Housing Subsidies in the U.S. and England

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BOOK REVIEWS


I. INTRODUCTION:

UNRESOLVED VAGUENESS IN THE LAW OF INSANITY

Although insanity is pleaded quite infrequently as a defense, for well over a century it has resulted in more disagreement and more literature than any other defense in the criminal law. This literature has concerned itself, especially in recent years, not only with how the insanity defense ought to be formulated, but also with its very justification. The seemingly disproportionate interest in this defense reflects the fact that it is deeply caught up in a growing ideological controversy concerning the fundamental direction our criminal law ought to take. For example, some see the demise of the insanity defense as a first step in the shifting away from a "punishment" system with its traditional moorings in condemnation for moral fault towards a totally forward-looking system of "treatment" for the criminally deviant.

While the insanity issue has generated much heated debate, there has been surprisingly little clarification of the underlying issues. The literature on this topic, largely polemical and inconclusive, suffers most from the tendency of the critics to offer answers to difficult moral and political questions without adequate conceptual understanding of the meaning of the questions posed and the principles upon which their answers are based. For example, the influential Royal Commission on Capital Punishment in its attempt to justify the insanity defense merely asserted the following:

We make one fundamental assumption which we should hardly have thought it necessary to state explicitly. . . . It has for centuries been recognized that, if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law.¹

But the Commission nowhere attempts to tell us what sort of "mental disorder" warrants the protection of the insanity defense.

¹ ROYAL COMM’N ON CAPITAL PUNISHMENT, 1949-1953 REPORT, CMD. NO. 8932, at 98 (1953).
Certainly there are those who commit crimes in the grip of passion and motives which are considered by many to be signs of underlying “mental disorder” whom the Commission would have no desire to exculpate, and there are other “mentally disordered” individuals who would be exculpated but would not be considered fit subjects for an insanity plea—e.g., victims of involuntary intoxication. Nor does the Commission attempt to tell us why it would be “unreasonable” to impute guilt and to punish individuals who suffer from the sort of “mental disorders” they have in mind.

The Royal Commission’s failure to contend with fundamental concepts is a reflection of the existing law of criminal insanity. Although all existing insanity defenses attempt to limit the scope of the defense by requiring that a defendant suffer from a mental disease, the very notion of “mental disease” (illness) has no clear agreed-upon medical meaning; indeed, the wide discrepancies in its current psychiatric and psychological usages have rendered this notion virtually meaningless. There are those who prefer not to use the concept at all, while others use it so broadly that it becomes a synonym for “abnormal behavior,” including within its scope the socially deviant and maladjusted as well as those who suffer from severe brain damage. Unfortunately, the various insanity defenses do not help in clarifying the class of people to whom they are meant to apply. Basically, these defenses are either variants of the M’Naghten Rule which require “knowledge of the nature of one’s act and that it is wrong,” or “capacity to control” tests which require the power to do otherwise, or combinations of both.

The American Law Institute (A.L.I.) takes the combination approach in its Model Penal Code, providing in its insanity rule that:

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 requirements of law.²

Although this rule is perhaps the best presently in use, its terms are couched in unresolved vagueness. The key term “substantial,” for example, was left totally undefined, as was the word “appreciate” which is used instead of the more traditional “know” so that the mere detached ability to realize that one’s act is criminally prohibited is not sufficient to preclude the defense. By opting for the term “appreciate,” the A.L.I. was merely following the various “broader” interpretations of the M’Naghten Rule which speak of “knowledge” as involving some “insight” into the nature and implications of the act and/or some degree of attendant “emotional

appreciation." Yet if knowledge that one's act is wrong must involve some emotional response such as anticipatory anxiety, guilt, shame, remorse, or inner moral conflict, the A.L.I. did not consider the apparent fact that there are many types of criminal offenders whom it did not intend to excuse on grounds of insanity—e.g., a political criminal, other cultural deviants, and the psychopath—who can commit their acts with as much "lack of affect" as the schizophrenic whom it did want to so excuse. The meaning and role of the notion of "appreciation" is simply left without any clarification. The meaning of "capacity to conform" is left equally unclear. In the Comment to its insanity rule, for example, the A.L.I. claims that a distinction can be made between "indisposition" and "incapacity" to conform to the law,8 but nowhere specifies how this distinction can and should be made.

Underlying the A.L.I.'s failure to resolve these problems is its inadequate analysis of the function of the insanity defense in the criminal law, which we are told is to distinguish ordinary criminals for whom "a punitive-correctional disposition is appropriate" from those "nondeterrable" offenders for whom "a medical-custodial disposition is the only kind that the law should allow."4 Yet this analysis is deficient, for it fails to recognize that there are some individuals, like Gandhi, who provide paradigmatic examples of nondeterrability, whom neither the general public nor the A.L.I. would want to classify as insane. If it is the A.L.I.'s desire to exculpate only those nondeterrables who have a "mental disease," this is another matter—but this is a distinction that cannot be found in the Comment to its insanity rule. Indeed, if this distinction had been clearly seen, it would have been incumbent upon the A.L.I. to attempt to explain why only those who are nondeterrable as a result of "mental disease" require a "medical-custodial" disposition and are to be excused. This, of course, would have involved coming to terms with the fundamental question of what "mental disease" should be taken to mean and why only those who are nondeterrable as a result of it should be excused on grounds of insanity. Yet the concept of "mental disease" is left totally undefined by the A.L.I.8

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4 Id., Comment 1.
5 The A.L.I. was, however, quite aware of the elasticity of the concept of "mental disease" and was in particular concerned with the tendency of some to take criminality in itself as symptomatic of mental disease. It attempted to exclude this possibility through a proviso added to its rule that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Id. at § 4.01(2). It is, however, unclear whether this clause excludes any category of mental abnormality. Even for those psychiatrists and psychologists who tend to classify all criminals as suffering from some "mental abnormality," the abnormality so diagnosed will almost certainly be seen as having at least some non-criminal manifestations.
II. Fingarette’s Analysis of the Concept of Insanity

With this dismal state of conceptual uncertainty as the backdrop, Herbert Fingarette presents a new analysis of the concept of insanity in *The Meaning of Criminal Insanity*. Professor of Philosophy at the University of California at Santa Barbara, Fingarette comes to his task with impressive credentials, equipped not only with the tools of philosophical analysis, but also with knowledge of psychiatry and criminal law. Unlike so much of the literature on the insanity defense, Fingarette does not merely criticize existing formulations of the test of criminal insanity and then offer a new formulation which merely shifts basic unanalyzed terms into a new concatenation. Instead, Fingarette attempts the essential philosophical task of going beyond the mere wording of the defense into its underlying meaning. His book is divided into two parts of roughly equal length. Part I, “At the Intersection of Psychiatry and Law,” consists of discussions of the concept of mental disease, of the intimate connection between moral and psychiatric judgments, and of the philosophical “red herrings” in law and psychiatry of “determinism vs. free-will” and “inaccessibility of mind.” This section is generally quite reasonable, if not especially original. The more interesting and original section is Part II, “The Legal Concept of Insanity,” where Fingarette provides his own conceptual analysis of the notion of criminal insanity. This

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In the Comment referred to in the Proposed Official Draft of its insanity rule, the A.L.I. tells us that this proviso was included specifically to exclude the so-called “psychopathic personality” from the category of mental disease. *Id.* at Comment 6 (Tent. Draft No. 4, 1955). Although for some “psychopathy” is a mere “wastebasket category” for habitual criminals, diagnostic procedure is not this crude for those who have attempted to define the concept of “psychopathy” and to understand and treat it. For example, if one reads Cleckley’s *The Mask of Sanity* and studies the case histories he supplies, it is quite clear that a behavioral syndrome is being presented which goes far beyond repeated criminal behavior. Though the psychopath’s repeated criminal behavior is normally what brings him to a psychiatrist’s attention, a psychiatrist, like Cleckley, in diagnosing his condition, will take into account his motives in committing crimes (e.g., his acts lack judgment and appear to be inconsistent with professed aims and values), the nature of his crimes, his reactions to them (e.g., he seems totally devoid of remorse) and his whole life history, including behavior in other contexts (e.g., unreliability, unresponsiveness to interpersonal relations and failure to follow a life plan). H. Cleckley, *The Mask of Sanity* (4th ed. 1964).

If we are to accept a basically “Clecklian” definition of the psychopath, the A.L.I. not only fails to exclude him through its proviso from the definition of the criminally insane, it even fails to justify its desire to exclude him. Surely, if its interest is only in “nondeterrability,” he should be so excused, for unamenability to punishment is one of the identifying characteristics of the psychopath. (It has been said that the psychopath is bored and as such will seek to “cut up” more than the ordinary person in order to relieve the tedium of an unrewarding existence, without caring—or being “capable” of caring—about the nonimmediate consequences of his actions.) If the A.L.I. believed that the apparent “nondeterrability” of the psychopath is different from that of the “truly insane,” it should explain that difference; yet no hint of such an explanation is ever given.

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section begins with an attack upon the tendency to assimilate a defense of insanity into traditional defenses of involuntariness or ignorance and a criticism of traditional formulations of the insanity test. It then proceeds to a development of Fingarette’s analysis of the meaning of insanity and its application to particular cases. Though recognizing the various ideological issues and questions of public policy that converge on the insanity issue (e.g., the very rationale of criminal punishment, and the justification, purposes, and limits to be placed on the involuntary confinement of those who are seen as dangerous, yet inappropriate objects for criminal punishment), The Meaning of Criminal Insanity does not pursue these issues at great length.

With the perspective of the analytic philosopher that he is, Fingarette sees conceptual analysis as the first required task, without which all else suffers. It is the inadequacies of Fingarette’s own analysis of the notion of criminal insanity that will provide the basic subject matter for this review. Essentially, I shall argue that his analysis is no more capable of providing a rationale for the cases of insanity that he considers paradigmatic than the traditional insanity rules he dismisses. I will preface my discussion with a critique of Fingarette’s treatment of the traditional insanity rules and end it by arguing that his failure to grapple with underlying ideological issues results in a failure to provide a rationale for the place of an insanity defense within a theory of the nature and justification of criminal punishment. Fingarette’s failure to grapple with the very conceptual coherence and justification of the insanity defense is a major inadequacy of his book. Fingarette to the contrary, ideological and conceptual issues are not easily separated.

A. “Knowledge” and “Capacity to Control” v. “Capacity for Rationality”

Fingarette is sharp in his criticism of the existing state of the criminal law of insanity which he finds conceptually unclear and confusing. Although certainly justified in this, he is mistaken in his apparent belief that the traditional “knowledge” and “capacity to control” tests have clear literal meanings which the law chooses to avoid in favor of undefined and unusual meanings artificially twisted to fit paradigmatic cases of insanity.

Considering “knowledge” tests, Fingarette discusses the case of the melancholic (and “psychotic”) mother who as a result of severe depression kills her newly-born and healthy child to save it from the sorrows of a cruel and bleak world. One may claim that such a woman justifiably can be said not to have “really known” (or “appreciated”) that her act was wrong. Although Fingarette shares the belief that such a person ought to be excused
on the ground of insanity, he will have nothing to do with the attempt to "broaden" the phrases of the traditional insanity rules to fit such a case, claiming: "This felt need to deepen or amplify the meaning of the phrases derives from the feeling that these phrases must be saved and an awareness that in their plain sense they do not apply."  

