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What's Wrong with Wrongfulness? Reconsidering the Wrongness Limb of the Insanity Defence

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Abstract: Insanity has been a contentious mental disorder defence ever since its initial formulation in England and Wales by virtue of the *M'Naghten* Rules. According to this standard, the defendant is exculpated if, due to a mental disorder, he did not know the nature and quality of his act, or, *he did not know that what he was doing was wrong*. Whilst the critiques of this test are vast in nature, one ambiguity has never been fully 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 across jurisdictions the courts have failed to reach a consensus on the matter. A general discussion of the critiques of the *M'Naghten* standard is thus beyond the scope of this paper, which focuses entirely upon the lattermost element of the defence, commonly known as the "wrongness" (or "wrongfulness") limb. In order to highlight the divergence of judicial opinion, this paper critically examines the differing approaches taken to wrongfulness in English and Australian law.

First, a discussion is undertaken of the position in England and Wales, where "wrong" is restricted to knowledge of illegality. It is demonstrated that this approach is so unusually strict and scientifically ignorant that psychiatrists are typically disregarding it in practice. Next, the approach taken in Australian jurisdictions is analysed, whereby the courts not only interpret "wrong" as morally wrong, but have also addressed the precise *nature* of an accused's knowledge. Nonetheless, the moral approach is also subject to criticism. Finally, it is contended that the wrongfulness limb is in dire need of reform throughout both English and Australian law. Instead of focusing upon historical analysis of rules that have their origins in the mid-19th century, an alternative formulation is proposed which much more accurately reflects contemporary understanding of how distorted thought processes truly impact upon the ability of mentally disordered defendants to know right from wrong.

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Introduction

The basic principles of responsibility in criminal law require that a person should have engaged voluntarily in conduct with knowledge of those circumstances and consequences which make that act prohibited by law.[1] It is not necessary, however, that he should have possessed knowledge of the normative status of his conduct, unless normative criteria are specified in the particular offence.[2] Therefore, it has long been established that ignorance of the law is no excuse.[3] Nonetheless, any principle permits a range of exceptions in order to avoid conflict with other principles or policies.[4] Thus, if certain conditions are met, ignorance of the "wrongfulness" of conduct will provide a defence to crime. One such exception to this general principle is the defence of insanity.[5] The foundations of this defence are found in the *M'Naghten* Rules.[6] The Rules, in essence, save a defendant from criminal liability where, due to a relevant mental disorder, he was unable to know what he was doing, or, was unable to *know that what he was doing was wrong.*[7] Across jurisdictions, however, the courts have failed to reach a consensus on how to properly define "wrong" in this context.[8] Should the defendant be ignorant about the fact that the law prohibits his act, or should he be unaware that his unlawful act is morally wrong?[9] The current paper critically examines this particular aspect of the insanity defence, highlighting the divergence of judicial opinion between how the courts in England and Wales have interpreted the wrongfulness limb, as opposed to those of Australia. For present purposes, it will suffice to say that the former interprets "wrong" as meaning legally wrong, whereas the latter unanimously interpret this phrase as morally wrong.

Chapter 1 discusses the wrongness limb in England and Wales. In particular, focus is dedicated to the strict legality standard and the process by which this interpretation came to be developed within the appellate courts. Furthermore, it is demonstrated how psychiatrists are currently failing to apply the strict letter of the law when examining the mental state of defendants whose responsibility is in doubt. This chapter also critically assesses the general adequacy of the strict legality standard.

Chapter 2 analyses the approach to wrongfulness in Australian jurisdictions, where "wrong" in the *M'Naghten* Rules has been interpreted as morally wrong. Other relevant matters regarding the exact *nature* of an accused's knowledge of wrongfulness are subsequently identified, including; for instance, the distinction between to "know" that an act is wrong, as opposed to "appreciating" its wrongfulness. The merits and critiques of the morality standard are then examined in light of the preceding chapter.

Chapter 3 returns to the *M'Naghten* Rules in order to examine their position on the relevant construction of "wrong". Specifically, both sides to the debate claim to follow the authority of *M'Naghten*, however, it is suggested that neither approach offers an entirely convincing argument for this. Consequently, it is submitted that the preferred way forward is *not* to historically analyse the archaic rules of *M'Naghten*. Instead, an alternative approach is proposed which redirects the focus of this limb upon current psychiatric understanding of mental illness.

Chapter 1 : The Legal Approach to Wrongfulness in England and Wales

This chapter deals with the interpretation of the "wrongfulness limb", which has been adopted by the courts in England and Wales. It begins with an analysis of the relevant judgments which have established the limb to be restricted solely to those who lack knowledge that what they are doing is *legally* wrong, and does not apply to those who lack the knowledge that what they are doing is *morally* wrong. The inconsistency in approaches taken to wrongfulness between the appellate courts, psychiatrists, and courts of first instance is then examined, with reference to relevant research. Finally, the legal approach to wrongfulness is critically discussed.

In England and Wales, the defence of insanity is derived from the *M'Naghten* Rules.[10] The Rules comprise a series of answers given by judges of the Queen's Bench in 1843 to questions put by members of the House of Lords, following the infamous trial of Daniel McNaughtan.[11] Whilst technically of no binding effect, they are generally regarded as a comprehensive and authoritative statement of the law.[12] The Rules provide that proof of insanity requires the defendant to be labouring under a defect of reason, from a disease of the mind, to the extent that he did not know the nature and quality of his act, or, *that he did not know he was doing what was wrong*.[13] The italicised section above is what has become known as the wrongfulness limb. When attempting to provide clarity upon this "stubbornly ambiguous"[14] phrase, it was initially provided that, "[i]f the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."[15] This clearly states two separate elements required to plead insanity under the prong of wrongfulness: firstly, the defendant must know that he "ought not" to do the act, and secondly, that act must be contrary to law.[16] The test is, however, silent as to the relevant sense of "ought not", which understandably led to much confusion during subsequent case law.[17]

1.1. Wrongfulness in the Appellate Courts

Over the course of 175 years since *M'Naghten*, the "generally undisturbed"[18] area of wrongfulness has only been grappled by the appellate courts of England and Wales on three occasions. The issue was initially addressed in *Codere*,[19] whereby, on application of this limb, Lord Reading was of no doubt that, "[o]nce it is clear that the appellant knew the act was wrong in law, then he was doing an act which he was conscious he ought not to do; and as it was against the law, it was punishable by law."[20] On one interpretation of this passage, his Lordship has offered a *definition* of "ought not", which restricts this limb of the defence solely to defendants who do not know that their actions are unlawful.[21]

This strict interpretation was subsequently applied in *Windle*,[22] which is widely regarded as unequivocally establishing the meaning of wrongfulness favoured by the courts in English law.[23] Within this case, the defendant famously said to the police "I suppose they will hang me for this?"[24] after administering his wife with a fatal aspirin overdose.

