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Book Review: The Meaning of Criminal Insanity

Michael L. Perlin

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elimination, discouragement, or neutrality on the question of marihuana use, the Commission opted for a discouragement policy supported by a partial prohibition.[6] Adoption of some type of regulatory scheme was rejected, although that possibility was given serious consideration.[7] Further, the Commission Report is self-admittedly only an interim view. A significant indication of the continued consideration being given plans such as Kaplan's is the recent action of the American Bar Association Section of Individual Rights and Responsibilities in adopting the following resolutions:

> *"Resolved,* That because the individual and social costs resulting from existing laws punishing personal use or simple possession of marijuana substantially outweigh any benefits derived, federal, state, local laws punishing personal use or simple possession of marijuana should be repealed.
> *"Be it further resolved,* That consideration be given to the feasibility of regulating the use of marijuana by licensing its distribution." [8]

Clearly, marihuana law reform is riding the wind. Every citizen, and certainly every lawyer, ought to inform himself about the subject. Is this recording tape a useful or suitable method to help accomplish this? After having listened to a number of continuing education tapes with high hopes, I personally have found recordings unsatisfactory. To some degree, this tape is no exception. While it is as entertaining and informative as any I have encountered, listing to a tape for one hour accomplishes considerably less than an hour's reading. Another major defect with recording tapes is the absence of reference sources. While this criticism possibly reflects an ivory tower outlook, I think it is more than that. Most lawyers object to statements of fact which must be taken on faith. Further, anyone whose interest is piqued by a recording winds up in the books anyhow. Perhaps no more should be asked of recordings other than to serve as a medium to stimulate further interest and provide a general survey of the subject. To me, this marginal benefit hardly justifies the required expenditure of both time and money.

Obviously I am wrong in this regard since cassette tapes on

[6] *First Comm'n Rep.* 129-167.

[7] *Id* at 146-150.

[8] Stern, "Reforming Marijuana Laws," 58 Am. B.J. 727, 730 (1972).

legal subjects continue to pour out on the market in increasing numbers. Thus, for the harried commuting practitioner who cannot abide the local rock radio station, I certainly recommend this informative and entertaining tape as a useful and valuable diversion to help pass the time while stuck in a traffic jam. For those who do not need "educational entertainment" during their commute to or from work, I recommend Kaplan's book,[9] one of his many articles,[10] and most certainly the Commission Report.[11]

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[9] Note 4 *supra.*

[10] Kaplan, "The Role of the Law in Drug Control," 1971 Duke L.J. 1065.

[11] Note 1 *supra.*

THE MEANING OF CRIMINAL INSANITY. Herbert Fingarette. University of California Press. 1972. 280 pp. $10.00.

Probably no major issue in criminal law is as misunderstood, oversimplified, and inherently mistrusted as is the concept of responsibility and its necessary corollary, the meaning of criminal insanity. Often glossed over in the law school curriculum, blithely ignored by judges (who often appear forever content merely to restate hornbook black-letter law without further thought), and simply out of the ken of most practitioners (even those with ample criminal practices), the problems of responsibility, sanity, and the interplay between law and psychiatry will continue to grow in scope and importance as caseloads increase, social and environmental pressures expand, and the awareness that law is not a self-contained, independent system grows.

Traditionally the history of the insanity defense is treated cursorily: *M'Naghten* is born; *M'Naghten* prospers; *Durham* raises questions; the ALI Model Penal Code shifts the focus; *M'Naghten* —by and large—survives. Formulas are taught, and the student is lulled into the false belief that the addition of a new word or thought (to the "equation") will "solve" the problem, as in a tax computation situation. That this is not so is clear; *why* it is not so is somewhat hazier.

