The Psychopath and the Definition of "Mental Disease or Defect" under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?

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The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?

I. INTRODUCTION

The legal system is concerned with the adoption and enforcement of rules. A disorder characterized by law breaking should be of particular interest to the law. Yet, the legal system has paid only minimal

MENTAL DISEASE OR DEFECT

attention to the group of individuals commonly known as sociopaths or psychopaths. The psychopath presents a number of issues for the legal system, in particular the question of criminal responsibility. Specifically, is psychopathy a condition which should relieve a criminal defendant of responsibility for his actions?

The insanity defense is based on the notion that certain individuals, by virtue of some mental impairment, should not be held legally re-


Although the terms are not entirely synonymous with one another, for the purposes of this Comment, the terms sociopathy, psychopathy and antisocial personality disorder will be used interchangeably. Where the definitions are impor-
tantly distinct, such differences will be noted.


There are additional implications for the legal system's ability to deal with psychopaths because they do not appear to be particularly responsive to treat-

ment and thus, may become repeat offenders. See Ashworth & Shapland, supra note 2, at 639; McCord, The Effectiveness of Milieu Therapy with Psychopaths, 4 MILIEU THERAPY 29 (1985); Jenkins & Beidleman, Challenges in the Treatment of Antisocial Patients: Joint Conference of the National Coalition of Arts Therapy Association, 14 ARTS IN PSYCHOTHERAPY 223 (1987); Ogloff, Wong & Greenwood, Treating Criminal Psychopaths in a Therapeutic Community Program, — BEHAV. SCI. & L. — (in press); Weller, Medical Concepts in Psychopathy and Violence, 26 MED. SCI. L. 131 (1986); Woody, McLellan & Luborsky, Sociopathy and Psychopathy Outcome, 42 ARCHIVES GEN. PSYCHIATRY 1081 (1985).
responsible for their actions. Over the years, there have been a variety of tests of insanity used in the United States. In the 1960s the American Law Institute ("ALI") developed the Model Penal Code test of insanity. Section 4.01 of the Model Penal Code states:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Subsection (1) was drafted to contain the standard for determining whether a person should be held responsible for conduct that would otherwise be criminal. According to this provision, only those individuals who possess "a mental disease or defect" leading to an inability to appreciate the wrongfulness of their conduct, or an inability to conform their conduct to the requirements of law, should be deemed

4. Why should certain individuals not be held criminally responsible for their actions? It seems intuitively correct to say that a man who thinks he is squeezing a lemon when he is in fact strangling his wife should not be held liable for first degree murder. Yet, why must that be so? It must be so because our conception of responsibility is based on ideas about human beings and their capabilities, such as their ability to reason rationally and to make decisions. This conception of responsibility has not often been clearly articulated, and because it has not been articulated, mental illness has been deemed the exculpating factor without further explanation. This has led psychology and psychiatry to become dominant forces in building an insanity defense. However, the role that psychological explanations for behavior have played has been based on unarticulated and incorrect conceptions of responsibility. See notes 141-50 and accompanying text. Psychological explanations for behavior can be applied to the legal conception of mental disease when they are focused on the reasons underlying the insanity defense. See infra notes 151-70 and accompanying text. Psychological testimony is appropriate to demonstrate that a person by virtue of mental illness is incapable of exercising those faculties which most people have, that is, to think rationally and act upon those thoughts.

5. Until the advent of the Model Penal Code test of insanity, discussed infra notes 6-12 and accompanying text, the M'Naghten test had been most widely used. In Regina v. M'Naghten, 8 Eng. Rep. 718, 722 (1843), the court stated:

To establish a defense on the grounds of insanity, it must be conclusively proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from the disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong. For other tests, see, e.g., Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954)("An accused is not criminally responsible if his unlawful act is a product of mental disease or of mental defect"); Parsons v. State, 81 Ala. 577, 597, 2 So. 854, 866-67 (1887)(irresistible impulse test).

7. Id.
8. Id.
Although the Model Penal Code does not attempt to define "mental disease or defect," subsection (2) of 4.01 includes a cautionary limitation. Subsection (2) excludes from the concept of "mental disease or defect" abnormalities manifested only by repeated criminal behavior or otherwise antisocial conduct. The ALI explicitly rejected the position that repeated wrongful conduct suffices to establish an exonerating condition. However, the ALI in no way attempted to prevent a defendant from presenting a defense of insanity "so long as the condition is manifested by indicia other than repeated antisocial behavior."

At the time the caveat paragraph was adopted, critics believed it to be a presumptuous legal intervention into the realm of psychiatric theory. One commentator specifically stated that the Model Penal Code's efforts to exclude psychopaths from those eligible for the insanity defense was illogical when seen from a psychiatric point of view:

[Why not do what the ALI recommends, ... and exclude the sociopath from the benefits of the relaxed rule of responsibility? The answer is that such special restrictive clauses aimed at excluding certain specified categories of...]

