

CRIMINAL RESPONSIBILITY

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“RESPONSIBILITY” is frequently used as a synonym for “liability.” Yet in the criminal law it clearly appears that responsibility and liability are not the same. With this, the criminal lawyer has somehow to deal. Whatever he does, he will be faced with the question: What must there be for there to be responsibility? Answering requires resort to first principles.

I

THE FACTUAL BASIS OF LIABILITY

Liability is imposed by law. There is no liability unless a law is enacted imposing it. But law does not impose liability out of the blue. Whether civil or criminal, there is a factual basis for imposing it; and the factual bases of civil and criminal liability have common elements. These are harm,¹ conduct, and causal relation between the conduct and the harm. At its minimum, conduct is voluntary outward bodily motion. Liability is not imposed for harm caused by involuntary motion.² The teacher of criminal law covers this in his treatment of the overt act and proximate causation.

II

RESPONSIBILITY

Where liability is imposed, voluntary motion, causal relation, and harm are always present. Absolute or strict liability is imposed on the basis of these three elements alone. Hence, in the primary sense that responsibility is the basis of liability, voluntary motion causing harm is responsibility.

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¹ It is “harm that puts the law into motion.” KOCOUREK, *JURAL RELATIONS* 265 (2d ed. 1927).

² Of course, liability may be imposed for omissions as well.

III

CRIMINAL RESPONSIBILITY

Though voluntary motion, causal relation, and harm are essential, these three elements alone are not enough for imposing criminal liability; there must be more. This necessary further element is mens rea or criminal intent, and it is the key to the question of criminal responsibility. The principal explorations of criminal responsibility have been made in connection with the plea of insanity,³ and the tests evoked by this plea all involve mens rea. As was pointed out almost a century ago, when the issue of responsibility is raised in a criminal case, the "real ultimate question to be determined seems to be, whether, at the time of the act, he [the accused] had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent."⁴ Thus, it appears that the essentials of mens rea and of criminal responsibility are the same.

A. What are the Essentials of Criminal Responsibility?

Inquiry can be begun by asking: Why is the factual basis of absolute liability not enough to establish criminal responsibility? The answer is that the causal motion must be more than merely voluntary; it must at least be made negligently; but since negligence is generally considered insufficient, the motion must be made recklessly or with intention to cause the resulting harm.⁵ This is best illustrated by a consideration of the effect of mental disease upon criminal responsibility.

³ "The whole relationship of psychiatry to the law is highlighted by the development of the insanity plea." WERTHAM, *THE SHOW OF VIOLENCE* 8 (1951).

⁴ *State v. Jones*, 50 N.H. 369, 382 (1871). *Accord*, *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *Holloway v. United States*, 148 F.2d 665, 666 n.6 (D.C. Cir. 1945); *Reeves v. State*, 196 Ga. 604, 27 S.E.2d 375, 381-82 (1943); *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501-02 (1844); *People v. Garbutt*, 17 Mich. 9, 20-21 (1868); *State v. Cumberworth*, 69 Ohio App. 239, 43 N.E.2d 510, 512-13 (1942); *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 1024 (1910); CLARK & MARSHALL, *THE LAW OF CRIMES* 336 (1958); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 449 (2d ed. 1960); MILLER, *CRIMINAL LAW* 125 (1934); 14 AM. JUR. *Criminal Law* § 30 (1938); 22 C.J.S. *Criminal Law* § 55 (1961); Annot., 45 A.L.R.2d 1447, 1449 n.8, 1450 (1956); Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 536 (1917); Mueller, *Criminal Law and Administration*, 34 N.Y.U.L. REV. 83, 84 (1959).

⁵ HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 271-72 (1958); PERKINS, *CRIMINAL LAW* 663-71 (1957); SNYDER, *AN INTRODUCTION TO CRIMINAL JUSTICE* 138-49 (1953).

Mental disease or defect does not of itself negate criminal responsibility unless the disease or defect affects the actor's mind in a certain way.⁶ After advertent to the tests of this qualification—*M'Naghten*, irresistible impulse, *Durham*, and the Model Penal Code—one can conclude that if because of mental disease or defect the actor does not know what he is doing (*i.e.*, the nature and quality of his act, sufficiently indicated by the hyperbolic example of a man thinking he is squeezing lemons when he is choking his wife), or if he acts from irresistible impulse, or if his act is the product of mental disease or defect, or if he is unable to conform his conduct to the requirements of law, he is deemed not to be criminally responsible. Why? Because he is deemed not to will to do what he does. Another question is: Why is it thought that the actor is not criminally responsible, if he, though knowing what he is doing, does not, because of mental disease or defect, know that it is wrong? One answer is that it is thought that he does not will to do what he does.⁷

The results of the foregoing inquiry can be summarized at this point, as follows: In any case, for the actor to be criminally responsible, he must will to do what he does; and to do that, he must know what he is doing. Moreover, it appears to be undisputed that if the actor knows what he is doing, knows that it is wrong, and wills to do it, he is criminally responsible.⁸ One then can ask: If a man knows what he is

⁶ ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT para. 280 at 99 (1953).

