

help feeling that he knocks them out too fast. He has an excellent ear for realistic dialogue, and you never doubt the authenticity of his plea-bargaining judicial hearings. You learn the words of art, the argot, the jargon, of the criminal courts. A "bullet" is a year in jail. E class felonies exist. A "flat" is also a year, so that a plea of guilty can buy "an E and a flat" for a criminal who multiply stabbed the person he robbed. Homicide sentences can go as low as three years, depending on the facts, as well as on the pressures.

Mills picked a good subject and his book has some shock value, but he falls short of doing a thorough muckraking job. His writing is thin and superficial for this type of material. I do not ask for muckraking in the grand old Lincoln Steffens or Upton Sinclair style, but more intensity is needed. We never really get into any other character besides Dori, and that hullabaloo about the prison riot is not very helpful or utile.

Of course, Mills offers no solution, having told us that only more money for courts and judges can solve the problem. So it becomes just another disaster of our social order, along with things like state mental hospitals and the like, which we bury out of sight as long as possible. Besides, only "crazies" or "bad guys" get stuck in those places.

I stated at the beginning of this review that I sensed a deeper theme in this book than the prison situation. I sensed the ultimate frustration of the trained professional in our social order. It was an easy step for me to liken my profession, psychiatry, to the hero's legal aid work, in many respects. I assume that any other professional can do the same with his—granted that the prison situation is far more horrendous than most. But the basic questions are these: After about twenty years of a profession, any profession, what are the rewards other than material? Should there be any rewards? Is it a form of vanity to ask for rewards?

We all justify our life's work in one way or another. In the book *Dori*, the lawyer, collected in a notebook various famous judges' definitions of "justice." Was he masochistically sublimating his failures, or his self-disgust at functioning within a "faulty" system? Do not we all function within "faulty" systems, yielding more often than we like to their "realities"? After all, by defending his clients and plea-bargaining with gusto, he actually was getting them back on the street in record time. Why should he give a damn or be plagued by the fact that some might actually be innocent? Even if they were, they clearly were better off pleading guilty. Yet it bothered him. What is it in man that won't let him settle for less? What do we want from ourselves? Why does it bother some men much more than others? These are the questions this book might engender in you.

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PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING. By Willard Gaylin, M.D. New York: Alfred A. Knopf. Pp. 250. 1974. Price \$7.95.

Let us imagine a completely rational criminal. How would he approach his craft? What must he consider?

Ultimately, like a practitioner of any other rational endeavor, the reasonable criminal's thought processes reduce themselves to an equation of a "benefit to cost" form, the typical approach of any entrepreneur. Like any business man the criminal must consider the likelihoods of the various benefits against the risks of the various costs. For example, a businessman, whose utility calculations involve objectively measurable quantities of money, might consider that a given move will have a 10% chance of gaining 2 million dollars or a 20% chance of gaining one million dollars, while he might face a 60% chance of breaking even, an 8% chance of losing half a million dollars, and a 2% chance of going bankrupt. He evaluates the risks against the losses, and makes his decision.

The reasonable criminal, however, must deal with more factors involving personal

value than the ordinary business man, for the criminal's benefits as well as his costs are often not expressible in monetary terms but rather are parameters which can be evaluated only subjectively and which differ from person to person. Thus a "rational rapist" might conceivably decide that on a projected rape he has a 75% chance of being successful, a 20% chance of becoming only further frustrated, and a 5% chance of being apprehended by the police. In forming his "utility table" for decision making, he would be likely to take into account such things as the recency of his last rape, the general attractiveness and resistiveness of the females to whom he might have access, the proportion of tried rapists found guilty, the length of prison sentences for rape, and so on. After incorporating these subjectively-evaluated factors into his calculations, he would make his decision, *i.e.*, to seek to rape or not to seek to rape.

