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## MENTAL DISORDER AND CRIMINAL RESPONSIBILITY

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The most widely accepted test of irresponsibility for a crime, on a plea of insanity, is whether the accused had "capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question . . ."<sup>1</sup> Conviction on the charge results in a verdict of either "guilty," or "not guilty, by reason of insanity." The acceptance of this test makes the formula the measure of justice rather than an independent consideration of the accused's capacities for responsibility, which is the basis of selection for responsible tasks in our society. Capacity for responsibility is a qualitative faculty not equally bestowed by the Creator, and can be materially altered by life experiences. It is proposed to show that the present method of fixing criminal responsibility is not just, is not especially protective of society, and is not in consonance with present knowledge of human behavior.

The aim of law is protection of society and justice for the person convicted of crime against the particular society or one of its members. A society which cannot afford justice for individuals is either so insecure or so depraved as to null the very purpose of its organization. A formula defining responsibility or irresponsibility in human behavior cannot do justice to individuals of unequal endowment in intellect, emotional stability, or probable intervention of various mental illnesses. These differences are often expressed in substantial disabilities which are not exposed by mere knowing right from wrong, and disregard of these must lead to legal perpetration of injustices.

The present yardstick of criminal irresponsibility discloses nothing affirmative about possible mental handicaps at the time of the criminal act, unless it shows that the accused possessed the consciousness and physical force to wield the lethal weapon. Paradoxically, the required knowledge of right from wrong is generally held to be of a moral<sup>2</sup> rather than of a legal nature; goodness from badness or evil in a social sense in interhuman relationships. The legal presumption that everyone has the requisite knowledge of criminal law precludes tests for determination of such knowledge.

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1. State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889).  
2. People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915).

Moral concepts are largely formed in infancy and early childhood. The wrong in doing injury to others, even killing of some domestic animals, and the Ten Commandments are indoctrinated by home, school, and the churches. When mind is perverted by injury, disease, or failure of function, the earliest instructions are the last to fail. Senile dementia is peculiarly marked by failure of memory for recent events with fair retention and recall of very remote memories. Amnesia victims who may not recall their own identity generally answer correctly questions about moral right from wrong. Mentally delapidated patients (chronic psychotics, functional type), after years of confinement in mental hospitals, have astounded lay persons with their retention of skills and learning acquired prior to the mental breakdown. Thus, the musician can recall much of his musical repertoire; a minister can deliver some of his tried sermons; the artisan some of his special skills, and so on. These findings are the rule rather than the exception. Moral concepts and trained behavior are generally demonstrated as automatic responses; only on special occasions does the individual require deliberative mentation to express them. Persons in ambulatory delirium, from whatever cause, may condemn themselves by the prevailing test; drug and alcohol delirium are well known to have been associated with grave crimes. Although wilfully induced intoxication is generally held as no excuse for crime, it seems certain that the condition of delirium or pathologic effect is neither intentional nor anticipated. Besides, there are many other causes for ambulant, delirious states which are completely of an involuntary nature. The important point is that such obviously sick people can answer correctly to the right from wrong test, but will show gross defect in reasoning "as not to know the nature and quality of the act" charged against them which relates to intent, premeditation, and deliberation requisite to a first degree murder conviction.

The magic power of precedent, the lack of agreement on more flexible principles, and the morbid social hostility towards criminals are the probable causes for continuing the M'Naghten Rules as the yardstick of criminal irresponsibility. These rules were formulated by 14 of the 15 highest Judges of England in 1843 as answers to five hypothetical questions posed by the House of Lords. Of immediate interest is the answer to questions II & III, to wit: "to establish a defense on the ground of insanity, it must be clearly proven that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he

was doing what was wrong."<sup>3</sup> Mr. Justice Maule wrote a separate opinion. He first protested the burden of answering to hypothetical questions without arguments on the subject, and that the answers may embarrass the future administration of justice. (His foresight was prophetic.) He nevertheless gave as his opinion "To render a person irresponsible for a crime on account of unsoundness of mind . . . it has long been understood and held, (the unsoundness of mind) be such as rendered him incapable of knowing right from wrong."<sup>4</sup>

The M'Naghten rules intended a firmer footing for the legal thinking of the period. Law is interested primarily in the collective security and an orderly functioning of a particular society. Application of law should take cognizance of changes in public policy and keep abreast of scientific progress relating to human behavior. The law concerned with criminal liability is behind the times many years, perhaps, because the public would rather despise than understand a known criminal. A formula based upon "what has long been understood and held" over one hundred years ago determines today whether a person accused of murder shall live or die.