9. This Comment will not be addressing the correctness of paragraph 1 of the Model Penal Code test as a proper test for nonresponsibility. Criticisms of the test abound in the legal literature. See, e.g., Weschler, The Criteria of Criminal Responsibility, 22 U. Chi. L. Rev. 367 (1955). Rather, this Comment will focus on the language "mental disease or defect" and whether, given a proper conception of legal responsibility, psychopathy should be considered a mental disease or defect for purposes of the insanity defense.

10. Most legislatures have accepted the caveat paragraph. See, e.g., ALA. CODE § 13A-3-1 (1982 & 1989 Cum. Supp.); ARK. STAT. ANN. § 5-2-312 (1987); ILL. ANN. STAT. ch. 38, para. 6-3 (Smith-Hurd 1989); ME. REV. STAT. ANN. tit. 17-A, § 33 (Cum. Supp. 1989). However, not all states have included the caveat paragraph as part of their insanity defense. See, e.g., MO. ANN. STAT. § 552.086 (Vernon 1979).

The District of Columbia considers the caveat paragraph in ruling on the admissibility of prior antisocial conduct as evidence of "mental disease," but does not use it to instruct the jury. United States v. Brawner, 471 F.2d 969, 992-94 (1972). Other federal circuits have fully accepted the caveat paragraph. See United States v. Frazier, 458 F.2d 918 (8th Cir. 1972); Blake v. United States, 407 F.2d 916 (5th Cir. 1969); United States v. Chandler, 393 F.2d 926, 927 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 684, 688 (7th Cir. 1967); United States v. Freeman, 357 F.2d 625 (2d Cir. 1966); United States v. Currens, 290 F.2d 761, 774 n.32 (3d Cir. 1961). Only the Sixth and Ninth Circuits have entirely rejected the caveat paragraph. See United States v. Freeman, 425 F.2d 64 (6th Cir. 1970); United States v. Smith, 404 F.2d 727, 727 n.8 (8th Cir. 1968). The status of the caveat in the Tenth Circuit is unclear. See Wion v. United States, 325 F.2d 430 (10th Cir. 1963).


12. Id.

individuals from exculpation simply do not make any psychiatric sense. They are as arbitrary and capricious as excluding defendants with red hair or blue eyes or Negro blood from the benefits of the law of criminal responsibility. They define by legislative fiat what is and what is not a psychiatric condition.\textsuperscript{14}

Some courts have rejected or qualified the caveat paragraph for fear of excluding certain defendants who should be able to present the insanity defense.\textsuperscript{15} For example, in \textit{Wade v. United States},\textsuperscript{16} the court stated:

\begin{quote}
While we approve paragraph (1) of the A.L.I. test . . . we are unable to find comparable merit in paragraph (2). The drafters of the A.L.I. test apparently intended to exclude certain psychopathic personalities from those who might otherwise be found to suffer from a "mental disease or defect." Noted medical authorities have responded that the second paragraph fails to achieve its purpose and fails to establish any meaningful test. The Sixth Circuit, noting the "great dispute over the psychiatric soundness of section 4.01(2)," has expressly refused to adopt it . . . .

The inclusion of Section 4.01(2) in an insanity instruction should have little or no impact on the determination of the criminal responsibility of any mentally deranged defendant, whether psychopathic or not, since it is practically inconceivable that a mental disease or defect would, in the terms of paragraph (2), be "manifested only by repeated criminal or otherwise antisocial conduct."\textsuperscript{17}
\end{quote}

The purpose of the caveat paragraph was to narrow the scope of what type of evidence could be used to establish the existence of a "mental disease or defect." Generally, a psychiatrist or psychologist might present evidence regarding what the defendant said or did, evidence which would reflect on the defendant's cognitive or affective capacities.\textsuperscript{18} However, the ALI wanted to prevent a psychiatrist or psychologist from trying to present evidence solely about the defendant's antisocial actions in the hope that the jury might take evidence of what might establish a psychiatric "disease" and find that the defendant suffered from a "mental disease or defect" as defined by the Model Penal Code.

