

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-

ated powers of *stare decisis*, accorded to them by contemporary and later English judges. These later judges must be seen as inadequately appreciative of the *raison d'être* and the justification of *stare decisis* growing out of specific, individual, adversary-trying cases. Nor were they adequately educated to the vital necessity to allow the common law to continue to evolve and develop, dynamically responsive to changing conditions and to progressively refined and reiterated principles. With these exaggerated powers of *stare decisis*, the growth and development of the English common law regarding criminal responsibility of the insane came to an abrupt halt in 1843. It became arthritic, if not calcified. Anglophilic and professionally disappointing American judges ignored the efforts of some of their more astute and scholarly colleagues—Chief Justice Lemuel Shaw, *Commonwealth v. Abner Rogers* (1844); Justice Charles Doe, *Boardman v. Woodman* (1866); and Justice Somerville, *Parsons v. Alabama* (1886)—in favor of the poorly reasoned position adopted in 1843 by the judges of the Queen's Bench.

Fingarette demonstrates the danger of inadequate knowledge of legal history in his brief description of Daniel M'Naghten's *actus rea*. "M'Naghten held to the delusory belief that there was widespread Tory plotting aimed at his ultimate destruction. In 'self-defense,' M'Naghten attempted to assassinate the Tory leader, Prime Minister Pitt. Unknown to him, it was the prime minister's secretary, Drummond, not Pitt himself, who happened to be riding in the prime minister's carriage at the time of the assault; M'Naghten, not knowing this, shot and killed Drummond" (p. 139). To begin with, William Pitt was Prime Minister of England from 1783–1801 and 1804–1806. He died approximately ten years before the birth of Daniel M'Naghten. What actually took place was that "Edward Drummond, private secretary to Prime Minister Sir Robert Peel, had just left his brother's bank at Charing Cross [on foot], when a young man . . . walked up behind him, placed a pistol against Mr. Drummond's back, and fatally shot him."³ No carriage was involved and Prime Minister Sir Robert Peel was not in the vicinity. The allegation that M'Naghten intended to assassinate Peel was never proved. The evidence adduced was circumstantial at best. The idea that Peel was implicated in M'Naghten's delusional system was not based on any substantial data. M'Naghten explicitly restricted his delusional system to "the Tories in my native city."⁴

Fingarette compounds this failing in his extended discussion of the meaning of "the knowledge-of-wrong criterion" in the *M'Naghten* rules (pp. 142–157). Much of the speculation about the probable intent of the judges in using the words "know" and "wrong" would have been obviated by reference to the full text of their answers. I could not find it in the book. Fingarette's efforts to understand the meaning of the answers do not include reference to commentators earlier than 1855 (the British psychiatrist John C. Bucknill) and 1883 (the British legal historian Sir James Stevens). How much more authoritative a discussion could have been provided to the reader had Fingarette consulted contemporary legal commentaries. The need for contemporary interpretations becomes obvious when we realize that it is quite possible that the word "know" was intended in a narrow sense. Fingarette says "The need for this broadening or deepening of the meaning of 'know' is supposed to arise from the danger of interpreting the word in such a narrow fashion as to make the criterion patently irrelevant as an insanity test" (p. 147). This is, of course, one crux of the controversy, then and now, about *M'Naghten's* acceptability. Fingarette does not appreciate how much his remark is influenced by his 1970's perspective and by the absence of an 1843 British perspective.

In 1843, before the M'Naghten trial, Forbes Winslow, the British psychiatrist, was accepting of the right-and-wrong test.⁵ Eleven years later, he condemned it as "worthless and practically inapplicable."⁶ What was the basis for this change after *M'Naghten*? Did it have to do with efforts to apply the rule in actual court practice? (Incidentally, to set the record straight, the statement attributed to Isaac Ray in 1876, by Fingarette—fn. 6, p. 177—was made by Forbes Winslow in 1854.)⁷ On the other side of the Atlantic,

Fingarette might have found a more substantial position in his effort to interpret the 1843 rules if he had read Isaac Ray's *A Treatise on the Medical Jurisprudence of Insanity*, 3rd edition (1853), which contains some penetrating analyses of the judges' answers.⁸