He appealed against his conviction on the basis that "wrong" should be defined broadly as morally wrong and not restricted to legally wrong. Lord Goddard strongly rejected this argument by submitting that, "[i]n the opinion of the court, the word 'wrong' means contrary to law, and does not have some vague meaning which may vary according to the opinions of different persons whether a particular act may or may not be justified."[25] This does not mean that the defendant must be aware of the section number, or even the name of the crime; the defendant need only know that the behaviour violates the law or is wrong in the sense of being criminal.[26] Thus, this decision is a clear acceptance of what Lord Brougham forcibly argued during the debates within the House of Lords following the acquittal of Daniel McNaughtan: "There is only one kind of right and wrong: the right is when you act according to law, and the wrong is when you break it."[27]

The Court of Appeal once again addressed the issue in the recent case of *Johnson.*[28] As well as considering the ruling in *Windle*, the court contemplated the observations of a number of legal commentators, in addition to the "highly persuasive ruling"[29] in the Australian case of *Stapleton*[30] (discussed in Chapter 2 below). Lord Latham acknowledged this clear "notorious area for debate",[31] and subsequently invited counsel to formulate questions of public importance, which the court could certify so that the House of Lords could decide whether it wished to revisit the *M'Naghten* Rules.[32] Nonetheless, the court at the time refused to adopt any alternative conception of its definition, remarking instead that "[t]he strict position remains as stated in *Windle*."[33]

1.2. Wrongfulness in the Courts of First Instance

One of the reasons why the court in *Johnson* attempted to pave the way for the issue to be addressed by the House of Lords was the observation by his Lordship that courts of first instance had been willing to approach the issue on a "more relaxed basis."[34] The court was presented with evidence based on empirical research by Mackay and his colleagues.[35] The first of Mackay's studies involved 49 successful insanity defences in England and Wales between 1975 and 1978. The wrongfulness limb was clearly identified as the relevant basis of the defence in 28 cases. In 23 of these it was the only limb identified, and in the other 5 there was reliance on both limbs. However, Mackay observed that there appeared to have been little attempt to distinguish between lack of knowledge of legal and moral wrongfulness. Indeed, so much so that he concluded that, "the general impression gained from reading the documentation in these cases was that the wrongness issue was being treated in a liberal fashion by all concerned, rather than in the strict manner regularly depicted by legal commentators."[36] There were 16 cases where the limb on which the successful defence was based could not be identified, and in 11 of these the psychiatric reports were of such a nature that "the rules could be regarded as having been considered by implication",[37] in that, for instance, lack of intent attributable to mental illness was identified as the basis of the defence.

Mackay and his colleagues extended their analysis further up to 2001 and studied 100 psychiatric reports where reliance was on the wrongfulness limb. They discovered that 68 made reference to moral or unspecified wrongfulness. Mackay therefore concluded that, "[t]his research once more supports the fact that the question many psychiatrists are actually addressing is 'if the delusion that the defendant was experiencing at the time of the alleged offence was in fact reality, then would the defendant's actions be justified?' – rather than the narrow cognitive test favoured by the law."[38] Forensic psychiatrist, Professor Keith Rix, argues that, from the perspective of his vocation, these research findings can only be regarded as "highly unsatisfactory".[39] In some cases, it appears that the defence of insanity was supported without any consideration of the relevant test, and, where it was in fact considered, it was not applied in accordance with the legal precedent laid out by the appellate court cases.[40] Indeed, it is suggested that, within the courts of first instance, *Windle* is receiving the "scant respect it deserves."[41] One prime example of the manner in which the wrongfulness limb was utilised leading to a successful insanity claim is a scenario involving a defendant named 'Leo'. Within this case, the defendant possessed the belief that he was 'Leo the Lion of Judah', that he was second only to God, and that God's law required him to kill his next-door neighbour for refusing to hand over the keys to Jerusalem. Leo's state of mind made him believe that this refusal gave him a legal right to kill his neighbour, notwithstanding that this was against the law.[42] This case illustrates some of the difficulties that face psychiatrists in applying the wrongfulness test. In particular, this scenario highlights a rather subtle distinction between the law of the land, and the implicitly superior 'God's law'. Insofar as the accused knew that what he was doing was against the law, he did not have an insanity defence. He was therefore very fortunate that his defence was accepted in England and Wales. On a strict application, in order to succeed, the defendant would have needed an additional delusional belief that the law of the land as to homicide was wrong, had been repealed, or had been superseded by the law to which he believed that he was subject.[43]

These are all critical distinctions when a successful defence of insanity hangs in the balance, and a mentally ill defendant is at risk of being criminalised and dealt with as a fully responsible offender.[44] Indeed, if the defendant knew the nature and quality of his act, then the question of whether he knew that what he was doing was wrong becomes the sole question on which his future may hang.[45] However, psychiatrists in practice are supporting an insanity defence on the basis of the accused persons believing that their actions are morally justifiable and disregarding knowledge of legal wrongfulness.[46] In other words, "if psychiatrists do apply a different test from that which the law requires, it will be either because they are ignorant of the law or because they are bending it."[47] The courts of first instance, in turn, usually through the verdict of a jury but occasionally on the decision of the judge alone, are then accepting defences which would not be upheld by the Court of Appeal.[48] As Kearns and Mackay have observed, "it may be argued that psychiatrists are in many respects adopting a common sense or folk psychology approach and that the courts by accepting this interpretation are, in reality, expanding the scope of the *M'Naghten Rules*."[49]

Of course, this may well be regarded as a welcome expansion of the law since it affords a psychiatric defence to individuals who would not otherwise benefit from it. It is, however, unsatisfactory that this depends upon psychiatrists and the lower courts side-stepping the law as laid down by the appellate courts.[50] It would be preferable if the law and practice were to act in harmony.[51] As in, for example, the case of *Johnson*, psychiatrists and courts respectively that apply the law in a strict manner can ultimately deny the defence in cases which are really no different to those in which it has been successful.[52] As Ormerod observed within his comment on *Johnson*, "[i]t appears that the appellant may have been unfortunate to have had legal and medical practitioners who applied the strict letter of the law."[53]

If this research had been conducted as early as 1843, there is no reason to suggest that Mackay's findings would have been any different. For example, it is arguably unsurprising that the judge who delivered the single dissenting judgment in *M'Naghten*, Mr Justice Maule, should only a few months later in *Higginson*[54] direct a jury in the terms of "so insane that he did not know right from wrong."[55] Perhaps more nonplussing is Lord Tindal's direction to a jury the following year in the terms of "no competent use of his understanding so as not to know he was doing a wrong thing."[56] Clearly, their Lordships at first instance were far more inclined to consider the contrast between right and wrong in the general sense, rather than a strict sense of lawfulness and unlawfulness which subsequently garnered support within the appellate courts. In fact, Lord Tindal's approach is similar to the method he used to address the jury in the very trial of *M'Naghten* itself. He referred to whether or not Daniel McNaughtan had "competent use of his understanding so that he knew that he was doing, by the very act itself, a wicked and wrong thing."[57] Thus, it has been suggested that when Lord Tindal's answers are viewed in the context of his directions to juries when sitting as a judge at first instance, the distinction is not so much between "strict" and "relaxed" application of the Rules, but rather, between theory and practice.[58] In sum, it is proposed that the appellate courts of England and Wales are highly out of touch with the approaches taken by courts of first instance regarding the issue of wrongfulness.

