup> House of Lords, 'House of Lords Debate', reproduced in Richard Moran, *Knowing Right from Wrong: The Insanity Defence of Daniel McNaughtan* (New York: The Free Press; London: Collier Macmillan Publishers, 1981), pp. 150-157.

<sup>131</sup> House of Lords, 'House of Lords Debate', p. 151.

<sup>132</sup> House of Lords, 'House of Lords Debate', pp. 157; 164-167.

questions. They employed a rarely used power of the House of Lords to ask the judges specific questions about the law of England.<sup>133</sup> These questions concerned the test of partial insanity and the testimony that could be given by medical witnesses, among other things. The first question related to the exculpatory effect of delusion, and specifically delusions relating to persecution.<sup>134</sup> The second and third questions asked the judges to define the instructions that should be left to the jury in such a case. The fourth question dealt with the law in a situation where a defendant was suffering from delusions relating to facts. The final question related to the testimony of medical experts who had never examined the prisoner. This question was a response to the courtroom role of Forbes Winslow. He had never examined the defendant, but sat in the courtroom during the trial and was invited to give his opinion on the defendant's state of mind. This unusual procedure was one foci of the Lord's ire, as it suggested that a medical expert without any special knowledge of the defendant would be entitled to make conclusions that usually belonged to the jury. The Lords' questions reinforce the insights of their discussion in the House of Lords. They were concerned by the broad nature of the test accepted by the bench in *McNaughtan*, and also hoped to reduce the influence of medical witnesses in insanity trials.

The judges' responses to the Lords' questions became the famous *McNaughtan Rules*, which codified the law of partial insanity in criminal cases. The majority of

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<sup>133</sup> Roger Ormond, 'The *McNaughton* Case and its Predecessors', in Donald J. West & Alexander Walk, eds., *Daniel McNaughton: His Trial and the Aftermath* (Ashford, Kent: Gaskell Books, 1977), p. 10.

<sup>134</sup> House of Lords, 'The House of Lords and the Judges' "Rules"', in Donald J. West & Alexander Walk, eds., *Daniel McNaughton: His Trial and the Aftermath* (Ashford, Kent: Gaskell Books, 1977), p. 74.

the judges declared that a person suffering from insane delusions of persecution could be found guilty if he or she knew that their act was against the law:

A person labouring under partial delusions only, and not otherwise insane, who did the act charged with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or wrong, or producing some public benefit, is punishable, if he knew at the time that he was acting contrary to the law of the land.<sup>135</sup>

If it had been applied in the trial, this statement would have excluded *McNaughtan* from benefiting from the defence. Although he was suffering from delusions, and believed that his action was justified, he knew that his act was against the law. The judges had effectively reversed the implications of their decision to stop the trial. The judges also offered a compromise position regarding medical experts' role in the courtroom, a position that was only partially compatible with the events of the *McNaughtan* trial. They decided that a medical witness who had never seen the defendant before could not give his opinion of the defendant's state of mind. They stated that the defendant's sanity or insanity was a question of fact, and was therefore a question for the jury alone. However, they added the proviso that if the facts were admitted, then the question of the defendant's state of mind was a question of science. In such a situation, the medical witnesses would be able to give their opinion.<sup>136</sup> This Rule was an intriguing response from a group of judges who were clearly under pressure from the House of Lords to narrow the scope of medical opinion in insanity trials. The Lords had been critical of medical opinion in their

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<sup>135</sup> House of Lords, 'Judges' "Rules"', p. 75.

<sup>136</sup> House of Lords, 'Judges' "Rules"', p. 75.



recent debate, and yet the judges created a role for medical experts in making scientific conclusions from agreed facts. This left room for medical experts to operate as they had in the *McNaughtan* trial, and offer opinions that had traditionally been the realm of the jury. This Rule was a sign of the gradual switch from ideas of madness manifest in behavioural patterns towards an understanding of insanity that emphasised the special knowledge of medical men. Similarly, the judges' hybrid test was a reaction to the competing pressures of lay and medical explanations of insanity. The *McNaughtan* Rules, and the indecision they express, were a product of a moment when the right to define insanity was passing from laypersons to medical experts.

Eigen was correct to argue that phrenology had enormous relevance to partial insanity and doctrines of legal responsibility.<sup>137</sup> Phrenology was determinist and materialist, but its explanation of partial insanity made it attractive to doctors and lawyers alike. This attraction culminated in the *McNaughtan* trial, where it played a vital role in the successful defence argument. Eigen searched the work of the leading phrenologists for a discourse on criminal responsibility, but Cockburn's reliance on Ray's *Medical Jurisprudence* shows that any investigation of the influence of phrenology on the law must include the work of the medico-legal experts who drew on the science. Spurzheim and Combe were not being cited in courtrooms, but the medical theorists who followed them were. However, Eigen has argued elsewhere that phrenology failed to make an explicit appearance in legal proceedings.<sup>138</sup> He argues that even when phrenologists testified, they were aware that their ideas were too controversial to be seriously accepted by the court. Eigen takes the absence of

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<sup>137</sup> Eigen, *Witnessing Insanity*, pp. 68-72.

<sup>138</sup> Eigen, 'Delusion in the Courtroom', pp. 44-45.

terms such as “organs” as a sign that the medical experts who followed phrenology were deliberately withholding their phrenological arguments. The reality is that phrenology had a more nuanced influence on medico-legal theory. The doctors who brought phrenology into the courtroom were employing the underlying assumptions and philosophies of their science, rather than obvious phrenological language. Eigen is correct, however, to argue that these phrenologists felt the need to hide the role of phrenology in their arguments. Ray’s attempts to camouflage the phrenological aspects of his work demonstrate that phrenologists were participating in a process of self-regulation.

