

RESPONSIBILITY AND THE REQUIREMENT OF *MENS REA*

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O, now for ever
Farewell the tranquil mind! Farewell content!

Othello, Act III, scene 3

In his great tragedy *Othello* Shakespeare does a very penetrating phenomenological analysis of responsibility. When Othello utters the above words a turning point has been reached in the drama. Othello voluntarily and deliberately decides that he is going to entertain doubts about the fidelity of his beloved wife Desdemona. He also realizes full well, and adverts to the fact, that in so doing he is bidding farewell to all the happiness and glory he has known and deliberately decides to do it anyway, *coûte que coûte*. What is interesting about this in terms of the related problems of voluntariness, responsibility and *mens rea* is the conscious and deliberate way in which he takes responsibility for his acts. He sees the consequences of what he is doing clearly when he deliberately and voluntarily decides to harbor doubts about Desdemona, indeed he goes on in the long paragraph which follows, to enumerate in detail

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all of the things that he is forfeiting in so doing, and he decides to do it anyway. In short, he assumes the full responsibility for his acts.

The reason that this is so interesting is because it contrasts so markedly with the pervasive moral attitude of our society, a society in which the dominant tendency is a more or less total denial of responsibility for anything. That such a denial of responsibility should come about is not at all surprising and is indeed the logical consequence of the vision of man which sees him only in one-dimensional, materialistic terms. Since the overwhelming majority of psychologists see man as only a purely material being, they must consistently deny him freedom.¹ Purely material beings are obviously not free; they are determined to one mode of activity, the stone to fall, water to freeze at 0° C. Thus if man is only a material being he is not free, and if not free, not morally responsible for his acts. But while this approach to man has the seeming advantage of relieving him of the burden of responsibility for his acts, it is an advantage, if such it be, that has been bought at a very considerable price.

A system in which there is a more or less complete denial of moral responsibility will have some very definite, and indeed profound, repercussions in the legal and social orders. The reason for this is clear. Our legal system, that is the Anglo-American system, has always been very closely tied to the moral order and indeed based upon it.² Therefore it is easy to see that a breakdown in the moral realm in terms of responsibility will have a profound effect in the legal and social sphere.

Let me illustrate this point in this way. Let us take one city for example, New York City, an example which could be replicated in every major city in the United States and in most of the smaller ones as well. In 1980, for example, in New York City we see the following crime statistics: murders 1,814; rapes 3,711; robberies 100,550; assaults 43,476; burglaries 210,703; thefts 249,421; automobile thefts 100,478. This totals to 710,153 felonies *reported*. It is estimated that the clearance rate in New York City is 10%. This means that the figure of 710,153 felonies, staggering as it is in itself, is merely the tip of the iceberg, since this very likely only represents 1/10th of the actual crimes committed. Most rapes, for example, as is well known, simply go unreported.

Two other examples will help to illustrate how totally impotent the criminal justice system presently in place is to deal with the epidemic of crime. Manhattan District Attorney Morgenthau tells us that this year there will be 56,000 arrests of drug *pushers*—*pushers*, not just users, *pushers*. Of this 56,000 with existing judges and court facilities he will be able to try at most 280 cases. For

56,000 felonies of a most serious nature—the destruction of the youth of our country—280 people, less than 1/2 of 1% will ever come to trial.

One further example will help to illustrate the complete breakdown of social controls. In New York City, according to the above statistics, approximately 100,000 cars are stolen per year. Since the penalty for Grand Theft Auto in New York State is 3-5 years, that would mean that if there were a prisoner behind bars for each of these felonies, even with a minimum sentence of 3 years, we might expect to find about 300,000 persons in prison for these crimes. But, of course, we do not find 300,000 people in prison in New York State for auto theft, nor do we find 200,000 nor even 100,000. Nor indeed do we find 100. At the moment we have, not just for New York City, but for the entire state 19—19 people in prison for over 300,000 felonies!

At this juncture some people might react to such statistics with shocked outrage and demand that what is called for is a real “crackdown”. But it is just at this point that we reach the impasse in social controls that I alluded to above. The impasse is this—what would we do with these felons if we caught them all??? We obviously couldn’t house even a minuscule fraction of them with existing facilities. At the present rate it costs, in New York State, about \$100,000 for each new prison cell. Police Commissioner Benjamin Ward tells us that in New York City it costs \$95 a day to keep a prisoner at the Rikers Island House of Detention. This works out to about \$35,000 per year for each prisoner. With such figures in mind a “crackdown” would obviously be impossible, just in fiscal terms alone.