Herbert Fingarette—a philosophy professor at the University of

California, Santa Barbara—has undertaken a more than formidable task in *The Meaning of Criminal Insanity*. He sets out his aim at once: to explain and justify "an adequately precise definition of insanity," one which is "thoroughly realistic from the standpoint of case law and legal theory." [1] In an exhaustive, logical, analytical, persuasive—nearly adversarial—way, he does just that—almost. He painstakingly discusses the relation between psychiatry and law, concludes that the scientific system is not per se more rational and internally consistent than the criminal law system, discards the concepts of free will and determinism as "pseudo-solutions," [2] and focuses attention on the significance of the moral values and moral sensitivity of the psychiatric expert, and how these values are closely interwoven into the key issue of the individual's "awareness of moral attitudes in society." [3]

From this point, Fingarette carefully examines and dissects the hoary *M'Naghten* case and its progeny, and focuses on what he considers the key determinant: existence of a defect in the way one comes to and formulates decisions, intentions, and actions,[4] specifically, the individual's capacity for rationality as manifested by his responsiveness (or lack of it) to the essential relevance of a fact pattern. If one cannot respond relevantly to that which is essentially relevant, he is irrational, and thus not responsible or—ultimately—blameable. To be insane, the person's lack of capacity to act rationally must be "part of his nature." [5] If one cannot rationally assess the status of an act, he is, thus, not accountable for it.[6]

With this backdrop, then, Fingarette states his ultimate test of responsibility:

> "Criminal insanity existed if the individual's mental makeup at the time of the offending act was such that he substantially lacked capacity to act rationally with respect to the criminality of his conduct." [7]

[1] Pp. 1-2.

[2] P. 84.

[3] P. 111.

[4] P. 157.

[5] P. 195.

[6] To be distinguished, of course, from the person with the capacity for rationality who "simply fails to use it." P. 201.

[7] P. 227.

This test, he argues, is superior to *M'Naghten* (which overemphasizes the importance of knowledge in the underlying "defect of reason"), although, somewhat surprisingly, he finds *M'Naghten*—if "defect of reason" is interpreted correctly—to be nearly an adequate formulation.[8] He rejects *Durham*'s use of "product" because it emphasizes causality instead of an "observed pattern of incapacity for rational conduct." [9] Finally, the ALI Model Penal Code variation fails: Its first phase ("lacks substantial capacity . . . to appreciate criminality . . . or to conform conduct . . .") neglects to explicitly discuss "defect of reason"; its second (excluding an "abnormality" manifested only by "repeated criminal conduct") is merely extraneous. By replacing all of these tests and their variants with the question of the defendant's inherent mental capacity for rational conduct, i.e., for responding relevantly with respect to criminality, Fingarette argues that a "reasonable legal standard" for criminal responsibility will finally be presented to the often-befuddled jury in a way "essentially consistent with the most contemporary and enlightened developments in psychiatry, philosophy and law." [10]

As indicated above, Fingarette is precise, pointed, and persuasive. Although the work is probably too scholarly to be read by the trial bar, it is clearly an important work, especially in its careful interweaving of legal and philosophical theories. As far as the work goes, it leaves only a few areas in need of further elaboration.[11]

[8] Pp. 239-240.

[9] P. 240.

[10] P. 15.

[11] For instance, it discusses briefly the relationship of the proposed test to the standard psychiatric diagnostic categories (neuroses, psychoses, and personality disorders) and merely is satisfied to plug these definitions into the test ("Do the personality disorders involve a grave defect in capacity for rational conduct with respect to the criminality of the act?") (p. 233). Clearly, the determination of whether such a "grave defect" is present must take into account a whole host of psychological and behavioral factors scarcely alluded to. In this regard, although the concepts of ego/id/superego are briefly defined, their significance—and possible utility to the legal process—is minimized, *except as they fit the test;* i.e., the ego's synthesis of id impulses and superego demands, combined with the ego's perception of reality, amounts to the person's capacity to act rationally (p. 116). Cf. Rapaport, "The Theory of Ego Anatomy: A Generalization," 22 Bull. Meninger Clinic 13 (1958), in *Psychoanalysis, Psychiatry and Law* 300 (Katz, Goldstein & Dershowitz, Eds. 1967).

Also, it appears that the "criminal law" is seen only as it includes crimes which

Yet, Fingarette's analysis still fails to come to grips with an aspect of the law of insanity and responsibility which is, perhaps, more crucial in terms of actual trial practice and procedure than any slight semantic difference in the various proposed tests. The basic hostility toward and mistrust of the whole concept of an insanity test—by the court, the prosecution and the public—is barely mentioned by Fingarette. Yet, the very existence of that hostility probably is outcome—determinative of more insanity trials than the use of one formula or another.