⁷ *State v. Mowry*, 37 Kan. 369, 15 Pac. 282, 284-85 (1887); *State v. Pike*, 49 N.H. 399, 437 (1870); *State v. White*, 58 N.M. 324, 270 P.2d 727, 729 (1954); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232, 238 (1943); *State v. Cumberworth*, 69 Ohio App. 239, 43 N.E.2d 510, 512-13 (1942); *State v. Harrison*, 36 W. Va. 729, 15 S.E. 982, 986 (1892); 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 167, 171 (1883). The *M'Naghten* theory is that a mental disease or defect which renders the actor incapable of knowing that what he is doing is wrong incapacitates him to will to do it; and that mental disease or defect that does not incapacitate him to know that it is wrong does not incapacitate him to will to do it. The irresistible-impulse theory is that a mental disease or defect which either does or does not incapacitate the actor to know that what he is doing is wrong can incapacitate him to will to do it. Snyder, *Who is Wrong about the M'Naghten Rule and Who Cares?*, 23 BROOKLYN L. REV. 1, 14 (1956).

⁸ *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945); *Smith v. United States*, 36 F.2d 548, 549 (D.C. Cir. 1929); *Parsons v. State*, 81 Ala. 577, 2 So. 854, 857-59 (1887); *Reeves v. State*, 196 Ga. 604, 27 S.E.2d 375, 381-82 (1943); *State v. Mowry*, 37 Kan. 369, 15 Pac. 282, 284-85 (1887); *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501-02 (1844); *Knights v. State*, 58 Neb. 225, 78 N.W. 508, 509 (1899); *State v. White*, 58 N.M. 324, 270 P.2d 727, 729 (1954); *State v. Cumberworth*, 69

doing, but because of mental disease or defect does not know it is wrong, is it possible that he can still will to do it. The answer appears to be that he can⁹—which brings up a more difficult question.

If the actor knows what he is doing and wills to do it, but because of mental disease or defect does not know it is wrong, is he criminally responsible? Two answers are made. By one view, the actor is responsible. The only import of his knowledge or want of knowledge that the act is wrong is its bearing, if any, on whether the actor wills to do what he does.¹⁰ The other position is that in addition to his knowing what he is doing and willing to do it, the actor must know his act is wrong. Under this latter view, causation is essential to criminal responsibility, and volition is essential to causation; but causational volition is not all that is essential to criminal responsibility. In addition, the actor's will must be a vicious will, his intent an evil intent, and, for his will to be vicious, his intent evil, he must not only will to do what he knows he is doing, but also know that what he is doing is wrong.¹¹

Ohio App. 239, 43 N.E.2d 510, 512-13 (1942); *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 1025 (1910); *State v. Harrison*, 36 W. Va. 729, 15 S.E. 982, 986 (1892); 2 STEPHEN, *op. cit. supra* note 7, at 183.

⁹ *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 1027 (1910); *cf. Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *Parsons v. State*, 81 Ala. 577, 2 So. 854, 857-59 (1887). It may be possible that a man who knows what he is doing and knows that it is wrong can will to do it. Also it may be possible that a man who knows what he is doing but does not, because of mental disease or defect, know that it is wrong cannot will to do it. But it is not certain that a man who knows what he is doing, but because of mental disease or defect, does not know that it is wrong cannot, nevertheless, will to do it. Though it has repeatedly been said that *M'Naghten* is a volition test, there has always surrounded the rule the notion that it is possible for a man to know what he is doing but not to know, because of mental disease or defect, that it is wrong to will to do it. *State v. Nixon*, 32 Kan. 205, 4 Pac. 159, 163 (1884); *Knights v. State*, 58 Neb. 225, 78 N.W. 508, 509 (1899); *Flanagan v. People*, 52 N.Y. 467, 470 (1873). See note 23 *infra* and text.

