# BOOK REVIEW

MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY. By Herbert Fingarette and Ann Fingarette Hasse. Berkeley: University of California Press. 1979. Pp. 322. $17.50.

Whether mental illness and related impairments in the human psyche should affect an individual's criminal responsibility for law-breaking behavior has always provoked intense and wide-ranging debate.[1] This debate clearly reflects society's lack of consensus concerning the appropriateness and scope of considering mental impairment in assessing individual criminal responsiblility. Thus, it is not unexpected that recently proposals to abolish the insanity defense have been seriously suggested[2] or that noted scholars have urged society to place the disposition of mentally ill offenders in the exclusive hands of experts.[3] That this heated discussion continues unabated should come as no surprise, since legal doctrines which excuse or lessen criminal responsibility force us to reexamine the very purposes of imposing punishment through our criminal justice system.[4]

To date most scholars who have examined what role, if any, mental impairment should play in the criminal law have either considered the subject on broad philosophic grounds[5] or have focused narrowly on critiquing specific legal doctrines of excuse or mitigation based on mental disability.[6] In this provocative book the authors not only analyze on a systematic basis most such specific legal doctrines but also propose a comprehensive and unifying doctrine (called the "Disability of Mind" doctrine or D.O.M. for short) which would gather all excuses and defenses based on mental impairment into a single conceptual framework. They maintain that this scheme would capture and implement the "basic intuitions, moral and legal"[7] underlying the wide vari-

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1. *See, e.g.*, A. GOLDSTEIN, THE INSANITY DEFENSE (1967); H. HART, THE MORALITY OF THE CRIMINAL LAW (1964); B. WOOTTON, CRIME AND THE CRIMINAL (1963); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963).

2. *See, e.g.*, S. 1, 94th Cong., 1st Sess. (1975); NEW YORK STATE DEPARTMENT OF MENTAL HYGIENE, THE INSANITY DEFENSE IN NEW YORK (1978).

3. *See, e.g.*, B. WOOTTON, *supra* note 1.

4. *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW 835 (1978).

5. *See, e.g.*, J. FEINBERG, DOING AND DESERVING (1970).

6. *See, e.g.*, Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L.C. & P.S. 313 (1971).

7. H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979) [hereinafter cited as FINGARETTE & HASSE].

ety of common law doctrines which enable a criminal defendant to avoid or mitigate responsibility for conduct based on mental conditions while avoiding the difficulties they have uncovered in those traditional doctrines.

The authors are well suited for their ambitious undertaking. Herbert Fingarette is Professor of Philosophy at the University of California at Santa Barbara and has written extensively on the subject of criminal insanity.[8] His co-author and daughter, Ann Fingarette Hasse, is an attorney who works for a leading San Francisco law firm and has also written on defenses based on mental disability.[9]

In Parts I through IV of the book[10] the authors carefully examine traditional legal defenses based on mental illness or disability which exculpate, either completely or partially, criminal defendants. Focusing on the M'Naghten test[11] and the ALI Model Penal Code test[12] of insanity, the authors argue that the common law considered insanity to be a defense logically derived from, and therefore merely a special version of, broader forms of excuse based either on lack of knowledge, (such as mistake of fact or ignorance of the law) or on lack of volitional control (such as duress). After careful analysis, they conclude that the insanity defense is in fact *not* logically or necessarily derived from these traditional common law defenses and that, more importantly, most insane criminal acts are committed with cognitive knowledge of the nature of the conduct and with substantial volitional control. Thus, according to the authors, most criminally insane

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8. *See, e.g.*, H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972).

9. *See, e.g.*, Hasse, *Keeping Wolff from the Door: California's Diminished Capacity Concept*, 60 CALIF. L. REV. 1641 (1972).

10. FINGARETTE & HASSE, *supra* note 7, at 15-198.

11. The M'Naghten test is whether "the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). In 1843 Daniel M'Naghten, obsessed with delusions of persecution, planned to kill Robert Peel, then the Tory Prime Minister of England, whom he considered his chief persecutor. Unknown to M'Naghten, Peel rode in Queen Victoria's carriage in her absence, and Drummond, his secretary, took Peel's place in a following carriage. Alas, M'Naghten shot and killed poor Drummond by sheer fortuity.