The reasons for this hostility are multiple and complex. First, there exists the attitude which insists that criminals be punished as an outlet for the internalized and moralized aggression of society (to show that the guilty party "can't get away with it," to establish the needed equilibrium between the id and superego functions and thus maintain the balance between indulgence and punishment, and to focus on the criminal as an example of the temptations which befall the remainder of society).[12]

In addition, there are those psychological and social factors which insure that the legal profession will continue to insist that the legal system is the proper vehicle for making psychiatric determinations so that practitioners of the medical/psychotherapeutic system must adapt themselves to the mode of the adversarial process, insuring the legal system's supremacy.[13] Also significant is the motivation behind the refusal of the courts to accept much of the body of modern psychiatric thinking, labeling it "nebulous"

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are malum in se (embodying "certain fundamental values of our society") (p. 56). Clearly, the concept of responsibility is important in malum prohibitum crimes (see, e.g., the *Dean Landis* or *Bernard Goldfine* income tax evasion cases, as well as in *non*criminal areas, such as trusts and estates, torts, domestic relations, and copyrights). It would be a mistake to limit the possible application of any basic formula to only those "universally recognized" malum in se crimes (p. 212).

[12] Flugel, *Man, Morals and Society* 169-170 (Compass ed. 1961). This is alluded to lightly by Fingarette merely to the extent that he terms the effect on the public of seeing that the harmdoer does not go "scot-free" as "significant and salutary" (p. 135).

[13] For a penetrating analysis of the system of legal education, see Kennedy, "How the Law School Fails: A Polemic," 1 L. & Social Action 71 (1970). Although Fingarette tacitly acknowledges that the courts force the psychiatric witness to mold his response to accepted legal terminology (p. 31), he ultimately concludes that the legal questions "must ultimately be answered in legal rather than psychiatric language" (p. 69). See State v. Maik, 60 N.J. 203, 219 (1972) ("[I]t is for the court, rather than the hospital, to decide whether a release should be ordered.").

because of its lack of "firm foundation in scientific fact." [14] And, finally, what underlies this hostility is the unconscious refusal on the parts of judges and prosecutors to come to grips with psychological realities about their own selves, as manifested through their concomitant use of ego defenses such as denial and avoidance[15] in an effort to forestall the inevitable discovery of potential personality deficiencies in their own emotional makeup, which otherwise would very likely remain hidden beneath the extra "layers" of superego, not at all uncommon in the structural mental composition of the legal practitioner.

Thus, although Fingarette *has* presented a clear and complete analysis of the various theories of insanity defense, he has barely skimmed the surface of the crucial (if hidden) issue of why the whole sphere of criminal responsibility is treated as it is.

This is the raw nerve which still must be exposed.

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[14] State v. Lucas, 30 N.J. 37, 72, 152 A.2d 50 (1959). But compare the virtual glee with which the same court accepts "scientific fact" in a situation dealing with the existence of an alleged geometric progression of drug abuse. State v. Reed, 34 N.J. 554, 556, 170 A.2d 419 (1961). See also State v. Thomas, 118 N.J. Super. 377 (App. Div. 1972), *cert. denied* 1972. Cf. State v. Maik, *supra*, at 213:

> "Indeed, to a psychiatrist the sick and bad are equally unfortunate. Blame is something he leaves to the moral judgment of philosophers, and they draw upon their unverifiable view of man and his endowments."

[15] See Bibring, Dwyer, Huntington & Valenstein, "A Study of the Psychological Processes in Pregnancy and of the Earliest Mother-Child Relationship," 16 Psychoanalytic Study of the Child 62 (1961), in *Psychoanalysis, Psychiatry and Law* 155-158 (Katz, Goldstein & Dershowitz, Eds. 1967).

WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN. Sanford N. Katz. Beacon Press. 1971. xv. 251 pp. $12.50.

The relatively recent marriage of the law to the social sciences was one both of convenience and necessity. It is a characteristic of that marriage that whenever a new area of societal concern arises, one partner wanders aimlessly in the dark for awhile until enlightened by the other, after which a mutual effort develops. As