Phrenology’s role in *McNaughtan* challenges the historian to resolve this science with the courts’ long-standing reliance on lay understandings of insanity. As Arlie Loughnan has argued, the insanity defence continues to incorporate doctrines that allow the expression of lay understandings of insanity.<sup>139</sup> It is difficult to reconcile this observation with the authority vested in medical experts in famous cases such as *McNaughtan*. Moments of agreement between lay and medical opinion express the transition between the competing models of insanity. Even in the trial, with several medical witnesses willing to testify to McNaughtan’s intellectual and moral insanity, Cockburn preferred to emphasise a test of insanity that was explicable to both lay and medical participants. In another sign that understandings of insanity were in flux, the judges, acting under the influence of the House of Lords, later reversed their acceptance of the phrenologists’ test of partial insanity. Instead, they clung to the test of knowledge of right and wrong, applying a criterion that appealed to lawyers’ and lay jurors’ common sense. On the other hand, there are elements of the Rules

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<sup>139</sup> Loughnan, “Manifest Madness”, pp. 379-401.

that imply that the judges were not as resistant to phrenology as this chapter has suggested. Weihofen argued that the Rules themselves were also influenced by phrenology. He argued that the judges' acceptance of the idea that a patient could be delusional in relation to some topics and not others (exemplified by the phrase "and not otherwise insane") is evidence of their belief in the discrete faculties that were central to phrenology.<sup>140</sup> Although Weihofen's argument is attractive, it is important to note that the judges maintained the right-wrong test opposed by Ray and Winslow. Although the underlying principles of the Rules were compatible with phrenology, the judges had rejected the phrenologists' arguments.

The *McNaughtan* trial came at the end of a long period of gradual transformation of the law. Partial insanity had been argued in a number of significant criminal trials, but was met with only limited success. *Hadfield* was undoubtedly the watershed case prior to *McNaughtan*, as it represents a striking example of the acceptance of the doctrine of partial insanity. However, *McNaughtan* went a step beyond the previous decisions. In *McNaughtan*, Cockburn successfully argued for a broadening of the insanity defence to recognise partial insanity based on delusions, whether or not the defendant could tell right from wrong. Medical experts, who thought that insanity should be diagnosed on the basis of delusion and lack of self-control, rather than reasoning ability, supported his test. It was also a test that was supported by phrenology. Phrenologists had emphasised the compartmentalisation of the mind and the power of delusions in a number of medico-legal works. The division of the mind into separate organs was particularly important, because it helped to explain why a patient could be insane in relation to some topics and sane in relation to

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<sup>140</sup> Weihofen, *Mental Disorder*, pp. 3-4.

others. The defence in *McNaughtan* relied on both of these ideas. They strove to overcome years of legal emphasis on personal responsibility and reason by appealing to medical ideas of materialism and determinism. For a brief moment, phrenology had made its way into the legal arena. Although the House of Lords attempted to quash these dangerous determinist ideas and the power that they gave to medical professionals, they were unable to erase partial insanity and medical opinion from the insanity defence.

## Chapter 3: Phrenology and the Negotiation of Medico-Legal

### Expertise

The medical and scientific communities accepted phrenology as a true science, and this led to its role in the *McNaughtan* trial. As the previous chapters have shown, phrenological theory appeared in the trial because it functioned as a legitimation of medical expertise and as a way of explaining partial insanity. However, the function of phrenology alone does not account for its role in *McNaughtan*. It is also important to consider its significance to the participants in the trial. Although some phrenologists approached the doctrine as a money-making enterprise, rather than as a bona fide science, this was only one aspect of the discipline. There was also an elite, intellectual side to the science, which had much more in common with the original ideas of Gall and Spurzheim. This respectability is the key to understanding phrenology's role in the *McNaughtan* trial. Phrenology appeared in the trial because it was an explanation of insanity and a philosophy of responsibility among doctors and intellectuals. The historians who have denied a place for phrenology in legal history have generally looked for the popular form typified by head reading and charlatan lecturers. Their approach ignores the multifaceted identity of the science, and this chapter begins the process of writing phrenology's dual identities into the history of its relationship with the law.

Historians who have studied the popularity of phrenology have identified two aspects to the discipline. Phrenology had an intellectual or philosophical form, which was

dominated by the medical and non-medical professional elite.<sup>141</sup> It also had a practical form, which emphasised the lessons that could be learnt from the study of the human skull. This latter form was popular among laypersons with little or no education, but who were interested in vaguely scientific ideas and embraced phrenology's potential to tell them about themselves. An exploration of the role of phrenology in the law must recognise that the elite, respectable form of the discipline was much more likely to win an audience in the superior courts that defined legal doctrine. The division of phrenology is an example of the negotiation of expert knowledge in the early nineteenth century. It saw phrenology transformed and distilled into a theory that was palatable to the courts and to elite society. This reinterpretation resulted in an emphasis on the intellectual form of the discipline. This is not to say that intellectual phrenology was uncontroversial: there were still many prominent and respected figures willing and eager to criticise it. However, this was criticism directed at an equal: at an idea that was respectable but nevertheless objectionable. It was different to the vitriol and ridicule directed at the practical phrenologists. This chapter argues that including phrenology in the story of the *McNaughtan* trial provides a window into the interaction between expert medical knowledge and legal doctrine. Disreputable ideas were excluded, but experts also modified their ideas to make them palatable to the legal authorities. Through this process, scientific ideas – such as phrenology – could become lose their most recognisable characteristics, although the core concepts survived. The best example of this negotiation and reinterpretation is the *McNaughtan* trial itself. The first two chapters of this thesis have explained how phrenology was twisted and camouflaged

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<sup>141</sup> Davies, *Phrenology*; de Giustino, *Conquest of Mind*; Cooter, *Cultural Meaning of Popular Science*.

until it could appear in this famous English trial. This chapter will explain why such a process was necessary, and charts its progress.