1.3. A Critique of the Strict Legality Standard

While the discussion above clearly ascertains that the position in English law has been firmly established by the appellate courts to be restricted to knowledge of illegality, it is by no means beyond critical scrutiny. Criticism of this linear approach can be traced back to as early as 1874, whereby the psychiatrist, Maudsley, stated it to be "obvious that knowledge of right and wrong is different from the knowledge of an act being contrary to the law of the land". Furthermore:

> *"It is certain that an insane person may do an act which he knows to be contrary to law because by reason of insanity he believes it to be right, as he is a law unto himself and deems it a duty to do it, perhaps with a view to producing some public benefit."*[59]

Thus, it is proposed that knowing an act to be wrong is one type of experience to an ordinary person, but a very different matter to those who are mentally ill. Such a person may

well feel himself to be above the law, or that his act was justified solely on the grounds that he was redressing an injury which his psychosis had induced him to believe had occurred. In such an individual, it is highly unlikely that, at the time of the offence, he would realistically be swayed by the legal rules of right and wrong which would influence a more normal man.[60] To illustrate the inadequacies of this strict standard, one needs only consider a defendant suffering from elaborately developed delusions who hears the voice of God commanding him to kill the very personification of evil in order to prevent the imminent destruction of mankind.[61] It would be petty legalism to question whether he knew the criminality of his act.[62] Of course he did. But for him, the conflict existed upon a much higher plane. Surely it would shock the sensibilities of any civilised community to hold such a man as criminally responsible for his act, merely because his deranged mind was able to grasp onto some slight, abstract knowledge of his conduct being contrary to law.[63] Due to these concerns, Weihofen labels the illegality position as a "sterile, armchair logician's test".[64] Its logic, admittedly, is impeccable: the law is concerned only with legality, and if the defendant knew the act was criminal, but nevertheless commits it, he is responsible. In the words of Isaac Ray, "[i]t is very reasonable, if insane men would but listen to reason!"[65] However, experience, as distinguished from logic, will show that disordered minds most certainly do not operate in this way. This leads Weihofen to conclude that the "preposterous"[66] illegality standard is not only "shockingly harsh: it is also scientifically ignorant."[67]

It is submitted that the preceding arguments certainly contain their merits. By prohibiting grossly sick individuals from receiving the proper rehabilitation they require, of which can only be obtained through admission to a psychiatric hospital, it surely cannot be said that such a rule results in sufficient justice. Indeed, research has shown that an alarming number of mentally ill offenders are currently incarcerated amongst the general population of convicts, and are receiving an inadequate amount of specialised treatment for their psychotic disorders.[68] It is not difficult to conceive of how this strict interpretation of wrongfulness may be a contributing factor to the problem.

The Butler Committee further echoed these critiques, submitting that "[k]nowledge of the law is hardly an appropriate test in which to base ascription of responsibility to the mentally disordered. It is a very narrow ground of exemption since even persons who are grossly disturbed generally know that acts such as murder and arson are crimes."[69] It is common sense that the bulk of humanity recognizes the unlawfulness of such acts, and thus, this stance surely only serves to remove protection from the majority of the mentally disordered,[70] aside from the few, as Hall (rather tactlessly) puts it, "drooling idiots"[71] who do not know that murder, theft and arson are illegal.

1.4. Defective Reasoning in the Court of Appeal

Some commentators have also been critical of the reasoning behind the decisions in the appellate court cases. For example, Lord Goddard in *Windle*[72] justifies his decision that the

term "wrong" must simply mean legally wrong, on the grounds that "[c]ourts of law *can only* distinguish between that which is in accordance with the law and that which is contrary to it."[73] His Lordship was of the view that it would be a rather "unfortunate"[74] thing if it were left to juries to consider whether an act was morally right or wrong. Whilst this lattermost statement is an understandable critique of a morality-based test, and will be considered during the subsequent chapter of this paper, Lord Goddard's former submission is notably controversial. Indeed, adhering to black-letter law enables certainty,[75] but his Lordship undoubtedly states his opinion as if it is a matter of fact. If this was truly the case, it would not explain why plenty of other common law jurisdictions have explicitly rejected the test in *Windle,* and have instead incorporated forms of moral wrongfulness within their insanity defence.[76] In other words, they are requiring exactly that which his Lordship states a court of law *cannot do*.[77] Moreover, even if his Lordship was, for the sake of argument, correct in saying that courts of law cannot consider questions of morality, this does not necessarily follow that they cannot contemplate whether a *defendant* can consider such questions.[78] These are two entirely separate issues.

Lord Goddard's second proposed justification was that a test of legally wrong was supported on the authorities, however, his reasoning rested on an obvious error. For instance, within the earlier case of *Rivett*,[79] he referred to s.2 of the Trial of Lunatics Act 1883, which introduced the special verdict: "Where a defendant was insane, so as not to be responsible, according to law, for his actions at the time when the act was done, then the jury may return a special verdict."[80] Evidently, section 2 does not define insanity. The legal test of insanity before and after the 1883 Act remained the *M'Naghten* Rules. Thus, s.2 can be expanded to read: "insane, so as not to be responsible, according to the law [as set out in the *M'Naghten* Rules]." In other words, "insane, so as not to be responsible" is a *conclusion* of the legal test for insanity. Curiously, however, Lord Goddard interpreted "insane" and "so as not to be responsible, according to law" as two separate tests, such that "it is responsibility and not merely insanity that is the true test."[81] His Lordship commented that:

> *"As I endeavoured to point out in Rivett, the real test is responsibility. A man may be suffering from a defect of reason, but if he knows that what he is doing is 'wrong', and by 'wrong' is meant contrary to law, he is responsible. I desire to emphasise again, as we sought to emphasise in Rivett, that the test is 'responsibility according to law.'"*[82]

However, nowhere in *Rivett* was it held that "wrong" means "contrary to law." Rather, it was emphasised that the test was responsibility. But that test of responsibility was simply the *M'Naghten* Rules, and those Rules did not specify the relevant sense of "wrong."[83] Therefore, Lord Goddard appears to have erroneously borrowed the phrase "according to law" from s.2 of the 1883 Act, and transplanted it from its proper place as a *conclusion* that the *M'Naghten* Rules apply, into a *premise* identifying what counts as "responsible" within those Rules.[84] To summarise, both of his Lordships' explicit reasons for restricting wrongfulness to illegality appear seriously flawed.