12. The ALI test is contained in § 4.01(1) of the Model Penal Code:

> § 4.01 Mental Disease or Defect Excluding Responsibility.
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> (1) 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 either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of the law.

offenders know what they are doing and choose to do it.[13]

Furthermore, in their opinion, the insanity defense cannot be rationalized by viewing it as an opportunity for the defendant to demonstrate that the requisite *mens rea,* or state of mind required by the statutory definition of the offense, was absent.[14] For example, in the celebrated case of Daniel M'Naghten[15] it is apparent that the assassin in fact intended to take the life of another human being and that he had sufficient mental capacity for foresight and prediction to know that shooting a loaded weapon directly at a living person would result in the loss of human life.

Focusing on more contemporary issues, the authors examine more recent trends which would excuse or reduce criminal responsibility because of alleged incapacity of the offender to conform his conduct to the requirements of the criminal law.[16] Fingarette and Hasse consider criminal defenses based on use of hallucinogens, chronic alcoholism, and narcotic addiction. Relying on empirical data, the authors argue that neither alcoholism nor narcotic addiction are "diseases" as understood by the medical model and, more importantly from their perspective, that addictive conduct is not involuntary conduct, since human beings still retain sufficient will to make difficult choices and to comply with the requirements of the law.[17] In their view hard choices still impose individual responsibility.

Their critique of the "diminished capacity" defense as developed by the California courts is a masterpiece of perceptive analysis.[18] Any lawyer or law student who has read *People v. Wolff,*[19] *People v. Conley,*[20] or *People v. Hood*[21] has probably felt

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13. FINGARETTE & HASSE, *supra* note 7, at 23-65.

14. *Id.* at 69.

15. *See* note 11 *supra.*

16. *See, e.g.,* United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973) (by a 5-4 vote, court rejected addiction as defense to charges of possession of heroin); People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978) (Supreme Court of California adopted the ALI test of insanity after concluding that volitional incapacity was relevant to criminal responsibility).

17. FINGARETTE & HASSE, *supra* note 7, at 137-95. In his philosophical writings Fingarette stresses the primacy of the human will and its ability to mediate and channel human behavior. *See, e.g.,* Fingarette, *Feeling Guilty,* 16 AM. PHILOSOPHICAL Q. 159 (1979). Nonetheless, the authors will permit evidence of drug and alcohol use to be considered in assessing criminal responsibility but *not* because such substances allegedly impair volitional behavioral controls. *See* notes 23-34 *infra* and accompanying text.

18. FINGARETTE & HASSE, *supra* note 7, at 117-37.

19. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). In *Wolff,* a 15 year old boy, after extensive planning, clubbed his mother to death so that he could forcibly bring neighborhood girls to his house in order to engage in sexual acts. The Supreme Court of

unease at the damage done to doctrinal and logical consistency by this court-made defense, even though they may have been sympathetic to its goal of permitting more individualized assessments of responsibility and blameworthiness. The authors persuasively demonstrate how, in many of these cases, the defendants in fact had the necessary *mens rea* at the time of the offense or that, if the evidence of certain disabilities such as intoxication is relevant to negating the requisite state of mind, then such evidence should logically be admitted on *all* mental states, not just in "specific intent" crimes. As the authors convincingly show, the courts are permitting a reduction in degree of culpability in certain cases of mental impairment, but they will not permit outright acquittal.

Fingarette and Hasse spend much of the book demonstrating how traditional doctrines which permit individualized assessment of responsibility accord with our intuitive moral assessments of relative blameworthiness but at the same time generate inconsistent results, compromise doctrinal and logical integrity, lack cohesive unifying principles, and create excessive dependence on the medical model and medical experts in adjudication. Thus, the authors contend their Disability of Mind doctrine is a great step forward in the criminal law because it avoids these pitfalls, while still permitting society to make the refined and discrete assessments of legal and moral responsibility which a just society requires.[22]

The Disability of Mind doctrine would be the *only* defense based on mental impairment available to criminal defendants.