¹⁰ *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 1027 (1910); *cf. Parsons v. State*, 81 Ala. 577, 2 So. 854, 857-59 (1887); *State v. White*, 58 N.M. 324, 270 P.2d 727, 729 (1954); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232, 238 (1943).

¹¹ *Morissette v. United States*, 342 U.S. 246, 250-51 (1952); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943); *Spies v. United States*, 317 U.S. 492, 498 (1943); *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *Smith v. United States*, 36 F.2d 548, 549 (D.C. Cir. 1929); *Reeves v. State*, 196 Ga. 604, 27 S.E.2d 375, 381-82 (1943); *State v. Nixon*, 32 Kan. 205, 4 Pac. 159, 163 (1884); *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501-02 (1844); *Knights v. State*, 58 Neb. 225, 78 N.W. 508, 509 (1899); *Flanagan v. People*, 52 N.Y. 467, 470 (1873); *State v. Brandon*, 53 N.C. 463, 467 (1862); 4 BL. COMM. 21; HALL, *op. cit. supra* note 5, at 158, 258, 288, 293; PERKINS, *op. cit. supra* note 5, at 596; 2 STEPHEN, *op. cit. supra* note 7, at 183; Mueller, *Criminal Theory: An Appraisal of Jerome Hall's "Studies*

Obviously, "wrong" and "know" need definition. Of course, for the actor to know that what he is doing is wrong, his act must be wrong. But how do we tell whether it is wrong? Responsibility, it is said, is a moral question.¹² The best view (not universally enunciated, but never excluded) is that an act is wrong when so adjudged by the moral standards of the community.¹³ The acts charged in the cases in which the insanity tests have been invoked have been wrong by this criterion.

What, then, does "know" mean? This is the crucial question.¹⁴ The words "full understanding,"¹⁵ "conscious,"¹⁶ and "awareness"¹⁷ have been employed in elucidation, as have "appreciate," "comprehend rationally," and "perceive."¹⁸ It also is insisted that the actor must know that what he is doing is wrong in such a way that he is subject to blame, morally culpable, that his mind is a guilty mind.¹⁹

What makes his mind a guilty mind? There are two views: One is that the actor must know that what he is doing is wrong and, knowing this, must will to do it.²⁰ According to this view, guilt is defiance

in Jurisprudence and Criminal Theory, 34 IND. L.J. 206, 216 (1959); Mueller, *The Teaching of Comparative Law in the Course on Criminal Law*, 11 J. LEGAL ED. 59, 62 (1958).

¹² ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT paras. 281-85, at 99-100 (1953). See *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945).

¹³ *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *People v. Schmidt*, 216 N.Y. 324, 332-40, 110 N.E. 945 (1915); HALL, *op. cit. supra* note 5, at 479-80; PERKINS, *op. cit. supra* note 5, at 748; SNYDER, *op. cit. supra* note 5, at 313; Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1058-61 (1958).

¹⁴ Mueller, *id.* at 1043, 1060.

¹⁵ *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 1025 (1910).

¹⁶ *People v. Gilberg*, 197 Cal. 306, 240 Pac. 1000, 1003-04 (1925); *Tenement House Dep't v. McDevitt*, 215 N.Y. 160, 168, 109 N.E. 88 (1915).

¹⁷ *United States v. Dotterwiech*, 320 U.S. 277, 281 (1943).

¹⁸ HALL, *op. cit. supra* note 4, at 482.

¹⁹ *Morissette v. United States*, 342 U.S. 246, 250-51 (1952); *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945); *State v. Cumberworth*, 69 Ohio App. 239, 43 N.E.2d 510, 512-13 (1942); HALL, *op. cit. supra* note 4, at 93; HALL, *op. cit. supra* note 5, at 258; MORELAND, *THE LAW OF HOMICIDE* 272 n.6 (1952); Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485, 490 (1956); Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117, 127, 131, 135, 136 (1922); Mueller, *Criminal Law and Administration*, 34 N.Y.U.L. REV. 83, 88 (1959); Mueller, *The Teaching of Comparative Law in the Course on Criminal Law*, 11 J. LEGAL ED. 59, 62 (1958); Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 980, 987, 989, 1008, 1017 (1932); Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L.J. 31, 34-35 (1936).