Having regard to the overwhelmingly negative reception that this interpretation has received, it is rather surprising that the certainty to which Lord Goddard held that "wrong" means legally wrong was not explicitly questioned in *Johnson*. Here, Lord Latham can be commended for commenting that, having regard to how they came about, the "rules must be approached with some caution".[85] However, scholars such as Rix have nonetheless criticised his Lordship for his stubborn and pusillanimous attitude to the problem by refusing to adopt an approach more consistent with courts of first instance, as well as many other jurisdictions which have explicitly rejected *Windle*. In his words, "whereas an amber light may cause some travellers to stop, surely the progress of justice requires other travellers to possess the willingness to move forward."[86]

Summary

To summarise, the current state of the law in England and Wales is ambiguous, unfair and ineffective. Far from being clear, the law derives from the *M'Naghten* Rules which fail to explicitly specify the desired meaning of "wrong". This has led to a notable divergence between how the appellate courts have interpreted the phrase as opposed to those of first instance. Far from being fair, the success of the defence depends more upon "clumsy, woolly and superficial psychiatric expertise"[87] or on psychiatrists who are prepared to bend the law. However, the defence will otherwise be denied to those whose cases the psychiatric experts apply the strict legal test, or if appeal is made to the higher courts. Far from being efficient and effective, the strict interpretation calls for an unwarrantedly narrow requirement that the defendant did not know that his conduct was contrary to law. Clearly, if the law is intended to avoid the criminalisation of mentally disordered defendants who, but for their mental disorder, would not be convicted of their offences, it is worryingly insufficient. Even in many of the tiny minority of cases in which the defence does succeed (for example, "Leo") on strict legal grounds, it technically ought not to have. It is therefore submitted that English law has certainly become ossified within this area. It is in dire need of reform in order to keep pace with the vast majority of other jurisdictions which continue to develop and evolve.

Chapter 2 : The Morality Approach to Wrongfulness in Australian Jurisdictions

This chapter concerns the interpretation of the wrongfulness limb employed by the courts in Australia. It will be recognised that the approach within these jurisdictions differs significantly from that of England and Wales, as the test here asks whether or not the defendant knew that their conduct would be perceived as *morally* wrong. An examination of the two High Court decisions regarding the meaning of wrongfulness subsequently follows, with particular focus dedicated to the divergence of opinion between how the English authorities have interpreted the *M'Naghten* Rules, as opposed to those of Australia. Finally, the morality approach is critically discussed in light of the preceding chapter.

2.1. *Wrongfulness in the High Court of Australia: R v Porter*

The Australian colonies inherited the *M'Naghten* Rules.[88] However, the developing nature of Australian legal regimes and the small number of cases meant that there was little change in the law until 1933, where Dixon J (as he then was) presided over the case of *Porter*.[89] Here, the Australian courts first began to favour a test of wrongfulness which substantially differed from that adopted by the appellate courts of England and Wales. As expressed by Dixon J, in order to determine whether an accused lacks the requisite knowledge:

> *"The question is whether he was able to appreciate the wrongness of the particular act he was doing. What is meant by 'wrong'? Wrong is wrong having regard to the everyday standards of reasonable people. The main question is whether the man you are trying was disabled from knowing that it was a wrong act to commit in the sense that a body of reasonable men understand right and wrong, and that he was disabled from reasoning with a moderate degree of sense and composure about what he was doing and its wrongfulness."*[90]

Elsewhere, Dixon J's direction to the jury has been described as a "model of precision that deserves more attention than it has yet received from the profession outside of Australia."[91] Likely one of the reasons behind such a praiseworthy reception was the notable focus upon a societal standard of morality, which permits the defence to be relied upon by those who are unaware that their actions are in violation of society's code of appropriate moral conduct, notwithstanding that the accused may be entirely aware that their acts violate the law of the land.[92] It is important to emphasise that *Porter* does not advocate a wholly personal or subjective standard of morality.[93] Thus, an accused will undoubtedly be held criminally responsible if he was aware that his conduct breached society's morals, even if he *personally* believed that his actions were justified.[94]

At first glance, a subjective standard of morality may appear to be the preferable option, since it would afford the defence to those defendants who, because of their mental illness, adhere to a personal code of morality.[95] Furthermore, in cases where the defendant's personal moral code is the direct result of their mental illness, it is arguably "sound common sense"[96] that it would be difficult to comprehend how that defendant's knowledge of society's disproval could be a matter of importance and reality to him.[97] Nonetheless, it is submitted that Ranade is persuasive when he refers to the subjective test as leaving "a sour taste in one's mouth".[98] Such an explication is based upon an accused's personal and idiosyncratic moral values that disregard the law as a public code and drastically lower the standard for evidencing insanity, perhaps encouraging its invocation as an escape.[99]

The societal morality definition of wrongfulness may substantially overlap the field of view furnished by the strict legality position, as society's moral norms are, of course, often tied to or embodied within the criminal law.[100] However, there are certainly some instances where this is not so, and where the distinction between these two interpretations can be of decisive importance.[101] For example, society's morals might be more or less restrictive than legal prohibitions. Similarly, society's morals might be more amorphous and difficult

to ascertain than society's legal pronouncements; or, society might be divided on the moral rectitude of certain actions, with the defendant in accord with one view and in violation of a competing view.[102]

2.2. The Nature of an Accused's Knowledge: To "Know" or "Appreciate"

Unlike the appellate courts of England and Wales, the case of *Porter* also develops upon what is meant by the word "know". Under the language of *M'Naghten*, a psychotic defendant could be found sane even though his knowledge of the wrongfulness of his act was merely a capacity to verbalize the "right" (socially expected) answers to questions relating to that act, without such knowledge having any affective meaning for him as a principle of conduct.[103] The fact that a defendant may be able to mechanically verbalize the right answer to a question (i.e. to respond that murder is wrong), or the fact that he exhibited a sense of guilt, as by concealment or by flight, is often taken as conclusive evidence that he knew the wrongfulness of his conduct.[104]

Yet, one of the most striking facts about the abnormality of many psychotics is that their way of knowing differs significantly from that of the normal person.[105] Goldstein opines that it may be compared to "the knowledge children have of propositions they can state, but cannot understand. It has no depth and is devoid of comprehension."[106] The *M'Naghten* Rules thus contentiously confine the inquiry to the defendant's cognitive capacity.[107] One shortcoming of this restriction is that it authorises a finding of responsibility in cases where the defendant's knowledge of wrongfulness is a largely detached or abstract awareness that does not penetrate the affective level.[108] It seems quite clear that the knowledge that should be deemed material in testing responsibility is more than merely surface cognition; it is the *appreciation* that sane men have of precisely what it is that they are doing and the legal and moral quality of their conduct.[109] Insofar as a formulation centred on mere surface cognition does not readily lend itself to application to emotional abnormalities,[110] the *M'Naghten* test has been regarded as "less than optimal as a standard of responsibility in cases involving affective disorders."[111]