From these examples it seems perfectly clear that our current system of justice simply doesn’t work. Further, I should like to argue, the way in large part by which we have arrived at this point has been paved by philosophical theories. Starting with an inadequate metaphysics of man, a one-sided materialistic vision of man, empirical psychology has denied any spirituality to man and with that denial, freedom is the first casualty.³ And the logic of this position dictates that there be a corresponding denial of responsibility. The picture of life in our cities that emerges from the above statistics is not that of an ordered, civilized, that is *human*, life. It much more closely resembles the inhuman, brutal, bellicose life in the original position described so well by Hobbes in the *Leviathan*—“*homo homini lupus...bellum omnium contra omnes.*”

In seeking solutions to these very difficult problems let us turn our attention now to philosophy of law, for the constant and unvarying tradition in philosophy from Socrates onward has been that among the many tasks of law one of its most important functions

is pedagogic. Already in the *Apology* when the question is put to Meletus by Socrates "Who then are the improvers of men?", the answer is elicited by Socrates, "The laws, O Socrates." And one of the areas, I should like to argue, in which the teaching of the law has been faulty is the area of responsibility, and particularly in the area of the much discussed doctrine of *mens rea*.

Again, let us start with an example which proved quite shocking to many people, though of course it shouldn't have, since it was common practice. In this case, John Hinckley attempted to assassinate the President of the United States, critically wounding him and several others, leaving some of them, Press Secretary James Brady, for example, permanently crippled. Hinckley was found not guilty by reason of insanity because he lacked the *mens rea* required by the federal jurisdiction in which the case was tried. While people were generally outraged at this verdict to a crime which literally left the street running with blood, they were doubly stunned when they found that in less than two months, a bare 50 days, he could petition for release.⁴ How did the law get to this point?

The doctrine of *mens rea*, that is the subjective element in a crime, the "inner facts" as Oliver Wendell Holmes called them,⁵ has had a long history. Even in ancient Roman Law provision was made for the mentally incompetent or *non compos mentis*. They were variously designated as *furiosus* or *fanaticus*—what we would call madmen.⁶ In English law we can find seeds of the doctrine during the reign of Edward I in England in the thirteenth century. In the late 1700s Blackstone wrote in his *Commentaries*, "An unwarrantable act without a vicious will is no crime at all."⁷ A more important precedent is the Hadfield decision of 1800,⁸ but by far and away the most important case was that of Daniel M'Naughten in England in 1843. In this case, M'Naughten, who seemed to be suffering from delusional paranoia, fancied that the Tories were hatching plots aimed at his destruction. He decided to preempt them by killing the Prime Minister, Lord Robert Peel. He instead mistakenly killed his secretary, Edward Drummon, who was riding in Peel's coach. He was found not guilty because of his mental condition.⁹ This verdict caused such outrage that the House of Lords responded by adopting the rare measure of asking the judges to explain the law in this case. The explanation set forth by Lord Chief Justice Tyndal has come to be known as the M'Naughten Rules and has exercised an enormous influence not only in England, but in the United States and many other jurisdictions as well. But how could a person who knowingly and willfully shoots someone with the intention to kill be found not guilty?

Our Anglo-American legal codes grew out of a moral system that held a person responsible for his acts if, and only if, he did such acts voluntarily,¹⁰ by which is basically meant that the person knows what he is doing and freely chooses to do it. There must be in other words both a cognitive and volitional element which constitute the wrongful act. For the wrongful act to be morally imputable both of the elements were required, and here the legal order followed the moral quite closely.¹¹ Our legal codes require for guilt not merely the commission of an act which is *objectively* wrong—killing someone for example—but in addition to the objectively wrongful act, *subjective* fault is also required. This is expressed in the legal axiom, "*actus non est reus, nisi mens sit rea.*"¹² It is not the mere commission of a wrongful act which renders one guilty, but in addition to this an evil or wrongful intent, *mens rea*, is also required. Let us take an example, say of the destruction of a priceless artifact. A person who does not know that he is an epileptic, while browsing in a museum, suffers an epileptic seizure which causes a muscular spasm throwing his arm out which knocks a priceless Ming Dynasty vase to the floor smashing it. We do not think the person morally or legally guilty of smashing the artifact because it was not a voluntary act and hence he is not morally (or legally) responsible for it. We view as altogether different the following case. Some years ago a man with a hammer concealed beneath his coat went into St. Peter's Basilica and after successfully eluding the guards leaped over the rail guarding Michelangelo's *Pietà* and deliberately smashed its face to powder. We judge these two acts, both of which *objectively* involve the same thing, i.e., the destruction of an artifact, to be morally quite different, and the difference is that in the first case the *subjective* element, the *mens rea*, is lacking and such lack we think exculpatory.