²⁰ *State v. Brandon*, 53 N.C. 463, 467 (1862).

of the moral standards of the community; if the actor, knowing that his act violates these standards, wills to do it, his mind is a guilty mind. The other view is that more than this is necessary. There is a theory that an offender who knows what he does, knows that it is wrong (and also legally punishable), and coolly and carefully prepares what he does, can and does control his actions right up to the moment of commission. However, if because of a mental disease or defect the offender has no sense of guilt (defined as "a self-reproaching attitude"),²¹ he is not criminally responsible.²² It has been asserted that the *Durham* rule is grounded on this theory; that, according to this rule, "an accused could know the nature and quality of his act, know that it was wrong, have the will power to restrain his act, and yet [commit] . . . homicide with criminal impunity."²³ In other connections, the judges have talked about a "sense of responsibility,"²⁴ the actor's knowing that what he is doing "*deserves* punishment,"²⁵ and the "mental power sufficient to apply that knowledge to his own case, and to know that, if *he* does the act, *he* will do wrong. . . ."²⁶ This second view, hence, is that guilt is more than defiance of the moral standards of the community. To have a guilty mind, the actor, knowing that his

²¹ ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 50 (1954).

²² *People v. Irwin*, 166 Misc. 751, 4 N.Y.S.2d 548 (Ct. Gen. Sess. 1938); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT para. 314, at 110 (1953); GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 90 (1952); MARTIN, *BREAK DOWN THE WALLS* 259 (1954); REINHARDT, *SEX PERVERSIONS AND SEX CRIMES* 12-13 (1957); WERTHAM, *op. cit. supra* note 3, at 125; ZILBOORG, *op. cit. supra* note 21, at 97. Quite likely a man who does any of the acts involved in the cases in which the insanity plea is made knows what he is doing, and wills to do it, and knows that it is regarded as morally wrong by the community and that it is punishable by law. Mueller, *supra* note 13, at 1060 n.49. It is control before the moment the act is done that counts; at the immediate moment of commission, perhaps nobody has control of what he does. SNYDER, *op. cit. supra* note 5, at 317.

²³ *Flowers v. State*, 139 N.E.2d 185, 194 (Ind. 1956). Though it has repeatedly been called a volition test (and certainly, according to it, if mental disease or defect incapacitating the actor to know that what he is doing is wrong does incapacitate him to will to do it, the actor is not responsible), *M'Naghten* has always adumbrated the notion that even if the actor does will to do what he does, he is not responsible if, because of mental disease or defect, he does not know that it is wrong. See note 9 *supra*.

²⁴ *Ridge v. State*, 229 Pac. 649, 650 (Okla. Crim. App. 1924).

²⁵ *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073, 1075 (1896). (Emphasis added.)

²⁶ *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 502 (1844). (Emphasis added.)

act violates these standards, must will to do it and, in addition, must recognize that he deserves to be punished—*i.e.*, he must have a sense of personal guilt.²⁷

Thus, it is possible to summarize the essentials of criminal responsibility in three different ways, as follows:

- (1) The act must be wrong, and the actor must know what he is doing *and* must will to do it (he cannot will to do it unless he knows what he is doing; but, of course, he can know what he is doing without willing to do it);
- (2) In addition to the elements of (1), the actor must know that his act is wrong;
- (3) In addition to the elements of (1) and (2), the actor must have a sense of personal guilt.

However, it seems that there is some question as to which elements are really indispensable to criminal responsibility. Though the elements of (1) certainly are essential, it is less clear whether there must be knowledge that the act is wrong (there can be knowledge that the act is wrong without there being a sense of personal guilt) or a sense of personal guilt (there must be knowledge that the act is wrong for such to exist) in addition to the elements of (1)—*i.e.*, in addition to volition.

B. Is a Sense of Personal Guilt or Knowledge that the Act is Wrong an Essential to Criminal Responsibility?

In examining this question, it must be pointed out at the outset that the commission of a criminal act does not necessarily import a mental disease or defect.²⁸ Criminal responsibility pertains to both mentally normal and mentally abnormal actors and, consequently, must be examined in relation to both.

1. *The mentally normal actor*

It is undeniable that men without mental disease or defect who commit criminal acts with no sense of personal guilt may be criminally responsible and hence legally liable. Those morally depraved,²⁹ with character disorder,³⁰ have been mentioned. It is, to be sure, contended

²⁷ HALL, *op. cit. supra* note 4, at 93-104.

²⁸ GUTTMACHER & WEIHOFEN, *op. cit. supra* note 22, at 26, 87-88, 90, 385-90.

²⁹ *People v. Schmidt*, 216 N.Y. 324, 340, 110 N.E. 945, 949-50 (1915).