Although *McNaughtan* was an English case, the discussion that follows incorporates developments in both Britain and the United States. This conflation reflects the fact that phrenology was a transnational phenomenon. Gall and Spurzheim, who were both born in Germany and lectured in Austria, Switzerland and France, influenced the science when it arrived in Britain.<sup>142</sup> Spurzheim himself toured the United States, where he died.<sup>143</sup> After Spurzheim's death, the Scottish lawyer George Combe took up his mantle, and also lectured in America.<sup>144</sup> From this point on, phrenology's fortunes on both sides of the Atlantic were linked. After all, Isaac Ray, an American, found that his ideas were cited in an English courtroom to overturn the dictum of the famous Englishman Sir Matthew Hale. This link is an excellent example of the power of phrenology to cross the borders between the two nations. Not only is *McNaughtan* an example of the power of phrenology to influence legal doctrine, but it is also an example of American medical jurisprudence playing a role in the development of English law.

The central tenets of phrenology, such as the localisation of brain function and the existence of discrete cerebral organs, have already been discussed. These beliefs were popularised by Gall's former student, J.G. Spurzheim. John D. Davies, in his extensive history of phrenology in America, argued that Spurzheim subtly altered Gall's theory. He replaced the idea of essentially good and essentially bad faculties

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<sup>142</sup> Davies, *Phrenology*, pp. 5-7.

<sup>143</sup> Davies, *Phrenology*, pp. 16-17.

<sup>144</sup> Davies, *Phrenology*, pp. 20-23.

with a model in which crime and insanity flowed from the abuse or indulgence of the faculties. Davies believed that this change added a metaphysical element to phrenology, which contrasted to Gall's focus on science and facts.<sup>145</sup> This metaphysical tradition was continued in later phrenological works, such as George Combe's *Constitution of Man*, first published in 1828. In this work, Combe tried to prove the existence of specific faculties by demonstrating how they related to the natural world.<sup>146</sup> For example, he argued that

Cautiousness is given, and it is admirably adapted to the nature of the external world. The human body is combustible, is liable to be destroyed by violence, to suffer injury from extreme wet and winds, &c; and it is necessary for us to be habitually watchful to avoid these sources of calamity. Accordingly, Cautiousness is bestowed on us as an ever watchful sentinel, constantly whispering, "Take care."<sup>147</sup>

Combe then went on to consider the consequences of the existence of these faculties, and the natural moral laws that could be deduced from their discovery.<sup>148</sup> These philosophical elements were present in phrenology practically from its very creation. Besides answering scientific questions about the brain, phrenology also equipped the practitioner to discuss metaphysical questions about the mind and the will. This

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<sup>145</sup> Davies, *Phrenology*, pp. 8-9.

<sup>146</sup> George Combe, *The Constitution of Man Considered in Relation to External Objects* (Hartford: Silas Andrus and Son, 1850), created 2005, Making of America Books hosted by University of Michigan Library, <<http://name.umdl.umich.edu/aca1611.0001.001>>, viewed 25 September 2008, pp. 14-16.

<sup>147</sup> Combe, *Constitution of Man*, <<http://name.umdl.umich.edu/aca1611.0001.001>>, p. 14.

<sup>148</sup> Combe, *Constitution of Man*, <<http://name.umdl.umich.edu/aca1611.0001.001>>, pp. 21-47.



tradition was continued by the elite societies formed for the discussion of phrenology, and it gave them the tools to grapple with the questions of delusion and will that were central to the insanity defence.

Phrenology had social significance beyond its ability to explain mind, character and responsibility. Roger Cooter has found that the average age of prominent phrenologists was much lower than the average age of anti-phrenologists.<sup>149</sup>

Combining this phenomenon with his observation that most phrenologists were just launching their careers, and lacked the power and wealth of the anti-phrenologists, Cooter argues that phrenology provided an intellectual touchstone for an up-and-coming generation of professionals. The literary and philosophical societies in which phrenology thrived can be interpreted as fora for the expression of ideas that distinguished the participants from the economic elite.<sup>150</sup> Steven Shapin's study of the social significance of phrenology among the intellectual elites in Edinburgh reinforces Cooter's observations. Shapin argues that phrenology provided a vehicle for reformists who were outside the established social structure in Edinburgh.<sup>151</sup>

However, Cooter has observed that by the 1840s, these new professionals who espoused phrenology had themselves made it into the elite, and therefore no longer required a unifying doctrine.<sup>152</sup> Cooter's argument has important implications for phrenology's role in the medical profession, its subsequent attractiveness to theorists who were attempting to reform the legal system, and the eventual rejection of the *McNaughtan* verdict by the House of Lords. It could explain why phrenologists were so attracted to a theory that had the potential to reform the way that criminals

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<sup>149</sup> Cooter, *Cultural Meaning of Popular Science*, pp. 42-44.

<sup>150</sup> Cooter, *Cultural Meaning of Popular Science*, pp. 68-71.

<sup>151</sup> Shapin, 'Phrenological knowledge', pp. 219-243.

<sup>152</sup> Cooter, *Cultural Meaning of Popular Science*, pp. 87-88.

were punished and asylums were run. Phrenology gave its followers the theoretical basis required to rationalise the organisation of the legal system and the asylums, thereby sweeping out the traditions of the previous generation. It also suggests that the House of Lords may have associated the *McNaughtan* verdict with the new generation of medical experts, and reacted negatively to the court's implied acceptance of their ideas. However, any attempt to establish a link between phrenological theory and the socio-economic status of its followers must recognise that phrenologists shaped their discipline just as much as the fundamentals of the doctrine appealed to their reforming spirit. The definition of phrenology was a process of give and take, and both scientific content and professional autonomy played a role.