One of the problems confronting philosophy of law, influenced as it is by the social sciences, especially psychology and sociology, is an ever expanding interpretation of what militates against freedom and responsibility. The M'Naughten Rules, mentioned above, were relatively restrictive, at least by comparison to present day standards. They state, "...to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of 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 what he was doing was wrong."¹³ This is, in several ways, quite restrictive. First, the only exculpatory claims that can be sustained are in the *cognitive* order, not volitional. Secondly, the

commentators in giving ostensive definitions as to who would qualify under these rules noted as examples someone who could not count out 20 pence, or could not recognize his mother or father. And a third, and most important qualification, was that the burden of proof of insanity was always on the defendant who claimed it. Thus judge Tyndal continues in his opinion, "...the jurors ought to be told in all cases that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction..."¹⁴

These were the rules then that obtained until 1954 in the United States, (the first successful defense of not guilty by reason of insanity being the Sickles decision 1859, Washington, D.C.). In 1954 the Durham decision had the effect of extending vastly the areas in which one might attempt to plead not guilty by reason of insanity. As we noted, the M'Naughten decision affected only the cognitive element of the voluntary act. Durham now extended to the volitional component ways in which *mens rea could be vitiated*. Now if a person suffered an "irresistible impulse,"¹⁵ as it became popularly known, though this wording is not found in the decision itself, this could also render the person immune from responsibility.

The Durham decision also had another very important consequence—the shift of evidentiary burdens from the defense to the prosecution. As we just noted, the M'Naughten Rules clearly stipulated that if a defendant claimed to be suffering from mental disease sufficient to render him insane under its provisions, the burden of proving such a claim was clearly on him. With Durham this changed one hundred and eighty degrees. Thus Judge David Bazelon wrote in his charge to the jury, "Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity."¹⁶ (my emphasis) It is interesting to note that John Hinckley was tried in Washington, D.C. in the Federal jurisdiction where this was the precedent. Thus the only thing that his lawyers had to do was merely raise the *probability* of insanity through expert testimony, and then it became incumbent on the prosecution to show that he was sane. But how do you do that? Aren't we all a little quirky? Just how much quirkiness would be required to be judged legally insane and not responsible for one's acts? That, it would seem, is a very difficult line to draw.

The philosophic theories which have been the underpinning upon which such legal decisions have been based have been suffering from the same sort of inadequate understanding of respon-

sibility that we have noted in the areas of philosophy of man and moral philosophy. We have arrived finally at a total and complete denial of anything like either moral or legal responsibility. There is a complete blurring of the distinction between mental disorder and moral/legal fault, until finally we have arrived at the point where jurists, and highly regarded ones at that, baldly state that all criminal acts are mental disease. Thus Edward Hoedmaker writes, "Modern psychiatry...regards all criminal acts as products of abnormal personality structure and development.... It is hoped that the day will come when *all offenders will be regarded as sick and treated as such.*"¹⁷ (my emphasis)

This tendency to eliminate the question of responsibility altogether from the law can be seen with special clarity in the writing of the noted, and highly regarded Lady Barbara Wooton. Concerning this desired conflation of legal fault and mental disease she writes:

Here, I think, one of the most important consequences must be to obscure the present rigid distinction between the penal and the medical institution...the formal distinction between prison and hospital will become blurred, and, one may reasonably expect, eventually obliterated altogether. Both will simply be "places of safety" in which offenders receive the treatment which experience suggests is most likely to evoke the desired response. Does this mean that the distinction between doctors and prison officers must become blurred? Up to a point it clearly does.¹⁸

This position, she hopes, will lead to the elimination of the useless and obstructive notion of responsibility. Thus she writes:

...any attempt to distinguish between wickedness and mental abnormality was doomed to failure; and the only solution for the future was to allow the concept of responsibility to "wither away"....¹⁹

Thus we see that the notion of responsibility has been constantly eroded until now, in the view of many legal experts, it is impossible to draw a distinction between legal fault and mental disease. Is there any way out of this cul-de-sac? Some experts in this area, for example, Herbert Fingarette and Anne Fingarette Hasse, have noted the confused morass which this area of law has become. They write:

...the law that has developed in this area is a thicket of confusion and controversy lacking in any rational ground plan.²⁰