³⁰ *United States v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314, 324 (1954). Mention has been made also of "moral anomaly." GAROFALO, *CRIMINOLOGY* 85, 96 (Millar transl. 1914).

that there is no "person not subnormal and otherwise intact in mental powers, who shows himself devoid of moral feeling."³¹ But inquiry need not bog down in this argument. There are clear cases. A man may have no sense of personal guilt not because of mental disease or defect, but because of different culture, philosophy, or religious conviction. The man who kills under the delusion that he is commanded by God to kill may be mentally diseased or defective; but the polygamist by religious conviction is not, and he has no sense of personal guilt—he has rather a sense of self-approval, notwithstanding that he knows exactly what he does, does it deliberately, and is well aware that other people generally consider his act to be morally wrong.³² The man who kills another to prevent the debauchery of a female member of his family may be as devoid of mental disease or defect as he is of a sense of his own guilt.³³ Then, there is

the counter-mores group. These are the stubbornly tenacious individuals who consistently flout society in one way or another. They are a very difficult group to handle effectively by law. They are made up largely of idealists, dissidents, and malcontents. They are to be found in large numbers among the conscientious objectors and the revolutionists. Psychologically they are heterogeneous in make-up; some are wise and strong men, . . . while many are neurotic individuals attempting to solve basic conflicts.³⁴

Those who are wise and strong men are certainly not mentally diseased or defective; but they too commit criminal acts in furtherance of their cause without any sense of personal guilt.

A hypothetical case will round out inquiry on this point. It is familiar learning that just as mental disease or defect may negate a mentally abnormal actor's knowledge of his act and hence his will to act, or though not negating his knowledge may negate his will, so mistake

³¹ HALL, *op. cit. supra* note 4, at 478, quoting William Healy.

³² Long v. State, 192 Ind. 524, 527-29, 137 N.E. 49, 50 (1922); People v. Schmidt, 216 N.Y. 324, 340, 110 N.E. 945, 950 (1915); HALL, *op. cit. supra* note 4, at 93-104; PERKINS, *op. cit. supra* note 5, at 721, 836; SNYDER, *op. cit. supra* note 5, at 298, 313. Homosexuals have among themselves no sense of guilt about their practices though they do about disloyalties *inter se*. REINHARDT, SEX PERVERSIONS AND SEX CRIMES *passim* (1957). But the ancient Greeks, highly civilized and not mentally diseased or defective, had no sense of guilt about homosexuality. Thus, it is plain that sense of guilt can be negated by something other than, as well as, mental disease or defect, even with respect to behavior usually today associated with mental abnormality.

³³ SNYDER, *op. cit. supra* note 5, at 286, citing People v. Cook, 39 Mich. 236 (1878).

³⁴ GUTTMACHER & WEIHOFEN, *op. cit. supra* note 22, at 395 (1952).

of fact by or coercion of a mentally normal actor may have the same effect. For example, if a man takes another's property really thinking it is his own, he is neither criminally responsible nor legally liable. Suppose, though, that the taker does know the thing he takes belongs to another. If there were some implied consent from actions of the owner or some permissive local custom, the taker would be neither criminally responsible nor legally liable.³⁵ Suppose, however, he admits that he knew what he was doing, that he did it deliberately, and that he knew it was regarded generally by other people as morally wrong, but asserts (and we believe him) that he thought it was not wrong for him to do it and that he had no sense of personal guilt in doing it. That he is not merely legally liable, but criminally responsible is hardly disputable.

But what about the mentally normal actor's knowledge that his act is wrong? This is a more difficult question, and it is confused by the assumption that if an act is wrong by the moral standards of the community, the only explanation of anybody's not knowing it is wrong is that he is mentally diseased or defective;³⁶ a mentally normal person who does such an act must know it is wrong.³⁷ This assumption appears to be sound as to people who have been brought up in the community or have been in it for some time, but is false as to strangers within the gates for but a short time. Take the case of "toting." A man from a place where "toting" is customary, lately arrived at a place where one may not "tote." If he is charged with larceny, a lawyer would ordinarily say that the question is not whether the defendant knew what he did was wrong, but one of mistake of fact: if the actor believed in good faith that the custom of the place from which he came prevailed also in the place to which he had come, he did not know what he was doing in that he did not know he was depriving the owner of anything without his consent and, hence, had no intention to steal. Whether or not this theory gets the defendant off the hook of legal liability, and whether these facts show that an actor who knows what he is doing and wills to do it but does not know it is wrong is or is not criminally responsible, the case does show that a mentally normal actor may not know that his act is wrong.

In a much discussed recent case,³⁸ the defendant had taken some

³⁵ SNYDER, *op. cit. supra* note 5, at 296-98.

