

The ALI Test for Insanity: A Re-examination

G L E N N H . M I L L E R M D (M)

Since 1972, Roy Schafer has published a series of articles re-conceptualizing the language of psychoanalysis.¹ Through his "action language," Schafer has replaced the mechanistic propositions of traditional psychoanalytic metapsychology with propositions free of anthropomorphism and determinism. His work is aimed toward psychoanalysts; he believes his system offers analysts a clearer, simpler and more serviceable language than metapsychology. In an earlier article,² I tried to show that action language is useful also to forensic psychiatrists when they wish to make statements about criminal responsibility. It encourages simpler and clearer statements of psychological activity thereby making the psychiatrist's statement more comprehensible to the court. More importantly, it allows a common framework for law and psychiatry, revealing that it is spurious to believe the law's free will theory is incompatible with psychiatry's determinism (Cf. Stone, chap. 13³). Finally, this simpler language allows the forensic expert to testify more clearly about the actions of the defendant without appropriating the court's responsibility for its determination.

In this paper, I will try to extend the application of action language to criminal responsibility; my main purpose is to examine the American Law Institute (ALI)⁴ test from an action language perspective. But before I can do that comprehensibly, I must explain Schafer's fundamental rule and its implication for forensic psychiatry.⁵

Fundamental Rule and Application

Action language's fundamental rule may be divided into two parts. First, Schafer regards any psychological process "as some kind of activity, henceforth to be called action." Psychological processes include not only observable psychological behavior such as crying, fighting, pacing, or kissing, but also what we have traditionally regarded as "cognition" or "emotion." For example, reading is an action, as is hallucinating, calculating, fishing, dreaming, and planning suicide. Action is *not* synonymous with observable events. Psychological activity without observable manifestations is still action. For example, if someone avoids murdering another by "keeping" his rage "pent up," he is still engaged in an action, namely refraining from killing someone. A chess player who neither moves nor speaks is still acting since he is thinking of moves to defeat his opponent. A psychoanalyst, silent for an entire session, is acting since he is trying to understand the patient's

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associations. (Though the analysand can rightly say, "My analyst said nothing," it does not mean that the analyst *did* nothing. That the analyst is exhausted at the end of the session is proof of his or her activity.)

The second part of the fundamental rule prescribes that each action be described by "an active verb stating its nature and by an adverb (or adverbial locution), when applicable, stating the mode of this action." Since all psychological processes are actions, it follows that they be described by action words, namely verbs. Schafer allows adverbs because sometimes verbs are not sufficient to designate an action. For example, to eat is not sufficient to describe eating voraciously or eating slowly. Perhaps devouring is a satisfactory verb to replace the verb-adverb phrase of eating voraciously, but there is no simple verb for eating slowly.

Adopting action language requires that forensic psychiatrists avoid some of the common ways of describing psychological processes. We can no longer use the passive voice (since a person is always doing something—not having something done to him). We can no longer reify mental processes; for example, we may not talk of a man's tyrannical superego because now the man himself is acting—not some imagined tyrannical homunculus inside his mind. In fact, "inside the mind" is disallowed itself since it implies a place—here a place for the tyrant. Mind is an activity—not a thing. Metaphor is disallowed: a person no longer "sees red"; now he "acts angrily." And, importantly, psychic determinism is eliminated. An id impulse does not cause a thought in the superego; nor does an irresistible impulse cause a man to murder. "My unconscious made me do it" is unacceptable, though we may translate such a statement to "I did it unconsciously." Nor does a delusion make a man do something. We no longer say Jones's criminal behavior is a product of his delusion. Instead we say he did it delusionally; we may then make this statement more specific, for example, "When he threw the suitcase in the water, he believed that it was filled with Devils trying to kill him."

People do not even suffer from mental illnesses anymore! They may do things bizarrely, obsessively, or in a mentally retarded way, but they do not have some occult entity, mental illness, that forces them to suffer. People suffer when they do certain actions, but they do not suffer from a mental disease. What they do is (or is not) their "mental illness."

The ALI Standard

The American Law Institute's standard⁴ is probably the most widely respected insanity test in the United States. I hope that analyzing it closely and transforming its language into action language will demonstrate its inherent anthropomorphic and deterministic aspects. In this section I will state the standard and then analyze it from an action language vantage point. The ALI states:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity

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either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law . . . As used in this article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

A person is not responsible Here, "is not responsible" is a legal judgment, not a psychological process even though "responsible" implies a psychological activity. Since this is not a statement about psychological processes, it need not follow the rules of action language. This is important to note because it would be wrong to think that every statement should follow those rules. Action language is not required in ordinary discourse, in dramas, in fantasies, or in statements to patients in psychotherapy (although many such statements would benefit from a translation!). "Make hay while the sun shines" need not be translated to "act expeditiously" except in statements about psychological activity; only in such propositions are metaphor, determinism, and anthropomorphism disallowed.

