A REVISION ON THE DOCTRINE OF DISABILITY OF MIND

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Introduction

Herbert Fingarette and Ann Fingarette Hasse have put before us a novel approach to the problem of *mens rea* or the mental element in crime (guilty mind)[1]. My purpose here is to provide some support for their theory in response to one of their critics.

The problem of *mens rea* is, roughly, that although someone may behave in ways that are unlawful, that by itself does not appear to be sufficient grounds for regarding the agent guilty of criminal behavior. Such behavior has to involve some measure of intent or deliberation for it to constitute culpable conduct. Unless this were so, the simple fact of someone knocking over another would ipso facto qualify for assault. An individual who is coerced to steal would be judged a thief. More pertinently, someone with a darranged mind –due to whatever cause (e.g., drugs, alcohol, brain damage, or some psychological dysfunction)– would be condemned as fully culpable.

We are aware of the distinction between human behavior and human action or conduct from many cases and from our common

1. Herbert FINGARETTE and Anne FINGARETTE HASSE, *Mental Disabilities and Criminal Responsibility* (Berkeley: University of California Press, 1979).

sense. And we understandably seek a theoretical framework which best explains this awareness.

The insanity plea, which harks back to the famous M'Naghten's Case of 1843, has become unsatisfactory. For one, the problem is that just because someone at the time of engaging in criminal behavior may not know that he or she is doing so, that does not seem necessarily to exculpate the agent involved. The *M'Naghten Case* states:

> To establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing or, if he did know it, he did not know he was doing what was wrong.

The *M'Naghten* test, which refers to knowledge, was later revised to include reference to volition. In *Davis v. United States* (1895) the provision of "irresistible impulse" was added, so that even if one knew right from wrong, if one could not contain oneself from doing wrong, one would be considered criminally insane.

In 1954 the ground for the insanity plea was further expanded, in *Durham v. United States*, when the District of Columbia Circuit held that "An accused is not criminally responsible if his unlawful act was the product of mental disease or defect." This produced much consternation in the legal profession because there had been no clear concept of mental disease or defect in use within the law and, indeed, within the mental health profession.

The American Law Institute wrote up yet another doctrine pertaining to the *mens rea* issue. It said that

> [A] person is not responsible... if at the time of [criminal] conduct as a result of mental disease or defect he lacks

> substantial capacity to appreciate the criminality of his conduct ... This is the law as applied today in the Federal courts.

Contrary to what one might think, this doctrine did not manage to change the verdicts in the relevant cases. For example, as Senator Orrin Hatch observed, in connection with John Hinckley's defense after he shot Mr. Reagan, "Hinckley was allowed to contend that he 'lacked substantial capacity to appreciate criminality... or to conform to the requirements of the law'. The jury in Hickley's trial was apparently so baffled by the hours of psychiatric testimony that they acquitted him on this standard"[2].

Clearly there is a lot more to all this. The essence of the matter is that often common sense suggests that when one is doing something one may well be insane in the sense in which the tradition of law suggests, yet that simply does not suffice to remove one's responsibility for one's behavior. Criminal insanity does not correspond to the way we ordinarily think about what is implied by mental imbalance. Normally it is not disputed that it is possible to get oneself into a state which, had one been more prudent, wise, or cautious, one would know would expose one to the threat of serious misbehavior. The simple case is when one becomes intoxicated. More complicated cases involve when one carries a grudge, harbors resentment, or otherwise thinks ill of another which may prepare one to discard good judgment when confronted with the chance of harming that person. Neglecting to learn to restrain oneself, in case one is angry, could also lead to misbehavior, yet none of this would suffice to fully exculpate one.

Fingarette and Hasse published their work in 1979, but the issue gained full public attention when John Hinckley attempted to assassinate Ronald Reagan in 1980. While clearly not an ordinary

2. Orrin G. HATCH, "Insanity Defense Reform," *Criminal Justice Ethics*, Vol. 3 (Summer/Fall 1984), p. 87.

chap, Hinckley seemed mostly confused and silly, rather than in any credible sense mentally disabled. Yet his attorneys marshalled expert testimony which by law convinced the jury that Hinckley could not be convicted as culpable for attempted murder. Such a result just did not sit well with the public.