Despite the philosophical and intellectual foundation of phrenology, the science also had a common-sense basis. This aspect gave the discipline an appeal to a non-medical and non-scientific audience. Instead of employing a medical and technical explanation of the mind, phrenologists explained the faculties in a manner that did not assume that their audience possessed medical training. For example, the propensity to destroy, or Destructiveness, could be readily understood by anyone who picked up a phrenology text or who listened to a lecture on the subject. The names of the faculties might be unconventional – Philoprogenitiveness being a prime example – but even this faculty described an emotion that was as easy to comprehend as the love of one's children. Gall's system should be compared to other theories of the brain and mind that were current in the 1840s, around the time of *McNaughtan's* trial. Robert Young has identified physiologists who believed that Gall had relied too heavily on metaphysics, and who encouraged strict physiological analysis

instead. Their studies had stronger evidentiary and experimental foundations, and were less concerned with the philosophical implications of their work than contemporary phrenologists.<sup>153</sup> This relationship between phrenology and other schools within the medical profession reveals the extent to which Gall's theory had been reinterpreted. His medical theories had been toned down, and replaced with a greater emphasis on metaphysics. These changes made it much more attractive to laypeople and professionals who lacked medical training.

This metaphysical element also added to the controversy surrounding phrenology. As a philosophy that offered a physical explanation of character, phrenology attracted criticism that it was determinist and anti-spiritualist. G.N. Cantor has described the intellectual and philosophical debate between phrenologists and anti-phrenologists in Edinburgh in the second quarter of the nineteenth century. Focussing on philosophical challenges to the science, he has identified a number of controversial issues. On a theological level, phrenologists' critics accused the followers of the science of denying the moral world, and suggested that phrenology was incompatible with Presbyterianism.<sup>154</sup> Further controversy derived from the phrenologists' claims that the brain was the organ of the mind, that dissection alone would never establish the function of the brain, and their emphasis on inherent character over environmental factors.<sup>155</sup> Of course, some of the issues Cantor identifies were only relevant to interactions taking place in Edinburgh, where the Scottish common-sense school dominated the intellectual landscape. As noted in the

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<sup>153</sup> Robert M. Young, *Mind, Brain and Adaptation in the Nineteenth Century: Cerebral localization and its biological context from Gall to Ferrier* (New York: Oxford University Press, 1990), pp. 80-88.

<sup>154</sup> Cantor, 'Phrenology in Nineteenth-Century Edinburgh', pp. 203-204.

<sup>155</sup> Cantor, 'Phrenology in Nineteenth-Century Edinburgh', pp. 204-208.

chapters above, phrenologists in the world of medical jurisprudence could work alongside non-phrenologists, and often drew on each other's studies. As the century went on, phrenologists began to climb the social ladder and their theories became more respectable. This respectability did not resolve the fundamental controversies that arose from the science's physical model of human character, but it did enable phrenology to spread into medicine and the law.

Phrenology's accessibility led to popularity among those without any technical medical or scientific training. Between 1839 and 1841, about one third of the membership of Phrenological Association in Britain who supplied data on occupation were doctors.<sup>156</sup> The vast majority of the rest of the members were professional figures or from the middle and upper classes: merchants, writers, clerks, and schoolteachers. Almost one in ten were lawyers, and one of the greatest British phrenologists, George Combe, was a lawyer.<sup>157</sup> Although intellectual phrenology was certainly of interest to medical experts, not all of its followers were doctors. More importantly, the Phrenological Association and the intellectual followers of phrenology represented just one part of the broader phrenological movement. There was also a strong sense of the everyday value of phrenology, particularly in America. Itinerant lecturers, who travelled from town to town giving brief talks on the doctrine and measuring heads for a fee, spread this practical form of the doctrine.<sup>158</sup> The audience did not come to hear about a science they could not understand; they came to hear about their own character in terms that were relevant to their everyday lives. Phrenology was certainly a science, in the sense that a science involves specialised

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<sup>156</sup> Cooter, *Cultural Meaning of Popular Science*, p. 93.

<sup>157</sup> Cooter, *Cultural Meaning of Popular Science*, pp. 7; 102-103.

<sup>158</sup> Davies, *Phrenology*, pp. 30-45.

knowledge and measurement techniques. But if it was a science, it was one that was particularly explicable to a lay audience. Phrenology had an appeal among those who did not necessarily understand anatomy or mental illness. The ease with which the phrenological faculties could be understood made it possible for phrenology to take root in a non-medical audience, although it maintained the scientific and medical flavour inherited from its founders.

In the US, travelling lecturers drew on the non-medical appeal of phrenology and repackaged it for a lay audience. They referred to the faculties to explain practical problems and everyday situations. They addressed health, family, religion and marriage, among other topics, all from a phrenological perspective. They aimed to turn a profit, of course, and managed to do so by reading heads after their lectures. John D. Davies dates the emergence of practical phrenology to 1833, when the Fowler brothers began to travel around north-eastern America lecturing and measuring heads for a fee.<sup>159</sup> This form of phrenology most susceptible to ridicule, and was the furthest from true science as we imagine it today. The practitioners were not medical experts, or even professional men, and in many cases were suspected of being travelling charlatans without any real phrenological training.<sup>160</sup> Davies has collected a number of examples of phrenologists travelling with freak shows and misrepresenting their identity and qualifications.<sup>161</sup> He also noted George Combe's fear that these lecturers would ruin the respectable image of phrenology. While phrenology had a wide audience outside the medical profession, this popularity came at the expense of a split between intellectual and practical practitioners.