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California, in reducing the conviction to second degree murder, concluded the unanimous expert opinion that the defendant suffered from a permanent form of schizophrenia characterized by complete dissociation between intellect and emotion established that he could not "maturely and meaningfully reflect upon the gravity of his act" and therefore did not commit first degree murder.

20. 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966). In *Conley*, the California Supreme Court reversed the first degree murder conviction of the defendant who, after consuming a substantial amount of alcohol, killed his lover after she told him she intended to break off their relationship and return to her estranged husband. The court concluded that evidence of voluntary intoxication should have been admitted to establish that the defendant lacked the capacity to entertain the "malice aforethought" required for conviction of both first and second degree murder.

21. 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969). In *Hood*, the California Supreme Court held that evidence of voluntary intoxication was not admissible to negate the *mens rea* required for assault with a deadly weapon since this was a "general intent" crime rather than a "specific intent" crime. The court's analysis of why such evidence tends to negate certain *mens rea* elements and not others is less than satisfactory and is ultimately best explained as a "policy" decision.

22. FINGARETTE & HASSE, *supra* note 7, at 1-22, 199-217.

Any mental abnormality or impairment from whatever origin could be considered. To have any impact on criminal responsibility, however, the abnormality or impairment must have materially affected the defendant's ability rationally to control his conduct in light of the requirements of the criminal law.

Under the proposed scheme the government must first satisfy its burden of proof in establishing the elements of an offense, *i.e.*, that the defined crime was in fact committed by the defendant. If established, the inquiry next focuses on whether the defendant, at the time of the alleged offense, suffered from a Disability of Mind and was consequently incapable of rational conduct with respect to the criminal significance of his behavior. The essential question then becomes whether or not the offender was "mentally able to take into account, in a practical way and at least in the essentials the relevance to that conduct of certain basic norms of criminal law."[23] The defense would have to show by a preponderance of the evidence that the defendant lacked the mental capacity for such rational conduct as a result of a D.O.M.[24]

The authors would impose minimal limitations on the type of evidence which could be considered in such an inquiry. Thus medical experts would still provide factual information—but not in diagnostic conclusions—about the defendant.[25] Additional

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23. *Id.* at 208.

24. Whether allocating the burden of persuasion (as well as the burden of production) to the defendant complies with constitutional due process as mandated by the fourteenth amendment is not clear. In Mullaney v. Wilbur, 424 U.S. 684 (1975), the Supreme Court struck down on due process grounds a Maine homicide statute which allocated to the defendant the burden of persuading the jury that he had acted in the heat of passion and was therefore guilty only of voluntary manslaughter. In a concurring opinion Justice Rehnquist in dicta stated that there was no constitutional prohibition on requiring the defendant to carry the burden of persuasion in establishing the insanity defense since due process only required the state to prove all material elements of crimes beyond a reasonable doubt. *Id.* at 705. Justice Rehnquist evidently considers insanity to be an excuse rather than a denial of *mens rea* or of *actus reus*. In Patterson v. New York, 432 U.S. 197 (1977), the Supreme Court upheld a New York statute which required the defendant to prove by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance in order to reduce an intentional killing from second degree murder to manslaughter. The Court evidently was persuaded that this special defense was more favorable to defendants than the common law defense of heat of passion, and that the state could therefore trade off the burden of persuasion for a defense more favorable to a defendant. Since Fingarette and Hasse do not consider the D.O.M. to be a negation either of *mens rea* or of *actus reus*, and because their standard for responsibility is arguably more favorable to defendants, their allocation of the burden of persuasion to the defendant as to the existence of a D.O.M. would probably be considered constitutionally acceptable by a majority of the current Supreme Court.