In stark contrast, the question in *Porter* is put not in terms of "knowing" but of "appreciating". A standard of appreciation therefore appears to be based on the view that a sense of understanding broader than mere cognition provides the best opportunity for reconciling the traditional concept of legal and moral accountability with contemporary scientific knowledge about psychiatric dysfunction.[112] To appreciate, in this context, means being able to consider with a "moderate degree of sense and composure" the wrongfulness of the act.[113] Amongst Australian jurisdictions, this test has become known as the *Porter* "gloss", and in several of these the courts are assisted by a statutory definition of the nature of knowledge of wrongfulness. For instance, in Victoria, the Crimes (Mental Impairment and Unfitness to be Tried) Act of 1997 adopts identical wording to that of the *Porter* gloss. Rix has commended this approach on the grounds that, by replacing the purely

cognitive verb "know" with the broader terms of "appreciate" and "composure", this test thereby appears to introduce a means of taking into consideration the emotional (affective) state of the accused and its interaction with the cognitive processes, or their emotional concomitants,[114] thus meeting the long and widely held criticism that the Rules ignore the affective disturbances that occur in mental disorder.[115] The mental states of those whose behaviour brings them into conflict with the law are often characterised by a lack of calmness or composure, and this recognition that emotions can have an adverse influence on the processes of thinking and decision-making opens up the defence to persons whose powerful, morbid emotions and pathological states of overactivity affect their composure and prevent rational thinking.[116]

Since the appellate courts of England and Wales are yet to address the precise meaning of "know", the *Porter* gloss can only be regarded as a definite improvement. However, this test is still open to substantial criticism. For instance, the language of the gloss is rather archaic, complex and subjective. It is therefore likely to be difficult for juries and mental health professionals to properly understand. In turn, this test would benefit from being phrased in a more simplistic manner, and in one which is more consistent with terms that are more commonly used in the contemporary field of mental health. To illustrate this point, one needs only consider the vagueness of the terms "sense" and "composure", and the complete lack of guidance as to when a defendant will be considered to have reasoned with a "moderate degree" of these attributes.[117] Furthermore, the *Porter* gloss appears to be erroneously suggesting that the line between mental competence and incompetence should be partly determined by whether a defendant was able to reason with composure and sense. However, this is likely too much to expect of many sane people, particularly those committing crimes of violence where the defence of insanity is typically raised.[118]

In a similar vein, Barnes has offered the worrying sentiment that, if taken too far, the *Porter* gloss may result in the exculpation of psychopathic defendants. For instance, he provides the example where a person, due to severe psychopathy, lacks the ability to incorporate the potential for regret into their decisions, thereby causing him to lack "a moderate degree of sense and composure" about the wrongfulness of his conduct.[119] It is submitted, however, that the most cardinal critique of the *Porter* gloss is its limited application. In other words, it fails to account for those instances where an accused's inability to comprehend the wrongness of his act will depend on considerations *other* than a capacity to reason about the matter with sense or composure.[120]

2.3. Wrongfulness in the High Court of Australia: Stapleton v The Queen

The subsequent case of *Stapleton* did not alter the test in any way, however, it did provide what has been described as a "complete and convincing theoretical justification for Dixon J's direction to the jury in *Porter*."[121] In order to achieve this, the judgment of the court gave a detailed examination of eighteenth and nineteenth-century authorities.[122] The court

concluded that, "[t]he context of *M'Naghten's* wrongness test leaves no doubt that this expression is referring to the canons of right and wrong and not to the criminal law."[123] Within the cases to which the court referred when supporting this broad assessment, it was discovered that the early authorities were referring to the defendant's ability to distinguish generally between "good and evil" or "right and wrong". That was the direction in *Arnold*,[124] *Hadfield*,[125] *Oxford*[126] and *Bellingham*,[127] among others.[128] The case of *Hadfield* is particularly instructive. The defendant attempted to assassinate King George in order to bring about his own execution.[129] Like the defendant in *Windle,* he undoubtedly possessed the knowledge that his act was legally wrong because his sole intention was to be sacrificed by the state, and to become a martyr to mankind's salvation.[130] Unlike Francis Windle, however, James Hadfield was acquitted by reason of insanity. The High Court acknowledged some competing authorities implying the legally wrong interpretation, but, on balance, the court concluded that such an interpretation was incorrect. In the words of Dixon CJ, "[t] he decision in *Windle* is not one that we are prepared to accept or act upon. The judges [in *M'Naghten*] were not asked to improvise a rule but to formulate the rule that existed and that is all they purported to do."[131]

2.4. "Actual" Knowledge & The "Capacity" for such Knowledge

In contrast, the Queensland,[132] Western Australia[133] and Tasmanian[134] formulations of the defence read that an accused will be held non-responsible if they were deprived of "the *capacity* to know that [they] ought not to do the act". The phrase "ought not" is interpreted as raising the issue of whether the accused was unable to know the act was wrong "according to the ordinary standards adopted by reasonable men."[135] This interpretation is thus synonymous to the social morality standard established within *Porter*.[136] However, unlike *Porter*, these Australian states call for a capacity-based interpretation of the knowledge requirement. Yannoulidis therefore makes a distinction between an accused's *actual* knowledge (*M'Naghten*, *Porter*) and their *capacity* for such knowledge (Queensland, etc).[137] Due to the notion that a person may possess the capacity to know the wrongfulness of their act, but not be able to exercise it at the material time, it is suggested that a capacity-based interpretation restricts the insanity defence to a greater extent than a test based on actual knowledge.[138]

Canagarayar takes the opposite view. He asserts that there are cases where the accused will admit that he knew, but that a court might, despite his admission, conclude that he did not have the *capacity* to know.[139] The error in this argument is Canagarayar's assumption that a court will unquestionably accept the admission of knowledge made by a mentally disordered defendant. It is not logically possible to conceive of a scenario where the accused, at one and the same time, actually knew what he was doing, yet lacked the capacity to know what he was doing.[140] Thus, the preferred approach is that an insanity defence based on incapacity is narrower than a test based on actual knowledge. It is submitted, however, that

whilst the above distinction is theoretically sound, it is of little practical significance because any distinction must be understood in relation to the requirement of mental disorder.[141] Therefore if, according to McKillop, the accused lacks the requisite knowledge, it would be "splitting verbal hairs" to suggest that he might nevertheless not have been rendered incapable of knowing as a result of this mental disorder.[142]

2.5. A Critical Discussion of the Morality Approach

Jurisdictions which favour moral wrongfulness tend to assume that this approach will provide broader scope to the defence, and will thus be fairer to the accused.[143] However, as Williams highlights, it is also possible that a person may know his act was morally wrong, but, through disease of the mind, mistakenly believe that it is in accord with the law.[144] Thus, as a matter of logic alone, neither sense of "wrong" can give broader scope than the other.[145] Admittedly, however, the adoption of a moral wrong standard has tended to give more assistance to the defence in cases where the problem has arisen, partly because it is easier to rebut a claim of insanity where the only issue is legal wrong. The work of the courts and police carries fairly clear meanings, and evidence tending to show knowledge of legal wrong, such as an attempt to avoid arrest, may therefore leave less room for divergent interpretation than evidence tending to show knowledge of moral wrong.[146] Additionally, in relation to the more serious offences where the issue has typically arisen, knowledge of moral wrong may require a higher level of cognitive capacity than knowledge of legal wrong.[147] As such, the adoption of morality as the standard against which wrongfulness should be judged could *potentially* have the effect of broadening the practical scope of the defence.