Disability of Mind

What is the Fingarette/Hasse solution? Essentially they argue for a position that seems later to have been picked up by Senator Orrin Hatch. As summarized by Hugo Bedau,

> The D.O.M. doctrine (if adopted) would confront the jury with a sequence of four questions: 1) Did the accused commit the offense as charged?; 2) If so, did he suffer from D.O.M. so as to affect his culpability for the offense?; 3) If so, does he incur any culpability for the origin of his D.O.M. (as will typically be true where the D.O.M. involves intoxication or addiction)?; 4) Regardless of how; 5) is answered, does he still suffer from D.O.M.?[3].

Many features of this doctrine are attractive to common sense thinking. One can distinguish between total and partial disability of mind. One can, for example, distinguish between self-induced and inflicted D.O.M. The burden of proving D.O.M. is on the defense. And there are others I will not touch on.

What I wish to discuss is that a feature of the Fingarette/Hasse D.O.M. doctrine has been criticized on grounds that it appears to reduce the value of their contribution to the discussion. I wish to concentrate on this feature in the rest of my remarks. I believe that

3. Hugo Adam BEDAU, "Soundness of Mind and 'Mental Setting'", *Hastings Center Report*, April 1980, p. 47.

D.O.M. can be a valuable concept provided certain aspects of it are made more explicit.

Human Reason

D.O.M. involves "any kind of individual mental abnormality, pathology, impairment, defect, or disorder, and of whatever origin" [if it bears on] "the capacity for rational (i.e., responsible) shaping of beliefs, moods, intentions, decisions, and actions in regard to criminal law standards"[4]. But a problem seems to arise, according to Professor Bedau:

> Here one notices a disconcerting circularity. If "rational" is virtually a synonym for "responsible," then little if any light can be shed on the criteria for responsibility by appealing to the concept of rational conduct. Although this circularity could have easily been avoided, it is a symptom of the deeper difficulty[5].

As Fingarette/Hasse's put it, one is irrational if one is "unable to... take into account, while forming his intentions, the criminal significance [of one's action]"[6]. And a person will be unable to do this when various "presumptions of fact" are missing[7].

Among the facts that a rational person must accept, according to what Fingarette/Hasse say, are certain moral beliefs.They hold that one is not a rational agent if one does not acknowledge, for example, "murder as an evil – a 'crime' in a moral sense"[8]. They lead one to think that a rational person would have to know, as a general moral fact, that murder is evil. "In the upshot, however, without some such minimum shared background-nexus of basic perceptions and values, which provide the basic standards relevant

4. FINGARETTE/HASSE, pp. 207, 211.
5. BEDAU, p. 47.
6. FINGARETTE/HASSE, p. 210.
7. Ibid., p. 224.
8. Ibid.

to crimina malum *in se*, there would, of course, be no community' . If a member of the community fails to be aware of such minimal moral feature of community life, he or she fails to be rational. "A person who can kill and yet sense no need for certain kinds of relevant excuse or justification is a person with no inner touchstone by which to assess conduct rationally in regard to law"[10].

Now it seems to Bedau, for example, that this view undermines the power of the doctrine of disability of mind. Granted much of the Fingarette/Hasse views on what is required for human community life, the points they raise seem somewhat to leave in doubt what renders an accused person guilty of a crime.

One objection to their view is that it is just in virtue of the fact that irresponsible behavior flouts or evades concerns about general moral matters (which should be the province of the law, e.g., the moral crime of murder) that many societies are defective human communities. We know, for example, that in some cultures "human life is cheap". We know that in some societies the respect due to human beings is simply not extended to women. And elsewhere there seems to be blindness to such moral facts as that racism is wrong and that individual liberty should be protected.

The responsibility for such defects would seem to lie, at least in significant part, with the members of the society. They should normally be found guilty of the moral insensitivity that their societies embody. Yet Fingarette/Hasse's apparent equivocation between rationality as acknowledgment of certain moral facts and as individual criminal responsibility would exculpate just such agents of criminal behavior.

For example, would John Hinckley have been found culpable by the Fingarette/Hasse criterion of criminal responsibility? It is unclear. He might have had to be found suffering from an

9. Ibid., p. 226.
10. Ibid.

excusing disability of mind because he did not believe that assessinating a famous person is morally wrong, given his other convictions and purposes. But is that not exactly what explains why some societies behave in morally apalling ways? In South Africa they are more concerned with white solidarity, while in the Soviet Union the government prizes singularity of political purpose rather than individual freedom for its citizens. In earlier societies various religious convictions distracted people from certain moral facts, as they do now also in, for example, Iran. For individuals, as for entire cultures, sometimes moral facts are "out of mind". But does this imply any lack of rational capacity?