25. FINGARETTE & HASSE, *supra* note 7, at 205.

data concerning the defendant's personality and biography would also be welcomed. Permitting the jury to consider a broad range of information about the defendant and to assess the defendant's capacity for rational behavior in light of this information has the added benefit, according to the authors, of explicitly recognizing that the jury is, at least in part, making a fundamental "policy" decision (as opposed to a factual finding) in determining whether it is reasonable in light of all the facts known about a particular defendant to expect him to abide by society's rules of behavior.[26]

If there is such a mental impairment and if it is dominant, then the defendant is *without* criminal responsibility.[27] According to the authors, such a defendant is not offering a traditional excuse recognized at common law. Rather, he is demonstrating that he is "outside" the law and is thus not a "response-able" person since, contrary to the law's fundamental factual assumption, he does not share the community's values, skills, and understandings and, consequently, is incapable of responding to commonly accepted legal norms or rules.[28] According to Fingarette and Hasse such a defendant lacks the "rationality" indispensable for criminal responsibility. This "rationality" consists of a "minimum shared background-nexus of basic perceptions and values, which provides the basic standards relevant to criminal *mala in se*"[29] and is presumptively shared by every member of the community until the contrary is demonstrated in a particular case.

If the person suffered from a material but not predominant D.O.M., then he is to be found guilty of the charged offense and also to be suffering from a partial D.O.M. Though there is still significant criminal responsibility for the behavior, this verdict permits a less severe punishment to be imposed than would normally be called for. Importantly, it is the lack of *capacity* for rational "shaping of beliefs, moods, intentions, decisions and actions in regard to criminal law standards" which is a necessary predicate for the successful assertion of the defense.[30] An individual who possesses such capacity but fails to exercise it could

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26. *Id.* at 233; *cf.* United States v. Brawner, 471 F.2d 969, 1010 (D.C. Cir. 1972) (Bazelon, J., dissenting and concurring) (Judge Bazelon made a similar proposal which would divorce the jury's factfinding from expert opinion by also using a conclusory standard).

27. FINGARETTE & HASSE, *supra* note 7, at 200.

28. *Id.* at 208-11.

29. *Id.* at 224-25.

30. *Id.* at 210-11, 230.

not avail himself of the doctrine.

Should the jury determine that the defendant suffered from a D.O.M., complete or partial, it must then determine if there was "culpability in the context of origin."[31] Put differently, was the defendant himself responsible for inducing the condition? If so, then the defendant can be found responsible for the act of inducing or permitting the onset of the impairing mental condition and, consequently, he can at the very least be found guilty of an offense either of recklessness or negligence, since he was careless in permitting his risk-creating condition to occur. For example, the defendant who voluntarily consumed a substantial quantity of alcohol and then killed another person while suffering a complete D.O.M. would still be held responsible for the risk-creating act of voluntary intoxication which resulted in death and would be convicted either of reckless or negligent homicide.[32]

Finally, if a defendant is found not "response-able" because of a complete D.O.M. or only partially "response-able" because of a D.O.M., there would be a mandatory post-trial commitment and examination to ascertain if he is dangerous to himself or to others and, if so, whether other techniques of social control or treatment are appropriate.[33] The authors, however, eschew any specific consideration of post-verdict disposition of defendants who successfully assert the D.O.M. defense.[34]

The Disability of Mind doctrine poses serious questions which require careful and reflective consideration. It is both expansive and limiting when compared to traditional insanity defenses. It is expansive in that affective or mood disorders could successively establish a complete or partial D.O.M. Neither the M'Naghten nor ALI tests permit this.[35] It is limiting in that the D.O.M. could not be established by demonstrating volitional impairment, *i.e.*, substantial difficulty in conforming one's conduct to the requirements of the criminal law. The ALI test would permit this.[36] In permitting only cognitive and affective impairment to exclude or reduce criminal responsibility, the D.O.M. doctrine may be criticized for "compartmentalizing" the mind—that is, selecting only limited mental functions as relevant

31. *Id.* at 211-16.

32. *Id.* at 249.

33. *Id.* at 204-06.

34. *Id.* at 204.

35. *See* notes 11 and 12 *supra* and accompanying text.