³⁶ *Knights v. State*, 58 Neb. 225, 228-29, 78 N.W. 508, 509 (1899).

³⁷ Mueller, *supra* note 13, at 1060 n.49.

³⁸ *Morissette v. United States*, 342 U.S. 246 (1952).

property, thinking on reasonable grounds and in good faith that the owner had abandoned it. Under the rubric of *mens rea*, the question of criminal responsibility was raised. In considering this case, the first question was: Just what was the question concerning criminal responsibility? The act must be wrong for the actor to be criminally responsible, and if it was not, he could not know that it was wrong. But was the defendant's act morally wrong by relevant standards? This seems to have been the question—not whether the actor must have known that his act was wrong. Let us suppose that the defendant's act was morally wrong by prevailing standards—a rather farfetched supposition, to be sure, but let us make it; and let us suppose further that the defendant did not know this—a rather far-fetched supposition too, if the act was wrong by these standards, but let us make it. We then can ask: Would the fact that the defendant did not know his act was wrong have negated his criminal responsibility? It seems that the answer cannot be other than that it would not.

At this point, let us consider the following case: an Oriental sailor is arrested in one of our ports on a "morals" charge. His counsel concedes that the defendant knew what he was doing, did it deliberately, and before and at the time of the act was not and is not now mentally diseased or defective; but he states (and we are sure he is telling the truth) that what the defendant did is not regarded as immoral where he comes from and he had no knowledge that it is regarded as immoral here. Counsel then argues that defendant should not be held criminally liable because this presumes his criminal responsibility, and he is not criminally responsible because he did not know that what he was doing was wrong. The questions of whether that argument would be accepted and whether it could rationally be accepted seem merely rhetorical.

It is true that if the actor knows what he is doing and wills to do it, the fact that he does not know it is wrong may be, and properly is, considered in mitigation of penalty; but that does not mean that liability is not imposed on the basis of criminal responsibility.³⁹ A devout polygamist newly come to this country, may not know that his conduct is regarded as morally wrong here, and may have no sense of personal guilt when he learns that it is; nevertheless, he certainly would be considered criminally responsible, though his penalty might be mitigated. A communist newly come to this country, may be unaware that

³⁹ HALL, *op. cit. supra* note 4, at 93-104.

certain acts are regarded as morally wrong here; but, if he committed one of these acts his ignorance would certainly negate neither his legal liability nor his criminal responsibility, and his penalty most likely would not be mitigated.

From the foregoing considerations, it appears to be perfectly clear that a sense of personal guilt is not an essential of criminal responsibility if the actor is mentally normal. It appears also, though not quite so clearly, that knowledge that the act is wrong is not an essential of criminal responsibility if the actor is mentally normal. Clearly, however, the act must be wrong by the moral standards of the community for criminal responsibility to exist. Moreover, the actor's knowledge of certain facts—*e.g.*, in the above hypothetical case, the fact that the owner had not abandoned the property—is necessary for the act to be morally wrong. However, the actor's knowledge that his act is thus wrong is not essential to his criminal responsibility. Knowledge that the act is wrong, especially that it is legally punishable, may be and sometimes is made a prerequisite of legal liability, but this knowledge is only a legal requirement, not something that is essential to criminal responsibility.

2. *The mentally abnormal actor*

The mentally abnormal actor presents the nub of the question. It is in determining his criminal responsibility that a sense of personal guilt or knowledge that the act is wrong is deemed to be important.⁴⁰ This seems odd, for, since neither is essential for the mentally normal actor to be criminally responsible, why should either be essential for the mentally abnormal actor to be criminally responsible? If all elements of criminal responsibility of a mentally normal actor are present in a mentally abnormal actor, why is not the mentally abnormal actor also criminally responsible? Mental disease or defect does not ipso facto negate criminal responsibility.

It is plain that volition may be negated by mental disease or defect; that volition may also be negated by other facts, and that if volition is negated either way, the actor is not criminally responsible. Moreover, it is plain that the actor's knowing what he is doing may be negated by mental disease or defect or by other facts, and that if his knowing what he is doing is negated for any reason, his volition is negated and he is not criminally responsible. In addition, it is plain that the actor's having

⁴⁰ Sayre, *supra* note 19, at 1018; Turner, *supra* note 19, at 35.

a sense of personal guilt or his knowing his act is wrong may be negated by mental disease or defect or by other facts. Hence, the puzzling question is: since a mentally normal actor's lack of a sense of personal guilt or his not knowing that his act is wrong does not negate his criminal responsibility, why do these factors negate the criminal responsibility of a mentally abnormal actor? Can it be that the essentials of criminal responsibility are different when the actor is mentally abnormal from what they are when the actor is mentally normal?