However, the \textit{Wade} court ignored the purpose of having this caveat paragraph.\textsuperscript{19} Instead of relying on legal conceptions of responsibility, the \textit{Wade} court gave considerable deference to the medical authorities

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\textsuperscript{14} Diamond, \textit{From M'Naghten to Currens, and Beyond}, 50 CALIF. L. REV. 189, 193-94 (1962)(footnotes omitted).
\textsuperscript{15} See \textit{supra} note 10.
\textsuperscript{16} 426 F.2d 64 (9th Cir. 1970).
\textsuperscript{17} \textit{Id.} at 72-73 (citations omitted)(emphasis in original).
\textsuperscript{18} This testimony would be elicited in order to shed some light on the defendant's ability to "appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." \textit{MODEL PENAL CODE} § 4.01 (Proposed Official Draft 1962).
\textsuperscript{19} United States v. Wade, 426 F.2d 64, 72-73 (9th Cir. 1970). \textit{See also} United States v. Smith, 404 F.2d 727, 727 n.8 (6th Cir. 1968); United States v. Brawner, 471 F.2d 969, 994-95 (D.C. Cir. 1972). In \textit{Brauner}, the court did not completely reject the
who were looking to the diagnostic category for psychopaths as a basis for finding impaired mental functioning.20

caveat paragraph, but it did refuse to give it as an instruction to the jury. The court stated:

The judge will be aware that the criminal and antisocial conduct of a person . . . is necessarily material information for assessment by the psychiatrist. On the other hand, rarely if ever would a psychiatrist base a conclusion of mental disease solely on criminal and anti-social acts. Our pragmatic solution provides for reshaping the rule, for application by the court as follows: The introduction or proffer of past criminal and anti-social actions is not admissible as evidence of mental disease unless accompanied by expert testimony, supported by a showing of the concordance of a responsible segment of professional opinion, that the particular characteristics of these actions constitute convincing evidence of an underlying mental disease that substantially impairs behavioral controls . . . .

We do not think it desirable to use the caveat paragraph as a basis for instructions to the jury. It would be difficult for a jurymen — or anyone else — to reconcile the caveat paragraph and the . . . definition of mental disease [from § 4.01(1)] if a psychiatrist testified that he discerned from particular past criminal behavior a pattern that established defendant as suffering from an abnormal condition of the mind that substantially impaired behavioral controls . . . . An instruction along the lines of the caveat paragraph runs the risk of appearing to call for the rejection of testimony that is based materially, but only partially, on the history of criminal conduct.

Id. at 994.

Query if the Brawner court carefully considered the implicit result of such a statement. The court seemed to be calling for conclusory testimony from an expert that “he discerned from particular past criminal behavior a pattern that established the defendant as suffering from an abnormal condition of the mind that substantially impaired behavior controls.” Such a determination should be left to a jury.

The fact that it is supposed to be a jury determination is all the more reason for instructing the jury of the necessity to sort out the mental impairment, which is an excusing factor, from simple antisocial behavior, which the ALI intended not to be an excusing factor.

20. Cf. United States v. Currens, 290 F.2d 761, 763 (3d Cir. 1961). In Currens, the court held that whether a person is classified as a psychopath, and is thus, criminally responsible is a jury question to be determined from the totality of the defendant’s symptoms. The court stated:

We are aware that some jurists and legal scholars are of the view that, as a matter of law, a psychopath is not “insane.” This view seems to be based on a fear that a rule recognizing that a psychopath may not be capable of possessing a “guilty mind” would open the door to the acquittal of persons accused of crime solely on the basis of a history of recurrent antisocial conduct. It is readily apparent that this objection to the inclusion of psychopaths among those entitled to raise the defense of insanity assumes a particular definition of psychopathy; viz., that the term psychopathy comprehends a person who is a habitual criminal but whose mind is functioning normally. Perhaps some laymen and, indeed some psychiatrists, do define the term that broadly; and insofar as the term psychopathy does merely indicate a pattern of recurrent criminal behavior we would certainly agree that it does not describe a disorder which can be considered insanity for purposes of a defense to a criminal action. But, we are aware of the fact that psychopathy, or sociopathy, is a term
As a practical matter, when the insanity defense is raised, psychologists or psychiatrists are expected to testify. The ALI wanted to make it clear that despite a psychiatric diagnosis of and testimony about repeated antisocial behavior, the jury should be required to identify evidence presented at trial representing an indication of some mental disease or defect distinct from the antisocial behavior about which the mental health professional may be testifying. Although mental health professionals may choose to recognize a mental disease based primarily upon repeated antisocial behavior, a legal conception of “mental disease or defect” may not allow antisocial behavior to which means different things to experts in the fields of psychiatry and psychology. Indeed a confusing welter of literature has grown up about the term causing some authorities to give up its use in dismay, labelling it a “waste basket category. . .” Our study has, however, revealed two very persuasive reasons why this court should not hold that evidence of psychopathy is insufficient, as a matter of law, to put insanity or mental illness in issue. First, it is clear that as the majority of experts use the term, a psychopath is very distinguishable from one who merely demonstrates recurrent criminal behavior. . . . In many cases the adjective “psychopathic” will be applied by experts to persons who are very ill indeed. It would not be proper for this court in this case to deprive a large heterogenous group of offenders of the defense of insanity by holding blindly and indiscriminately that a person described as psychopathic is always criminally responsible. Our second reason for not holding that psychopaths are “sane” as a matter of law is based on the vagaries of the term itself. In each individual case all the pertinent symptoms of the accused should be put before the court and jury and the accused’s criminal responsibility should be developed from the totality of his symptoms. A court of law is not an appropriate forum for a debate as to the meaning of abstract psychiatric classifications. The criminal law is not concerned with such classifications but with the fundamental issue of criminal responsibility. Testimony and argument should relate primarily to the subject of the criminal responsibility of the accused and specialized terminology should be used only where it is helpful in determining whether a particular defendant should be held to the standards of the criminal law.