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<sup>159</sup> Davies, *Phrenology*, pp. 31-32.

<sup>160</sup> Davies, *Phrenology*, pp. 44-45.

<sup>161</sup> Davies, *Phrenology*, pp. 44-45.

The intellectual or philosophical form of phrenology took root among asylum managers and doctors. However, this process involved integration and reconciliation with existing, acceptable ideas, and the most obvious features of phrenology were sometimes lost. This renegotiation of the content and meaning of phrenology laid the foundation for its incorporation into the legal system. As noted above, medical practitioners were attempting to create a consensus that only they had the expertise necessary to diagnose, control and treat the mentally ill.<sup>162</sup> In his study of phrenology's influence among asylum managers, Roger Cooter noted that some of the most distinguished asylum managers of the early nineteenth century supported phrenology.<sup>163</sup> Cooter explains medical asylum managers' support for phrenology by suggesting that the science allowed them to argue that the treatment of the insane required a medical expert. If madness had a physical cause, then it was logical that a physician would be required to treat it.<sup>164</sup> In fact, if restraint were abandoned under the new regime of moral treatment, then more efficient forms of diagnosis and control would be required. The phrenologically trained doctor could exert this control through an understanding and utilisation of the phrenological faculties.<sup>165</sup> Some asylum managers accepted phrenology, but saw no need to acknowledge their adherence to the discipline, nor utilise its practical form when diagnosing insanity. Instead, they accepted its fundamental concepts, such as the division of the mind into discrete faculties, without measuring their patients' skulls.<sup>166</sup> This choice provides a contrast between the different strands of the science. While practical phrenology

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<sup>162</sup> Cooter, 'Phrenology and British Alienists', pp. 76-77.

<sup>163</sup> Cooter, 'Phrenology and British Alienists', pp. 61-62.

<sup>164</sup> Cooter, 'Phrenology and British Alienists', pp. 76-77.

<sup>165</sup> Cooter, 'Phrenology and British Alienists', p. 79.

<sup>166</sup> Cooter, 'Phrenology and British Alienists', pp. 74-75.

was popular with a lay audience because it provided an easy-to-understand guide to the brain and character, medical experts referred to their understanding of intellectual phrenology to bolster their claims of professional knowledge.

Penal reform was another opportunity for interaction between philosophical phrenology and the legal system. The science had important implications for the confinement, classification and rehabilitation of criminals. It was not unusual for Gall and Spurzheim to make a trip to a prison in order to examine the inmates and attempt to predict their crimes. Studying a violent criminal with a large Destructiveness would help to find the organ in ordinary subjects.<sup>167</sup> This interest was often reciprocated, with some prison wardens following phrenological ideas in the administration of their prisons. In 1846, Eliza Farnham, head matron of the women's prison at Sing Sing, edited and re-published a work entitled *Rationale of Crime*. It was a reprint of Marmaduke B. Sampson's *Treatise on Criminal Jurisprudence Considered in Relation to Cerebral Organization*. In this work, she combined Sampson's account of phrenology with her own experiences at the head of a prison. Farnham's notes reveal that phrenological principle shaped her attitude towards insanity and responsibility. For example, she believed the phrenological faculties cause criminality, although she held out hope that treatment was possible:

How many...are born to the inheritance of propensities whose solicitations for criminal indulgence know no restraints? The force of the physical law is the same in the case of each set of faculties. If their organs act, the emotion, desire or feeling, which they produce, must be experienced...It is not my

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<sup>167</sup> Spurzheim, *Phrenology, in Connexion with the Study of Physiognomy*, pp. 28-30.

design to teach that crime is inevitable, but that the causes which lead to it often are, so far as the individual criminal is concerned, and that society ought to direct its treatment to causes instead of effects.<sup>168</sup>

Farnham's belief that the faculties caused crime evoked a sympathetic attitude towards criminals. She believed that crime was the responsibility society as whole, whose members should discourage crime through the proper treatment of criminality and insanity. Farnham's work lies firmly within the philosophical tradition of phrenology. She was following the tradition of Spurzheim and Combe in proposing phrenological solutions to criminality, rather than offering phrenology as a means of assessing the character of individual patients. Farnham's arguments engaged with the intellectual strand of phrenology. Of the two forms of phrenology, intellectual phrenology had a stronger connection to the legal system, as demonstrated by its audience in asylums and prisons.

Philosophical phrenologists were also enjoying a growing role in medical jurisprudence relating to the civil law. Wills were often challenged on the basis of the testator's alleged insanity at the time the will was made. These disputes were another opportunity for medical experts to become involved in the law, and sometimes they brought phrenological ideas with them. Just as asylum managers and medical experts were called as witnesses in criminal trials, they were also asked for an assessment of capacity in civil cases. This rarely involved an examination of the testator's skull or brain: this would be much too crude for a professional medical witness, and at any rate, the philosophical phrenologists held that disease of the

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<sup>168</sup> Farnham, *Rationale of Crime*, p. 28 (note).



faculties was not detectable via autopsy.<sup>169</sup> Instead, medical experts who drew on phrenology used it to answer controversial questions of medical jurisprudence. Ray's work is a premier example. He argued that civil responsibility should be abrogated in cases of moral mania if the act in question, such as making a will, came within the realm of the topics on which the patient was diseased. He cited cases of famous, intelligent people who had suffered from some strange delusion or belief, but who nonetheless possessed perfectly normal judgment.<sup>170</sup> Once again, Ray's belief in discrete mental organs had influenced his theory of insanity. His proposed rule of civil responsibility in cases of partial moral mania relied on the core beliefs of philosophical phrenology, such as the division of the brain into separate faculties. The phrenologists who shaped legal doctrine drew on the underlying philosophy of their discipline, instead of its practical aspect.