Let us assume that when the issue of responsibility is raised by the insanity plea, the question, granted that he did know what he was doing, is not whether the defendant had a sense of personal guilt or whether he knew that his act was wrong; it is his mental capacity or incapacity to have a sense of personal guilt or to know that his act was wrong. When this view is taken, what appears is that not a sense of personal guilt or knowledge that the act was wrong, but rather mental capacity for such a sense or such knowledge is essential to criminal responsibility. Or, put another way, that want of a sense of personal guilt or of knowledge that the act was wrong owing only to mental disease or defect negates criminal responsibility. But why?

The answer is found in the cases. It is that if the actor has no sense of personal guilt or does not know that his act is wrong because of mental disease or defect, he does not have mental capacity to will to do what he does; but, if the actor has no sense of personal guilt or does not know that his act is wrong because of facts other than mental disease or defect the actor has mental capacity to will to do what he does.⁴¹ In other words, want of a sense of personal guilt or of knowledge that the act was wrong because of mental disease or defect shows that the actor did not will to do what he did; want of either because of other facts does not show that the actor did not will to do what he did. Hence, even though the actor is mentally abnormal, neither a sense of personal guilt nor knowledge that the act is wrong is of itself an essential of criminal responsibility; want of either, owing to mental disease or defect is but evidence negating volition. If this evidence is conclusive of want of

⁴¹ See cases and works cited, *supra* notes 7-9, 16, 23-27. Some of the opinions do adumbrate the proposition that notwithstanding whether he does, in fact, will to do what he does, the actor is not criminally responsible if because of mental disease or defect he does not know that his act is wrong. However, the cases have neither answered nor even squarely raised this question. The question of volition preponderates in them all. The big argument has been and still remains whether mental disease or defect negating knowledge that the act is wrong is the only kind of mental disease or defect that negates volition.

volition, a sense of personal guilt or knowledge that the act is wrong is, in a manner of speaking, essential to criminal responsibility if the actor is mentally abnormal; but, even so, the one or the other is essential only because essential to volition and volition is essential to criminal responsibility.

Thus, it appears that neither a sense of personal guilt nor knowledge that the act is wrong is essential for a mentally abnormal actor to be criminally responsible. There are, to be sure, tantalizing questions that remain unanswered. For example: Is his want of knowledge that his act was wrong owing to mental disease or defect conclusive proof that the actor did not will to do what he did or is it only rebuttable evidence? Can mental disease or defect that does not negate knowledge that the act is wrong in fact negate volition? If want of knowledge that the act was wrong owing to mental disease or defect shows, conclusively or rebuttably, that the actor did not will his act, why does not want of knowledge that the act was wrong because of other facts show that a mentally normal actor did not will to do what he did? Yet, whatever the answers to these questions may be, it appears, nevertheless, that, if the actor wills his act, he is criminally responsible, even though he is mentally abnormal.

Taking account of all the foregoing considerations, is not the best, and perhaps the most supported, conclusion the following? Whether the actor is mentally normal or mentally abnormal, the essentials of criminal responsibility (of *mens rea*) are: the act must be wrong by the moral standards of the community; the actor must know what he is doing, and he must will to do it—*i.e.*, his causal motions must be not only voluntary, but also made recklessly or with intention to cause the resulting harm. A sense of personal guilt or knowledge that the act is wrong, or want of either whether because of mental disease or defect or because of other facts, is relevant only as it bears one way or the other, if at all, on the question of volition and as it bears, if at all, on the upward or downward adjustment of penalty. If the actor wills his act, criminal liability is properly imposable.

IV

IMPORTANCE OF THE PROBLEM OF CRIMINAL RESPONSIBILITY

It has been said that: "The greatest problem that confronts the criminal law as a social institution is the test of the responsibility of a

person for his crime. . . ."⁴² "Certainly no one who has studied the problem of mental disease in relation to criminal responsibility can be content with either the present rules or their administration."⁴³ Thus it seems that the tests being used are not doing what they are supposed to do well enough; consequently there is need of a better test or tests.

