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Henry Weihofen

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CAPACITY TO APPRECIATE "WRONGFULNESS" OR "CRIMINALITY" UNDER THE A. L. I-MODEL PENAL CODE TEST OF MENTAL RESPONSIBILITY

HENRY WEIHOFFEN

The author is Professor of Law at the University of New Mexico, a position he had held since 1948. He has also taught at the law schools of the University of Colorado and the University of Puerto Rico.

Professor Weihofen holds three degrees from the University of Chicago: a Ph.B., 1926; a J.D., 1928; and a J.S.D., 1930. He practiced law in Chicago from 1930-1932.

In addition to Professor Weihofen's numerous writings he is the author of several books, one of which is *Mental Disorder as a Criminal Defense* (1954).

Although the M'Naughten test of criminal irresponsibility is now more than 120 years old, and has been applied in hundreds of cases, one ambiguity in its wording has never been resolved: does the criterion of whether the accused knew that the criminal act was "wrong" mean legally wrong or morally wrong? Few cases have even discussed the question, and those that have, have disagreed in their answers.¹

The American Law Institute's Model Penal Code specifically declines to resolve the issue. In its tentative drafts, it did undertake to do so; as then worded the Code spoke of capacity to appreciate the "criminality" of the act. But the Proposed Official Draft of 1962 inserted, as an alternative term, "wrongfulness".² The comments

¹ Some cases have held that "wrong" means legal wrong, i.e., knowledge that the act was prohibited by law. *State v. Foster*, 44 H. 403, 354 P.2d 960 (1960); *State v. Andrews*, 187 Kan. 438, 357 P.2d 739 (1960). This is also the interpretation adopted in a leading English case, *R v. Windle* [1952] 2 Q.B. 826, 2 All Eng. 1. The leading case to the contrary, holding that in proper circumstances the word ought not to be limited to legal wrong, is *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915). In *State v. Kirkham*, 7 Utah 2d 108, 319 P.2d 859 (1958), the Court deliberately used the disjunctive and said that a defendant is to be acquitted if he either did not know that the act was wrong morally or did not know it was prohibited by law. See also *People v. Benton*, 144 Cal. App. 2d 600, 301 P.2d 620 (1956); *People v. McDonough*, 198 Cal. App. 2d 84, 17 Cal. Rptr. 643 (1961); *State v. Davies*, 146 Conn. 137, 148 A.2d 251, cert. denied, 360 U.S. 921 (1959); *State v. Thorne*, 239 S.C. 164, 121 S.E.2d 623 (1961).

² "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." American Law Institute, Model Penal Code, §4.01(1).

to the Code give no arguments for preferring one over the other. Legislatures or courts considering adopting the Code's formulation are thus given no help in deciding which word to choose.³

The purpose of this paper is to suggest that the preferable word is "wrongfulness."

If we are to hold a person mentally responsible for his criminal act unless he is so disordered as to be unable to appreciate its criminality, we shall have to condemn as responsible and fit for punishment some of the most wildly disordered persons ever seen—for example, persons with elaborately developed delusions who hear "voices" and who kill while believing that the deed was commanded by God. Such a person may know full well that the act was a violation of the temporal law. He may even commit it precisely *because* he knows it is criminal: believing that he is the reincarnation of Jesus Christ, ordained again to suffer execution, he commits an act that will bring about that result. As long ago as 1800, just such a case was tried in England. That was

³ In *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1963), the Court in adopting the code wording repeated it verbatim, with "wrongfulness" in brackets following "criminality," thus leaving unresolved the choice between them. In the important case of *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966), the court specifically chose "wrongfulness" instead of "criminality" because "we wish to include the case where the perpetrator appreciates that his conduct is criminal, but, because of a delusion, believes it to be morally justified". *Id.* at 622, n. 52. Illinois and Vermont have by statute adopted the Model Penal Code wording in the earlier version using the word "criminality". *Smith-Hurd's Ill. Ann. Stat.*, c. 38, Sec. 6-2 (1964); *Vt. Stat. Ann.*, Tit. 13, Sec. 4801 (1958). Kentucky in 1963 adopted the Code formula by judicial action, including the same interpretation ("that he was violating the law"). *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963).

the famous case of Hadfield,⁴ a war veteran who had been discharged from the British army on the ground of insanity. He was suffering from systematized delusions that, like Christ, he was called upon to sacrifice himself for the world's salvation. He therefore shot at King George III, so that by the appearance of crime he might be condemned, and thereby lay down his life as he felt divinely called upon to do. Hadfield was acquitted on the ground of insanity, largely because of the brilliant handling of the case by his counsel, Lord Erskine. Under the "criminality" wording of the Model Code formula, it would seem that latter-day Hadfields would have to be condemned.