This is not a fair appraisal of the situation. Granted that the phrases have no clear meaning, the criminal law's tenacity in using them can simply be attributed to the fact that nothing more definite has been offered which would not lead to patent injustice in particular cases. In addition, the belief that there is a "deeper" concept of "knowledge of right and wrong" is not a creation of a confused criminal law, but reflects a distinction, vague and unrefined though it may be, which can be found embedded in ordinary language as well as the more technical vocabulary of modern psychoanalysis. It would appear to me that there is no "plain sense" to the question of whether the melancholic mother "knew that her act was wrong." One may with all justification answer: "In a sense yes and in a sense no. Certainly, she did in the sense that she knew that her act would be considered morally wrong and would merit criminal punishment, and for all we know, she herself might have believed her act to be wrong; but in another sense, she did not. Her depressed mood made her 'see' the world in a totally different way than the rest of us, and that fundamentally affected her 'knowledge' of what she was doing." If "knowledge of right and wrong" has a literal meaning, as Fingarette seems to think, what is it? Certainly it cannot be the mere ability to utter (or think) the particular words "this act is wrong," for this can be achieved by a parrot as well. One must "know what one means"; however, as contemporary analytic philosophers have amply demonstrated, the notion of "what one means" itself has no simple meaning. Consider, for example, a "psychotic" who commits a murder and admits to the authorities that he did wrong. It turns out, however, that his reason for thinking this has absolutely nothing to do with the community's reason for considering it so. Let us assume that he believes that it is morally wrong to kill on Mondays, but all right the rest of the week. Is it such a departure from "ordinary usage" to say that this man simply did not know what he was doing? I think not.

Fingarette is equally critical of the various "capacity to control" tests, also apparently believing them to have a literal meaning which the law chooses to ignore. For example, he plainly says

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7 Id. at 141.
8 See L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953). Perhaps, in certain circumstances, for A to truly understand what B means, A must understand "the form of life" of B.
of James Hadfield and Daniel M'Naghten, who both committed crimes under the force of delusions, that properly speaking they would be said to have had the capacity to conform to law. Why does Fingarette hold this view? No clear answer emerges in his analysis. One must recognize that individuals like Hadfield and M'Naghten, though acting under delusions, choose their acts and are often capable of carefully planning them and of taking precautions to avoid detection and capture. They can refrain from acting if they choose to, and often can be patient in waiting for the most ideal moment to commit their crimes.

Although he does not think that such individuals should be said to lack the capacity to conform to law, Fingarette does not attempt to provide a coherent analysis of the concept which justifies the position he takes. As a philosopher, he must, however, be aware of the vast number of philosophical analyses of the troublesome concept of “capacity to control” or as some prefer, “capacity (power) to do otherwise.” At times, Fingarette seems to accept one of the more philosophically naive analyses which claim that an individual “could have done otherwise” means that “if he had tried (or ‘chosen’ or ‘decided’) to do otherwise, he would have succeeded.” If this analysis is accepted, then such individuals as Hadfield and M'Nagthen must be said to have been capable of refraining from their illegal acts. But this analysis should not be accepted, for one may be capable of refraining from one's act if one tries, but not have the power to try. It is for reasons such as this that more sophisticated analyses consider various factors relevant to one's capacity to control. For example, one's power to do A in a situation S should be considered to vary directly with one's power to think about A in S. A man who has little ability to think about the alternatives of action open to him or their consequences may have very little “power to do otherwise”; yet such a man does not yield to psychological and physical forces that are overpowering, nor does he “try” to overcome them and fail. Similarly, a person's power to do otherwise may be severely limited by his ethical convictions or lack of them. When factors such as these are considered relevant, it is no longer clear that Hadfield and M'Naghten should be said to have had the capacity to refrain from their criminal acts.

The question: “When does an individual have the power to

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9 FINGARETTE, supra note 6, at 139.
10 Obviously, if we are to claim that such individuals as Hadfield and M'Naghten lack the capacity to control (or as philosophers often put it, the capacity to do otherwise), their incapacity is not the radical sort that negates volition and consequently precludes the existence of an actus reus. In such a case (e.g., an act resulting from an epileptic seizure), the act is not one that is chosen.
do otherwise?” Fingarette fails to recognize, presupposes a moral perspective concerning the conditions that are required for the “proper” imputation of moral responsibility. Yet, when this notion is used in ordinary language and in the various “capacity to control” tests in the criminal law, a consistent set of moral presuppositions is never made explicit; consequently, the concept suffers from multi-dimensional vagueness, for a person may be said to have much power to do otherwise from one perspective, but very little from another. For example, a person may have great power to do something if he tries, but little power to attend to considerations which would lead him to realize why he ought to try. Indeed, as my major argument will attempt to establish, it is precisely the same multi-dimensional vagueness and ultimate lack of definition that inheres in the notion of “capacity to do otherwise” that will be found in Fingarette’s notion of “capacity for rationality.” Both notions equally cry out for elucidation, and analysis of either would bring out very much the same problems.

Though Fingarette often does write as if the traditional insanity tests have a literal and mistaken meaning, at other times he contends instead that these tests are misleading and confusing and that he can supply in their stead a more enlightening and clearer substitute so that “the jury member would feel much more readily justified in officially ascribing insanity in cases where its presence is intuitively evident.” It will be my contention, however, that this is not achieved. Though the old notions of “knowledge” and “capacity to conform” do not guide our intuitions as much as they act as rationalizations for them, the same will be seen to be true of Fingarette’s notion of “capacity for rationality.” Indeed, it matters very little which of these notions we choose to use; what does matter is that one elucidate whichever notion one chooses.

Prior to presenting his analysis of criminal insanity, Fingarette writes:

No doubt when we speak of mental disease in the context of criminal law we do have in the back of our minds some

12 For example, those who claim that “X was powerless to refrain from A in S” should be analyzed as “X would have refrained from A in S if he had tried (or chosen, or decided) to” are tacitly taking the moral position that the causal factors upon which one’s capacity to try (choose, decide) to depends are to be completely disregarded in the imputation of responsibility. Yet others claim that these factors ought to be considered morally relevant and consequently ought to be incorporated into the notion of “power to do otherwise.”

13 FINGARETTE, supra note 6, at 212. After presenting his analysis of insanity, Fingarette tells us at the end of his book that he would be willing to accept any of the traditional insanity rules which he now argues are capable of being interpreted on the basis of his analysis. If the old rules are to be used, he claims, the trial judge should so interpret them for the jury. Given this position, Fingarette is much too sharp in his original criticism of the existing insanity rules. He should have suggested that they are misleading without proper interpretation rather than simply mistaken.
unique condition or set of conditions that we intuitively appreciate as insanity and as therefore excluding criminal responsibility. It is because of this notion that we think, intuitively, that "of course" an act due to mental disease cannot justify criminal conviction. But the task we have never yet adequately faced up to is to bring out explicitly and clearly what it is that we have in the "back of our minds," and to see explicitly rather than intuitively how that condition is related to responsibility status.

I propose now to examine the various specific criteria that have been proposed as completions of the formula, "Insanity is mental disease such that . . . " I propose to show that none of them really does bring out what we have "in the back of our minds," and that they therefore cannot cover the paradigm cases of insanity—unless we greatly stretch the natural meanings of words or ignore them entirely and tacitly substitute the trier of fact's common sense. I want ultimately to show that what is needed is . . . a specification of the authentic criterion, centering on the notion of a mental makeup such that there is incapacity for rational conduct, that we have in mind when we think of criminal insanity.14

I find this an exceedingly puzzling claim. Do "we" indeed have a concept of "insanity" in the "back of our minds"? Any cursory review of the several studies of actual jury use of the various insanity tests would indicate that certainly "the average man" has no clear concept at all in mind when he classifies someone as insane.15 This is true, I would suggest, of all of us, regardless of our medical, legal, or philosophical sophistication. There are conflicting conceptual strands in our use of the concept of insanity which pull us in different directions. Fingarette is fundamentally wrong when he writes, as he often does, as if he is dealing with a definite concept having a "standard" meaning which can be discovered by the penetrating logical eye of a philosophical analyst like himself. The difficulty of analyzing the concept of insanity is more than the typical difficulty of borderline vagueness, as Fingarette seems to think. A study of how the concept of insanity is used will not yield a single coherent meaning, but will instead indicate that we are dealing with a cluster of conflated notions which require delineation. Furthermore, if guidance is to be provided in the formulation of an insanity rule, the mere description of the several conceptual strands that comprise "our intuitive understanding" of when a person is criminally nonresponsible due to insanity will not suffice; this understanding will have to be guided by some coherent reconstruction of the concept of insanity.

14 Fingarette, supra note 6, at 127-28.
What then does Fingarette take the "authentic meaning of our intuitive concept of criminal insanity" to be? He writes:

[T]he concept which has underlain the intuitively understood phrase "criminal insanity" can be explicated as follows: It is the concept of a mental makeup at the time of the offending act such that the individual substantially lacked capacity to act rationally with respect to the criminality of the act.16

Elaborating upon his definition, Fingarette notes:

[R]ational conduct is a notion that alludes to far more than the purely intellectual or cognitive powers. Acts may be irrational by virtue of excess or defect of emotion, or by virtue of bizarreness of mood, or from defect of will, as well as by virtue of intellectual flaw.17

Thus, he states:

In general to say that a person has lost his reason is to say that there is something "mad" about the way he conducts himself. It may be that the madness . . . is distinguished mainly by an irrational mood which we see as permeating and dominating what he does; or it may be madness that has as its most distinctive characteristic certain delusory beliefs or hallucinatory perceptions; or it may be madness that grows out of such a "flatness" of emotional response . . . or capacity to sympathize or empathize with others, or such perverse desires and tastes, that the person cannot rationally assess the significance of what he is doing.18

Fingarette concludes:

When we speak of a person as insane, we mean to say of one . . . that in some sense it is now his nature . . . to act irrationally. He lacks capacity for rationality . . . but this lack of capacity must now be a part of his nature and not merely the temporary effect of special circumstances [e.g., temporary intoxication]19

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A criminally insane person must be not merely incapable of rational conduct, but incapable of conduct that is rational specifically with respect to the criminality of that conduct. That is, he must substantially lack capacity to rationally take into account the criminal implications of his act.20

Fingarette's emphasis on "rationality" and his notion of "responding relevantly to the criminality of an action" are stimulating in their departure from the well-worn traditional approach. This refreshing difference jars us from our complacency with the old, though far from clear, notions of "capacity to conform" and "capacity to appreciate." It is my position, however, that it does no more. Fingarette does not adequately delineate his concept; it is not clear which cases fall within it, and which do not, and why.

16 Fingarette, supra note 6, at 10.
17 Id. at 23.
18 Id. at 178.
19 Id. at 195-96 (emphasis added).
20 Id. at 210-11.
In this respect, Fingarette's notion of "capacity for rational action" is no less vague, no less exasperating in its analysis, than the notions that he is attempting to replace. There is indeed irony in Fingarette's plight, for though he rejects such notions as "capacity to appreciate the criminality of an act" and "capacity for emotional appreciation" as incapable of coherent elucidation, he claims that having "appropriate emotional reactions" to a situation is part of the "rationality" he sees as requisite for criminal liability. I see no basic difference here. Indeed, in a fundamental sense, it matters not at all whether one speaks as Fingarette does of "defect of emotion" or "flatness of emotional response," or as the traditional approach does of "lack of emotional appreciation," but it matters immensely that one elucidate whichever linguistic counters one chooses to use.

B. Fingarette's Paradigms of Insanity

The cases Fingarette analyzes as paradigmatic of insanity provide no coherent principle which can justify his intuitive judgments of who should be considered insane. The notions he uses are instead merely after the fact rationalizations for these judgments. Furthermore, the notions are elusive and as such can be used to justify excusing individuals that Fingarette gives no indication ought to be excused on grounds of insanity.