Id. at 761-63 (citations omitted).

21. It is the role of the jury, rather than psychiatrists, to determine what is properly a “mental disease or defect” for purposes of the insanity defense. Compare the “Guilty but Mentally Ill” verdict (“GBMI”), which appears to be looking for a clinical definition of mental illness. See, e.g., MICH. COMP. LAWS ANN. § 768.36 (West 1982)(GBMI option); MICH. COMP. LAWS ANN. § 330.1400(a)(West 1980)(mental illness defined).


23. See infra notes 77-83 and accompanying text for a discussion of the DSM-IIIR and the diagnostic criteria for the antisocial personality disorder. There are, however, other diagnostic techniques available besides the DSM-IIIR. See infra note 180.
be the sole basis of the mental impairment.\textsuperscript{24} In fact, if the conception of mental disease or defect presented in this Comment is taken seriously, it will become quite clear that psychopathy is not a "mental disease or defect" that should lead to exoneration from criminal liability.

The ALI stated that the reason it included this paragraph was because there were conceptions of psychopathy or sociopathy as forms of mental illness that should not be given the benefit of an insanity defense.\textsuperscript{25} As shall be discussed in Part II of this Comment, this determination was a bit premature, as there was no diagnostic category manifest entirely by antisocial conduct in effect at the time the Model Penal Code was adopted.\textsuperscript{26} However, with the revision of the Diagnostic and Statistical Manual (DSM-III R), such a concern is real, as the current diagnostic category\textsuperscript{27} is primarily based on antisocial behavior.\textsuperscript{28} The concern exists because there is always the possibility that the jury will give deference to the experts testifying rather than make a legal determination of what constitutes a "mental disease or defect."\textsuperscript{29}

Part II of this Comment will describe the characteristics of psychopathy so that the reader will have a better understanding of the type of individual in question. In addition, Part II will present the current psychiatric criteria for labeling an individual a psychopath. Part III of this Comment will present the prominent psychiatric view that psychopaths by virtue of their diagnosis should be exonerated from criminal liability. This view has evolved out of the idea that psychopathy is a condition that results from certain causal factors, and in Part III the biological and psychological explanations for the causes of psychopathy will be examined. Further, a response will be made to the view that where causal agents can be identified for behavior, the defendant should be legally excused for his or her actions. Since all

\textsuperscript{24} Unfortunately, the ALI gave no guidance as to exactly what constitutes a "mental disease or defect." Certainly, the ALI did not intend it to be a clinical definition but rather a legal one. The best guidance as to what type of impairment should qualify under this definition has been given by Michael Moore. \textit{See infra} notes 158-67 and accompanying text. \textit{See also} M. PELIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, \S 2.05 (1989).

\textsuperscript{25} \textit{MODEL PENAL CODE} \S 4.01 explanatory note (Official Draft and Revised Commentaries 1962).

\textsuperscript{26} \textit{See infra} notes 74-76 and accompanying text.

\textsuperscript{27} The current diagnostic category is not called sociopathy or psychopathy. Rather, it is known as an antisocial personality disorder. \textit{See infra} note 78 and accompanying text.

\textsuperscript{28} \textit{See infra} note 79 and accompanying text.

behavior is in some sense “caused,” this view cannot substantiate excusing a person merely because he or she has a diagnosable mental illness. Rather, some other basis for excuse must be discovered.

Part IV of this Comment will discuss the most logical basis for excusing those with diagnosable mental illnesses. The basis for the excuse must be tied to the reasons most “normal” people are held criminally responsible for their actions. Yet, in Part V, it will be demonstrated that psychopathy itself is not a proper subject for the insanity defense. Thus, the ALI was perfectly correct in trying to exclude individuals diagnosed as psychopaths from presenting evidence of their antisocial behavior as the sole basis for relief from criminal liability.