Utility decisions involve measuring the reward or punishment *value* of any outcome and the *likelihood* of that outcome. Because such decisions involve uncertainty, they are fundamentally gambling decisions. But it must be recognized that all of us are gamblers in all of life's decisions. And all decisions involve some subjective line-drawing. Ultimately there is no saying how much risk a rational person should expose himself to in order to obtain different amounts of potential benefits. Indeed, some people who bet their shirts on the red go on to break the bank; most, however, leave clothed in barrels. Nevertheless, though there is no unambiguously determinable, reasonable place to draw the line, there are some "common sense" ideas about sensible and non-sensible gambling behavior.

Such common sense notions underlie the law of crimes and punishment. It is presupposed that people acting rationally will be deterred by high risks from acting in criminal ways. For the most part the imposition of strong penalties for crimes places a high negative utility on being a criminal. Increasing police cover, narcotics agents, bank auditors, and the like are devoted to increasing the risk that a person will be caught and penalties imposed if he commits an offense. Placing a high risk on detection of criminal behavior and a high negative utility as a consequence of such detection is the essence of "law-and-order" thinking about crime control.

Such an approach also recognizes that the positive utilities with respect to crimes may vary among different people. The acquisition of twenty thousand dollars in a bank robbery might mean a great deal to some down-and-outers, while to an up-and-inner it might be a trifle. The law must, and does, create a negative utility high enough to discourage the potential criminal to whom law-breaking has a high positive utility.

This kind of legal thinking seems to be quite effective in preventing the commission of crimes by people who act rationally. Probably the few exceptions are individuals who plan and try to execute the "perfect crime," as well as functionaries of organized crime who are able to operate with a low degree of risk.

However, even assuming that the criminal laws do work so as to deter the more reasonable and controlled fraction of the population, as well as its more timid and more inert segments, there are still many active individuals who are fear-free and irrational, and they commit multitudes of crimes of all kinds. (The reader is likely to have felt before this point that if there is such a thing as a rational rapist, he is a rare specimen indeed. The writer has never seen one.) Thus, though the law might be directed at, and successful with, the well-adjusted and the adequate, in practice the criminal justice system deals with the inadequate and the poorly adjusted. The work of the courts involves those who don't make it in the world.

In handling those marginal individuals who appear before them, criminal courts have two major functions. The first is to determine whether an individual is a criminal or not. Though a highly publicized activity, it is, at least in terms of numbers of persons directly affected by criminal process, far less important than the second function, that of disposition of those individuals who have been found to be guilty. The sentencing task is by far the more important duty of the court.

And how should a court sentence the irrational and inadequate human nuisances—indeed, sometimes menaces—who are subject to such court decisions? What should be the purpose of it all? How can the judge or society know whether sentencing has been done well or poorly? What are the criteria by which the sentencing process should be evaluated?

Those questions cannot be approached systematically until we know how the sentencing function is actually carried out in practice. Who gets what kind of sentence from whom and for what crime? What happens to the sentenced criminal as a result of his sentence, and what are the secondary effects on society? What goes on in the judge's mind when he makes these most critical decisions?

Dr. Gaylin's study deals primarily with the last issue, that of judges' views toward sentencing convicted criminal defendants. He tells us that he is looking for explanations of the fact of diversity of sentencing, and he gives as examples such findings as these: 1. 565 of 566 public drunkenness cases arraigned before one judge were found guilty, while 531 of 673 before another judge *in the same district* had their cases dismissed (p. 9). 2. In Nevada the average liquor law sentence is two months . . . in northern Alabama twenty-five months (p. 8). 3. The average sentence for all offenses in the First Federal Circuit was eleven months, and in the Sixth Circuit, seventy-eight months (p. 7). 4. Forgers averaged twenty-two months of sentence in a New York District, forty-five months in Central California, and seventy months in Kansas (p. 12). 5. The average sentence to Federal prisons was 28 months in 1957 and is almost double that now (p. 23). 6. In the U.S., during a given time, 15,000 offenders were given terms of more than five years; in England the number was 150 (p. 24).