Case 1: The Schizophrenic

In discussing insanity as it relates to "emotional-moral impairments," Fingarette imagines the following:

In our new hypothetical situation Jones is fully responsive to the relevance of the physical implications of what he is about to do. But he is incapable of responding to the relevant emotional-moral aspects of the situation and his conduct. Jones . . . is a schizophrenic psychotic. He seems able to carry on practically to a fair degree . . . but . . . he is emotionally flat and does not respond to the relevance of human suffering. It's not that he enjoys seeing suffering; he just has no capacity to react. The suffering of others, in its immediate emotional-moral relevance, is beyond his ken. It is an observable fact to Jones that Smith will be injured, but it has no emotional or moral relevance, and he cannot respond to it as such, so he throws the rock, since Smith suddenly makes a perfect target. Jones can talk about these matters . . . and give correct answers; he can talk correctly about the legal proscriptions and the prospect of punishment; and in fact he does steal away secretly, after having injured Smith, in order to escape punishment.21

It is cases such as this that have been used to develop California's

21 Id. at 188.
diminished capacity doctrine in the law of homicide. But what is the principle involved here which justifies the exculpation of the schizophrenic-psychotic Jones? Fingarette tells us that Jones is "incapable of responding to the relevant emotional-moral aspects of the situation," but he does not elucidate. Does he mean perhaps that the criminal ought to feel guilty or ashamed about what he has done, that he feel at least a bit sorry for his victim, that his heart should beat faster, his adrenalin flow more rapidly? Characteristically, Fingarette is silent. What, for example, morally differentiates Jones from the hired killer or political assassin who can also commit crimes with no apparent emotional and moral response? If, as Fingarette suggests, the latter are "capable" of expressing "appropriate emotional reactions" in other contexts, he must counter the fact that schizophrenics are not at all emotionally dead (indeed their problem, it can be claimed, is that in a sense they are too emotionally and morally alive); they too can respond emotionally and morally in quite appropriate fashion in certain situations. Just as a Mafia hired killer can "care about" the welfare of others and consequently appreciate the moral significance of prohibitory legal rules embodied in law, so can the schizophrenic. Indeed he is quite different from the classical psychopath who is incapable of caring at all about others. Fingarette suggests that, at least from a moral point of view, the schizophrenic cannot properly be held criminally responsible because:

He may be restrained or deterred by threats of sanctions or by physical control, but this is neither responsiveness to law nor responsibility under law. It is mere control by fear . . . sheer power, to his mind.

But how are we to distinguish the schizophrenic from the countless numbers of "common criminals" who have no respect for the moral authority of the state and the law it enforces, which to them is brute force (e.g., consider some of the black radicals of recent years)? These are the questions that cry out for answers, but none are provided by Fingarette.

One must always be wary of Fingarette's tendency to camouflage these pressing questions by using the elusive notion of "incapacity"—for nowhere does he distinguish that "genuine incapacity to respond to rudimentary moral issues," that the schizophrenic has, from that mere "indisposition" to do so that the "common criminal" may display. I would suggest that no matter how the distinction is made, you will find yourself either excusing more

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23 FINGARETTE, supra note 6, at 189.
25 FINGARETTE, supra note 6, at 189.
criminals than your intuitions originally lead you to or you will find yourself questioning your original intuitive judgments. For example, if we say that the "schizophrenic" is incapable of responding in the sense that he cannot be convinced by rational persuasion to so respond, we fly in the face of those countless psychiatrists who attempt precisely this. On the other hand, some members of subcultures have beliefs and attitudes which are as difficult to change as those of the "sickest of psychotics." If this is so, is the cultural deviant as morally nonresponsible as the schizophrenic? If so, why should there be a legal difference and can that legal difference be justified on moral grounds?

Case 2: The Paranoid Psychotic

The lack of attention given by Fingarette to the moral difference between "sociological incapacity" and "psychological incapacity" is reflected in another example he gives:

Jones is suffering from the delusion that he is being pursued and persecuted, and is the object of systematic attempts at assassination. He sees Smith appear in the bushes. He instantly and violently throws the rock at him.

What is it that leads us to characterize Jones as deluded rather than . . . malicious? It is that, from prior observation or knowledge of Jones, we have concluded that his belief is unaffected by relevant evidence or argument; that is, he responds relevantly to that which is consistent with his deluded belief, but he does not and cannot genuinely respond to anything pointing to the falsity of that belief. If we believed Jones genuinely considered and took into account what was relevant, we would view him as mistaken or stubborn. But the gross discrepancy between the belief he holds and the relevant facts as we see them, and the fanatic character of his belief in the face of everything, lead us to conclude that in this connection he is incapable of rationality, not merely a dedicated or stubborn man who is in error.

The undeveloped distinctions utilized here will not do. It simply is false that the typical psychotic suffering from delusions (paranoid or not) cannot be affected by relevant evidence pointing to the falsity of his belief. Indeed, the intelligent psychotic will be ingenious in his ability to incorporate any apparent counterexample into his "deluded" view of things; he will often not avoid challenges but will eagerly attempt to meet them. Fingarette

26 I think a strong case can be made that, at least in some cases, there is no moral difference; moreover, whatever legal difference we are to make in these cases is on purely utilitarian grounds of general deterrence and in no sense reflects the greater moral blameworthiness of the cultural deviant over the schizophrenic. In order for the law to maintain its moral effectiveness for the mass of generally law-abiding citizens, certain "fictions" may be necessary. I will not, however, pursue the matter here.

27 FINGARETTE, supra note 6, at 190-91.

28 Among the many interesting psychiatric cases Robert Lindner relates is
is too facile in depicting Jones, the paranoid psychotic, as not "merely a dedicated or stubborn man who is in error," but one who is "incapable of rationality" because of "the fanatic character of his belief in the face of everything." What are we to say of political ideologues such as Angela Davis who see the world on the basis of an ideology which to some is pure delusion? Certainly a conservative like William F. Buckley would use very much the same description of Ms. Davis that Fingarette uses in characterizing the paranoid psychotic, and Ms. Davis, in turn, would see Mr. Buckley in very much the same way. It is considerations such as these that have led many sociologists to agree with La Barre's claim that "there is no discernable difference in the content of a culture and of a psychosis." I do not suggest that the answer is that simple; I do suggest that the question must be tackled in order to develop a moral rationale for the insanity defense.

Case 3: The Heroin Addict

Let us consider another of Fingarette's examples. Jones is a heroin addict, at the moment in the throes of intense withdrawal symptoms and in a state, therefore, of desperate craving for heroin and, hence, of desperate need for some ready cash. Jones does apprehend the physically, emotionally, morally, and legally relevant aspects of his situation and of what he is about to do (assault Smith). Although he sees their relevance and groans inwardly, he finds that he cannot respond relevantly to these. He is uncontrollably animal-like in his assault; considerations of humanity can play no part in what he does. The physical quest to grab Smith's money is the sole relevant factor to which his behavior is responsive. . . .

Given the circumstances as described, Jones must be judged to be acting irrationally; he has lost control over himself and in this respect has lost his reason. In terms of our formulation, he is incapable of responding to certain aspects of his situation and conduct that have essential relevance—the suffering and the moral and legal rights of Smith. I find this case puzzling. If Jones is in the "throes of intense withdrawal symptoms" and attacks Smith in order to obtain money to purchase heroin, I do not see why he should be said to be "acting irrationally." Certainly, Jones' action is understandable on the

the story of Kirk, a quite intelligent scientist who believed that he spent part of his time in space travel and in other worlds. Kirk's ability to weave a tale in meticulous detail and to attempt to meet criticism on a scientific plane so fascinated Lindner that he almost came to share Kirk's delusion. R. LINDNER, THE FIFTY-MINUTE HOUR 223 (1955).

29 W. LA BARRE, THE HUMAN ANIMAL 246 (1954). It is interesting in this context to consider the treatment currently afforded political dissidents in the Soviet Union who may be looked upon as "psychotics" and placed in mental hospitals.

30 FINGARETTE, supra note 6, at 189-90.
basis of the ordinary motive of self-preservation. I do not see at all how Jones is an example of a man who "has lost control over himself and in this respect has lost his reason." Normally, we speak of someone as losing control when under the grips of a temporary emotion, he does something which under calmer reflection, he would have preferred to have refrained from doing, but Jones, if he were in a calm frame of mind, might find his act justifiable (or at least excusable) in the circumstances. Furthermore, if we accept Fingarette's rationale for excusing Jones the heroin addict, are we to excuse everyone who "loses control" over himself? If the answer to this is obviously no, we need to draw finer distinctions in this case than Fingarette does.

Case 4: The Melancholic Mother

Another person whom Fingarette believes would qualify as insane under his proposed standard is the melancholic mother previously mentioned who after much brooding and anguish kills her newly-born child (in many cases, though not in Fingarette's example, she will also attempt suicide). In order to show that it is not the mother's "lack of knowledge" which leads him and others to want to excuse her, Fingarette tells us to imagine that in her own view it is a grave sin to kill a child, and continues:

According to her own conscience, then, she has given in to the temptation to commit a sin, a wrong. Using . . . M'Naghten, we should have to find her sane because under these circumstances she does know her act to be wrong. But such a conclusion runs squarely counter to our intuitive judgment. A woman who has such a blatant recent background of hallucination, delusion, psychotic disorganization, and infanticidal thoughts, who has a family background filled with overt schizophrenia, who kills her own infant for the reasons mentioned, and who shows up on current psychiatric tests as definitely schizophrenic is surely to be held insane and nonresponsible if anyone at all is. The question whether, among all else, she thought herself to be doing what was morally right or morally wrong is surely beside the point: she is insane, not responsible for her acts or her moral judgments. What is relevant is the way in which she comes to form her views and, more importantly, her conduct, not the degree to which her conclusions on moral issues coincide with ours.\(^3\)

Again, what is the principle involved here? Why is anyone who shows up on current psychiatric tests as definitely "schizophrenic"\(^3\) to be held insane in a situation like this?

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\(^3\) Id. at 155-56.

\(^3\) Fingarette is too uncritical in his acceptance of psychiatric diagnostic categories. In this instance psychiatrists will often disagree on when a diagnosis of schizophrenia is justified and on what that diagnosis means. For a very sharp criticism of psychiatric diagnostic ability, see Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 650 (1958).
Though Fingarette does not make the connection to this case himself, he makes an insightful point in his critical discussion of the existing “irresistible impulse” or “capacity to conform” standards of insanity.3 Consider the following passage:

[W]hen, at some moment . . . the person indulges a particular mood even though it is inconsistent with the main pattern of all he formerly did, thought, or valued, the idiom of being “dominated” or even “overwhelmed” by the mood may be apt. The idiom tacitly acknowledges that this is his mood, that it is he who initiates the mood-related conduct and not someone else; but the imagery of the divided person helps to emphasize that one would be in error to assess and judge the man as a whole by reference to his comportment of the moment.4

I think Fingarette is here reaching an important point which is at the heart of the lay tendency to see mental illness as something that “possesses” or “victimizes” a person—a psychic cancer that interferes with a person’s normal behavior and consequently affects his very self-identity.5 Yet when Fingarette presents his analysis of insanity as “lack of capacity for rational action,” he does not refer back to this conception of “possession” or lack of self-identity. When he refers to the melancholic mother at this point in his exposition, it is merely to claim that she is insane because “[h]er mood and attitude were irrational. Her act was irrational.”6 Her mood was “not rationally related to her life circumstances.”7 In the context of Fingarette’s remarks, it seems quite clear that it is the “unusual” nature of the woman’s attitude that makes her act “irrational” and not the presence of internal conflict and the lack

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3 See FINGARETTE, supra note 6, at 158-72.
4 Id. at 165-66.
5 The concept of “possession” or “lack of self-identity” may be very apt in describing certain types of mental illness, but in others it is quite misleading. The problem here is that many categories of behavioral disorder are used in such a way that the “disorder” is by definition a complex behavioral syndrome which constitutes, or at least heavily contributes to the very personality makeup of a person; to say that such a person suffers from a mental disorder is to say that he suffers from his very own personality and that is quite different from being involuntarily afflicted with some physical disease such as cancer. If we accept such a model of some mental illnesses, when a person is “cured,” he has not simply been freed of some malicious psychic cancer which had previously interfered with his “normal” functioning; on the contrary, he can, in a much more appropriate sense, be said to have been “reborn.” Similarly, the assimilation of mental illness to lack of self-identity, though often quite appropriate for individuals who “lose their mind,” is totally inappropriate for individuals whose mental illness progressively develops and is very much an integral part of the very development of their personality. In such cases, the notion of mental disorder can only be understood in terms of deviation from norms of “proper” or of “normal” mental or behavioral functioning. As such, this notion is conceptually tied to moral and social norms of how people ought to think, feel, and behave. It is precisely for this reason that psychiatric judgments as to who “really” has a mental disorder often reflect different moral preferences.
6 FINGARETTE, supra note 6, at 176.
7 Id. at 224.
of identification or coherence of that attitude with her "normal" personality. I wish Fingarette had pursued this model of victimization or lack of self-identity more fully and applied it to the melancholic mother, for it is certainly worthy of pursuit and application to that case.