II. WHAT IS A PSYCHOPATH?

A. Historical Overview

Attempts to clarify the concept of psychopathy began in the early 1800's when the French psychiatrist Phillippe Pinel coined the term *manie sans delire* (mania without insanity). He used this term to describe a group of behavioral disorders characterized by asocial and antisocial actions but without features of “mental illness.” In 1835, J.C. Pritchard, a British psychiatrist, renamed these disorders “moral insanity.” He believed that this behavior manifested a failure to abide by society's expectations of religious, ethical, and cultural conduct. Pritchard's terminology was used for over fifty years until Koch, a German psychiatrist, decided that the term “moral insanity” had unwarranted, negative connotations, and he proposed that a more acceptable designation would be “psychopathic inferiority.”

In the years that followed, psychologists attempted to develop classification schemes for psychopathy, and in 1930 G. E. Partridge considered psychopathy an exclusively social maladjustment and specified that “sociopath” was a more applicable label. In 1952, the American Psychiatric Association dropped “psychopath” and officially adopted “sociopath,” or more specifically, “sociopathic personality distur-

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31. See J. Pritchard, TREATISE ON INSANITY AND OTHER DISORDERS AFFECTING THE MIND (1835).
33. See, e.g., E. KRAEPELIN, TEXTBOOK OF PSYCHIATRY (1913)(delineating seven categories of psychopathy: excitable, unstable, impulsive, eccentric, liars and swindlers, antisocial, and quarrelsome).
34. See Pennington, PSYCHOPATHIC AND CRIMINAL BEHAVIOR, in AN INTRODUCTION TO CLINICAL PSYCHOLOGY (L. Pennington & J. Berg eds. 1966).
bance." In 1968, the American Psychiatric Association changed the 1952 classification of "sociopathic personality disturbance, antisocial reaction" to "personality disorder, antisocial type." Whatever the medical profession has chosen to call this personality type, the public generally associates the psychopath with criminality. While any particular psychopath may or may not be a criminal, he or she demonstrates verifiable behavior and predispositions different from those of the general population.

B. Behavioral Descriptions

The most comprehensive authority on the behavioral characteristics of the psychopath is The Mask of Sanity, written by Hervey Cleckley. Cleckley described the psychopath as having superficial

35. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952).
36. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968) [hereinafter DSM-II].
37. One criminal considered to be a sociopath was Neville Heath, who committed two of the most brutal murders in history. See P. HILL, PORTRAIT OF A SADIST (1960). For a good description of the murders and Heath's personality, see INFAMOUS MURDERS 14-21 (Verdit Press ed. 1975). In modern days, the "Hillside Strangler" was thought to be a sociopath. See Watkins, The Bianchi (L.A. Hillside Strangler) Case: Sociopath or Multiple Personality?, 32 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 67 (1984).
38. Most antisocial people who have been studied have been institutionalized, typically in prisons. However, not all psychopaths are caught and jailed. Some do not violate the criminal law but may be antisocial in other respects. See Widon, A Methodology for Studying Noninstitutionalized Psychopaths, 45 J. CONSULTING & CLINICAL PSYCHOLOGY 674 (1977). See also Winslow & Solomon, Entrepreneurs Are More than Non-Conformists: They Are Mildly Sociopathic, 21 J. CREATIVE BEHAV. 202 (1987).
41. H. CLECKLEY, supra note 39. See also Blashfield & McElroy, The 1985 Journal
charm and above, to above average, intellectual ability.\textsuperscript{2} The outward characteristics manifested by the sociopath “suggest desirable and superior human qualities, a robust mental health.”\textsuperscript{3} Cleckley stated that psychopaths come across initially as friendly and outgoing.\textsuperscript{4} They appear well educated and knowledgeable, displaying many interests.\textsuperscript{5}

In Cleckley’s clinical work, he found that psychopaths lack neurotic, psychotic, or emotional problems, such as excessive worry and anxiety, irrational thinking, neuroses, delusions, severe depression, or hallucinations.\textsuperscript{6} Cleckley stated that the psychopath maintains “excellent logical reasoning” and “can foresee the consequences of injudicious or antisocial acts, outline acceptable or admirable plans of life, and ably criticize in words his or her former mistakes.”\textsuperscript{7} Psychiatric examinations would disclose nothing that would indicate incompetency or suggest that the psychopath could not lead a successful and happy life.\textsuperscript{8}

Cleckley stated that not only is the psychopath rational, he or she appears to react with normal emotions.\textsuperscript{9} Yet, psychopaths do, in fact, have a deficit of emotional reactions. For example, although they may become outraged and shout, they only effectively mimic appropriate emotions rather than experience genuine feelings.\textsuperscript{10}

Cleckley found that although psychopaths enjoy practical jokes, they lack a genuine sense of humor and ability to laugh at themselves.\textsuperscript{11} Psychopaths are selfish and principally unable to love or give affection to others.\textsuperscript{12} Nevertheless, the psychopath’s inability to love is not absolute. He or she is capable of affection, of “casual fondness,” but the duration and strength is severely limited.\textsuperscript{13}