Thus even considering that every criminal and every crime are unique, it appears that different sentencing modes exist both within a jurisdiction (among the different judges who sit therein) and among jurisdictions. Some judges are "hanging judges," and some jurisdictions themselves are more severe than others.

Gaylin is concerned that such a lack of uniformity may impair justice, and he explores some factors which appear to contribute to it. Besides the prominent geographical factor, he notes differences in social classes and race (among and between judges and defendants), the specifics of offenses classified as the same "crime," political and religious differences among judges, the length of time a judge has been on the bench, special considerations involving the defendant, such as illness, etc., the presence or absence of a trial, and finally, idiosyncratic personality factors in the judges. He documents many of these factors.

Gaylin's method has been to interview many judges, and he presents us with extensive detailed notes and verbatim quotations from interviews with four of those judges. His interview method is that expected of a psychoanalyst, the open-ended method, with questions and interpretations interspersed. The data he has developed are utterly intriguing.

The reader is privileged and enlightened by being privy to Gaylin's interviews. Recorded in detail were four judges, three pseudonymous, Judges "Garfield," "Stone," and "Nicholson," and one courageous jurist who was willing to allow his comments to be identified, Judge Justin C. Ravitz. Judge Ravitz was elected in 1972, at age thirty-two, to a ten-year term as judge of the Detroit Recorder's Court. He is surely unusual, if not unique, as a Marxist sitting as a judge in the United States.

With the caveat that abstracting eliminates the richness and subtlety of the raw data, it seems worthwhile to outline some of the trends Gaylin shows. Most important is the similarity among the judges. They all see themselves as having an important role in the protection of society and as implementing that role by incarceration of those criminals whom they regard as dangerous. They believe that the legal system of crimes and punishments acts as a deterrent to crime, and they believe that a term of punishment experienced first-hand by a person may deter more effectively than his previous second-hand

knowledge of it. They all tend to hope that a jail sentence may be rehabilitating, but none believes that rehabilitation through imprisonment is common. Perhaps most important, they take their sentencing responsibilities very seriously, and they try hard to insure that they are fair and appropriate. They all stress judicial integrity and resistance to pressure or popular hysteria. They also agree that ethnic and religious differences among judges may correlate with different stands toward certain issues, such as pornography or liquor law violations.

They tend to disagree somewhat in emphasis on such points as lengths of sentence. Judge Garfield's view is that nine months is a substantial sentence, while no maximum should be more than five years. (He thinks that after that period of time in prison a person is different—less energetic, if not wiser.) Judge Ravitz says a year is a tough sentence, while Judge Nicholson feels the greatest *minimum* sentence for a felony should be three years. Judge Stone follows a rule of thumb that if a man pleads guilty (and saves the government the expense of a lengthy trial, the *maximum* he gets is half the *statutory maximum* for the offense. (Note that the terms in which the different judges describe their modes of sentencing are not strictly comparable. However, it does appear that Judge Stone, the Federal Judge, who has the least crowded docket of the four, is also the stiffest sentencer.)

The Marxist, Ravitz, and the conservative, Stone, tend to agree that violators of public trust should be dealt with severely. Judges Garfield and Nicholson appear to view their clientele mostly as slobs and feel frustrated by the impotence of the corrective system to accomplish meaningful rehabilitation. Judge Stone tended to see his defendants as more calculating creatures than did the other three, who are judges in criminal courts of large municipalities, while he and Judge Nicholson both had bad words for TV as a criminogenic medium.

Judge Garfield, formerly a law school professor, was the jurist whose interviews were most thought-provoking to me. His judge's-eye view of plea-bargaining is especially enlightening. In his jurisdiction the volume of cases is so great that the only way to dispose of them is through plea-bargaining. (In the jurisdiction of a similar judge cited in the book, 90% of the cases were disposed of by plea-bargaining, and only 10% of the cases went to trial (p. 131)). Garfield seemed proud that he could dispose of his cases; some judges can't do it well. Some refuse to because "Often the judge is compelled to enter into bargains where the motivating factor is the number of cases in court" (p. 73), and they feel this compromises their integrity. Judge Garfield points out that that is not necessarily the case if plea-bargaining is conducted appropriately.