The famous M'Naughten's case⁵ itself, from which the present rule derives, involved a defendant suffering from delusions of persecutions of exactly the sort just described. To quote from M'Naughten's own testimony:⁶

The Tories in my native city have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland and all over England; in fact, they follow me wherever I go. I can get no rest from them night or day. I cannot sleep at night in consequence of the course they pursue towards me. I believe they have driven me into a consumption. I am sure I shall never be the man I formerly was. I used to have good health and strength, but I have not now. They have accused me of crimes of which I am not guilty; they do everything in their power to harass and persecute me; in fact they wish to murder me. It can be proved by evidence. That's all I have to say.

M'Naughten was found not guilty by reason of insanity. But if we adopt the first, and apparently preferred, wording of the Model Code, such paranoiacs will presumably have to be convicted—if the jury follows the instructions on the law. Actually, I doubt whether a jury in our day would be any more willing to convict such a person than was M'Naughten's jury in 1843. But then they

⁴ 27 How. St. Tr. 1281.

⁵ 10 Clark & Fin. 200.

⁶ Quoted in Ellison and Haas, *A Recent Judicial Interpretation of the M'Naughten Rule*, 4 BRIT. J. OF DELINQUENCY 129 (1953); and in Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320, 324 (1955).

would have to flout the law. Surely we should not impose legal rules so harsh that juries will gag at applying them, especially by adopting a form of wording whose broad purpose is to liberalize the historic test.

Dr. Charles Mercier forty years ago denounced such a narrow view. "As well," he said, "might we convict of high treason the general paralytic who claims the crown of England. He knows that the world considers wrong the act that he does. He knows that it is against the law. But he does not know and appreciate the circumstances in which he acts".⁷

This restriction calls for a legalistic approach that would seem absurd to anyone but lawyers. Suppose a fairly typical paranoid case, where the person has delusions of persecution—like M'Naughten's. He thinks "they" are after him. "They" may be "the Tories", or they may be "the Catholics" or "the Masons", or he may be unable to make clear just who he thinks "they" are. But they are after him. When he walks along the street they follow him. At work or at home, he feels their eyes upon him; always he sees them lurking. At night they peek through his windows. They send noxious fumes through the keyhole to poison him; they send deadly rays right through the walls; they send sound waves by radar, mocking him and telling him that he is in their power. Driven to desperation by this incessant hounding, one day he turns and shoots someone on the street who he believes is one of "them". To determine whether this man should more properly be sent to a mental hospital or to prison or to the electric chair by asking whether he knew that his act was criminal would be ridiculous. First of all, it might be a nice question for lawyers and judges themselves to ponder whether the act was criminal or not. Perhaps this could be deemed self-defense. Whether it was or was not might depend upon whether the defendant thought they were trying to kill him or merely to mock, harass, and bedevil him. Even if he thought his life was in danger, it might make a difference whether he thought the danger was direct, as by shooting poisonous fumes into his bedroom, or indirect, as where they were trying to drive him out of his mind, or drive him to suicide. Even if direct, and if he thought the man he shot was one of those who were trying to kill him, was it criminal to shoot him at a moment

⁷ MERCIER, CRIMINAL RESPONSIBILITY 193 (1926).

when the man was not making any such attempt, but was only following him? Should the defendant have run away and called the police instead of shooting, if it was safe to do so, and did he think it was safe?

Suppose the reason he did not call the police is that he had already complained repeatedly to the police, but had—as we can understand, but he could not—got no help from them. Suppose he knew that taking the law into one's own hands is ordinarily not permitted, but he felt he had no other recourse?