At least one source of our natural sympathy for the melancholic mother's plight stems from precisely this model of possession and lack of self-identity. Having ourselves suffered from bouts with depression, when we were "not really ourselves," we can easily empathize with her, imagining ourselves "possessed" by a severe depression (severer than any we have previously known) and acting as she did. Perhaps it is primarily the belief that the melancholic mother "wasn't herself" at the time of her act that makes her punishment appear inappropriate to so many of us (the crime should not be attributed to her, but to the "psychosis" from which she suffered), and it is for this same reason that we choose to look upon her as "victimized" by an alien condition of a pathological nature, requiring the services not of a warden, but of a physician—someone who can get her to "snap out" of her abnormal state and to return to her normal one.

Yet the matter cannot end here, for we can easily imagine other cases of strong internal conflict, of a desire lacking coherence with a person's normal personality, which does not normally lead us to want to excuse. Imagine, for example, a mild mannered bank clerk, a pillar of respectability, until, one day he finds himself with an obsessive desire to embezzle. He fights this desire, recognizing its immorality and rejecting it as alien; yet he feels "possessed" by it and, becoming more and more possessed, he finally embezzles. Now perhaps we ought to feel the same towards him as we do towards the melancholic mother, but most of us simply do not. We can accept the description of his situation and dismiss its moral relevance. "He should have controlled himself" many of us will say. "There is, after all, no evidence that he did not have the capacity to do so and that is the morally relevant factor; it is morally irrelevant that he did not consider his desire to embezzle as part of his 'true' or 'normal' self. After all, we all, at one time or another, find within ourselves desires which seem 'alien' to our nature, which seem as if they were imposed upon us from without. Yet as long as we have some degree of control over them, we are responsible for them." Yet we will not often bring this same line of reasoning into play when we turn our attention to the plight of the melancholic mother who seems to arouse our natural sympathies much more than the embezzler. Why is this so? Certainly the difference cannot be in the relative strengths of their desires, for we have no way to compare them. It would appear that the difference lies in the ordinary "self-
interest" of the embezzler's monetary motive as compared to the "unselfish" nature of the mother's motive to save her child from a bleak world. Since the embezzler's motive is one which we all find within ourselves at one time or another (i.e., we want things that do not belong to us) and have to repress or control, we have a natural tendency to want to punish the embezzler which we do not have in the case of the melancholic mother. Since few of us want to kill our loved ones in order to bestow a supposed benefit upon them and, believing this to be wrong, successfully control ourselves, we do not feel cheated; consequently, a prime psychological reason for punishment with its condemnatory force is lacking.  

C. Fingarette's Failure to Dissect and Analyze Strands in the Concept of Insanity

Our discussion of the melancholic mother illustrates the different conceptual strands conflated into an "intuitive" understanding of what constitutes insanity (e.g., the fact that desires or acts seem to lack coherence with the rest of one's personality or so overcome one's normal personality that they seem to replace it, defeating a claim of self-identity; the presence of internal conflict and indications of personal suffering, the fundamental lack of self-understanding and failure to obtain conscious satisfaction from one's act, and the lack of apparent normal self-interest in the act or its motive, rendering it "unintelligible" to the average layperson). No one strand can totally capture the elusive concept of in-

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38 According to many psychoanalysts, following Freud, certain unconscious processes account for the condemnatory and retributive function of punishment. First, the moral disapproval we feel towards the criminal and the suffering we inflict upon him is a moralistic response (a "discharge of super-ego aggression") brought about by our own internal conflicts. Since the desires that the criminal has dared to act upon are present in the ordinary citizen, the criminal is a source of hidden envy, for he has done what we would have done had our instinctual desires (id) had its way. But our conscience (super-ego) will have none of this and consequently we condemn the criminal. As Freud wrote:

The human code of punishment . . . rightly presumes the same forbidden impulses in the criminal and in the members of society who avenge his offense. Psychoanalysis here confirms what the pious were wont to say, that we are all miserable sinners.

S. FREUD, TOTEM AND TABOO 12 (J. Strachey transl. 1950). Yet moral condemnation of the criminal alone is insufficient; we must prove to ourselves that his action was really self-defeating, that "crime really does not pay." As John Flugel puts it:

[the criminal by his flouting of law and moral rule constitutes a temptation to the id; it is as though we said to ourselves, "If he does it, why should not we?""] This stirring of criminal impulses within ourselves calls for an answering effort on the part of the super-ego, which can best achieve its object by showing that "crime doesn't pay." This in turn can be done most conveniently and completely by a demonstration on the person of the criminal. By punishing him we are not only showing him that he can't "get away with it" but holding him up as a terrifying example to our own tempted and rebellious selves.

sanity. One can only obscure the issue by lumping all these strands together as Fingarette does and calling them by the single name of "lack of capacity for rational action."

Certainly the notion of insanity as mere "bizarreness" or "unintelligibility" to the average layperson which Fingarette emphasizes over and over again is only one of these conceptual strands. Indeed, this notion is very slippery, for behavior can be seen in different lights. What may be unintelligible to one layperson might be quite intelligible to another layperson or to a psychiatrist. There is, after all, no radical difference in the modes of explanation of human behavior provided by the layperson and the trained psychiatrist. Psychiatrists, like the ordinary layperson, often can see the behavior of the same individual differently by emphasizing different aspects of it and organizing it in different ways. Though some psychiatrists may see the behavior as irrational, others may see it as an intelligible and rational attempt to make the best of an irrational situation. And still others will see the behavior as a partially successful and partially unsuccessful "strategy for living" which differs from ordinary modes of behavior in certain respects and is similar in other respects, but is nevertheless quite intelligible. If the psychiatrist is forceful in painting his picture of the defendant's behavior, he may convince a layperson that his original way of looking at the defendant is not as enlightening in understanding him as is the "deeper" perception provided by the psychiatrist; what was originally "bizarre" or "unintelligible" to that layperson can now become quite intelligible.

Fingarette does not seem to realize that the mere fact that an act appears "bizarre" or "unintelligible" is rarely considered in itself sufficient for exculpation. He certainly makes no case for his apparent position that it should be so considered. Consider, for example, the following:

Fish, the complacently habitual child killer and child eater, was found sane under a traditional insanity test, but he was in fact a very paradigm of insanity. His emotional reactions and desires were in some respects so distorted that he had not the capacity to act rationally insofar as these came into play. However, his intellectual and perceptual capacities were not ever substantially impaired, nor was he, apparently, dominated by depressed or manic moods. When he ate children or stuck objects into his body, he knew what he was doing, and he knew—as his actions showed—that what he was doing was contrary to law and public morality. . . . Under M'Naghten . . . or the Model Penal Code formula,

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39 Fingarette explicitly states:
[Insanity is not a technical notion but is at bottom a layman's term referring to grave personal defect in the capacity to act in ways that are at least minimally intelligible or meaningful to the ordinary man.
FINGARETTE, supra note 6, at 227 n.11.
Fish was sane. He knew what he was doing, had the capacity to conform to law, but of his own volition did what he knew was contrary to law. . . . Yet we do not strain language at all, indeed it is exactly apt, to say that his conduct was grossly irrational. And it is this notion that is the ground for our intuitive but very clear perception that he is insane.\textsuperscript{41}

Fingarette, however, merely states and does not argue for his belief that Fish was clearly insane nor does he mention that those who tried Fish may not have shared the "intuitive but very clear perception that he [was] insane," for they did, after all, condemn him.\textsuperscript{42}

To begin with, we are not presented in this example with much insight into Fish's mental state at the time of his ghastly acts. Fingarette tells us that he was not "dominated by depressed or manic moods." Was he, however, ashamed or guilty for what he did? Did he feel himself "victimized" by strange and alien desires that went contrary to his moral code and his conception of himself as a human being and did he try to fight against them, or did he simply accept himself for what he was, taking his enjoyment as he found it? Was he totally oblivious of the suffering he caused others, or was he perhaps aware of it, but too selfish to care? These are the questions which might weigh on the mind of a juror in judging Fish's responsibility, but we are given no information as to their possible answers.\textsuperscript{43} Fingarette instead centers his at-

\textsuperscript{41} FINGARETTE, supra note 6, at 177 (author's footnote omitted).

\textsuperscript{42} Fredric Wertham, a psychiatrist who testified on behalf of Fish's alleged insanity, relates this case in his book. F. WERTHAM, THE SHOW OF VIOLENCE (1949). Wertham claims that one of the jurors commented after the trial that many of them felt that Fish was insane, but should be electrocuted anyway and consequently convicted him. During the trial, Wertham and two other psychiatrists supported Fish's contention that he was insane, while four others testified for the state that he was sane. Considering these differences in judgment, one wonders how Fingarette can speak as he does of "our intuitive . . . perception that he is insane."

It is interesting to speculate on the underlying motives of those whose "intuitions" would lead them to declare Fish sane and condemn him. Considering the highly immoral and repulsive nature of Fish's actions and the fact that little helpless children were involved, for whom most people feel special tenderness and regard, it may be especially difficult to make a distinction between the moral evil of the act and that of the actor. In our bitterness and revulsion towards Fish's acts which run counter to deep moral sensibilities, we may fear that to excise Fish would be to show toleration for his acts as well. Or perhaps, the desire to reject Fish's actions so overshadows questions as to his moral blameworthiness, that one expresses total rejection of these actions through the moral condemnation of their perpetrator. Since Fish was neither "a drooling, helpless idiot" nor a person who gave the indication of having suffered from and fought against "alien" desires and then repented after acting upon them, there would be no natural sympathy for such a person and consequently no desire to find a rationale to excuse him.

\textsuperscript{43} Though Fingarette does not pose these questions nor indeed delve into Fish's personality at all, Wertham does throw some light on Fish's personality. He writes:

There was no known perversion that he did not practice. . . . When Fish was five years old he had a woman teacher who used to spank the
tention only on the obviously "bizarre" nature of Fish's desires. His claim that Fish's "emotional reactions and desires were in some respects so distorted that he had not the capacity to act rationally insofar as these came into play," is curious. Obviously, Fish in a sense did act quite rationally "insofar as his desires came into play," since he killed and ate several children before he was finally caught. It would appear that Fingarette is simply asserting that the nature of Fish's unusual desires in itself precludes his rationality. But what precisely is the principle involved here? Are we to consider as insane all those whose desires are "bizarre"? What of the common sense rejoinder that it is not so much the nature of the desire that merits exculpation, as the power to overcome that desire—precisely the direction of traditional "capacity to control" tests that Fingarette dismisses? Fingarette does not consider this question.

children frequently on their bare bodies. At that early age he used to derive sexual pleasure from having this done to him and seeing it done to others.

Sadomasochism directed against children ... took the lead in his sexual regressive development ....

_Id._ at 72.

When Fish was in his middle fifties a definite psychosis with delusions and hallucinations began to develop insidiously. Always intensely interested in religion, he began to be engrossed in religious speculations about purging himself of inequities and sins, atonement by physical suffering and self-torture, human sacrifices .... He had visions of Christ and His angels .... He heard them saying words like "stripes," "rewardeth," and "delighteth." And he connected these words with verses from the Bible and elaborated them delusionally with his sadistic wishes. .... He felt that he was ordered by God to castrate little boys. .... He had episodes ... during which he craved or executed his sadistic and autosadistic activities in a mental state of horror and rapture, or ecstasy and confusion, with or without hallucinations. Frequently he enjoyed these experiences (e.g., sticking needles into himself) to the point of orgasm.