Cleckley found psychopaths to be unreliable, irresponsible, and unpredictable regardless of the importance of the occasion or consequence of their actions.\textsuperscript{14} The pattern may be cyclical, i.e., they may act responsibly for a period of time, but then become irresponsible.

\begin{thebibliography}{99}
\bibitem{42} H. Cleckley, supra note 39, at 338-39.
\bibitem{43} Id. at 339.
\bibitem{44} Id. at 338.
\bibitem{45} Id.
\bibitem{46} Id. at 339.
\bibitem{47} Id.
\bibitem{48} Id.
\bibitem{49} Id.
\bibitem{50} Id. at 348.
\bibitem{51} Id. at 349.
\bibitem{52} Id. at 346-47.
\bibitem{53} Id. at 347.
\bibitem{54} Id. at 340-41.
\end{thebibliography}
again. The pattern itself cannot be predicted as there seems to be no relation to stress or mood. Further, the unreliability is marked by demonstrations of conforming behavior whose motives and incentives may not be that of the average person.

Cleckley described the psychopath as an individual who has no regard for truth and appears to have no internalized moral or ethical sense. Yet, many times he or she appears candid and trustworthy. Although a psychopath would lie "about any matter, under any circumstances, and often for no good reason," the psychopath sometimes discloses errors and appears to be honestly facing consequences of his or her actions.

Cleckley found that a lack of remorse or guilt regardless of the severity or immorality or consequences of their actions was most distinctive of psychopaths. In particular, they might engage in destructive or antisocial behavior with absurd risks and insignificant personal gains, such as forgery, adultery, and fraud, and will often have no apparent goal motivating their actions. Psychopaths have a need to experience thrills and excitement and, thus, are impulsive. Their profound stimulation seeking leads many psychopaths to be drawn into dangerous activities.

Despite the psychopath's "excellent rational powers," Cleckley found the psychopath to be incapable of learning to avoid failure and future situations which could bring him or her harm, e.g., a jail term.

55. Id. at 341.
56. Id.
57. Id. at 341-42. Recent studies have dealt with two characteristics that bear on the psychopath's moral development: their relative immunity to the deterrent effects of punishment and their attraction to new experiences. See McCord, The Psychopath and Moral Development, in PERSONALITY THEORY, MORAL DEVELOPMENT, AND CRIMINAL BEHAVIOR 357-72 (W. Laufer & J. Day eds. 1983). See also Smith, The Psychopath as Moral Agent, 45 PHILOS. & PHENOMENOLOGICAL RES. 177 (1984). These characteristics relate to a psychopath's inability to internalize social norms and values of the external social world. McCord, supra. When norms are internalized, it means that an individual accepts events or beliefs and makes them a part of his or her own thinking. Some have stated that the psychopath may not be able to internalize societal values. Thus, he or she may be more likely to violate them because the only sense of right or wrong the individual values is his or her own. See Fodor, Moral Development and Parent Behavior Antecedents in Adolescent Psychopaths, 122 GENETIC PSYCHOLOGY 37 (1973)(found that the psychopath demonstrates a primitive level of moral reasoning). Psychopaths believe in self-gain, having little understanding of the feelings of others. The emphasis here is on meeting one's own needs, looking at human relationships as those of a marketplace or as means to an end, not of loyalty or justice.

58. H. CLECKLEY, supra note 39, at 342.
59. Id. at 343.
60. Id.
61. Id. at 343-44. See also Sutker, Behavior and Personality Assessment in Men Labeled Adaptive Sociopaths, 5 J. BEHAV. ASSESSMENT 65 (1983).
62. H. CLECKLEY, supra note 39, at 345-46. There is specific experimental evidence
Yet, despite poor judgment demonstrated in actual daily living the psychopath demonstrates unimpaired judgment in appraising situations involving ethical, emotional, and other evaluational factors. It appears only to be the concrete situation in which he or she is a participant that the psychopath makes inappropriate choices. So long as the psychopath is asked what should be done, and not to actually do something, the psychopath performs well.63

The psychopath suffers from an inability to gain insight into his or her own actions.64 This lack of insight often is demonstrated by his or her apparent assumption that legal penalties for a crime committed should not apply to him or her.65 Instead of accepting facts that would normally lead to insight, psychopaths project and externalize blame onto others for their misfortune.66 Occasionally, the psychopath will accept blame for his or her actions, but Cleckley found this to be at best an “excellent mimicry” at accepting responsibility.67

Cleckley found that small amounts of alcohol prompt most psychopaths to become vulgar, domineering, loud, boisterous, and to engage in practical jokes and pranks.68 Cleckley found that the psychopath exhibits suicidal tendencies. Cleckley pointed out that many psychopaths get themselves into situations in which the “normal man” would end his own life. Yet, he or she rarely carries out the threat of suicide.69 Finally, the psychopath’s sex life shows certain “peculiarities.”70 Tied to their inability to feel deep emotional love, the psychopath’s sexual activities are limited to physical contact, free from emotional attachment. Sex becomes casual to most psychopaths, and their need to have sex is less strong than at first glance.71 Their record of sexual promiscuity seems more closely related to their lack of self-restraint than to a strong sex drive.72

supporting Cleckley’s observation that psychopaths are unable to learn. See infra notes 113-14 and accompanying text.