Phrenologists within the medico-legal community hid the influence of the science on their work. The doctrine was far from universally accepted and there were journals and experts willing to attack the science throughout its history. Some of these criticisms were based on a fear that materialism would destroy human responsibility, and some emphasised the untrustworthy nature of the lecturers who espoused practical phrenology.<sup>171</sup> John Starrett Hughes, in his comprehensive biography of Isaac Ray, described Ray's unwillingness to publicly and explicitly endorse phrenology. Hughes believes that Ray was trying to avoid the negative connotations of the science. He had decided that it was better to ensure that his model of insanity

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<sup>169</sup> Spurzheim, *Physiological System*, pp. 565-566.

<sup>170</sup> Ray, *Medical Jurisprudence*,  
<<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, pp. 240-241.

<sup>171</sup> Davies, *Phrenology*, pp. 65-75.

was accepted, rather than attempt to further phrenology's cause by citing it explicitly.<sup>172</sup> Ray did not mention phrenology by name in the *Treatise*, but he did refer to a mysterious persecuted science that he believed could completely reform the treatment of the mentally ill. He lamented that

The only metaphysical system of modern times, which professes to be founded on the observation of nature, and which really does explain the phenomena of insanity, with a clearness and verisimilitude, that strongly corroborate its proofs, was so far from being joyously welcomed, that it is still confined to a sect, and is regarded by the world at large, as one of those strange vagaries, in which the human mind has sometimes loved to indulge.<sup>173</sup>

This “metaphysical system” was phrenology, and although Ray clearly believed in the value of the science, he was so wary of the consequences of an association with it that he avoided mentioning it by name. Although he utilised phrenological principles, he realised that if he were to explicitly declare his support for phrenology then his book would be associated with head reading and fall victim to the moral and philosophical criticisms of the science. Ray's subsequent career suggests that his decision to withhold explicit support for phrenology was a wise decision. Ray appeared as a witness in at least one trial, and testified that the right versus wrong test was flawed. He also argued that some maniacs are unable to resist criminal

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<sup>172</sup> Hughes, *Isaac Ray*, pp. 61-69.

<sup>173</sup> Ray, *Medical Jurisprudence*, <<http://galenet.galegroup.com.ezproxy1.library.usyd.edu.au/servlet/MOML?af=RN&ae=F105365208&srchtp=a&ste=14>>, p. 66.

action.<sup>174</sup> His role as a medical expert suggests that not all of Ray's contemporaries were necessarily philosophically opposed to phrenology. Indeed, Hughes notes that some lawyers were very excited by Ray's ideas, and were fully aware of their phrenological foundations.<sup>175</sup> Ray had found some legal supporters, who were even more interested in his ideas because they represented a nexus between phrenology and jurisprudence. But these supporters were ardent believers in phrenology themselves. What of the legal authorities who were not phrenologists? How did Ray's ideas appear in a trial as significant as *McNaughtan's*, when none of the lawyers were phrenologists?

Legal authorities considered Ray's ideas because he had deliberately altered them to make them palatable to a courtroom audience. *McNaughtan* was a single moment in phrenology's split into intellectual and practical forms of the science. The role of phrenology in *McNaughtan* was the result of negotiation between medical expertise and legal authority; a process exemplified by Ray's *Medical Jurisprudence of Insanity*. It was a period during which medical experts were beginning to appear more frequently in insanity trials.<sup>176</sup> Not only were they appearing more frequently, but they were also beginning to challenge lay understandings of manifest madness. Doctors were given the task of diagnosing insanity using medical expertise, rather than relying on the obvious signs of insanity brought to the courtroom by lay witnesses.<sup>177</sup> Ray's incorporation of phrenology was a step in this process. He was a member of a profession that was engaged in a struggle over the correct definition of insanity, and realised that his ideas remained controversial. In order to manage this

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<sup>174</sup> Hughes, *Isaac Ray*, p. 122.

<sup>175</sup> Hughes, *Isaac Ray*, pp. 64-65; 67-68.

<sup>176</sup> Eigen, "I answer as a physician", pp. 171-172.

<sup>177</sup> Eigen, "I answer as a physician", p. 180.

controversy, he declined to mention the foundation of his ideas by name. Instead, phrenology played a vital yet unstated role in his work, which flowed into Cockburn's courtroom argument. For example, as shown in Chapter 2, Cockburn relied on Ray's theories to support his argument that the proper legal test of partial insanity should be a test of delusion, rather than a test of knowledge of right and wrong.<sup>178</sup> Neither Ray nor Cockburn explicitly declared that this test relied on a phrenological conception of mind, but in reality, Ray's theory rested on philosophical phrenology. Its appearance in *McNaughtan* shows that his ideas were acceptable, although phrenology was still controversial. That is, phrenology had negative connotations, but the content of the discipline could sway a court. Ironically, Ray's willingness to abandon explicit references to the science was the key to its eventual adoption.