Questioned about these needles, he gave me five conflicting—but to his mind apparently not contradictory—explanations. He said that he did it to relieve the pain from a hernia; that he "got a sexual kick out of it"; that he did it to punish himself for what he did to others; that "voices told me to purge myself of sin ...."

.... [I]n talking about the murder of Grace Budd and his previous sadistic acts, he made no attempt to blame them on his supernatural messages. He said to me, "I am not insane, I am just queer. I don't understand it myself ...." He always mixed up his explanations when he talked about these messages, saying both that he had the desire to do something and that he was commanded to do something. These discrepancies in explanation never bothered him at all.

_Id._ at 75-77.

44 Certainly Wertham looks beyond the bizarreness of Fish's act as a basis for exculpation. From his discussion, it would appear that he was quite content to rest the case for Fish's insanity on the M'Naghten test. Wertham points to Fish's psychotic symptoms, in defending his testimony that Fish "does not know the nature and quality of his acts. He does not know right from wrong." Particularly telling for Wertham was that Fish told him that "What I did must have been right or an angel would have stopped me, just as the angel stopped Abraham in the Bible." _Id._ at 85. Also influencing Wertham's judgment that Fish was insane was the "matter-of-fact way" in which Fish described in minute details the manner in which he practiced his cannibalism.
It would appear that the mere statistical unusualness of a desire or a mode of behavior is the criterion involved in determining its "bizarreness" or "unintelligibility" for Fingarette. But if this is so, should we classify homosexuals as insane and consequently free them of moral and legal responsibility for their actions? If the answer is no, is it simply because there are too many of them about and consequently their desires and actions are not "unusual" enough? If so, would the situation be any different if the incidence of homosexuality were statistically much lower? Would we then classify the homosexual in the same insane category as Fish? How many homosexuals, one may ask, must there be before they can be held morally responsible? If Fish is to be declared insane on the basis of the "bizarre" nature of his desires, must we change our opinion of him if we find that there are more like him than we originally thought? Fingarette gives no hint of his answers to these puzzling questions. Yet this is not a trivial matter, for answers to these questions are necessary if one is to distinguish the bizarre desires, beliefs, and actions of an individual who is for that reason considered "sick" from those of a shared way of life, ideology, or religion.

D. Condition v. Causal Antecedents

Fingarette's analysis is misleading in another respect. Especially in the first part of the book, when he is simply critical of the existing state of the law as regards criminal insanity and has not yet presented his own view, Fingarette clearly writes as if the justification for a classification of insanity will ultimately involve certain causal antecedents which result in certain sorts of behavior. The inference is that the same sort of behavior would not be excusable if the cause were different. For example, he writes:

The general lesson . . . is that it is not the person's own moral view that identifies insanity but something defective about the way in which he comes to decide to think and act as he does. The verbal cue or label we use to denote this defect in the way he comes to act as he does is the phrase "because of mental disease."

. . . . [Similarly] it is not what a person wills, or intends, or what he actually does which is of the essence for identifying insanity. Instead, it is something defective . . . in the way he comes to these decisions, intentions, and actions. And whatever is the specific nature of this defective way of forming intention and action, it is closely related to what we mean when we advert to the . . . phrase, "mental disease," and say that the person suffers from mental disease.45

In other words, it is not the condition that exculpates, but the cause

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45 FINGARETTE, supra note 6, at 156-57.
of that condition. Yet when Fingarette finally does present his view, it is clear that this is not his final position. For example, he writes:

One could say, idiomatically, that the mother was in the grip of an irrational mood and that she could not help what she was doing. One could say of Hadfield that he did not really understand his act . . . . Then we might elaborate and go on to say that the mother could not help what she was doing because she was irrational, and that Hadfield did not really know what he was doing because he was irrational. However, this “because” must not confuse us. For the loss of reason is not a “cause” of the loss of self-control or the lack of true understanding. Rather . . . [they] are idiomatic ways of characterizing the way in which these individuals manifested their irrationality.46

Now when he speaks of lack of rationality, Fingarette is characterizing the act in a particular way and not attempting a causal explanation of it—i.e., it is the actual behavioral manifestation that is important and not the causal antecedents of it. This becomes even clearer when Fingarette, in passing, makes the remark that:

When we make a judgment of defective capacity, we are characterizing the man’s mind . . . by reference to the pattern of his observed conduct . . . . These judgments are not merely discoveries of facts; they are in part decisions about how we choose to view the person.47

This remark cries out for clarification, but none is supplied. If, indeed, our classification of a person as insane is at least in part a decision “about how we choose to view the person,” then is it not possible for different people to view the same person differently? Is there not a sociological dimension here—i.e., different cultural beliefs generate different classifications of people? Are there not, perhaps, as I have suggested previously, many different factors which motivate us to view a person in a certain light?

I am always uncomfortable when Fingarette says with a note of certainty that someone is “plainly insane.”48 When he makes this statement, he loses sight of his important point that a conceptual choice is being made which is not totally determined by “the facts of the case”—different decisions being possible “on the same facts.” Certainly reference to certain people as “plainly insane” is inconsistent with a professed belief that a classification of insanity is not determined by “the facts.” The impression developed in the first part of his book that a description of the causal antecedents of insane behavior would be forthcoming, apparently leads

46 Id. at 176-77.
47 Id. at 196.
48 We should not lose sight of the fact that those who quite clearly have “lost touch with reality” will be weeded out of the criminal process, either through civil commitment or by being declared incompetent to stand trial.
Fingarette to believe that the concept of insanity is more definite than it really is. It leads to the mistaken belief that ultimately he will provide the reader with the specific defects or sorts of defects which give rise to insane behavior and supply a justification for granting them exculpatory status.

III. FINGARETTE'S CONCEPT OF INSANITY: UNRESOLVED VAGUENESS AGAIN

After presenting his analysis and supporting examples, Fingarette tells us that a jury should be presented with a concept which clearly differentiates the insane from the sane. Yet, it is precisely this clear differentiation that he does not supply. No clear distinction ever emerges in his analysis between the person who "lacks the capacity for rationality" and the person who has that capacity but "chooses not to use it." Nor is any analysis given of what is involved in "responding to the criminally relevant aspects of one's conduct." Fingarette quite rightfully points out that not all types of irrationality should count as insanity, but he never tells us which kind should. It simply will not do to say that "to be able to act rationally with respect to the criminality of one's conduct . . . is simply to be able to rationally take into account the implications of the act relevant to criminality," without specifying, as Fingarette does not, what these implications are. Similarly, it will not do to speak glibly as Fingarette does of the distinction between the "stupid, immoral, greedy, ruthless, imprudent, 

49 The problem is more complicated than this, for Fingarette believes that there is another condition built into the notion of insanity. He writes:

[When we say a person is insane, we say more than that he acts irrationally or even that he lacks capacity to act rationally. . . .

When we speak of a person as insane, we mean to say . . . that in some sense it is now his nature, his makeup, to act irrationally. He lacks capacity for rationality, true enough, but this lack of capacity must now be a part of his nature and not merely the temporary effect of special circumstances.

FINGARETTE, supra note 6, at 195-96 (author's footnote omitted). Fingarette says this in order to distinguish the insane from individuals such as those under the influence of alcohol or some other drug and those suffering from "a severe blow on the head or suffering other severe but temporary trauma." Unfortunately, the distinction is not so simply made. First, there might be many necessary conditions needed to trigger an insane act, one of which may be a temporary external stimulus without which the act would not occur (e.g., Robert Lindner describes a case in The Fifty-Minute Hour in which a girl's ring triggers unconscious associations and results in her brutal murder). R. LINDNER, THE FIFTY-MINUTE HOUR (1955). In order to take care of cases such as these, one would have to analyze "cause located in mental makeup" to entail the notion that a precipitating event would not be sufficient to result in the act in question if imposed upon the "average person." In addition to this problem, Fingarette does not consider the implications of his claim that the "incapacity for rationality" should be part of the defendant's nature and not an effect of temporary circumstances on a plea of temporary insanity. If this is not to be ruled conceptually incoherent, some more detailed analysis is required.

50 FINGARETTE, supra note 6, at 211.
or impulsive" and those who have "lost their reason" or, one would suppose, never had it), without presenting the standard or standards by which this distinction is to be made.

If, for example, as Fingarette claims, individuals like M'Naghten are "substantially affected in their capacity to act rationally with respect to criminal law," why is this so? M'Naghten knew that his act was illegal and knew that if he were caught he would be punished, and though I do not know the details, one can assume that he acted rationally in his attempt to escape. The current law, to be sure, never gives any clear answer to this question. According to the A.L.I. rule, for example, it could be said that as a result of his delusion, M'Naghten lacked "substantial capacity to appreciate the criminality of his act." Fingarette, on the other hand, says that he "lacked substantial capacity to act rationally with respect to the criminal law." Without the needed clarification, we have achieved nothing. Fingarette tells us:

[T]hose who propose replacing "know" with "appreciate" or comparable language fail to give any specific and acceptable meaning to the new terms. . . . [S]uch "improvements" do not aid us in understanding what we mean by "insanity."

Conduct is insane . . . when it is not shaped in the light of certain norms. These . . . are norms regarding what emotions, or moods, or attitudes, or desires are in some sense suitable or proper with respect to certain other aspects of one's situation. Clearly there is much room for variety here . . . . But there are limits. These are the limits that distinguish the irrational and unintelligible from the rational. Yet, we can bring exactly the same criticism to bear upon his analysis and charge that if there are such "limits," Fingarette has nowhere supplied them.

IV. FINGARETTE'S FAILURE TO CONSIDER UNDERLYING PHILOSOPHICAL QUESTIONS

A basic inadequacy in Fingarette's book is his failure to anchor his discussion of criminal insanity within a philosophical theory of the nature and justification of criminal punishment and excusing conditions. The inconclusive quality of the literature concerning the proper formulation of an insanity defense, including Fingarette's contribution, stems from this basic failure. Once the passionate exhortation is put aside, we find that we are offered some insanity test, but are not clearly told what precise function this test performs or ought to perform within the criminal law. Indeed, as in Fingarette's book, the ultimate question of the very

51 Id.
52 Id. at 152 (author's footnote omitted).
53 Id. at 183.
conceptual coherence and justification for this defense remains unposed in most of the literature.

A. Excusing Conditions Within the Criminal Law

In discussing excusing conditions, Fingarette is concerned with showing the legal irrelevance of the abstract philosophical view that free-will is incompatible with determinism (i.e., the view that every event has a cause). He claims, for example, that from a legal perspective, the question of whether or not an act was the result of “duress” has nothing to do with whether or not it was caused. The legal excuse of duress is accepted because

we recognize human frailty and do not normally expect resistance to imminent mortal threat . . . . Resistance in such circumstances . . . is heroic . . . . It is because our blame and praise are attuned to man as we can ordinarily expect him to be that we do not condemn one who gives in to genuine coercion . . . . This is a truth of common sense and plays its role in common practice; it is neither based on nor commits one to any particular view, one way or another, concerning . . . universal causality . . . .

Leaving aside the dubious philosophical conclusions one can draw from this, Fingarette calls our attention to the important fact that the law often operates with so-called “objective” standards of what the “average person” (assumed to be “reasonable”) would feel, believe, and do in a given defendant’s “place.” As contemporary debate over the relative merits of “objective” versus “subjective” liability amply demonstrates, jurists are exceedingly wary of introducing a general principle into the law which would make it a universal requirement of criminal liability that the accused must have been able to conform his conduct to the requirements of the law he is alleged to have violated. Instead the law acts “as if”

\[54\] *Id.* at 80.