Garfield notes that plea-bargaining predisposes to uniformity of disposition of cases. "Disparity of sentences will always be higher in those counties where plea-bargaining pressure is least. . . . The DA will insist on higher pleas for the same kind of offense, same kind of defendant, same kind of prison record, same quality of evidence, *since he can try more cases*" (p. 74; italics added). Therefore occurs the paradoxical situation that *individualization of cases leads both to greater disparity of sentences and to higher sentences*. One wonders whether justice is served better or worse thereby.

Garfield also mentions "bail acquittal," a phenomenon in which a person on bail goes untried because of pressure on the court to process cases of defendants who have been retained in jail. When dockets are sufficiently crowded, a bail acquittal case can be repeatedly and indefinitely postponed and thus ultimately dismissed. However, "If you want to make a pain of yourself, you can get yourself tried. . . . But you really have to work at it" (p. 78). Garfield notes that defendants have a strong say in the ultimate disposition of a case, for they (or their attorneys) know the cases can't all be processed. (The resulting fact of trial only for serious cases leads to a practical decriminalization of minor offenses, though, and a resulting attitude of impunity, disrespect, and disdain for the law on the part of defendants, as well as ambiguity of responsibility for police officers. The latter in turn leads, among other things, to police frustration, which can

give rise to many police-community problems. *De facto* decriminalization also may produce the very undesirable situation in which it is *reasonable* for an individual to thumb his nose at the law, for he knows the law can't mean business in enforcing its threats.)

Garfield likes to hold a pre-plea bargaining conference in which the alleged facts of the offense and the quality of the evidence are evaluated. Such conferences include the judge, who becomes part of the plea-bargaining process. Thus in Garfield's court the defendant is assured that his plea will result in a predictable bargain. Another advantage of such conferences is increasing the involvement of district attorneys in the ultimate disposition of criminal cases. Judge Garfield finds, to his disappointment, that district attorneys are usually interested in the cases only to the point of conviction. Once that stage is reached, the prosecutors tend to abdicate dispositional responsibility, leaving that to the judge. The formation of a predictable plea bargain at a joint conference places more burden on the DA's, but it helps the judge with the task of sentencing.

Judge Garfield is impressed with the many defendants he sees who don't give a damn about themselves or about others; he regrets that there aren't good sentencing alternatives for them. Yet he defers sentence when in doubt. He feels that even if sentence is wrongly deferred, the recidivist will almost surely eventually be apprehended by the police. However, the judge is less sanguine about releasing those who commit crimes of violence than those who commit property crimes.

Other sources illustrate Judge Garfield's appraisals. Thus in New York City, an example of a large metropolis with clogged court dockets, eight of ten defendants charged with the serious crime of homicide plead guilty to a lesser charge and receive either probation or a prison term of less than ten years.¹ It is also pointed out, though, that police and district attorneys, as if in anticipation of plea-bargaining, over-book homicides and charge murder in almost all of them. Fear of the risks of a trial may lead an innocent person to plead guilty to a lesser charge.²

After having examined sentencing practices and some of the human factors which influence them and which lead to diversity, Gaylin's work closes with a number of recommendations. He suggests the following: 1. Enable judges to follow up on their sentencing. 2. Require a judge to give reasons for his sentence. 3. Enable appellate review of sentences. 4. Constrain sentencing discretion by more specific and restrictive statutory definitions of crimes. 5. Incarcerate fewer offenders (and release many who are presently incarcerated). These recommendations presuppose a certain view of justice, society, and the court system and assume that society would be better off if the recommendations were implemented.