For criminal conduct When the standard uses conduct, it is referring to *overt* behavior. Using the term conduct alone says little about intent. Here the conduct is called criminal, suggesting wickedness. The framers of the ALI would have done better to follow *Durham*, which spoke of "unlawful" instead of "criminal." By talking of conduct, the ALI has now added a psychological dimension. Strictly speaking, we may object to the substantive use of criminal conduct in a statement about psychological activity. Instead we could say "conduct himself criminally" or better "acting unlawfully."

As a result of We may interpret "result" in either of two ways. (1) We may construe result in a mathematico-scientific manner (such as "lithium produces excellent results in the treatment of mania"); this is a deterministic interpretation since it describes cause and effect. (2) Result may also be construed as an explanation; for example, her leaving was a result of his philandering. Here we are describing the *reason* why she left, not the cause.

This phrase alone is not sufficient to determine the intent of the ALI. But the next phrase ("the mental disease or defect") makes it clear that the language is deterministic rather than reason giving.⁶

The mental disease or defect The phrase lends itself to an anthropomorphic interpretation since it invokes *diseases* rather than *reason*. The defendant did it as a result of an affliction (disease or defect), not as a result of a psychological activity. Ryle⁷ has called this a category mistake—the problem of believing the team spirit moves the players, and mind controls the body, or that mental illness forces a person to do strange actions (Ryle⁷ p 1517; Schafer¹ esp. pp 102-120; Miller² pp 122-123).

He lacks substantial capacity Substantial capacity is a reification: surely the defendant does not lack substantial capacity in the same way a stadium lacks capacity. The whole phrase may be reduced to "he can't." We can do without "substantial" since it results in a contradictory phrase. A capacity can be no more substantial than a cure can be partial: either the

defendant has the capacity or he lacks it, though perhaps he has a "substantial" enough "mental illness" that he has lost some of his capacities (for example, "He is retarded enough to be unable to read").

Even if we reduce this phrase to "he can't," we have not completed the transformation because "can," a modal verb, must be replaced by an active verb. Since the notion of "can" is so important and since this notion reappears in the ALI, I will defer discussion of it until later.

To appreciate "Appreciate" is a key word in this standard, substituted for "know" of M'Naghten. It may be a vague term, but it is an active verb, thereby complying with an action language requirement. One may say that it should be more clearly described—but that issue is beyond the scope of this article.

"Appreciate" allows more defendants to make the insanity defense than "know" does because appreciate has a wider scope than know. It means that a person not only can state the requirements of the law (that is, knows the rules of law) but also that he comprehends the rules; for example, he may do so insightfully, discriminatively, and non-delusionally. Knowing the requirements of law is relatively simple, but because the defendant knows them does not mean that he can act in accordance with the rules. One may object that appreciate may be understood more narrowly, that it can be interpreted as no broader than "to know." That is possible but is contrary to the spirit of the ALI that wishes to expand the limited "know" of M'Naghten. Further, I will argue later that allowing this wider meaning of "appreciate" allows us to dispense with "conforming his conduct."

The criminality (wrongfulness) of his conduct Because this applies to a psychological process and because criminality and wrongfulness are nouns, we may object to their use in an action-language vocabulary. But this is probably too strict since one could charge that even saying "he performed an action" should be inadmissible on the same grounds. "Appreciated the wrongfulness" is far different than "swallowing your rage" though the form is the same. If we wish, we might simply change the phrase to "appreciate that he acted wrongly."

Or to conform his conduct The comments about the last phrase apply here as well. Further, it is possible to construe this phrase in a more anthropomorphic way: "his mental disease forced him to lose control of himself." It also sounds like there are two actions, conforming and conducting. There is only one: conducting (just as there is only one action in "to enjoy fishing") and this can be seen by changing the phrase to "acting (conducting himself) in conformity with the law."

To the requirements of the law A valuable reminder that the defendant's actions must always be measured against the requirements of the law, that criminal responsibility is a legal concept, not a psychological process.

As used in this article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct We may object to "mental disease or defect" as sub-

stantives. We may also say that repeated criminal activity is not the *manifestation* of some occult abnormality but *constitutes* the abnormality. But these flaws are minor compared to its virtues: it offers *guidelines* in applying psychiatric knowledge to criminal responsibility. Except perhaps for *M'Naghten* in its original form (8: 1596-97), no important insanity defense has stated specifically what the law requires.