The question of “subjective” vs. “objective” liability is one of those ultimate questions of moral and social policy in which the law uneasily compromises between conflicting principles. Issues in this area are presently enmeshed in controversial legal flux and development. First, notions of subjective liability are filtering into Anglo-American law through the development of various doctrines of “diminished responsibility,” where an individual’s “diminished capacity” is used as a ground for reducing criminal liability. Secondly, the question of whether criminal liability ought to be made contingent upon an individual’s actual capacity to conform (“the capacity principle”) is entangled in the United States with constitutional provisions guaranteeing “due process” and prohibiting “cruel and unusual punishment.” The argument has been made that these notions constitutionally require that the capacity principle be considered a basic presupposition for criminal liability. For example, the Supreme Court’s decision that punishment for the “status” of narcotic addiction is “cruel and unusual punishment” can only be made coherent conceptually on the basis of an adherence to the capacity principle.
people are capable of self control unless they fall into the established categories of infancy or insanity. Consequently, the underlying principles behind the presently accepted legal excuses of accident, mistake and duress are significantly different from those behind the excuses of infancy and insanity. For the first class of excuses the law tacitly assumes a community of "average," "reasonable" citizens, having roughly similar capacities to reason, to judge consequences and to exercise self-restraint, capacities enabling them to conform their conduct to legal rules. It is for this reason that these excuses rely heavily upon the notion of "the reasonable person" and not upon the differing capacities of individuals. In such excuses individuals are simply assumed to have the capacities attributed to this "reasonable person." If there is a single principle underlying all these excuses, it is that one cannot justly punish an individual for doing what "the reasonable person" would have done.

Yet realizing that some individuals cannot justly be expected to have the capacities which the law tacitly assumes of the average citizen, the excuses of infancy and insanity are recognized. Such excuses attempt to isolate those "nonaverage," "nonreasonable" individuals whom the general community would consider it patently unjust to punish (or blame) for not abiding by the same standards of conduct to which the average citizen is held. From this perspective, the insane are those adults who are perceived by their community as so dissimilar that it would be wrong to hold them to moral and legal standards which simply were not designed with them in mind. Gabriel de Tarde, an Italian legal philosopher at the turn of the century, recognized this essential point when he claimed -that "social similitude" as well as personal identity are constitutive of the notion of individual responsibility. He wrote:

In order for me to judge an individual to be responsible for a criminal action committed a year, ten years ago, is it enough for me to believe that he is the identical author of this action? No, for though I might have brought the same judgment of identity to bear in the case of a murder committed on a European by a savage of a newly discovered isle, yet I would not have the same feeling of moral indignation and of virtuous hatred as a similar act carried out by one European on another, or by one islander on another, would inspire within me. Therefore one indispensible condition for the arousing of the feeling of moral and penal responsibility is that the perpetrator and the victim of the deed be and should feel themselves to be more or less fellow-countrymen from a social standpoint, that they should present a sufficient number of resemblances . . . .

See Robinson v. California, 370 U.S. 660 (1962). Yet the Supreme Court has not yet been willing to explicitly accept this principle. See Powell v. Texas, 392 U.S. 514 (1968). 56

De Tarde draws our attention to the important insight that criminal punishment presupposes the existence of a community of individuals who identify with each other within a background of mutual cooperation and kinship. Within such a community, a violation of certain community interests by members from within is a moral issue since the offender of these interests, the criminal, is seen as having a moral obligation to respect these interests. For this reason, a community's reaction to a criminal carries with it a judgment of moral censure and is unlike the mere hostility directed to sources of danger from without; the criminal is not merely an enemy, but a traitor to the community to which he is seen as tied by the bonds of moral obligation. If we accept this general position, the problem that remains is the systematic analysis of the types of dissimilarity that as a matter of fact motivate us to consider individuals "insane" and the factors (if any) that ought to so motivate us. Indeed, the great advantage of Fingarette's fresh approach to the insanity issue lies precisely in its ability to cut away from the old sterile questions and to direct our attention to the same questions that de Tarde's analysis invites.

B. *The Coherence and Justification of the Insanity Defense: At the Ideological Crossroads*

Fingarette's failure to grapple with the fundamental question of the conceptual coherence and justification of the insanity defense is reflected in his much too facile dismissal of the entire "free-will vs. determinism" issue. Some of those who deny man's free will do not merely assert that human acts are caused and ipso facto unfree (the only view that Fingarette discusses), but are more subtly asserting that a psychological and sociological understanding of the "springs of human behavior" would undermine any morally adequate distinction between the morally blameworthy and the morally nonresponsible; this, in turn, would undermine any coherent defense for the excuse of insanity. A moral skeptic, looking upon the vast edifice of our criminal law, deeply embedded with the moral condemnation of the criminal, could argue, with much justification, that the law tends to operate with morally unsupportable standardized conceptions of what the vast majority of "normal" individuals have the power to do and can reasonably be expected to do. On the basis of this mistaken paradigm of the normal citizen as a member of a society having a fair and equal distribution of benefits and burdens, the "normal" criminal is perceived as a fit object for moral condemnation, even though there are a few "insane" criminals who are not. This, the skeptic will claim, is simply not so. An understanding of the causal determinants of behavior will undermine any distinction of this sort.
If the skeptic is right, any attempt to formulate a clear insanity defense will prove futile, for as we attempt to delineate the various dissimilarities that justify exculpation on the grounds of insanity and as we learn more about the underlying causes of human behavior, we will find that the vast majority of criminals can be made to fit into some class of insane dissimilarity. If this is so, some will say that the only morally justifiable approach would be the elimination of a punishment system anchored as it is on the concept of moral fault and condemnation and its replacement with a totally "forward-looking" system of "treatment" for the socially deviant. Others, accepting as inevitable a community's retributive feelings towards some of its offenders, and recognizing that a person may be more apt to be deterred if he sees his contemplated offense as "morally wrong" and the community's indignant condemnation of him as "just" and "deserved," may suggest that we continue with the fiction that the majority of criminals are blameworthy. The insanity defense, they may claim in turn, should be maintained as a necessary safety valve for the preservation of this fiction. The issues here cannot be easily resolved. Yet it is precisely their ultimate resolution which will determine the fundamental direction of the criminal law in the future.

VICTOR GRASSIAN*

I. COMMON ANGLO-AMERICAN HOUSING CONCERNS

England and America may be, in a phrase ascribed (perhaps apocryphally) to Winston Churchill, "two great nations separated by a common language," but they are surely united by a common concern and controversy about the allocation of housing resources. Indeed, as Daniel Mandelker has observed, "[n]o social problem has proved more intractable to the western democracies than housing."¹ A recent study of housing in fourteen nations declared that "no nation in the world is fulfilling a goal of decent sanitary housing for every family."² This includes the United States and England, for although there have been undeniable improvements in the quantity and nature of housing in these two countries, the situation is far from acceptable.³ Former President Richard Nixon admitted that in the United States "too many low-income families have been left behind: they still live in substandard, overcrowded and dilapidated housing . . . ."⁴ A more permanent testament to the elusiveness of adequate shelter equitably distributed is found in the Housing and Community Development Act of 1974, wherein Congress appended the following confession

¹ Mandelker, Strategies in English Slum Clearance and Housing Policies, 1969 Wis. L. Rev. 800.
   [A] two-year study was conducted by Harvard University and the Massachusetts Institute of Technology through their Joint Center for Urban Studies. It found that public and private emphasis on new construction in the 1960's did decrease the proportion of families living in physically substandard housing.
   It predicted 23 million new housing units would be built between 1970 and 1980 but said that would not necessarily be enough to help the households it described as "housing deprived."

The study also disclosed that 13.1 million low and moderate-income American families are living in households described as physically deteriorated, overcrowded, or too expensive.

In England, production has not kept pace with need, and the 319,100 new homes completed in 1972 was the lowest in ten years, except for the following year when during the first half of 1973 only 148,400 homes were completed. This was 15,500 less than in the comparable 1972 period. Hillman, Building of Houses at New Low, The Guardian (London), July 3, 1973, at 1, col. 7.

to its amendment of the “National Housing Goal” contained in the Housing and Urban Development Act of 1968:

The Congress further finds . . . that the deterioration and abandonment of housing for the Nation’s lower income families has accelerated over the last decade, and that this acceleration has contributed to neighborhood disintegration and has partially negated the progress toward achieving the national housing goal. . . .

Although general agreement exists in the United States that thus far “social and economic inequalities” in housing have not been “arranged so that they are . . . to the greatest benefit of the least advantaged,”6 there has never been a coordinated attack on the housing problem which is gnawing at the heart of the country’s declining urban centers.7 In England, successive governments have at least proposed coherent overall housing policies. However, even though the number of unfit British dwellings has been reduced and the overall quality of housing has been improved in recent years, some people do not share in this achieve-

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7 Governments at all levels (federal, state and local) almost never adopt policies that adequately respond to all the relevant factors. Instead, they tend to make partial, selective policy responses focused mainly upon physical production or construction, rather than social factors, because the former are both more visible and much easier to control than the latter. . . . Another class of policies that governments usually avoid are those requiring considerable time between inputs (which cost money) and outputs (which generate political support); the timing of recurrent elections gives most political leaders short-run perspectives. These biases make federal policies far less effective in dealing with the needs of low-income households in areas of concentrated poverty than in dealing with the needs of middle-income and upper-income households on the urban periphery.


In the polemics surrounding American urbanism and metropolitanism there is a persistent demand for a unified federal urban policy. . . . Such a condition will never exist. The American decision process simply does not work that way. Policy changes are incremental, not sweeping.

Id. at 92.
ment and their condition may have actually worsened.\textsuperscript{8} Despite improvements, serious and pervasive inequalities\textsuperscript{9} remain to challenge the imagination, will, and power of the British government at a time when its capacity to effectively rule is being seriously questioned.\textsuperscript{10}

Thus, Daniel Mandelker's \textit{Housing Subsidies in the United States and England}\textsuperscript{11} is available at a propitious moment. This comparative study of public housing schemes is an important analysis of the central problems of providing housing for those who cannot obtain it unaided. The discussion of American public housing delineates many issues that have been raised by national efforts to provide "decent, safe and sanitary"\textsuperscript{12} low-income hous-

\begin{itemize}
  \item \textsuperscript{8} The recently ousted Conservative government in Great Britain confessed in one of its last White Papers on the housing situation:

  For too long, too many people in this country have had to live in unfit or inadequate homes, despite vigorous policies which have begun to reduce the legacy of past neglect in the physical condition of our older housing. In 1967 when the first National House Condition Survey was made, there were 1.8 million slums in England and Wales; by the end of this year the figure will be under 1 million...

  This progress, while encouraging, provides no ground for complacency. Much remains to be done. Almost one household in six still lives in a house that is unfit or lacks at least one of the basic amenities. These worst physical conditions are increasingly concentrated in our cities and older industrial towns in parts of which there is intolerable overcrowding and multiple occupation. The decline of the private rented sector is adding to the hardship of many families in stress areas and, at the same time, reduces the stock of rented homes for workers moving to take up new jobs in districts where local authority housing may not be available. In some places conditions are getting worse, not better. We must not only maintain the drive to improve the physical condition of our housing. We must do so in ways that will give most help to those people in greatest need and make the best contribution towards solving the many social problems inextricably linked with bad housing.

  \textbf{Better Homes---The Next Priorities, CMND No. 5339, at 1 (1973).}

  \textsuperscript{9} An additional and shocking indication of the inequality in the allocation of housing resources was found by a study of homelessness in London which declared that

  the numbers of homeless have continued to rise. By the end of 1970 there were some 25% more homeless people in local authority 'temporary accommodation' in London than when the study had been commissioned as a matter of urgency eighteen months before.


  \textsuperscript{10} It is easier to understate than to exaggerate the seriousness of the position which [Britain] is now in. Britain faces the most precarious crisis in its peacetime history with the most precarious Government it has had for nearly a century... It is not... a Government in which the country has any great confidence, and it may not even be a Government, in its initial stages, which has any great confidence in itself.


  \textsuperscript{11} D. Mandelker, \textit{Housing Subsidies in the United States and England} (1973) [hereinafter cited as \textit{Mandelker}].

  \textsuperscript{12} The phrase is from the policy declaration that precedes the new sub-
ing on a mass basis. Although the British effort dwarfs the American, the comparison of the two systems does reveal the strengths and weaknesses of each.