63. H. CLECKLEY, supra note 39, at 346.
64. Id. at 350.
65. Id. at 351.
66. Id. at 350.
67. Id. at 350-51.
69. H. CLECKLEY, supra note 39, at 358-59.
70. Id. at 359.
71. Id. at 361-62.
72. Id. at 363.
To summarize, Cleckley's main features of psychopathy, developed primarily from clinical experience, are:

1. Superficial charm and good intelligence;
2. Absence of delusions and other signs of irrational thinking;
3. Absence of nervousness or neurotic manifestations;
4. Unreliability;
5. Untruthfulness and insincerity;
6. Lack of remorse or shame;
7. Antisocial behavior without apparent compunction;
8. Poor judgment and failure to learn from experience;
9. Pathologic egocentricity and incapacity for love;
10. General poverty in major affective reactions;
11. Specific loss of insight;
12. Unresponsiveness in general interpersonal relations;
13. Fantastic and uninviting behavior, particularly with alcohol;
14. Suicide threats rarely carried out;
15. Sex life impersonal, trivial, and poorly integrated; and
16. Failure to follow any life plan.\(^7\)

Cleckley's description of the psychopath had a profound impact in the treatment and diagnosis of psychopathy. The Diagnostic and Statistical Manual ("DSM-II") that was in effect when the Model Penal Code was adopted included a similar set of descriptive terms that could be used to diagnose the condition:

The term [antisocial personality] is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups, or social values.

They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalizations for their actions.

\(^7\) Id. at 337-38. However comprehensive Cleckley's characteristics are, there has been considerable disagreement about the traits which describe the psychopath. For example, in one survey, Canadian psychiatrists were presented with twenty-nine concepts typically used to describe the psychopath and asked to rank order the ten concepts that they considered most meaningful. No clear overall characterization emerged, but the most frequently selected traits were:

1. Does not profit from experience;
2. Lack of sense of responsibility;
3. Unable to form meaningful relationships;
4. Lack of control over impulses;
5. Lack of moral sense;
6. Chronically a recurrent antisocial;
7. Punishment does not alter behavior;
8. Emotionally immature;
9. Unable to experience guilt;
10. Self-centered.

S. SMITH & R. MEYER, supra note 1, at 520.
behavior. A mere history of repeated legal or social offenses is not sufficient to justify this diagnosis." When the Model Penal Code was adopted, there was no diagnostic category that was manifested merely by repeated antisocial behavior. As the DSM-II provided, to receive the diagnosis of antisocial personality, one needed to exhibit other characteristics such as being irresponsible, impulsive, and grossly selfish. Yet, the ALI recognized the substantial role that antisocial conduct played in the diagnosis and wanted to make sure that a jury was able to sort out purely antisocial behavior from what should be considered to constitute evidence of a "mental disease or defect." Of particular concern was the fact that the DSM-II did not contain explicit criteria for diagnosis, leaving clinicians using these manuals on their own to define the content and boundaries of these categories. Thus, a clinician could have chosen to give a diagnosis to a habitual offender who had committed severe and numerous crimes, but also exhibited some, although minor and not necessarily deviant, degrees of impulsivity or callousness. The clinician might properly believe that he or she had given a meaningful diagnosis to such an individual and might, in fact, have done so for the purpose of treatment. However, the purpose of treatment and the purpose of determining legal responsibility are not necessarily the same since a diagnosis given in the former situation may not be applicable in the latter.

In contrast to the DSM-II, the American Psychiatric Association's most recent Diagnostic and Statistical Manual—Revised ("DSM-IIIR") provides specific diagnostic criteria as guides for making each diagnosis. The specific criteria are designed to enhance diagnostic reliability. The DSM-IIIR does not use the terms psychopath or sociopath; nor does it rely on Cleckley's description or the DSM-II diagnostic criteria. Rather, the DSM-IIIR describes what has been commonly known as sociopathy or psychopathy as the "antisocial personality disorder," and gives a limited and concise set of diagnostic criteria on which to base the diagnosis.