Whilst the morality standard may result in greater justice, it is by no means a perfect alternative to the strict legality position. Arguably, to hold that absence of moral discernment due to mental illness should exempt a person who knows that legally he or she ought not to do a certain act is to introduce a lack of parallelism into the criminal law.[148] Generally, absence of moral appreciation is no excuse for criminal conduct. When the moral mechanism breaks down in the case of an individual who is entirely sane, this is not treated as an excuse for disobeying the law, for example, in the case of a psychopath.[149] The rationale for this is that an individual either knows or is presumed to know the law, and the fact that his or her moral standards are at variance with those of society is not a legitimate excuse.[150] As such, there is no logical reason as to why deficiency of moral appreciation due to mental illness should have a different consequence than deficiency of moral appreciation due to, for instance, a morally impoverished upbringing.[151]

Moreover, there are several practical difficulties associated with the incorporation of a social morality standard. For example, Schiffer purports that:

> *"If we were to judge wrongfulness by the moral standards of society, it is submitted that the right-wrong test would become virtually meaningless. In the case of certain crimes (e.g.*

abortion), even the most lucid individual would have trouble appraising society's views without conducting an opinion poll. In the case of other crimes (e.g. rape) even the most severe psychotic might know that they are morally condemned by society."[152]

Although abortion is no longer the subject of criminal sanction, Schiffer's point remains valid. It is not difficult to conceive of other criminally proscribed acts, such as euthanasia, where wrongfulness in the eyes of society may not necessarily coincide with wrongfulness in the eyes of the law.[153] A further problem with making knowledge of moral wrong the test for criminal responsibility is that of determining what society's moral judgment will be in every situation. For instance, it is difficult to predict what result would be obtained on occasions where an accused claims not to know that his unlawful act was morally wrong and, objectively, the act is one for which the moral wrongfulness can be disputed. Arguably a court is in no position to make determinations on questions of morality, nor is it fair to impose the responsibility on a jury and expect them to agree on what is morally right or wrong.[154] In essence, the importance of certainty in the criminal law cannot be over-estimated. It should be relatively clear when criminal responsibility attaches and when it does not if the criminal law is to have the requisite deterrent effect and if it is to be seen to function fairly and equitably to all.

Whilst the critiques of the social morality standard cannot be dismissed lightly, it is submitted that this approach is to be preferred over the current legal position in English law. As Glanville Williams once stated, "[t]he wrongness limb, unless interpreted as referring to moral wrongness, adds nothing to the other questions."[155] Williams' point is that an accused would have to be severely deranged to not realise the criminality of his conduct; so deranged, in fact, that a jury would probably refuse to find that he knew what he was doing in the first place.[156] Thus, whilst the social morality approach is not perfect, it at least avoids the problem of making this limb redundant.[157] Furthermore, critics of this standard will hopefully be comforted by the fact that the presence of a relevant mental disorder is required before an analysis of whether the accused knew that his acts were morally wrong is even undertaken. Moreover, unlike the subjective approach, critics need not be concerned about an opening of the "floodgates", as the accused cannot simply substitute his own moral code for that of society, and claim that he was acting according to that code in order to escape from criminal liability.[158]

Summary

The various developments in Australian jurisdictions seem to affect three fundamental aspects of the wrongfulness limb. Firstly, the nature of an accused's knowledge, which is expressed by the word "know" has been replaced in several jurisdictions by "appreciate". Within *Porter*, "appreciation" involves the ability to reason with a moderate degree of sense and composure about whether the conduct was wrong. In turn, this appears to allow for affective components to be taken into account when assessing responsibility. This surely

must be regarded as a step-forward when compared to the purely cognitive position in English law. Nevertheless, for the reasons suggested in the discussion above, it is submitted that the *Porter* gloss is out of touch with current understanding of psychiatric dysfunction, and therefore in need of refinement.

Secondly, the object of an accused's knowledge, which finds expression in the word "wrong" is now unanimously defined across Australian jurisdictions as a societal standard of morally wrong. It is true that this interpretation is likely fairer to the mentally disordered accused, particularly in comparison to the arguably futile legality position in English law. The moral approach can be criticised for being premised upon the mistaken assumption that there will be a community norm in relation to each case at hand,[159] however, it is submitted that a reformed version of the wrongfulness limb (discussed below) should retain this aspect of the defence. A social standard seems to strike the correct balance between the legality approach, which is far too strict, and the subjective morality approach, which is far too lenient to ever be acceptable "in a viable criminal law."[160]

Thirdly, whilst some Australian jurisdictions, such as Queensland and Tasmania have adopted an approach concerning the *capacity* for knowledge, as opposed to *actual* knowledge, there seems to be no significant difference between how these tests are applied in practice.[161] As long as the courts continue to ignore the more pervasive nature of a capacity-based interpretation, it is irrelevant whether the wrongfulness limb refers to the former or the latter.

Chapter 3 : Reforming the Wrongfulness Limb: A Move Away from Historical Analysis in Favour of Contemporary Understanding of Mental Disorder

This chapter contends that the approach to wrongfulness in both English and Australian law is in need of reform. Largely, this is due to the fact that both sides to the debate claim to follow the authority of the *M'Naghten* Rules, however, the Rules do not offer an explicit preference as to how wrongfulness should be defined. As a result, it is submitted that this limb should *not* be determined by historical analysis of Rules which have their origins in the mid-19th century. Instead, an alternative formulation is proposed which much more accurately reflects contemporary understanding of psychiatric dysfunction.

3.1. Misinterpreting M'Naghten

After examining both the legality and morality approaches to wrongfulness, it seems to be clear that each side of the debate claims to follow the authority of the *M'Naghten* Rules.[162] However, the Rules do not offer a clear and unequivocal statement regarding which type of wrongfulness should be applied.[163] For example, in answer to a general question by the House of Lords on the legal position of an insane accused who knew that he was acting

contrary to law, Lord Tindal stated that he would be "punishable if he knew that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land."[164] Despite this, his Lordship went on to address, in somewhat different terms, the correct charge to the jury on the question of an accused's mental state:

> *"If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had sufficient degree of reason to know that he was doing an act that was wrong."*[165]

The first quoted passage seems to support the notion that "wrong" means legally wrong, whereas an argument could be made that the italicised section of the second passage can be construed as morally wrong.[166]