The legal technicalities involved make this a pretty good law school examination question, on which normal and intelligent law students might exercise their powers of legal reasoning. To ask whether a mentally disordered person was able to appreciate the "criminality" of his actions in such a situation is preposterous. We can say of this rule what Judge Ladd said of the so-called "mistake of fact rule"—a part of the rules laid down in M'Naughten's case which is now generally disregarded—the rule that a person laboring under "partial delusions" only "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were true". Of that rule Judge Ladd said many years ago:⁸

... it is probable that no ingenious student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness.

Many mentally ill persons are grappling with very profound issues of spiritual life. They are trying to deal with their failure to measure up to the moral standard that they have accepted for themselves. Very frequently, they show a strong religious concern. The original problem takes on cosmic and universal form. It becomes a struggle between good and evil, between God and Satan. They feel themselves in tune with some mighty cosmic force which they are likely to personalize under the name of God. They see

themselves in the leading role of a great cosmic drama, the kind of role in which the old Hebrew prophets saw themselves.

A young man of strict religious upbringing finds himself tormented by a strong sex urge. This leads him to yield to fantasies and to actions that his conscience tells him are immoral and sinful. This conflict may dramatize itself to his mind not merely as one between his better and his worse self. He may develop a delusional system in which he sees himself as God's champion in the universal conflict between good and evil. One day he strangles a prostitute with whom he has had relations. He says, in justification, "She was evil; she was a tool of the devil". It would be petty legalism to try to determine his mental responsibility by asking simply whether he appreciated the "criminality" of the act. Of course he did. But for him the conflict was on a much higher plane. He killed under a paranoid delusion that he was carrying out God's will by destroying the very personification of evil. To execute such a person as mentally responsible for his act would shock the sensibilities of any civilized community.

In a sense the mentally ill defendant may be a more moral person than the criminal. The former is often one who by standards that he accepts as his own, stands condemned as unworthy. He cannot bear the thought that those who are nearest and dearest to him should know him as he is. He thus becomes isolated from those who are closest to him and whose approval he wants. His battle is being fought out within.

The true criminal, on the other hand, is one whose imagination has never been kindled by any such ideal, and who when he found the ethical standards of his family and friends too difficult to maintain, gave them up and accepted those of some gang whose code was closer to his own practices. This corruption of morals will probably at least save his sanity, for a man is not likely to fall victim to a psychosis so long as he can belong to some group to whose standards he can conform.

The "standards" may consist largely of verbalizations. We do not merely rationalize acts we have already done or determined upon. We also act *because* we have rationalized. A businessman may undertake a shady transaction because he tells himself that "business is business". Simpler minds especially are inclined to accept a pat or currently accepted verbal cliché as if it were a reason. "I'm a chip off the old block", says a

⁸ State v. Jones, 50 N.H. 369 (1971).

delinquent boy whose father was indeed an old reprobate. The father's influence was no doubt important, but the verbality makes it easier for the boy to follow his pattern. The people who are within or on the margin of the criminal group are not wholly isolated from the ethical ideas of the other members of the society in which they all live. They all know that society condemns killing, stealing and lying, and most of them have not consciously and by logical process refuted and rejected these precepts. More likely, they have made some superficial reconciliation of them by use of some handy clichés. Though killing is wrong, bumping off a squealer is different. Stealing from the rich, who will never miss it, is not like ordinary stealing. Certain forms of dishonesty are not like ordinary cheating, because "everybody does it". In our society, clichés are particularly potent. We are so accustomed to having hucksters use them on us in high pressure advertising that we tend also to use them to "sell" ourselves.

The criminal is not being peculiarly a criminal in this pattern of conduct. He is being a human being. The average, the "normal", man is apt to do the same sort of thing—to seek the solution of conflicts between his ideas and his mundane urges by socializing them with a lowered threshold of conscience, and comforting himself with the thought that he is no worse than his neighbor. Even the Church, the institution that stands for the ethical standards we deem most permanent and universal, has constantly had to find short-cuts and devices that will enable it to bolster up the moral self-respect of its members when they fail to live up to an ideal that is, alas, too high for most mortals to maintain. It therefore introduces confessions, absolutions, and other devices to remove some of the weight of guilt feelings; it overemphasizes credal conformity; it makes much of ritual, and in other ways tends to substitute minor for major virtues and loyalties. It is easy for skeptics to point to this tendency with scorn or with sadness, but it is probably necessary. The effort to maintain the high ideals of any enlightened religion would probably collapse if people were not given such encouragements in the face of human frailty.