As Mandelker indicates, American public housing subsidies have been "deep" but limited to very few units in the market. The subsidies have a major impact on the housing costs of those who receive them, but with such a relatively limited supply of available units, eligible households are forced to scramble for a limited number of vacancies. In the meantime, housing often deteriorates so much that even the desperate will not live in it, and those "in charge" sometimes resort even to demolition of the units because rehabilitation is too expensive. Since subsidies have been limited to the poorest—and consequently in the urban areas largely to blacks—extensive social class concentrations and ulti-


Great reliance has been placed in British housing policy on the direct provision of housing by public authorities—in the main, the local housing authorities, but also New Town Development Corporations and the Scottish Special Housing Association. At the end of 1970 some 5.7 million dwellings in Britain were publicly owned: forming 28 per cent of the total in England and Wales .... In 1971, new building was divided roughly 45 per cent public and 55 per cent private. .... With this high rate of public authority building, the proportion which it constitutes of the total stock is steadily increasing: in England and Wales, from 12 per cent in 1947 to 25 per cent in 1961 and 28 per cent in 1970.

2 J. CULLINGWORTH, PROBLEMS OF AN URBAN SOCIETY 43-44 (1972) [hereinafter cited as CULLINGWORTH].

According to Mandelker: "Two-thirds of all rental housing in England is publicly owned." MANDELKER, supra note 11, at 7. The American public housing effort hardly bears comparison. "Nationally, only about three or four percent of all rental housing is publicly owned ...." Id. at 6. Indeed, "the public housing program was never very large; since 1937, when it began, only about one million units have been built. The vast majority of poor people did not (and do not now) receive housing aid, other than through welfare ...." Gans, A Poor Man's Home Is His Poorhouse, N.Y. Times, Mar. 31, 1974, § 6 (Magazine), at 20.

"American public housing serves a narrowly defined income group, and is limited to the lowest income groups in the population." MANDELKER, supra note 11, at 8. See note 13 supra.

15 The abandonment, and in some cases, the demolition of public housing projects is a national scandal. The paradigm is St. Louis' Pruitt-Igoe housing project, once 43 brick buildings, each 11 stories tall, built in 1954 on a 57-acre site at a cost of 36 million dollars. At its peak occupancy, the project housed some 12,000 people, but by March of 1972, only 600 of the 2,800 units were occupied, more than a third of the buildings were empty. Smashed windows and interiors ravaged by vandalism, neglect, fires, and weather pervaded the complex. As part of a rehabilitation plan exceeding by more than 3 million dollars the original construction cost, HUD undertook controlled explosions to destroy parts of the project, ignoring local pleas to raze the entire project and replace it with more livable units geared to the needs of the tenants. N.Y. Times, Mar. 19, 1972, § 1, at 32, col. 3. For a pre-demolition assessment of Pruitt-Igoe, refer to Cooper, St. Louis Housing Disaster: Lessons for All Big Cities, L.A. Times, Aug. 30, 1971, pt. I, at 1, col. 1.
This conflict between public housing policy and larger social objectives has led to plans to disperse public housing and to increase the socio-economic diversity of the tenants. These initiatives are designed to ultimately mirror the British situation where public housing tenancy is not so sharply skewed in terms of class or race.

On the other hand, Mandelker suggests that British efforts to narrow the range of housing subsidies to eliminate help to those who require less of it may have the effect of concentrating subsidies at the very lowest income levels. The observations he makes are interesting, but the differences between the two systems are so striking that it is fair to say that the British are in little danger of repeating the American public housing disaster. In the first place, public housing is so pervasive in England that its very extent should serve as a check to socio-economic homogeneity. Secondly, England simply does not have the intense racial problem that has disfigured American public housing and national life, nor is it likely to have such a problem, since a series of governmental measures has effectively shut off the flow of non-whites to England.

Because of the limitations imposed by a comparative study, which demands a substantial amount of exposition of the foreign system and correspondingly restricts the amount (and subtlety) of attention to native problems, Mandelker's work often only traces the contours of the housing problems in the countries under consideration. He is unable to discuss in sufficient degree the fundamental differences between the structure of government and policy formulation in the two nations and the impact that these differences have on housing-related issues.

Nonetheless, the book has a variety of uses, not the least of which is to expose through a comparison of the two systems some

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17 MANDELKER, supra note 11, at 8.

18 [The British race relations situation] is, at this stage, fundamentally different from that of the United States. The size of the non-white population is much smaller in over-all and relative terms; . . . the economically active immigrants have a high level of employment, do not mainly live in ghetto areas, nor do their children go to de facto segregated schools.


of the issues that were important in the struggle between the Nixon Administration and Congress which culminated in the Housing and Community Development Act of 1974\(^\text{19}\) signed during the pre-pardon "honeymoon" of President Ford. Specifically, the book provides a helpful gloss on the problems of providing an adequate supply of housing and ensuring racial and economic integration within that housing, problems which the new legislation attempts to solve.

II. SCARCITY, INTEGRATION AND THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

Prior to the passage of the Housing and Community Development Act of 1974, the Nixon Administration sent several far-reaching proposals to Congress which would have sharply and "radically" transformed traditional strategies for governmental intervention in the housing market.\(^\text{20}\) The Administration, for ex-

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\(^{19}\) Pub. L. No. 93-383, 88 Stat. 633 et seq. (1974). The legislation is an eight-title omnibus bill of nearly 110 pages, encompassing subjects ranging from a comprehensive community development program and major reforms in federally-assisted housing and comprehensive planning, to new standards for mobile home construction and new flexibility in housing credit. The dollar figure for new authorizations under the act totals 11.9 billion dollars. 

... [The legislation] was ... a substantial victory for national interest groups who pressed for a final bill that set national objectives for the use of community development funds, for extension and reforms of existing housing assistance programs, and for a federal involvement in the ultimate fate and success of the program efforts. Nenno, The Housing and Community Development Act of 1974: An Interpretation: Its History, 8 J. HOUSING 344, 345 (1974) [hereinafter cited as Nenno]. The Nixon Administration had hoped to greatly reduce the federal government's active role in the provision of housing for the poor. The Administration's bill would have terminated all new traditional public housing activity after December 31, 1975. S. 2507, 93d Cong., 1st Sess. § 301, at 86 (1973); H.R. 10688, 93d Cong., 1st Sess. § 301, at 85 (1973). See note 20 infra. As an interim measure, the Administration sought to tailor the existing "leased housing" subsidy program to fit their philosophy of reduced governmental involvement in housing. Refer to notes 27-34 & accompanying text infra.

[The decision to attempt to halt the construction of public housing] was based on two premises fundamental to the housing philosophy of the Nixon Administration: The big city-owned public housing projects of the past were failures that should not be repeated; and what poor people need is not housing built for them but money that will enable them to shop for housing in the private market.


\(^{20}\) Though widely regarded as a conservative, President Richard Nixon did advance new ideas, some arguably "radical." One comment on the draft of the speech in which a guaranteed-income proposal was advanced as part of the Family Assistance Plan explained: "You miss Richard Nixon's main point, which is..."
ample, unsuccessfully proposed the abolition of the National Housing Act's Section 235 and Section 236 programs. Section 235 is designed to encourage individual home purchases by subsidizing the cost of interest to as low as one percent, thereby making housing available to lower/middle and lower-income Americans. Section 236 permits similar subsidies for private non-profit, limited dividend, or cooperative sponsors of low and moderate income rental housing projects. Neither program has been with-

to make a radical proposal seem conservative.'" Comment of William Safire, quoted in D. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME 218 (1973). In the case of the Family Assistance Plan and its guaranteed-income section, Richard Nixon can be thought of as having supported both ideas that were novel as well as ones traditionally associated with the political left. In housing programs, however, his proposals, except for the housing allowance scheme, a distant relation of the guaranteed-income, were radical only in the sense that they broke with the tradition of "subsidizing the cost of new construction." A. SOLOMON, HOUSING THE URBAN POOR 35 (1974) (recent work which is skeptical about the efficacy of traditional strategies).

21 The Administration's proposed housing legislation, entitled the Housing Act of 1973, was prefaced with severe criticism of existing subsidy programs. S. 2507, 93d Cong., 1st Sess. § 102(a) (1973); H.R. 10688, 93d Cong., 1st Sess. § 102(a) (1973). The Administration proposed a revised National Housing Act which did not provide for the continuance of the Section 235 or 236 programs. Id. at tit. II. However, [t]he original Senate-passed 1974 bill . . . contained a complete rewriting of the National Housing Act and of the United States Housing Act of 1937, incorporating completely reformed versions of the Federal Housing Administration's Section 235 home-ownership and Section 236 multi-family rental housing programs. . . . What survived in the new 1974 act is a complete rewriting of the 1937 act—and, hence, of the public housing program. The Senate's proposed consolidation and simplification of the National Housing Act was not achieved but a number of the Senate's major individual reforms of the Section 235 and 236 programs are a part of the new legislation.


22 Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II, § 210, 88 Stat. 671-72 (1974), amending 12 U.S.C. § 1715Z (1970). Section 235 is designed to stimulate the flow of private funds into the production of housing while making it possible for people in the $3,000 to $8,000 income bracket to own homes. The program operates by enabling prospective home purchasers to obtain loans at the current FHA rate with a minimum downpayment of 3 percent of acquisition cost. The government pays the mortgagee a mortgage assistance payment which reduces the amount paid by the homeowner on account of interest to a figure potentially as low as 1 percent.

The low monthly interest as well as the low principal payments and modest down payment induced many low-income families to purchase homes. Moving more families into the private home market was also a boon to the construction industry, which is now in a record slump partly because of a lack of funds for housing.


out its problems, but both strategies constitute a positive step towards ameliorating the severe housing shortage which affects all America. In addition, the Nixon Administration announced in June of 1974 that it had decided to stop construction of public housing. As a constructive alternative to the largely negative policy of halting the construction of new units, the Administration lobbied for its new housing allowance program, an advocacy that finds expression in the new housing legislation.

As an interim program, the Nixon Administration revised and expanded the Section 23 "leased housing" program of the 1965 Housing and Urban Development Act. But changes pronounced in 1974 by Regulations of the Department of Housing and Urban Development (HUD) ran the risk of reshaping the program so substantially as to undermine its objectives of increasing

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24 A response to the argument that the programs should be abandoned because of abuses is contained in Subcomm. on Priorities and Economy in Gov't of the Joint Economic Comm., 93d Cong., 1st Sess., Report on Housing Subsidies and Housing Policy (Joint Comm. Print 1973). Until all Federal Housing programs were halted by the Nixon Administration in January, 1973, 235 and 236 were on the way to providing almost half as many dwelling units in four years as public housing had provided in 35 years, although most of them went to families well above the poverty line; the median income of their occupants was about $5,500. Gans, A Poor Man's Home Is His Poorhouse, N.Y. Times, Mar. 31, 1974, § 6 (Magazine), at 20.


[a] series of regular periodic payments made to an individual or family currently unable to afford decent housing in a suitable living environment. Family need in relation to the cost of standard units in moderate housing cost neighborhoods determines the amount of the allowance. The individual or family involved must use the allowance to make rental or home ownership payments.


the supply of rental housing available to low-income people and spreading the units throughout the entire housing stock.

Under the basic plan for Section 23, local housing authorities (LHA's) were instructed to “conduct a continuing survey and listing of the available dwelling units within the community” and were also authorized to invite owners of suitable dwelling units to enter into contracts with them. Under normal circumstances, the LHA would lease the unit directly from the owner, pay the owner his monthly rent, and collect a portion of the rent from the tenants. For the owner, this was a strong incentive to enter into a lease with the LHA. The scheme protected landlords from absconding tenants and economic losses from long-term vacancies. Thus, the LHA was able to attract owners to the program and bargain for reductions in rents. In Los Angeles, for instance, the LHA was able to attract owners by offering for a certain consideration to contribute to maintenance, to perform all management functions including the selection of tenants, and to keep all accounts and records for inspection by the owner.