As stated in the preceding chapter, advocates of the morally wrong position have bolstered their argument by contending that the *M'Naghten* Rules were only meant to express the existing law, and that in the cases prior to *M'Naghten* the primary concern had been with wrongfulness in a moral sense.[167] Indeed, this was the main pillar of argument relied upon by Dixon CJ in *Stapleton*. The complete lack of such a historical analysis in *Windle* (where "wrong" was restricted to legality) is a logical reason for concluding that a standard of morality is much more in line with what the judges in *M'Naghten* truly intended. As such, it is arguably not surprising that the judgment in *Stapleton* was subsequently considered to be a more "technically accurate formulation of this limb of the *M'Naghten* Rules than the bare perception by the accused of the illegality of his actions accepted within the English appellate courts."[168] Nonetheless, it is respectfully submitted that Dixon CJ's reasoning for restricting wrongfulness to morality is not entirely convincing. For instance, the entire argument that the judges in *M'Naghten* were merely "formulating the rule that already existed"[169] is certainly questionable, because it can just as effectively be counterargued that they were actually *redefining* the law that was to be followed thereafter.[170] Furthermore, Dixon CJ failed to pay ample attention to the numerous sections within the Rules themselves which reference a defendant who knows that he is acting contrary to law.[171] This is particularly apparent when the judges elucidate on exactly *why* the wrongness limb is phrased so ambiguously:

> *"If the question [of wrongfulness] were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law was essential in order to lead to a conviction, whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it."*[172]

It could be suggested that the language cited above clearly points to the fact that the main reason for phrasing the test by way of the ostensibly ambiguous term "wrong" centred on the need not to unnecessarily confuse the jury.[173] Thus, whilst the judges may have advocated a standard of legally wrong, they were at pains to point out that, notwithstanding

this principle, the direction to the jury (who are not legally trained) was to be encompassed within the word "wrong", lest they be under the erroneous impression that the accused had to be shown to have had "*actual* knowledge" of the law before he could be deprived of the insanity defence; which would, presumably, be to afford the accused excessive flexibility.[174]

If the morality approach is an incorrect interpretation of the Rules, then it would appear that a more accurate construction restricts this limb solely to defendants who do not know that their actions are unlawful. The issue, however, is that this perspective is also highly flawed. It is submitted that the most convincing argument against this proposition is the choice of vocabulary used by Lord Tindal in the very trial of Daniel McNaughtan itself. Here, his Lordship put the following direction to the jury:

> *"You [must be] satisfied that the prisoner had that competent use of his understanding as that he knew that he was doing, by the very act itself, a wicked and wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law of God or of man, undoubtedly he was not responsible for that act."*[175]

A "wicked and wrong thing" and "a violation of the law of God" hardly offer persuasive support for the legally wrong interpretation.[176] Furthermore, as Dixon CJ perceptively highlighted in *Stapleton*, it would be rather "strange" if Lord Tindal were to entirely depart from his charge to the jury at trial, so as to adopt an approach so significantly different when answering the hypothetical questions put to him by the House of Lords.[177] In fact, if his Lordship truly had restricted "wrong" to legally wrong, then it is likely that Daniel McNaughtan would have been convicted at his own trial.[178] McNaughtan's own admissions that "I know what I'm about!"[179] and "I am guilty of firing!",[180] as well as the numerous witness testimony which indicated that McNaughtan was a very "calm and inoffensive man"[181] with nothing awry with his intellect, could be taken to suggest that he was well aware that attempting to shoot Sir Robert Peel (and killing Edward Drummond) would be regarded as contrary to law. Overall, it is submitted that both sides of the debate are disappointing in that, instead of concentrating on the real function and scope of the defence of insanity and its *raison d"tre* in a modern society, they are both largely concerned with historical analysis and the interpretation of ambiguous language, on the strength of which either view of the meaning of the word "wrong" seems equally supportable.[182] As Mewett purports, the debate may as well be decided by the "toss of a coin".[183]

A third possible interpretation of the Rules has been proposed by some scholars.[184] It will be recalled that the Rules ask whether the defendant "did not know that what he was doing was wrong". According to Ormerod:

> *"The key to a proper understanding of this question is to recognise that the question is a negative one. If the accused does know either that his act is morally wrong or that it is legally wrong, then it cannot be said that he does not know that what he is doing is wrong."*[185]

Unfortunately, no such positive inference can be accurately drawn from *M'Naghten's* negative phrasing. "If A *didn't* B, then C" explains nothing about what follows if A *did* B.[186]

Of course, the Rules specify the relevant criteria for the insanity defence, and if the accused knew his act was "wrong", then he does not get the defence. It remains the case, however, that the relevant *sense* of wrong is not explicitly revealed by *M'Naghten's* negative phrasing.

A similar argument has been offered by McLachlin J (as she then was) within her dissenting judgment in the Canadian Supreme Court case of *Chaulk*.[187] Here, the majority adopted a social morality standard of wrongfulness, and her Ladyship dissented on the grounds that, if the defendant was aware that their act was wrong in *any* sense - whether legal or moral - then they should not be afforded the defence. Part of her reasoning was as follows:

> *"The word 'wrong' is used without modification. Had Parliament intended it to mean a specific kind of wrong, one would have expected Parliament to have said so."*[188]

Although McLachlin J is referring to section 16(1) of the Criminal Code which provides for the defence of insanity in Canada, the same argument is applicable to the *M'Naghten* Rules. It follows that knowledge of *any* sense of wrong should deny the defence, otherwise Lord Tindal surely would have been explicit about this. This exegesis can be justified as being more in line with the overall purpose and theory underlying the provisions of insanity. The basic rationale behind these provisions is that it is unfair and unjust to make an individual who is incapable of conscious choice between right or wrong criminally responsible.[189] Thus, punishment is only appropriate for those who have the ability to reason right from wrong. A person may conclude that he ought not to do an act for a variety of reasons. One may be that it is illegal. Another may be that it is immoral.[190] However, the *reasons* for which one concludes that they ought not to do something are collateral to the fundamental rationale behind the insanity provisions – that criminal conviction is appropriate only where the defendant is capable of understanding that he or she ought not to do the act in question.[191]

It is suggested, however, that McLachlin J's take on wrongfulness is not beyond criticism, for the simple fact that her argument proves too much.[192] For instance, Manwaring provides the example of a mentally disordered defendant who vandalises property in the delusional belief that it belongs to the mafia, and that doing so is both legally and morally justified. Such a person knows that his conduct is regarded as wrong *by the mafia*, but this surely cannot be grounds to deny him the defence.[193] The fact that an accused knows that his act is wrong in at least one sense cannot be sufficient. It is submitted that *which* sense of wrong certainly matters if the courts are to avoid potentially absurd results.

It is clear from the above discussion that all three approaches *could* be mistaking the authority of the *M'Naghten* Rules. Indeed, the *M'Naghten* position itself is so archaic and ambiguous[194] that it is impossible to accurately propose an argument for which sense of "wrong" the judges were referring to, without immediately encountering another argument which undermines it entirely. Therefore, it is respectfully submitted that it is time to move away from historical analysis, and to consider an approach to this aspect of insanity which

is more compatible with modern expertise of how psychiatric disorders effect the ability to distinguish right from wrong.