They go on to review various proposals that have been made to eliminate what they call a "miasma of ad hoc legal doctrine and evidentiary confusion..."²¹ such as that of Lady Wooton, who proposed that all evidence as to mental condition, even that of *mens rea* be considered only after the trial, the trial itself being restricted to the determination of whether or not the accused did in fact do the act of which he stands accused.²² But Fingarette and Hasse regard the several proposals to remove the entire issue of mental disability from the trial process as too radical a surgery.²³ In the end they believe that the determination of *mens rae* is fundamental to the trial process.²⁴

Unfortunately it seems that their solution of what they call D.O.M., Disability of Mind,²⁵ does very little to move us beyond our present impasse. True they do wish to restrict what they call the "tyranny of the experts,"²⁶ that is the abuse of testimony by expert witnesses, and that surely is laudable, but in the end the reform attempted by the D.O.M. doctrine really seems to leave things too much in the state of the confused mess they are.

I should like to suggest that a possible way out of the impasse might lie along a different route, that of the doctrine of strict liability which is used in tort law, especially in what are called "public welfare offenses." In tort law Richard A. Epstein has proposed a theory of strict liability that has attracted a great deal of attention,²⁷ and, it seems to me, it might be useful, by way of analogy, in criminal law as well. In tort law Epstein wants to replace negligence theory (the "reasonable man" test) by a theory of strict liability, that is causation of an act gives rise, prima facie, to responsibility.²⁸ What I would like to suggest is that by way of analogy we might do the same thing in criminal law.

This notion of strict liability is of course anathema to some jurists,²⁹ constituting, as they think, a return to primitive legal barbarism.³⁰ But this of course need not be so and in my view would be a much needed redress of the present bias against personal responsibility.

Lady Wooton, for example, correctly notes that many, indeed most of the cases dealt with in criminal law are dealt with in terms of strict liability where no element of *mens rea* is considered.³¹ If one is charged with car theft, burglary, breaking and entering, or armed robbery, for example, no element of *mens rea* enters as exculpatory—*res ipsa loquitur*, the deed speaks for itself and nothing needs to be proved about intention, motive, capacity for control or whatever.

But what about the area where *mens rea* proves especially troublesome, murder cases. Blackstone wrote in the *Commentaries*,

"...no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions...", and he is of course correct. The law cannot search out the *secreta cordis*; after all, it is not God, who alone is "the searcher of hearts and reins." But neither need it be. It can follow Blackstone's advice and not try to search out all of the secret depths and mysteries of human motivation. It cannot, in any case, do that, and it need not. When a person does a lethal act, for example picks up a pistol, aims it and fires it at his enemy, the law may legitimately *infer* intent—when you pick up a lethal weapon, aim it and fire it, your intention is obviously lethal and that is all the law need prove for a *mens rea*. As R.J. Gerber has pointed out:

...insane persons clearly *do* intend their acts. A paradigm of many examples, M'Naughten himself manifestly intended killing, carefully premeditated it, and knew it to be wrong and punishable—this is precisely what his lengthy deliberation and careful concealment of plans connote. A strictly honest reading of his test on its face would exonerate neither M'Naughten nor many, if any, similarly insane defendants.³²

Epstein's theory of strict liability in tort law holds that proof that the defendant caused harm creates a presumption of intention and there is no room to consider, as part of the *prima facie* case, allegations that the defendant did not intend harm to the plaintiff or could have avoided the harm he caused by the use of reasonable care. The choice is plaintiff or defendant and the analysis of causation is the tool which, *prima facie*, fastens responsibility upon the defendant.³³ I would like to suggest that criminal law, analogously, might follow this approach. When a person, be it M'Naughten, Hinckley, or whoever, intentionally does a death-dealing act, the presumption, *prima facie*, is that *mens rea* is present.

1. This tendency to deny freedom of will on the part of science which has adopted a totally materialistic vision of man is noted by the eminent neurobiologist and Nobel Laureate Roger Sperry in "Changing Concepts of Consciousness and Free Will," *Perspectives in Biology and Medicine* XX, no. 1 (Autumn 1976): 10. Thus he writes: "Ever since the advent of behaviorism and the adoption of the materialist philosophy in the early 1900s, the prevailing doctrine of twentieth-century science has been telling us that conscious mind and free will are little more than introspective

illusions.... In other words in the world view of Materialist science, real mental freedom to act and choose is an illusion...." This tendency to deny any freedom of the will by science which has accepted a materialist world view is also noted by Sheldon Glueck, "Diminished Responsibility: A Layman's View," *Law Quarterly Review* LXXVI (1960): 232.