Phrenology's role in legal cases was not limited to the hidden influence of the philosophical side of the science. Practical phrenology also appeared in some courtrooms. This phenomenon was more common in the United States, although it was still a rare event. In 1834, a young boy was accused of a violent crime, and was examined by a number of phrenologists before his trial, including Isaac Ray. The boy's lawyer was a keen adherent of phrenology who attempted to use the case to introduce phrenology to the law. This argument would be based on a practical phrenologist's diagnosis of a large organ of Destructiveness, and the lawyer intended to argue that this abrogated the boy's responsibility. This argument was distinct from the arguments of medico-legal experts such as Ray. Ray used phrenology to propose a theory of insanity, while this lawyer wanted to use the science to diagnose

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<sup>178</sup> *R v McNaughton* (1843), p. 45.

individual cases of insanity. Despite this distinction, Ray was disappointed when the defence case was unsuccessful.<sup>179</sup> Phrenology did not always take such a central role in criminal trials. In 1857, the *New York Times* carried a phrenologist's description of the head of a prisoner awaiting trial for murder. The correspondent did not refer to questions of will or responsibility, but instead preferred to judge guilt and innocence using practical phrenological techniques.<sup>180</sup> This evidence encourages a reassessment of Joel Peter Eigen's claim that phrenology did not make an explicit appearance in the courtroom.<sup>181</sup> It appeared in American courts and coverage of American trials. However, despite the transnational nature of phrenology, England and the United States diverge on this point. The examples above indicate that practical phrenology was closer to the law in the United States than it ever was in England, and work to contrast the two legal systems and their relationships to practical phrenology. Furthermore, Eigen may have been correct when he argued that references to phrenological organs were unacceptable to the courts. Eigen believed that phrenological language was too unfamiliar to the lawyers and jurors. It is more likely that medical witnesses were discouraged from discussing practical phrenology because of the courts' unwillingness to accept a comprehensive method of assessing insanity that would supplant the jury's role. As the debate in the House of Lords demonstrates, some authorities resisted medicine's power to invalidate lay understandings. Practical phrenologists eschewed the philosophy behind the science in favour of applying its insights to the everyday situations around them. This

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<sup>179</sup> Hughes, *Isaac Ray*, pp. 57-60.

<sup>180</sup> *New York Daily Times*, 'A Phrenologist's Examination of Cancemi', 13 August 1857, ProQuest Historical Newspapers <<http://ezproxy.library.usyd.edu.au/login?url=http://proquest.umi.com/pqdweb?did=78503969&sid=2&Fmt=2&clientId=16331&RQT=309&VName=HNP>>, viewed 20 April 2008, p. 3.

<sup>181</sup> Eigen, 'Delusion in the Courtroom', pp. 44-45.

phenomenon extended to the determination of guilt and innocence. However, the Lords' response to the outcome in *McNaughtan* emphasises the limits that could be placed on the ability of medical experts to challenge the jury's role in deciding guilt, innocence, sanity and insanity.

The contrast with practical phrenology illustrates the part intellectual phrenology played in the *McNaughtan* trial, and its role in English professional society.

Cockburn did not ask his medical witnesses to measure McNaughtan's head, nor did he refer to phrenology by name. The doctrine had a more subtle influence on his argument. This episode reflects the nature of intellectual phrenology. It was a science that possessed links with other philosophies of the mind and remained theoretically accessible to those outside the medical community. Intellectual phrenologists did not see the point in head reading, and instead offered theories of human will and responsibility. Their science was exactly what a defence lawyer would look for in a medical theory: a discipline that offered a broader definition of exculpatory insanity, but which would not challenge the judge and jury to the extent that they would reject the philosophical underpinnings of the theory. This form of phrenology was subtle and theoretically acceptable. In the decades preceding the *McNaughtan* trial, it had been widely and wildly popular among medical and professional intellectuals. It had then been incorporated into medical theory, which gave phrenological ideas a life that lasted long after the obvious signs of the doctrine had disappeared. It is far from certain that Cockburn or Tindal realised that the argument in *McNaughtan* owed its medico-legal theory to phrenology. Nevertheless, Ray's ideas provided a bridge for phrenological philosophy to make its way into the English criminal law.

## Conclusion

Phrenology shaped the arguments made by the defence in the *McNaughtan* trial. Recognising the role of phrenological ideas – albeit a subtle and camouflaged one – encourages a reinterpretation of the interaction between the science and the legal system in the early nineteenth century. While some historians have looked for obvious signs of phrenology in legal proceedings, their approach ignores the multifaceted and negotiated status of the science. Because of the process through which phrenology was translated into medical jurisprudence, and the controversial status of the practical form of the doctrine, there was no significant nexus between the law and practical phrenology. Instead, only the respectable, intellectual aspect of the science played a role in the law.

Phrenology was incorporated into the law because it functioned in two ways that were very attractive to medico-legal theorists and defence lawyers. The first useful function was its power to legitimate medical diagnoses of insanity. Its power to do so was a product of its physical explanation of character. This foundation meant that it could be used to encourage the legal authorities to accept a doctor's diagnosis of insanity. *McNaughtan's* defence counsel were attracted to the science because it allowed them to challenge lay understandings of insanity. Their ability to do so was vital when their client exhibited behaviour that a lay observer would interpret as a clear sign of sanity. Phrenology was popular at a time when medical experts began to play a greater role in the courtroom diagnosis of insanity, and in which technical explanations of madness supplanted lay visions of manifest madness. Of course, this is not to say that manifest madness disappeared entirely: the obvious signs of

insanity still appeared in lay witnesses' accounts of the defendant's crime, and were a precondition for the decision to raise the insanity defence. Nevertheless, medical experts and their ideas of insanity were playing a greater role in insanity trials, and the physical basis of phrenology allowed them to argue that a physician should provide the final diagnosis of insanity.