Crime often results from perversion or aberration of a sane mind. It may follow sanctioned social activity, like the pathological reactions from alcoholism, or the "oiled" tempers of inebriate celebrants. Neurotic and psychopathic persons clash with the law largely as a result of prevailing social pressures. Psychopaths are adversely influenced by the inconsistencies in our moral, religious, and social practices. Among the youth of Central Europe must be thousands of malignant psychopaths, products of a hateful ideology and a protracted merciless war. They understand the accepted right from wrong, but respond with perverted attitudes towards social values; the preciousness of life is greatly discounted, and the sacredness of private property even more discounted. Combat trained soldiers returned to civilian pursuits may harbor hatreds and a taste for blood. Press reports indicate a post-war rise in criminal activity, most marked among those of military age of World War II, in this country and abroad. Increased criminal activity and psychopathic behavior are well known aftermaths of wars.

Social resentment of crime is justified, but the criminals are entitled to be understood. Society should recognize its share in the precipitation of criminal behavior, although not entirely to blame. Fuller understanding of the criminal would lead to a higher level of justice while

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3. 10 Clark and Finn 203.

4. *Ibid.* 205.

still providing the desired protection for society. When crime is due to a mental illness which is amenable to treatment, the criminal should be placed under treatment; those handicapped by mental deficiency or organic brain damage beyond remedy should be segregated under effective control; whether in a hospital or an institution with maximum security facilities is a matter of secondary consideration.

These views have been widely accepted in dealing with juvenile delinquency and non-capital crimes. It is shown by the increasing number of institutions to deal with such offenders, and the growing popularity with courts of mental hygiene clinics and psychiatric consultation services. There is no factual support for the legal presumption of uniform capacity for responsible conduct in a conglomerate population, nor for the myth that individuals are possessed with a "free will." The fallacy of the first is within common knowledge. Every population has persons of exceptional intellects, from the idiot to the superiorly endowed. It has been reliably determined that about 10% of the general population is of moronic or lower intelligence. During the last war it was evident in dealing with millions of troops that intellect alone is not a sufficient criterion for attaching responsibility; even those with superior intellects may lack capacity for discharging responsibility. Knowledge about human behavior has progressed far since "the wild beast test" and "the child of fourteen years test," were the measuring rods for legal responsibility.

The assumption that man functions by a "free will" is a myth thoroughly exploded. Psychoanalytic studies of human behavior have revealed beyond question the dynamic influence of the subconscious. It is within common experience that daily behavior is largely performed thoughtlessly, that behavior patterns are often directed by undisclosed motivations. The subconscious of the normal individual is finely regulated to a working balance between primitive or infantile goals (the *id*), the aspirations or desired esteem (*super-ego*), and the mediator (*ego*) between the two relatively conflicting drives. Social behavior expresses the effectiveness of ego control. This effectiveness may be readily disturbed by disease, intoxication, and sudden change in emotional tension. Predominance of the *id* suppresses inhibitory controls, permitting primitive or socially unaccepted behavior. Under such behavior the elements of premeditation and intention may be reduced to the type and quality found in beasts. This is already recognized in jurisdictions which permit a plea of "heat of passion" as a defense.

The inhibitive mechanism in human behavior is protective against self-

debasement. Failure of function may indicate a powerful *id* or an inflated super-ego; the former generally results in an amoral or lawless character, the latter, in behavior of opposite extreme such as exaggerated piety and honesty. Chronic alcoholics, drug addicts, and persons with other pronounced behavior disorder often evidence powerful demands from the *id*, as well as from the super-ego. Thus alcoholics and psychopathic personalities may voluntarily reduce themselves to the lowest dregs of society and yet be ready to fight over the slightest aspersions upon their persons or characters. This sensitiveness, of course, may also be due to inadequacy of the super-ego. Murder is one of the most debasing crimes against society. Yet, there are more would be murderers than the records can show; the wish is not unknown even to completely normal persons. The threshold for criminality varies with individuals and in the same person at different times. Through factors beyond control of the individual the "free will" may become "the will of the wisp."