Lack of capacity to appreciate and capacity to conform These are two essential capability phrases in the ALI. I have discussed the metaphoric quality of capacity above, but here I will discuss the fundamental question of inability.

Schafer argues against using "can't" statements to describe psychological processes. He accepts the idea that a person can't do something when he does not have the strength, the skill, or other ability to do it. But he rightly points out that most statements a person makes about his "psychological inability have nothing to do with this strength or skills."¹ When a young woman says, "I can't go to the dance tonight," it is unlikely that she means she is paralyzed or cannot find her way to the dance; it is more likely she means she does not wish—or refuses—to go to the dance even though she believes she should. Or, as Schafer points out, "'I can't tolerate the idea' has nothing to do with strength or skills and in fact one *does* think the idea when he or she is claiming that he is not."

In cases of unlawful action, we do find instances of inability. When they are related to an organic basis they may be excused under the general rules of criminal responsibility (compare Morris⁹ p. 526 and Szasz¹⁰ p. 12-13). For example, a profoundly mentally retarded defendant, who cannot recite the alphabet can hardly be expected to read a subpoena; because of his inability, he should be excused if he does not respond to the subpoena sent to him.

But what about the man, delusional for years, who throws someone else's suitcase out the window because he believes there are voices within it trying to harm him? The retarded man mentioned above could not read—he could not have acted differently. But the delusional man might have done otherwise; for example, he might have run out of the room. We should say that the delusional man *does* not appreciate the act rather than *cannot* appreciate the act.

This is not to say that we cannot use can; we can if we make clear how we are using it. But since it is a modal word, sooner or later we have to translate it into action. Can Jones ride a bicycle (even though he hasn't gone near one in the last ten years)? We can only tell when he gets on one. Could the defendant appreciate that he acted unlawfully? Well, how *did* he do the act—did he plan it well? did he talk strangely? did he explain his reasons for doing it? It is what he *does* that determines what he *can* or *cannot* appreciate. "Lack substantial capacity to appreciate" may be eliminated; we need retain only "appreciate."

The second part of the test, inability to conform, can be eliminated altogether. Conform—like comply or control—is a regulatory word; any

statement of "not conforming" can be restated as "not appreciating" so long as appreciate is interpreted in its broader meaning.

One could argue the opposite, that the law should eliminate "not appreciate" and keep "not conform" since whenever one says "he lacks substantial capacity to conform his conduct" one *always* also affirms that the defendant "lacks substantial capacity to appreciate" that is, not conforming includes not appreciating.¹¹ It would be a mistake to eliminate appreciate and keep conform. If we had only the "cannot conform" clause, the test would require a translation into actions to define the "cannot conform" (and thus would be reduced again to something like appreciate). Until that was done the test would be so inclusive as to be meaningless.

Revising the ALI

Any number of action language translations of the ALI is possible. I will not present one here because formulating an insanity standard is the job of jurists not psychiatrists. (In fact, the attentive reader may construct his or her own version based on the analysis above.) But the law should be responsive to ideas of psychiatrists and other psychological experts. Though psychiatrists should not frame the law, psychiatrists may point out that certain laws are inconsistent with present thinking in psychiatry. That is how *Durham* supplanted *M'Naghten*.

An action approach serves the expert and the court by fostering fuller testimony. It furthers the aim of *Durham* and the ALI by encouraging the expert to speak more clearly and simply, to limit himself or herself to psychological descriptions, and to avoid moral judgments.

Action phrases do not prevent an expert from testifying in conclusory statements. Nor would one more reformulation of the insanity standard make much difference in courtroom practice. But by using action language, the expert avoids the misleading notion that an entity, mental illness, "produces" criminal behavior. Instead he or she may describe the defendant's *reasons* for unlawful behavior.

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4. American Law Institute, Model Penal Code, Draft 4, 1955
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6. See Taylor DM: *Explanation and Meaning: An Introduction to Philosophy*, chap 6. London, Eng, Cambridge University Press, 1970
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11. The ALI allows a choice "if he lacks substantial capacity *either* to appreciate . . . *or* to conform . . ."
In practice, it is not a choice but a two-step process: if the examiner determines that the person does not appreciate that he did something unlawfully, he assumes the defendant could not conform his conduct. However, if the expert finds that the defendant does appreciate it, he considers whether the defendant could comply with the law. It is *never* the reverse, that a person who *cannot* appreciate *can* conform.
12. Durham v. US 94 App D C 228 214F 2d 862, 45 ALR 2d 1430 (1954) □