But as revised by the HUD Regulations, Section 23 tenants were given the responsibility for locating suitable dwellings even though they generally lack the ability and expertise necessary to find housing in what is in reality a “seller's market.” This modification seriously undermined the all-important dispersal objective of Section 23, designed to integrate low-income tenants into more affluent neighborhoods. Without guidance from the LHA, tenants are surely more likely to look in their “own” neighborhoods rather than wander adventurously into areas from which they have been effectively excluded.

Hunting for an apartment was not the sole duty imposed upon tenants by the HUD Regulations. The LHA was also prohibited

28 42 U.S.C. § 1421b(d) (1970), as amended, Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II, § 201(a), 88 Stat. 653-67 (1974) (absorbing all of Section 23 into a revised Housing Act of 1937). The language of the statute also allowed a direct lease between the assisted tenant and the owner, with payment of the subsidized portion of the rent arranged through a collateral agreement between the LHA and the owner. This option was seldom utilized by LHA's. Interview by Mitch Lane, third year member, UCLA Law Review, with an executive of the Housing Authority of the City of Los Angeles, in Los Angeles, Cal., May 16, 1974 [hereinafter cited as Interview].

29 For example, in the Los Angeles area, prior to the ceiling proposed by the HUD Regulations of May 13, 1974, (refer to notes 31-37 infra) a one-bedroom apartment with a monthly private-market rent of $160 could have been leased by the LHA for $135; a two-bedroom with a monthly listing of $185 could have been secured for $155, and a three-bedroom apartment with a monthly rental of $210 for an unsubsidized tenant would have been leased to the LHA for $185. Interview, supra note 28.

30 Id.

from contracting a lease with owners. Rather, the tenant signed the lease and both the tenant and the LHA paid their respective shares of the rent to the owner. The LHA was also prohibited from providing any management or maintenance functions, or from paying any subsidy to the owner when the unit was vacant except when tenants vacated in violation of the lease and the owner had taken all feasible actions to fill the units. These changes effectively eliminated both the inducement for owners to accept Section 23 tenants and any bargaining power the would-be tenants and the LHA might have.

The Housing and Community Development Act of 1974 absorbs Section 23 into what is now Section 8 of the United States Housing Act of 1937. This program, acronymed "HAP," reflects the compromise that pervades most of the new housing legislation and until new regulations are written and implemented, no definitive comparative analysis of Section 23 and "HAP" is possible. But the central idea of dispersed, rather than concentrated, publicly supported housing is a central feature of the legislation. Moreover, the range of the subsidy is broadened in both the "leased housing" as well as in the traditional public housing program which remains in force over Administration protest. On the other hand, whether the program will be implemented so as to encourage participation by the private sector remains to be seen since the spirit of the Section 23 regulations may break through the ambiguities of the new legislation.

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82 Id. at § 1274.103(g), 39 Fed. Reg. 17189.
83 Id.
84 Under the HUD Regulations to Section 23, where the LHA continues to pay rent for a vacant apartment (i.e., the tenant left in violation of the lease, and the owner has made unsuccessful, diligent efforts to fill the vacancy), the amount paid by the LHA is only the amount of the subsidy payment, which varies with the income of the tenant. It may be as low as a few dollars per month.
85 Pub. L. No. 93-383, tit. II, § 201(a), 88 Stat. 662 (1974). Previous Section 23 programs are unaffected by Section 8 (see, id. at § 208, 88 Stat. 669) and are presumably still controlled by the HUD Regulations. Note that regulations have been proposed by HUD that will control the new "HAP" program. See HUD Proposed Regs., 39 Fed. Reg. 40668-99 (1974); id. at 41062-92 (1974).
86 Refer to note 19 supra.
87 Viz., Section 8(e)(2) of the amended United States Housing Act of 1937 (Pub. L. No. 83-383, tit. II, § 201(a), 88 Stat. 665 (1974)), which might be consistent with the HUD Regulations' "finders-keepers" policy (HUD Reg. § 1274.103(a), 39 Fed. Reg. 17188 (1974)) which throws the entire responsibility of locating suitable space on the tenants. Ostensibly this strategy maximizes dispersal, but as already noted, it may in practice lead tenants to look only in familiar neighborhoods. Whether HUD tailors the new legislation to fit the pattern of the pre-legislation realities depends on, at least in part, to what extent "the national nightmare" (to use President Ford's phrase, L.A. Times, Aug. 10, 1974, pt. I, at 1, col. 5) is in fact over. As one commentator asked, "Will the Ford Administration interpret the new act in the spirit of compromise in which it was enacted . . . or as a mandate to fulfill the objectives of the former Nixon Administration?" Nenno, supra note 19, at 346.
Since the future of “HAP” and dispersed public housing is still undetermined, Mandelker’s book, which ends with a suggestion resembling more the original Section 23 than the revision worked by the recent HUD Regulations, may be influential in the debates on policy sure to mark HUD’s implementation of the new Section 8 of the amended United States Housing Act of 1937:

The leased public housing program has many advantages. Controls over rents are provided by the requirement that the lease between the owner of the unit and the public housing agency be negotiated by and acceptable to the public housing agency before the housing unit is taken into the program. The guarantee afforded the private landlord by the long-term lease and the public housing agency’s guarantee of payment should also encourage the landlord both to make necessary repairs and improvements, and to take a lower rent than he would have demanded from an unsubsidized lower income tenant who cannot give him the same financial assurances. Since leases for these units can be negotiated for housing located anywhere in the housing market, the dispersal objective is also easier to achieve under this program. Subsidy costs are lower whenever existing units are utilized, although the program has also been used for units that are newly constructed and that are then taken into the public housing program.38

Mandelker’s observations with respect to the functioning of the Section 23 program did of course precede the struggle over the various bills which eventually led to the 1974 Act. This struggle between divergent philosophies on government involvement in housing also shaped the fate of other subsidy programs, which were either abolished or continued in the various bills proposed by the sides in the battle. The 357-page Senate bill, which passed by a 76 to 11 margin,39 (a substantial part of which was enacted into the 1974 Act) built incrementally upon traditional subsidy strategies, but reflected a consensus shared by virtually all students of subsidy programs that racial and economic homogeneity is the curse of public housing programs. In order to avoid the concentration of very low-income projects by themselves, the Senate bill and the 1974 Act itself introduced the concept of a cross-section of eligible income groups in both public and FHA assisted housing.40 To prevent excessive increases in rent, the

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38 Mandelker, supra note 11, at 221.
40 With respect to public housing, the new Act contains at least two separate provisions that will effect the “economic mix” of the tenants. See Pub. L. No. 93-383, tit. II, §§ 201(a)(3)(1) (requiring 20 percent of units be occupied by very low-income families), 201(a)(6)(c)(4)(A) (requiring that housing authorities comply with Secretary’s tenant selection criteria which assure families with a broad income range) (1974). In regard to the Section 236 program, an economic mix of occupants has been promoted by the deletion of the statutory requirement of
Senate bill and the Act also contained provisions for allocating federal operating assistance to Section 236 programs in the event of increases in operating costs.41

The principal House bill also built on past programs42 and contained basically the same reforms of existing programs as the Senate version, but terminated all new public housing activity in favor of a housing block-grant approach designed to distribute significant sums to local governments to meet their housing needs according to their own realities, and it must be said, prejudices.43 Reformed Sections 235 and 236 were to continue as a supplement to locally orchestrated housing programs funded by block grants.44

In short, the Administration rejected the past, the Senate affirmed it, and the House legislation poured old wine from the bottle of "New Federalism." The legislation ultimately signed by President Ford was the product of major compromises and concessions between the Administration and Congress as well as national interest groups concerned with housing and community development. The legislation sets a "middle course between the program directions of the past, including a strong federal role, and a new tack—the Nixon 'New Federalism'—based on an unqualified shift to local responsibility."45 What emphasis HUD will give the new legislation is yet unclear, but certainly national housing policy will be profoundly affected by local level response fueled by block grant "automatic entitlement" to federal assistance funds based on local need.46

III. Conclusion

Mandelker's book conveys neither the drama nor the urgency of British or American housing problems. Though the deficiency preference to the lowest income groups. In addition, the Secretary has been given flexibility in establishing an income ceiling. Id. at § 212(5). See also, id. at § 212(2)(2)(B). 41 Id. at § 212(3).
43 Id.
44 Id.
45 Nenno, supra note 19, at 345.
46 While a local community can reject the offer of federal assistance by failing to file an application to claim its entitlement, such action must come through a deliberate decision to ignore its local housing and community development needs, even with federal money already assured. The indication is that about 1100 local political jurisdictions are eligible for grant entitlements for community development funds. . . . Similarly, the HUD Secretary may allocate housing assistance funds on the basis of "need criteria" to states and HUD area offices across the nation, providing a first opportunity for all localities to apply for assistance, before the distribution of funds on the basis of "demand" represented in actual applications.
is a problem of style, it is also a question of emphasis: The book confines itself to the history, organization and allocation of public housing in the United States and England, and primarily to the mechanics of the most direct American and British subsidy—the public construction and management of housing. Other subsidy schemes receive consideration, most notably the English rent rebate system, and to a lesser extent, the American housing allowance program. But such important subsidies as the Section 235 and Section 236 programs as well as the FHA conventional mortgage programs receive scant attention. Finally, the most serious omission is the lack of attention to the greatest subsidy of all—the tax relief which the government gives middle and upper-income Americans who own homes.

Perhaps the suggestion that the book is not broad enough in scope is but a quibble—or a question of properly titling a significant discussion of public housing. For if the book is understood to be primarily about public housing, then it does serve as an excellent point of departure for consideration of subsidy policy. The clarity of presentation and discussion has the virtue of defusing what has become, to say the least, inflamed public discourse. But while reading Mandelker’s book, those of us who have seen American and British housing problems “close up” may occasionally complain that the blandness of style obscures the depth and urgency of housing needs in the 1970’s.

For the informed student of public housing, Mandelker’s study will be useful for his essays entitled “Perspectives on Housing Subsidy Problems,” and “Policy Problems in Housing Subsidy Programs.” Those new to the study of housing problems will find his excellent and unpadded bibliography a guide to the rele-

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47 MANDELKER, supra note 11, at 173-206. The rent rebate system is a process in which an unrebated rent is first set for the housing under a so-called fair rent standard, and a portion of the rent is then rebated by the local authority to tenants unable to pay the fair rent. In turn, the local authority may receive a national subsidy to cover part of the rebate cost.


49 The murky provisions of the Internal Revenue Code contain the most important housing programs currently administered by the federal government. One “program” costs the Treasury at least $7 billion per year. It subsidizes nearly every homeowner in the United States.


Home ownership is spurred by tax “breaks” in England also. Tax reliefs on mortgage interest payments may or may not be considered as ‘subsidy’; this is entirely a matter of definition. Nevertheless, they definitely reduce the cost of buying a house (and, for those who can afford it—the cost of buying a second house).

CULLINGWORTH, supra note 13, at 58.

50 MANDELKER, supra note 11, at 1.

51 Id. at 25.
vant literature in the field. More importantly, his comparison of two different housing systems underscores the value of, and need for, comprehensive and intensive research into ways of meeting the worldwide need for decent shelter. 52

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52 Though the Mandelker book compares two Western democracies, there is evidence the problem has resisted solution by Eastern European planners. A Conservative British news magazine has observed:

The Communist part of Europe suffers from an acute shortage of housing. It is partly because there is not enough labour and building materials, but is also the result of too rigid a planning system. Just how big the problem is for Poland was revealed by Mr. Edward Gierek, the Polish party leader, at the end of last year. He estimated that to put every Polish family in its own home would require a staggering 7.3 million dwellings by 1990—or two and a half times the construction rate of the past 20 years.


* In 1973 the author was a Visiting Fellow at Wolfson College, Oxford. With the cooperation of the Oxford Centre for Socio-Legal Studies and the University of London (Bedford College), he undertook a study of British housing problems on grants from the UCLA Center for Afro-American Studies and UCLA Committee on International and Comparative Studies. He now teaches Urban Housing and Redevelopment at UCLA School of Law.