Clearly, the test of insanity based upon knowing right from wrong can do grave injustice to many accused. Most psychotics (insane, in legal language) retain indefinitely approved ethical concepts in relation to specific deeds, and to the wrongness of murder in particular. This presents an incongruous and an untenable legal situation which should be resolved. An accused person may die if he knew right from wrong at the time he committed the act, even though he may have been at the time mentally disordered, as judged medically; he may yet escape punishment, if he is found insane (committable to a mental institution) before, during or after trial. A man might be found guilty because he knew right from wrong but may not be executed because of being medically insane. This generally requires that the insanity shall be manifest, which must be taken to mean obvious, at some time after the crime, and, of course, before execution. A patient on temporary leave from a mental institution who commits murder or rape, knowing such acts are wrong and punishable, will be punished in those jurisdictions which hold the "right from wrong" test as the only criterion for responsibility. Practically all jurisdictions hold that an insane person is not to be executed, yet the concept of responsibility which may lead to capital punishment bears no determining relation to the concept of mental illness warranting civil commitment to a mental institution. Why should there be different standards of irresponsibility for the same person at different times? The present formula for irresponsibility, indeed, gives a tenuous support to the justice in our laws; a human life is balanced against it, suspended by a hair.

The special defence of "partial delusion" is no improvement. It is inconceivable in the present state of our knowledge to speak of anybody as partially insane and otherwise normal. Only relatives of insane persons may be heard to speak of mental patients as being, say 85 percent normal, to feel encouraged about the outlook. Such partially insane persons, presumably delusional, must meet the standards of judgment in relation to criminal acts as is expected from normal persons, according to the M'Naghten rules. If the accused does not meet this protective standard, "and is not in other respects insane," he is punishable as a normal person. If relief is sought from "in other respects insane," the probable outcome has already been considered.

The present application of the law does not provide maximum protection for society. Criminal law is punitive and also exemplary, primarily to safeguard individuals in a society, and the orderly functioning of the society itself. Capital punishment has not served well to materially reduce the incidence of murder. Religion with its promise of reward in the hereafter for good deeds and, most unattractive, everlasting punishment for grave sins has not effectively discouraged criminal activity even in religious persons. The annual rate of legal executions and the increasing population in our penal institutions is evidence that the present system is not successful despite its long history of operation, that it is a system created out of fear rather than as an intelligent approach to a problem. It cannot be said that it is the best system or that it has not yet received sufficient trial. In other social endeavors experience and newer knowledge have caused social, political and legal changes.

The answer to the present dilemma is not for more indiscriminate executions. The desired security and greater justice in our penal system would be as well, if not better, served by a fairer and fuller consideration of the criminal's mind at the time of the crime, and not alone by whether he knew "right from wrong." Society has known a long time about institutions of maximum security; many men have died in such institutions as proof of their effectiveness. A verdict and judgment based upon capacity for responsibility at the time of the crime would avoid absolution for some doubtful cases, while allowing a greater measure of justice for mentally ill persons accused of crime but who cannot be squeezed under the line of the protective formula.

The degree of guilt which attaches to a deed cannot be separated from the state of mind of the accused at the time of the crime. Under the established tests persons with severe forms of mental disorder may

be held responsible. Such practice ignores realities concerning human behavior, and cannot be justified by the mere lack of more adequate tests or any difficulties in applying more just principles. This point of view has been variously recognized for a long time, in instances too numerous to recite. In *Sage v. State*, 91 Ind. 141 (1883), the court stated that "the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury . . . the better to enable them to judge of its character." This is clearly a sane and humane principle of justice. Legal minds are frequently slaves to time-honored rules, and quite indifferent to a reasonable evaluation of the life under consideration. It is not unusual for the prosecution to pass over or ask exclusion of collateral information and demand that the verdict be based entirely on the established test. Members of appellate bodies have been known to summarize expert testimony on the probable state of mind of the accused by asking "Well, did he know right from wrong at the time?" Answers have had to be given in the affirmative, even though the degree of mental disorder at the time precluded an appreciation of the nature and quality of the act. A moment of reflection will convince that the two conditions are not synonymous and may co-exist.