The second important function of phrenology was as an explanation of the phenomenon of partial insanity. Because phrenology explained mental phenomena by referring to discrete organs of the brain, it could account for some defendants' ability to reason and function while also exhibiting delusion on specific topics. Phrenologists argued that the phrenological faculties could account for this strange behaviour, because the faculties relating to the obsession were diseased while the rest of the brain was healthy. The rise of phrenology was linked to the recognition of this form of insanity as a bona fide excuse for crime. While it is difficult to argue that phrenology caused the acceptance of partial insanity as a sufficient excuse for crime, the phrenological idea of discrete faculties gave physicians and defence lawyers the tools to legitimate this form of insanity in the courtroom. In the *McNaughtan* trial, the medical testimony played a particularly important role in persuading the bench to stop the trial. After a difficult birth, the concept of partial insanity had arrived in a form that was palatable to the court. The response of the House of Lords to the verdict complicates this picture, and suggests that even after the trial, there was still substantial disagreement regarding the extent to which medical accounts of insanity should be permitted to dominate insanity trials. Despite the reaction of the House of Lords and the watering down of the verdict in the *McNaughtan* Rules, it was clear



that phrenology had begun to influence the way insanity was understood and represented in the courtroom.

The final element to phrenology's role in the law was the discipline's status as a respectable, if controversial, scientific theory. Phrenology had a multifaceted identity, which included both a philosophical and intellectual element and a practical element. The intellectual elites considered the practical form of phrenology dangerous and unscientific, while it had substantial appeal to a lay audience who wanted to understand their own character and mind. Although the functional elements of phrenology contributed to its appeal, the doctrine still had to be accepted by the elite legal authorities. Thus, practical phrenology, and the practice of head-reading, were not accepted in the highest courts. Although it appeared in some trials, and in the coverage of some cases, practical phrenology did not take root as a tool for the diagnosis of insanity or the assessment of guilt and innocence. Instead, the explanatory and metaphysical power of intellectual phrenology led this form of the science to play a role in the medical definition of insanity. At a time when the medical profession was playing a greater role in insanity trials, it was just a short step from the major works of medical jurisprudence into actual legal proceedings.

This account of the interaction between phrenology, law and medical expertise are consistent with other historians' observations of the nineteenth-century development of these three bodies of knowledge. Medical experts' determination to control asylums and to contribute to the definition of insanity made certain legitimating ideas very attractive to this audience. Asylum managers' adoption and adaptation of phrenology provided a vehicle for phrenological ideas to influence the legal system.

This process has been explored by Scull and Cooter, who conclude that medical experts were eager to accept ideas that furthered their own influence over the diagnosis and treatment of insanity.<sup>182</sup> Phrenology's power to explain partial insanity, and the attractiveness of the doctrine that resulted from this explanatory power, has been observed by both Weihofen and Eigen, albeit in the context of broader studies of the insanity defence.<sup>183</sup> This thesis offers a detailed analysis of the attraction and function of phrenology in the law, and explores its role specifically within the *McNaughtan* trial. Finally, this thesis draws on the division of phrenology into practical and intellectual strands, proposed by the seminal accounts of the discipline.<sup>184</sup> The result of the integration of these three areas of scholarship, combined with a detailed analysis of the defence argument in *McNaughtan*, is a clearer picture of phrenology's subtle role in the development of legal doctrine.

This account of the development of the insanity defence suggests that medical ideas were not easily incorporated into the law, and that lay understandings of insanity maintained their power well into the nineteenth century. Dana Rabin has argued that lay understandings of responsibility began to make way for medical and legal definitions of insanity in the late eighteenth and early nineteenth centuries.<sup>185</sup> Martin Wiener, in his discussion of the emerging power of science and medicine to control and diagnose, emphasises the relationship between the content of medical theories of

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<sup>182</sup> Scull, 'Mad-doctors and Magistrates', pp. 279-305; Scull, 'Madness to Mental Illness', pp. 218-261; Cooter, 'Phrenology and British Alienists', pp. 58-104.

<sup>183</sup> Weihofen, *Mental Disorder*; Eigen, 'Delusion in the Courtroom', pp. 25-49; Eigen, *Witnessing Insanity*.

<sup>184</sup> Davies, *Phrenology*; de Giustino, *Conquest of Mind*; Cooter, *Cultural Meaning of Popular Science*.

<sup>185</sup> Rabin, *Legal Responsibility*, pp. 111-169.

insanity and a fear of the diseased will in the mid nineteenth century.<sup>186</sup> Roger Smith, in his comprehensive study of the interaction of medicine and the criminal law in the nineteenth century, argues that phrenology “served as a linguistic and conceptual bridge in the transition to physicalist views.”<sup>187</sup> This thesis has shown that Smith was correct to argue that phrenology was a stepping-stone between lay understandings of insanity and the medical theories that were beginning to replace them. The defence in *McNaughtan* emphasised a test with appeal to both lay and medical participants, and the science itself served as both a legitimisation of medical expertise and a means for laypeople to participate in metaphysical debate. However, this thesis also suggests that the process of medicalisation of the definition of insanity identified by these three historians was not a smooth one. Instead, understandings of insanity were negotiated between lay, medical and legal participants. Even phrenology, despite all its lay appeal, was reinterpreted and concealed before its core scientific ideas could be incorporated into legal doctrine.

This analysis shows that a study of the power of scientific ideas in a legal context must be sensitive to the cultural significance of an idea, as well as its functional power. An argument about the role of phrenology in the law would be incomplete without a study of the significance of the different strands of phrenology to different audiences. It also shows that an analysis of the utility of scientific ideas in a legal context must be sensitive to unstated influences on the work of individual theorists. In Ray’s work, phrenology was hidden because he realised that his faith in phrenology could taint his conclusions. Phrenology had been camouflaged, but the logical conclusions of the science survived this process intact. From Ray’s work, it

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<sup>186</sup> Wiener, *Reconstructing the Criminal*, pp. 10-12; 162-170.

<sup>187</sup> Smith, *Trial By Medicine*, p. 43.

was a short step to playing a fundamental role in the defence argument in *McNaughtan*. Phrenology's role in the insanity defence was the result of a subtle process of concealment and negotiation, rather than an outright acceptance of the practices of the science.

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