2. H.L.A. Hart, "Responsibility," *Law Quarterly Review* LXXXIII (1967).

3. There is also a healthy tendency among some scientists, Roger Sperry is a notable example, in the opposite direction, that is to view the materialist vision of man as inadequate. Thus he remarks in "Changing Concepts of Consciousness and Free Will," p.11: "The reason lies in the emergence in recent years of a modified interpretation of the nature of the conscious mind and of the fundamental relation of mind to brain mechanism. These latest views represent a substantial swing away from the classic materialist position and give renewed recognition to the role of mental over material forces." See also his *Science and Moral Priority: Merging Mind, Brain, and Human Values* (New York: Columbia University Press, 1983) in which he develops this theme that the old materialistic world view of science which rejected free will as romantic mysticism is now passé as a result of split brain research. Thus he writes, pp.39-40: "The proposed brain model provides in large measure the mental forces and abilities to determine one's own actions. It provides a high degree of freedom from outside forces as well as mastery over the inner molecular and atomic forces of the body. In other words it provides plenty of free will as long as we think of free will as self-determination. A person does indeed determine with his own mind what he is going to do and often from among a large series of alternative possibilities." It is to be hoped that this tendency in science continues, but unfortunately for the present it has had little effect on the legal order.

4. *Newsweek*, July 5, 1982.

5. Holmes, *The Common Law*, Lecture II, "The Criminal Law."

6. Daniel Robinson, *Psychology and Law: Can Justice Survive the Social Sciences* (New York: Oxford University Press, 1980), p.36.

7. William Blackstone, *Commentaries On the Laws of England* (London, 1765-1769).

8. Rita James Simon, *The Jury and the Defense of Insanity* (Boston: Little, Brown & Co., 1967), p. 18.

9. Herbert Fingarette, *The Meaning of Criminal Insanity* (Berkeley, University of California Press, 1972), p. 138.

10. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1967), p. 186.

11. H.L.A. Hart, "Legal Responsibility and Excuses," in *Philosophical Issues in Law*, ed. Kenneth Kipnis (Englewood Cliffs, N.J.: Prentice Hall, 1977), p. 15.

12. *Ibid.*

13. Simon, *The Jury and the Defense of Insanity*, pp.22-23.

14. Ibid.
15. The term "irresistible impulse" is used already in 1834 in the United States in *State v. Thompson*.
16. Simon, *The Jury and the Defense of Insanity*, p.31.
17. Edward Hoedmaker, "Irresistible Impulse' As A Defense in Criminal Law," *Washington Law Review* XXIII (1948): 6-7.
18. Barbara Wooton, "Eliminating Responsibility," in *Responsibility*, eds. Joel Feinberg and Hyman Gross (Encino, Calif.: Dickenson, 1975), p. 148.
19. Ibid., p.144.
20. Herbert Fingarette and Anne Fingarette Hasse, *Mental Disability and Criminal Responsibility* (Berkeley, University of California Press, 1979), p.3.
21. Ibid., p.5.
22. Barbara Wooton, *Crime and Criminal Law* (London: Stevens & Sons, 1963), chapters 2,3,4.
23. Fingarette and Hasse, *Mental Disability and Criminal Responsibility*, p.5.
24. Ibid., pp.5-7.
25. Ibid., p.3.
26. Ibid., p.10.
27. For his theory of strict liability in tort law see especially his *Theory of Strict Liability: Towards a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980); as well as the following. "Pleadings and Presumptions," *University of Chicago Law Review* XL (1973): 556-82; "Intentional Harms," *Journal of Legal Studies* IV (1975): 391-442; "Causation and Corrective Justice: A Reply to Two Critics," *Journal of Legal Studies* VIII (1979): 477-504; "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," *Journal of Legal Studies* VIII (1979): 49-102.
28. Epstein, *Theory of Strict Liability*, p.25.
29. Jerome Hall, *General Principles of Criminal Law* (Indianapolis, Ind.: Bobbs-Merrill, 1947), pp.304-05.
30. Epstein, *Theory of Strict Liability*, p.71.
31. Wooton, "Eliminating Responsibility," p.138.
32. "Is the Insanity Test Insane?" *Readings in Philosophy of Law*, ed. John Arthur and William Shaw (Englewood Cliffs, N.J.: Prentice-Hall, 1984), p. 398.
33. Epstein, *Theory of Strict Liability*, p.25.