But what is a test of responsibility? What is it supposed to do? It is a means by which to tell whether the prerequisites of responsibility were in the actor's mind. A test of responsibility tells us that if this or that was not in an actor's mind, he was not responsible. In telling us that, it tells us that this or that is an essential of responsibility. However, this does not tell us what all the essentials are. How then can we devise and administer any test or tests that will do a better job, unless we have and consistently adhere to a clear concept of just what all the essentials of responsibility are? Take the burden of proof, about which there has been and is much argument. "Basically," it has been asserted, "how the burden should be allocated is a matter of public policy. . . ."⁴⁴ Suppose the burden is allocated to the prosecution. Then the prosecution must prove that all the essentials of criminal responsibility were present. If we do not know what all the essentials are, we cannot know what the prosecution must prove nor can we tell, whatever it has proved, whether it has sustained its burden. Suppose the burden is allocated to the defense. Then the defense must prove that at least one of the essentials of criminal responsibility was not present. If we do not know what these essentials are, how can we tell whether the defense has prevailed, whatever it has proved, even if it has proved it beyond a reasonable doubt?

Some suggest that the concept of responsibility be discarded.⁴⁵ In reply it may be asked: if we do not know just what all the essentials of responsibility are, how do we know just what it is suggested that we discard? And how can the concept be discarded? The problem of volition will not go away. "Even a dog distinguishes between being stumbled over and being kicked."⁴⁶ A snappy poke in his nose would most likely elicit from the most determined determinist the emphatic judgment, "Why, you did that deliberately, you . . . , " even if he has

⁴² BOK, *PROBLEMS IN CRIMINAL LAW* 14 (1955).

⁴³ HALL, *op. cit. supra* note 4, at 486. See also DAVITT, *THE ELEMENTS OF LAW* 212-13 (1959).

⁴⁴ WEIHOFEN, *THE URGE TO PUNISH* 103 (1956).

⁴⁵ Cf. HALL, *op. cit. supra* note 4, at 528, disagreeing with Dr. White.

⁴⁶ HOLMES, *THE COMMON LAW* 3 (1881).

just finished the most thorough demonstration of determinism; and his judgment would most likely remain unchanged after he has had the benefit of counsel of his peers and plenty of cooling time.

V

RESPONSIBILITY—A MORAL QUESTION⁴⁷

To impose criminal liability on the basis of the above conclusions as to what the essentials of criminal responsibility are, is not to say that liability is nonmoral.⁴⁸ Rather, this concept of liability is grounded on a moral foundation: the act must be wrong by the moral standards of the community.⁴⁹ This requirement supplies criteria for answering the question of whether the act is a harm, since the effect of human conduct may or may not be a harm.⁵⁰ But answering this question is not enough. There remains the question: granted he has done an act that is morally wrong, what justifies the government's bringing force to bear on a human being? Is it the personal wickedness of the harm-doer, or is it his social dangerousness and the moral right of other members of the community to have government protect them?⁵¹ Since in our concept of the source, nature, and measure of its powers, government has no just powers to force retribution from offenders but only to protect the lives, liberties, and properties of the citizenry,⁵² the answer appears to be that it is the latter. Personal wickedness and its retributive deserts are relevant only as they relate to social dangerousness and the need of protection. The above conclusions as to the essentials of criminal responsibility accord with this concept of government's just powers.

⁴⁷ See text *supra* note 12; GUTTMACHER & WEIHOFEN, *op. cit. supra* note 22, at 447.

⁴⁸ Cf. HALL, *op. cit. supra* note 4, at 146-70.

⁴⁹ This basic principle is in accord with modern views. "Mental disorders are today viewed primarily as failures in the socio-adaptive capacity of the individual." GUTTMACHER & WEIHOFEN, *op. cit. supra* note 22, at 13. The socio-adaptive failures of the mentally diseased and mentally defective persons who get into the criminal courts and invoke the insanity plea are certainly failures in adapting to the moral standards of the community.

⁵⁰ Cf. HALL, *op. cit. supra* note 4, at 212-46; HALL, *op. cit. supra* note 5, 16, 248-50.

⁵¹ *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945); *Parsons v. State*, 81 Ala. 577, 583-84, 2 So. 854, 858 (1886); GUTTMACHER & WEIHOFEN, *op. cit. supra* note 22, at 444; HALL, *op. cit. supra* note 4, at 93-104; MORELAND, *THE LAW OF HOMICIDE* 272 n.6 (1952); WEIHOFEN, *op. cit. supra* note 44, at 146; Levitt, *supra* note 19, at 127; Sayre, *supra* note 19, at 1018; Turner, *supra* note 19, at 34-35.

⁵² SNYDER, *Justice by Means of State Law: Natural Rights*, 26 BROOKLYN L. REV. 184, 193-97 (1960).