Weihofen and Overholser<sup>5</sup> claim that "one who lacked comprehension of the nature and quality of his act cannot be said to have had any intent with regard to that act." They ask the question, "how can one justify holding a person guilty of a deliberate and premeditated killing when he did not deliberate and premeditate, and, indeed, was incapable of deliberating and premeditating?" In *Torres v. State*, 39 N.M. 191, 43 Pac. 2nd 929 (1935), the court defined deliberation as "a thinking over with calm and *reflective mind*" (italics mine). In the case of *State v. Friedrich*, 4 Wash. 204, 29 Pac. 1055 (1892), it was held that when the statute divides murder into degrees, proof is required of the actual existence of premeditation and deliberation to convict in the first degree. The Oregon Code Ann. #23, 414 (1940), requires the deliberation and premeditation be evidenced by "proof that the design was formed and matured in cool blood, and not hastily upon the occasion." Absence of the required premeditation and deliberation, with a "reflective mind," does not preclude knowledge of right from wrong as regards the particular act. The malignant psychopath tainted

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5. WEIHOFFEN, HENRY AND OVERHOLSER, WINFRED, *Mental Disorder Affecting the Degree of a Crime*, THE YALE L. J. 56:959, June 1947.

with the brutalities of a protracted war and possibly with an ideology which totally discounts human values, when in the course of committing petty crimes also commits an especially brutal and heinous murder, the probabilities are that the graver crime was committed without the premeditation and deliberation of a first degree murder. When a participant in a drunken brawl hits a fellow reveller with a lethal weapon and kills him, there is not only the question of the requisite premeditation and deliberation, but also whether he knew the nature and quality of the act; he may readily have known that what he was doing was wrong.

One may question the full validity of Weihofen and Overholser's statement that a mind so disordered as not to know the nature and quality of the act "cannot be said to have had any intent with regard to that act." This could be true for cases of acquired temporary or permanent disorder of the mind. It probably would not apply to severe mental defectives of mature bodies and infantile intelligence. The latter can show sufficient intent without appreciating the nature and quality of the act. The apparent brutal acts of children are frequently due to the insufficiency of knowledge of the nature and quality of their action; their motivations are allowed ventilation because of this deficiency. One of the authors apparently reversed himself from a previous opinion which he held on the meaning of "not to know the nature and quality of the act." Fifteen years previously he believed there was no difference between this clause and "right from wrong" test. The joined authors reach the sound conclusion that "The theory that mental disorder, though not so pronounced as to come within the tests of criminal insanity, may nevertheless negative the particular intent requisite to the crime charged, will continue to make progress in the courts. . . . Its logic has not yet been refuted by any court, and it will not permanently be disposed of by mere summary rejection."

#### SUMMARY AND CONCLUSIONS

A concept of mental disorder in relation to criminal activity is presented. Medical appreciation of the problem supported by statute and judicial opinion warrants considerable broadening of the present tests of criminal irresponsibility. The principle of guilt for a criminal act according to mental capacity for responsibility, is supported. The whole issue so important to the basic tenets of the Federal constitution, as the question of life or death for inhabitants of this country, should not be left to state jurisdictions but controlled by Uniform Criminal Liability Law. It should be abhorrent to judicial minds that any

human being might suffer legal death by the sheer accident of residence in a particular jurisdiction. One of the prime purposes of law is justice. No just law can be ageless; it should bear relationship to a specific time and society. It cannot have literal application for a changing and unpredictable civilization. Law in essence is a book of rules by which a society seeks security and order. The judiciary *interprets* the rules, passes judgment, and imposes penalties for violations. This power vested in the judiciary should not be exercised without regard for the human beings affected, without awareness of change in the social and economic pressures upon the persons involved, or without notice of newer knowledge about human behavior. A just application of law would seem possible only through the instrumentality of thinking, living and feeling minds, in relation to persons rather than acts or things. It is suggested that the punishment be set to fit the accused or criminal, not the man of one hundred years ago but the man today, under modern conditions of social responsibility. Society could be more adequately protected under such a rule; there would be less likelihood of abuses than is possible under the present system which often permits premature freedom for murderers. Any difficulties in the application of the enunciated principles can be resolved once recognized as a sound and just approach; mere difficulty in application is not a warranted basis for rejection.