36. *See* note 12 *supra*.

to responsibility—just as the M'Naghten test has been criticized.[37]

The definition of the Disability of Mind doctrine is not imminently clear. The linguistic formulation is extremely difficult to parse. Most persons would probably conclude that "rationality" means the ability to accurately perceive reality or, in more psychological terms, being properly oriented to person, place, and time. But apparently Fingarette and Hasse mean something quite different. Their definition is evidently tied to an individual's ability to participate practically in the community's value system and to be aware of the criminal significance of contemplated conduct. Besides being a somewhat primitive definition, it may also create substantial difficulty for jury application. Does the test simply require that the defendant had an awareness of societal norms? If it does, is the ALI test a clearer and more useful statement of the relevant inquiry? The D.O.M. test does not require the jury to consider the causal relationship, if any, of this impairment to the criminal conduct. It simply asks the jury to decide whether the defendant had the "mental capacity, at least in a practical way, to take the standards of law into account."[38]

In detaching the inquiry even further from the medical model of mental disease and the supposed assets of such a grounding (verifiability and increased confidence in factfinding), have the authors simply conferred unfettered discretion on juries, thereby relying too heavily on "jury justice"?[39] It is not clear that the proffered test really articulates defined standards or criteria which will yield greater consistency, predictability, or "even-handedness" in the adjudication of these difficult issues. Indeed, it is difficult to ascertain the full scope of the D.O.M. doctrine. Would it, for example, exclude from criminal responsibility a religious zealot such as Jim Jones (had he survived) who was primarily responsible for mass suicide in Jonestown, Guyana?

Significantly, the authors conclude that a person suffering from a complete D.O.M. at the time of the offense is much like a very young child who is simply not capable of acting as a respon-

37. *See, e.g.*, United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966).

38. FINGARETTE & HASSE, *supra* note 7, at 266.

39. Judge Bazelon offers an interesting and provocative discussion of the advantages of expansive jury discretion in assessing criminal responsibility in light of claimed mental impairment. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (Bazelon, J., dissenting and concurring).

sible human being in relation to the criminal law.[40] A finding of a total D.O.M. is, therefore, quite similar to the finding made at very early common law under the "bestiality test" that an insane criminal defendant was like an animal and thus not blameworthy.[41] Whether the law ought to so dehumanize actors brought before the bar of justice raises serious moral questions for society.

Perhaps the most telling criticism of the D.O.M. model is the absence of reasoned argument that "irrationality" as defined by the authors should be the essence of nonresponsibility. The M'Naghten test of insanity excuses individuals who lack cognitive ability, since knowledge is a necessary predicate for choice and the criminal law punishes those who chose to do wrong. Without such knowledge, there is no basis for personal blameworthiness and punishment is inappropriate. The ALI test accepts this thesis and, in addition, permits a defendant to demonstrate, alternatively, that he could not control his behavior even though he knew he was doing wrong.[42] Thus, he also did not choose to do wrong. Fingarette and Hasse all too frequently defend the validity of their scheme and its primary grounding in their concept of "rationality" by relying on its manifest correctness. As they put it: "The three basic propositions [of the D.O.M.] express the substance of long-persistent intuitions of common-sense that have only erratically been explicitly expressed in the common law. The intuitions have validity that is self-evident . . . ."[43] Unfortunately, an appeal to intuition and self-proving obviousness is usually an argument of last resort. Its correctness remains to be demonstrated.

Finally, it is not clear that a unitary doctrine of responsibility encompassing every form of mental impairment or disability is desirable. One of the traditional strengths of the common law legal system is the ability to evolve new doctrines in light of changing moral values and newly discovered empirical knowledge. Perhaps the current multiple doctrines of excuse or mitigation which are tailored to specific contexts provide more flexibility and are more in accord with our deeply shared values than any unitary doctrine could be.

On balance, the Disability of Mind doctrine probably does not accord with, nor implement, the basic moral intuitions which

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40. FINGARETTE & HASSE, *supra* note 7, at 208, 230-31.

41. *See, e.g.*, Rex v. Arnold, 16 How. St. Tr. 695 (1724).

42. *See* note 12 *supra*.

43. FINGARETTE & HASSE, *supra* note 7, at 203.

support society's framework of criminal responsibility. It is highly unlikely that this epic scheme will ever be adopted by any legislature or court and that would not be a disappointment.

Undoubtedly, this book, which is very readable and maintains the reader's enthusiasm and interest throughout, will provoke intense and thoughtful discussion among those who care about justice and individual responsibility. Even though the prognosis for implementation of the D.O.M. doctrine is not favorable, this proposed scheme will surely stimulate a valuable re-examination of our underlying legal, moral, and philosophic values as they relate to individual criminal responsibility. And, that is no small accomplishment.

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