3.2. A Proposal for Reform

Due to these concerns, a proposal for reform of the wrongfulness limb is worth quoting in full:

> *"The inquiry [should] focus not on the general capacity to know right from wrong, but rather, on the ability to appreciate that a particular act is wrong in the circumstances. Of course, the accused must possess the intellectual ability to know right from wrong in an abstract sense. But he or she must also possess the ability to apply that knowledge in a rational way to the alleged criminal act. The real question is whether the accused should be exempted from criminal responsibility because a mental disorder at the time deprived him of the ability for rational perception and hence rational choice about the rightness or wrongness of the act."*[195]

The preceding approach is heavily influenced from the position laid down in the (somewhat) recent Canadian Supreme Court case of *Oommen*.[196] The court addressed the question of what is meant by "knowing that the act was wrong", and concluded that this refers not merely to the abstract knowledge that an unlawful act would be viewed as morally wrong by society, but rather, *it also extends to the inability to apply this knowledge in a rational way to the circumstances which the accused perceives.*[197] As Mackay purports, "[t]his is an important judgment as it reflects much more accurately the true nature of the distorted thought processes of those whose psychiatric disorders impact on their capacity to know right from wrong."[198] Indeed, as discussed in the initial chapter, this approach is typically mirrored by psychiatrists when assessing whether a defendant knew that what they were doing was wrong.

One could argue that this approach is too lenient, in that it may benefit the psychopath or the person who follows a personal and deviant code of right and wrong. However, this argument misunderstands the point. Mathew Oommen, after becoming the victim of an unprovoked assault, began to develop severe delusions of paranoia that members of a local union were conspiring to "destroy" him.[199] One night, he became convinced that they had surrounded his apartment building. This resulted in Mr Oommen fatally shooting his flatmate with a rifle, before she, in his distorted mind, killed him first. In essence, Mr Oommen accepted society's views of right and wrong. The suggestion is that, accepting those views, he was unable because of his paranoid delusions to perceive that his act of killing was wrong in the particular circumstances of the case. On the contrary, he thought it was right.[200] This is notably different from the psychopath or the person following a deviant moral code. Such a person *is* capable of knowing that his acts are wrong in the eyes of society, and despite such knowledge, chooses to commit them.[201]

By focusing on "wrong" in terms of societal morals, the decision in *Oommen* avoids the unwarrantedly narrow interpretation which has been adopted in the English cases

of *Windle* and *Johnson*. This decision also places much greater emphasis upon the precise *nature* of an accused's knowledge of wrongfulness, by questioning whether the defendant was able to "apply knowledge in a rational way to the alleged criminal act."[202] This is a vital aspect of the insanity defence which has been ignored by the English appellate courts. Whilst several Australian jurisdictions have attempted to explain this element by reference to reasoning with a "moderate degree of sense and composure", this test leaves much to be desired when compared with the approach favoured in *Oommen*. For example, this decision avoids using archaic and subjective language, and, in the process, circumvents the possibility of excusing psychopathic defendants who merely lack appropriate moral feeling for their victims.[203] Furthermore, Zhao and Ferguson purport that the holding in *Oommen* is likely to be particularly appropriate for dealing with paranoid schizophrenia, even in situations where the accused's degree of composure and sense typically remain intact. This is because many paranoid schizophrenics are unable to rationally perceive their actual circumstances, and thus, they lack the ability to rationally assess whether their acts are right or wrong according to morally accepted standards.[204]

Summary

To summarise, it can be seen that both *Windle* and *Stapleton* potentially misinterpret the authority of the *M'Naghten* Rules. The accuracy of the approach offered by scholars such as Ormerod is also open to doubt. As such, there is much to be said for Mewett's cry that this aspect of insanity should not be determined by the analysis of Rules which have their origins in the mid-19th century, but rather, from contemporary psychiatric understanding of mental illness. It is submitted that the decision in *Oommen* surely must be regarded as a step forward in this respect. This approach avoids the strict legality standard of England and Wales, as well as refining the highly vague "moderate degree of sense and composure" test that has been employed in numerous Australian jurisdictions. In sum, both English and Australian law have much to learn from the approach favoured in *Oommen*.

Conclusion

In conclusion, the "wrongfulness limb" has been a continuing source of contention ever since its formalised development as part of the *M'Naghten* Rules. The references within the Rules to the appropriate standard of wrongfulness were, at best, ambiguous; with the judges failing to make explicitly clear which construction should be applied to the word "wrong". The controversy over this issue has caused a significant divergence of opinion across jurisdictions as to which sense should be applied when the law embarks upon the challenging issue of dealing with mentally ill defendants. In England and Wales, the question is simply whether the accused did not know that what he was doing was *legally* wrong. To those whom certainty is the most important desideratum will likely be delighted with this strict standard. It works exactly how a precise rule should work; easily and simply.

However, this position is otherwise untenable. It would, in essence, condemn to the cells persons suffering from some of the most dangerous and severe types of mental disorder ever known to man.

In contrast, Australian jurisdictions have unanimously adopted an approach concerning the moral views held by reasonable members of society. It is submitted that this is certainly the preferred approach. If a person realises than an act is illegal but believes it to be right according to the standards of ordinary people, then finding him criminally responsible and liable to punishment seems wholly inappropriate. Punishment will not likely deter him from committing similar acts if his insane delusion is allowed to persist without psychiatric treatment. Unlike the English appellate courts, the Australian High Court has also addressed the nature of an accused's knowledge by questioning whether they are able to reason with a "moderate degree of sense and composure" about the wrongness of the act. This recognition that knowledge has important emotional concomitants is a step towards releasing the vice-like, purely cognitive grip which has befallen English law. However, in doing so, Australian law has potentially (and controversially) opened up the defence to psychopathic defendants, whilst simultaneously closing off the defence to those persons who are unable to comprehend wrongfulness due to considerations other than a lack of sense or composure. As a result, it is arguable that aspects of the wrongness limb in both English and Australian law are problematic and in need of reform.

Currently, both sides to the debate are heavily concerned with attempting to accurately follow the authority of the 19th-century *M'Naghten* Rules. However, the issue with this approach is that the Rules do not, at any point, explicitly specify which sense of "wrong" is to be preferred. As such, this author agrees with Mewett when he suggests that this aspect should not be determined by the historical analysis of ambiguous Rules which represent a time in which the practice of psychiatry was in its infancy. In contrast, the decision in *Oommen* goes well beyond the holding in *M'Naghten*, and, in doing so, much more accurately reflects the true nature of the distorted thought processes of those whose psychiatric disorders impact on their capacity to know right from wrong. Until English and Australian law acknowledges the significant developments undertaken in Canada, it is submitted that the concerns of Lord Coleridge will remain valid for the foreseeable future:

> *"The law in the matter of insanity is not incapable of being so interpreted as to do terrible injustice."*[205]

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Notes

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