I confess to having similar biases to what I perceive Gaylin's to be in this matter, and I concur with all those recommendations. Surely whatever their ultimate effects on the social order, application of these measures would reduce the senseless and useless variation among sentences.

But even then where would we be? Judge Garfield's experiences and views in particular set off exquisitely the situation noted before. The criminal justice sentencing system is one which deals with social breakdown. Other than 1) taking some dangerous people out of circulation temporarily, and 2) illustrating to adequate people the consequences of illegality, does sentencing contribute much to society? (Perhaps those two functions more than justify the system's existence, though.) Yet thousands of convicted criminals are sentenced daily. The justice apparatus is not a "Sewage Disposal System" like the Gulag,³ but there is seldom any measurable benefit to its immediate subjects. Sentencing is by nature of unknown value; complete, computerized, scientific sentencing formulas cannot alter that gross fact. Yet as Gaylin puts it, "When there is no treatment. . . . except an inadequate one. . . . we utilize the inadequate one" (p. 100). The criminal justice system must continue to process the bodies that are presented to it. It will continue to do so in the present ways until fashions change. (No better ways are in prospect now.) Is it good; is it bad? Who is to say?

But it is interesting. And Gaylin's book highlights the interest. I found it peremptorily engaging. My guess is that most forensic psychiatrists, as well as those more directly engaged in dispositions of criminal cases, will also find the book most stimulating.

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THE MEANING OF CRIMINAL INSANITY. By Herbert Fingarette. Berkeley: University of California Press. Pp. 271 + viii. 1974. Price \$3.25 (paper).

The author introduces his book with several historical and contemporary assertions that a precise or adequate definition of insanity is impossible. He then states "I believe, however, that an adequately precise definition of insanity . . . is possible" (p. 1). He closes the book with the statement, "Finally, however, it is the principle, the substance of the meaning and the rationale of the plea, rather than the precise form or the limitations or expansion of it in practice, that concerned me here. Without clarity on the principle, all else suffers" (p. 253). I found in this book intellectual stimulation, learning and sensitivity. I also found confusion, factual error, and neglect of many crucial areas. It should be noted that while two law professors read the author's manuscript before publication, no psychiatric consultant is acknowledged. When I finished the book, I was moved to paraphrase the author: "Without clarity on the principle *and the facts*, all else suffers."

The meaning of the concept of criminal insanity cannot be encompassed by any effort that does not include detailed and careful study of its inception and its original rationale. There is nothing in this book pertaining to Biblical, Roman, Greek, or even early Anglo-Saxon law regarding the criminally insane. We find no helpful contrasting of pre-Norman strict liability law and Church law. Nor is there any significant reference to Bracton's discussions of the definition of crime (*actus rea* and *mens rea*) as it related to infants and madmen. "They lack sense, reason and no more do wrong than a brute animal."¹ "And this is in accordance with what might be said of the infant or the madman, since the innocence of design protects the one and the lack of reason excuses the other."² Nor is there any reference to the intended goals or purposes of these earlier laws. By omitting this aspect of the history of the concept of criminal insanity, the ground is prepared for the inadequate attention accorded to *mens rea* later (pp. 128-137). In fact, we must question Fingarette's understanding of the concept of *mens rea*, since he seems to equate it with "blamability" and "responsibility" (p. 131). In Anglo-American common law, a crime consists of two components, the "criminal act" and the "criminal intent." In the absence of either, no common law crime has been committed.

Early in this book Fingarette observes that "Bad philosophy generates more bad philosophy" (p. 81). Similarly, inadequate legal history generates more inadequate legal history. This can result only in obfuscating, distorting, and doing violence to the meaning and intent of earlier legal actions. The text contains no indication, for example, that the historical impact, in law, of the *M'Naghten* rules was two-fold. Retrospectively, they performed radical, if not crippling, surgery on what had been a much more liberal pre-1843 English common law of criminal insanity. Prospectively, they assumed exagger-