Fingratte/Hassse perhaps do not fully embrace this view. After all, they regard capacity for rationality as the most important ingredient of criminal responsibility. But when they proposed what counts as evidence of lack of such capacity, they chose an inappropriate candidate, namely, lack of awareness of general moral truths. They clearly do not need the conception of rationality that is implicit in their example.

Volitional Rationality

While Fingarette/Hasse seem to wish to avoid metaphysical issues –lest they get involved in debates about natural versus positive law and the like[11]– it seems such deeper discussions are unavoidable if their view is to be clarified and made more palatable. The question has to be answered, what is the nature of human rationality? According to a sensible answer, would a rational individual have to know that murder is evil?

First of all, "rational" can refer to someone's capacity to reason or to someone's characteristic mode of behavior. It seems clear that a person *incapable* of reasoning is not fully responsible for

11. Ibid., p. 224n.

his conduct. Even if this incapacity had been self-induced, responsibility would not likely be full. This is similar to the intoxication/addiction situation.

If, however, a person is just not engaging in rational conduct prompted by not having engaged in rational thought, full responsibility may yet be ascribable. The reason is that it is arguable that one *ought to think* under certain circumstances and the failure to do so does not qualify as an excuse. This point is well brought out in a discussion by H. L. A. Hart:

> [N]o satisfactory account of what it is which makes "conduct" voluntary or involuntary, capable of covering both acts and ommissions can be given in [the] terminology of "states of mind" or "mental attitude". What is required (as a minimum) is the notion of a general *ability* or *capacity* to control bodily movements, which is usually present but may be absent or impaired[12].

Fingarette/Hasse appear, unwittingly at least, to invoke the "states of mind" criterion for responsible conduct when they make part of the requisite rationality a matter of what the agent believes – to wit, that murder is evil. Hart indicates further why that is not adequate:

> [I]t is important to pause and note that if anything is "blameworthy", it is not the "state of mind" but the agent's failure to inform himself of the facts and so *getting into* this "state of mind"[13].

The point may be put as follows: The voluntariness of conduct stems from the fact that persons can become aware of relevant facts

12. H. L. A. HART, *Punishment and Responsibility* (New York: Oxford University Press, 1968), p. 142.

13. Ibid., p. 143.

as a matter of their own volition. They can choose to attend or choose not to attend, to pay or not to pay heed. If in the context of human community life persons choose not to pay heed to the moral requirement of respecting human life, property, freedom, etc., this will leave them ignorant of the fact, for example, that murder is evil. And that would seem to show they lack rational capacity.

I don't think that Fingarette/Hasse's want this result. While they may accept that such persons are irrational, they may not wish to identify this with lack of rational capacity. In a sense such persons will act irrationally, without good reason for what they do. But they might easily have been rational in the sense that they might have elected to exercised their rational capacity, something that they could well possess but fail to activate.

When John Hinckley became preoccupied with some narrow objective –impressing his beloved– he may well have managed to obliterate a great deal of what he should keep in mind. He may indeed have ended in a state of ignorance about the significance of human life or Ronald Reagan's status as a human being or any number of other matters which a sustained activation of one's rationality would bring to one's awareness. Yet this could well be a matter of Hinckley's own "failure to inform himself of the facts and so *getting into* this 'state of [ignorance]".

Last Reflections

Does a person have the capacity to initiate his or her thinking process, of "getting into" some state of mind on his or her own accord? This is indeed the ancient philosophical question of whether at a most fundamental level one is a free agent. If one is a free agent, it would appear that being free just within this sphere of one's self would make the most sense.

All the best arguments for free will suggest that freedom is a matter of one's control over one's consciousness. Philosophers as

diverse as Aristotle, Kant, Sartre, and Hart seem to view the matter along such lines. The arguments about why determinism is self-refuting do the same. And finally the occasional scientific accounts of the nature of free will also lead to this conclusion[14].

Perhaps the above adjustment will help further to preserve in law the notions of criminal responsibility as well as sensible excusing conditions based on disabilities of mind[15].

14. See, respectively, Joseph BOYLE, G. GRISEZ, and O. TOLLEFSEN, "Determinism, Freedom, and Self-Referentail Arguments", *The Review of Metaphysics* (September 1972): 3-37, and Roger W. SPERRY, "Changing Concepts of Consciousness", *Perspectives in Biology and Medicine* (August 1976): 9-19.

15. I wish to express my thanks for the support of my work on this and related papers by the John M. Olin, Reason and Progress Foundations.