Similarly, in his efforts to determine the meaning of the concept of "mental disease," Fingarette confounds confusion by not acknowledging the evolution of the concept. He does not say that "mental disease" is a necessary sub-division of "disease" as the inevitable consequence of a philosophical dualism which created distinctly separate and mutually exclusive categories of "material" and "spiritual." Nor does he say that some present-day non-psychiatrist scientists consider the dualistic view a spurious one (e.g., Ludwig von Bertalanffy).⁹ He does say that "the notion of mental disease is understood against the background notion of disease in the realm of physical disorders. There are deep analogies at work here . . ." (p. 20). But he does not explore this idea further, nor does he explore the earlier periods, when a holistic view of man and disease was dominant. He goes on to say that "Historically, the term 'mental disease' entered the legal picture [in *M'Naghten*] at a time when the notion of physical disease had emerged into prominence in the field of medicine" (p. 20). The rationale for restricting the beginning of our concern to *M'Naghten*, or for the focus on the "term" when it is the *concept* that is crucial, is not clear. Hadfield's jury (1800) saw physical damage to the skull and brain, which they linked to his insanity. The implication of organic brain disease in the insanity of Major Sir Archibald Gordon Kinloch (1795)¹⁰ was also demonstrated to the satisfaction of the jury. The point to be made is that the concept of mental disease cannot be divorced from the totality of the concept of disease. This, in turn, cannot be understood without attention to the evolution of the scientific climate and the varying contexts in which the concepts are invoked. The same principle applies to the social, political, and legal climates in which these concepts are used. Finally, perhaps it is significant that in his first footnote of this section, Fingarette quotes Shelford, "Insanity is essentially a medical disease . . ." and then Bucknill, "The element of disease therefore . . . is the touchstone of irresponsibility" (p. 20). A lawyer making a medical declaration about insanity, followed by a psychiatrist making a legal declaration about irresponsibility.

On page 211, Fingarette says, ". . . we can now formulate a complete definition of criminal insanity: *The individual's mental makeup at the time of the offending act was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally (to respond relevantly to relevance so far as criminality is concerned)*" [emphasis and parentheses in original]. It seems to me that this definition, if adopted, would require that the jury read its entire development in this book in order to comprehend its meaning adequately. If we are to consider doing this, I would suggest, instead, that the jury be presented with the temporal, legal, and medical evolution of the problem, so that they can understand *society's* intent in its continued support of the insanity defense in selected cases.

With such an approach, the jury might find restored its full function as the trier of fact regarding the entire criminal charge, including the essential component of *mens rea*. Such an approach would allow adoption of a common use, daily language standard, for example, "The accused *could* not be a sufficiently reasonable man, where his criminal act was concerned, to have the necessary intent." This would allow the jury to take into consideration questions such as age, coercion, physical factors, and mental disease (however judges eventually define the latter). Of course, the contemporary and traditional concept of the legal fiction, "the reasonable man," is no better defined and no more easily applicable to individual cases than the medical concept of mental disease.

I look forward to a second edition of this book. Given a foundation of more reliable data, a greater appreciation of clinical psychiatric realities, and a broader time scope to consider, I believe that Fingarette's philosopher's perspective can teach law and psychiatry

a great deal about this impossible problem that humane justice requires we attempt to solve.

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PSYCHIATRY AND LAW. By Ralph Slovenko, LL.B., Ph.D. Boston: Little, Brown and Co. Pp. 686. 1973. Price \$28.50.

It is most difficult to review a book with which one has little or no quarrel. Too often, I think, reviewers, in order to demonstrate their competence, seek to demonstrate the incompetence or failures or inaccuracies or inadequacy of the author. *Psychiatry and Law* is an excellent, authoritative, comprehensive, readable and scholarly book. Its excellence was attested to by the American Psychiatric Association when it awarded its Guttmacher Award of 1973 for this work. The award is given annually for the best publication in the area of psychiatry and law.

The author brings unusual qualifications to the writing of this book. He is a lawyer and a Ph.D. psychologist, and while at Tulane he received full three-year training as a psychiatric resident. Currently he is Professor of Law and Psychiatry, Wayne State University School of Law.

His writing style is very agreeable, scholarly but not pedantic, lucid but not simplistic. All of the difficult and controversial issues in this growing and troubled field are confronted with balanced and thoughtful exposition. Doctor Slovenko has his opinions and he advances them, but he does not polemicize. The book is a *tour de force* in interdisciplinary communication. The lawyer who reads the book will achieve far greater insight into the values, the strengths and certainly the limitations of the psychiatric profession in the forensic area. The psychiatrist or the mental health professional, even if experienced in the field, will learn a great deal about the law, painlessly. The author manages to cut through the argot of the law and that of psychiatry with disarming ease and clarity.

The book offers broad scope but at the same time detailed exegesis. Covered are "psychiatric aspects of criminal responsibility, disposition of offenders, addiction to alcohol and drugs, commitment procedures and rights of the mentally ill, civil competency, personal injury evaluation, marriage and divorce, custody of children, abortion, malpractice litigation, regulation of psychiatric practice, psychiatric testimony in courts or before legislative bodies, and confidentiality of communications," with many subsidiary chapters on such topics as traumatic neurosis and sexual psychopathy statutes. In addition to these are a series of appendices devoted to psychiatric testimony, mostly