So the mentally ill person and the criminal are not alone in this problem. Every human being judges himself by the standards of the person or group with whom he seeks to identify. For the sake of his own mental health, he must belong to some group. If he cannot bring himself within

some group whose standards he can meet, whose standards will serve to justify himself to himself, he will be isolated and destroyed.

The standards by which we judge ourselves are not merely the rock-bottom prohibitions of the criminal law. Rather they are the affirmative standards and ideals of the group with which we wish to identify. This is not necessarily the group to which we *have* belonged; it is the group to which we aspire to belong. Conscience is not merely backward looking; it lies, as someone has put it, on the growing edge of human nature.

If we are to employ appreciation of wrongfulness as a legal test, it is unrealistic to limit it to appreciation of illegality. This is a sterile, armchair logician's test. Its logic, admittedly, is impeccable: the law is concerned only with legality. If a person had understanding enough to appreciate that the act was criminal, but nevertheless commits it, he is responsible. In the words of Isaac Ray, "It is very reasonable, if insane men would but listen to reason". But what Holmes said about law and logic is certainly applicable here. Experience, as distinguished from logic, will show that disordered minds do not reason this way. There are no types of mental disorder in which the patient is typically deluded about the legality of his act. Cases may be found, perhaps, where the facts as imagined might constitute self-defense, for example. But much more often, the act is known to violate the temporal law, but it is committed nevertheless because of delusions involving transcendental issues of eternal righteousness. Limiting the defense to delusions about criminality is not only shockingly harsh; it is also scientifically ignorant.

This restrictive formulation in its harshness might even permit the judges to prevent the jury from tempering law with mercy, as an English case decided in 1952 illustrates. In that case, *R. v. Windle*,⁹ although the defendant pleaded insanity, the evidence was uncontroverted that he knew that his act, giving his wife a hundred aspirin tablets, was illegal. The trial judge therefore took the case away from the jury. The Court of Criminal Appeal upheld him.

The High Court of Australia, in a case decided soon after the *Windle* case, expressly refused to follow it and held instead that "wrong" means morally wrong.¹⁰ The same has been held in

⁹ *R. v. Windle* [1952] 2 Q.B. 826, 2 All Eng. 1.

¹⁰ *Stapleton v. The Queen*, 86 Commonwealth Law Rep. 358 (Aust. 1952). For a debate prompted by the

Scotland.¹¹ And in 1966, the Court of Appeals for the Second Circuit, in the important case of *United States v. Freeman*,¹² adopting the Model Penal Code test, specifically substituted "wrongfulness" for "criminality" because "we wish to include the case where the perpetrator appreciates that his conduct is criminal, but, because of a delusion, believes it to be morally justified."

Windle and Stapleton cases, between Norval Morris and J. L. Montrose, see 16 MODERN L. REV. 435 (1953), and 17 *id.* 383 (1954).

¹¹H. M. Advocate v. Sharp, cited by Mr. C. C. Cunningham, Permanent Secretary, Scottish Home Dept., before the Royal Commission on Capital Punishment, *Minutes of Evidence*, pp. 77, 78, par. 581, 511.

¹²*United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966). A New York Commission on Revision in 1964 recommended amending the state Penal Law, Sec. 1120, so as to adopt essentially the Model Penal Code wording, but using "wrongfulness" instead of "criminality". Temporary State Commission on Revision of the Penal Law and Criminal Code, Proposed New York Penal Law, p. B-4.

People to whom certainty is the most important desideratum should be delighted with the result in the English case. That is exactly how a clear and precise rule should work: easily and simply, like using a yardstick. But the High Court of Australia and the Court of Appeals in the *Freeman* case seem right in rejecting such a restrictive interpretation. A yardstick is too simple an instrument for measuring human behavior. It is better to leave the matter to the jury's discretion, guided by expert testimony as to the defendant's mental condition, than to have it disposed of in this summary and narrow fashion by the judge.

To adopt the word "criminality" instead of "wrongfulness" in the wording of the Model Penal Code's test of mental irresponsibility would be a long step backward. It would subvert the liberalizing purpose behind all the other changes in the wording of the test that the Code would make.