To be assigned the label antisocial personality disorder, one must

74. DSM-II, supra note 36, at 43 (emphasis added).
75. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiv (3d ed. rev. 1987) [hereinafter DSM-IIIR].
76. See infra notes 77-78 and accompanying text.
77. DSM-IIIR, supra note 75, at xxiv.
78. Actually, the DSM-IIIR differentiates between two types of disorders: the adult antisocial behavior disorder and the antisocial personality disorder. The antisocial behavior disorder merely involves antisocial behaviors and does not require anything more for the diagnosis. However, the antisocial personality disorder involves some personality characteristics. The caveat paragraph would automatically exclude the antisocial behavior disorder, but not the antisocial personality disorder. Thus, the antisocial personality disorder will be discussed as the primary diagnosis of concern in this Comment. Id. at 359.
be at least eighteen years old; have the onset of the problem before age
fifteen with no intervening problem-free period of five years or more;
and show no evidence of mental retardation, schizophrenia, or mania.
In addition, an individual must exhibit at least four of the following:
1) inability to sustain consistent employment; 2) inability to function
as an effective parent; 3) failure to accept social norms evidenced by
persistent criminal behavior; 4) inability to maintain enduring sexual/
affectionate relations; 5) irritability and aggressiveness; 6) failure to
honor financial obligations; 7) impulsivity; 8) disregard for the truth,
including conning others for profit; 9) recklessness; and 10) lack of
remorse. 79
The DSM-III-R is commonly used in clinical practice today. 80
Rather than traditional definitions such as Cleckley's, the DSM-III-R
may be used to say to the jury, "This individual has a mental illness
currently recognized by the psychiatric profession," and by implication,
"he or she must have a 'mental disease or defect.'" The definition
of psychopathy embodied in the DSM-III-R will be discussed in the
remainder of this Comment. 81
Among the crucial features believed to distinguish psychopaths in
the early literature were: lack of guilt or remorse, inability to profit
from experience, inability to delay gratification, inability to form last-
ing emotional ties, stimulus seeking, and superficial charm. 82
However, the DSM-III-R presently does not require that an inability to
profit from experience be present in order to make this diagnosis. 83
The inability to learn from past mistakes might be seen as a cognitive

79. Id. at 342-46. The DSM-III-R has been criticized as being too inclusive and ignor-
ing certain key concepts used in the past to identify sociopaths. See, e.g., Assess-
ment of Psychopathy, infra note 180; MacKay, Psychopathy and Pathological
Narcissism: A Descriptive and Psychodynamic Formulation on the Antisocial
Personality Disorder, 11 J. OFFENDER COUNSELING SERVICES & REHABILITATION
77 (1986).
80. DSM-III-R, supra note 75, at xviii.
81. Query whether the diagnostic criteria that Cleckley used for diagnosing soci-
opathy would be sufficient to find a "mental disease or defect." Using the concep-
tion of responsibility and the reasons why mental impairments should act as
exonerating conditions that are presented in this Comment, arguably the soci-
opath would still be held liable. Even Cleckley's description is marked by an
absence of delusions and other signs of irrational thinking. Although Cleckley's
descriptions of psychopathy remain important, particularly in academic research
on psychopathy, his descriptions will not be considered further in this Comment.
Rather, the DSM-III-R diagnostic criteria will be considered primarily because of
its prominence both in present-day clinical practice and in the court system.
82. See supra notes 40-73 and accompanying text.
83. The absence of a requirement of "lack of guilt or remorse" is also exceptional
since it is probably the most commonly identified feature in the literature dealing
with these individuals and the one characteristic that most clinicians believed to
be the defining feature of psychopathy. Marshall & Barbaree, Disorders of Per-
sonality, Impulse, & Adjustment, in ADULT PSYCHOPATHOLOGY AND DIAGNOSIS
impairment, substantially different from normal functioning and might allow an individual to present evidence of the presence of a "mental disease or defect." However, given the diagnostic criteria used in the DSM-IIIR, a diagnosis of antisocial personality disorder does not necessarily present evidence of mental disease or defect, as will be discussed in Part V of this Comment.

III. THE DIAGNOSIS AS AN EXCUSING CONDITION

A mere description of psychopathy does not explain why the individual who receives such a diagnosis should be relieved of criminal responsibility. Psychological expert testimony could be received to identify the defendant as a psychopath, and yet, not tell the jury why the defendant should not be held legally accountable for commission of criminal acts.

Many mental health professionals attempt to justify their belief that individuals diagnosed as psychopaths should be treated differently in the legal system by pointing to experimental evidence designed to demonstrate that psychopaths are not "normal." For example, there has been a variety of experimental research demonstrating that there may be a biological basis for psychopathic behavior. In many experiments, psychopaths respond differently than control subjects in a variety of experimental contexts. However, even if that experimental evidence is accepted as true, does that evidence present anything more than the fact that there is an identifiable cause for the behavior? Does this evidence explain why the behavior should be excused? Consider some of the psychological explanations for psychopathy presented below.

A. Experimental Evidence that Psychopathic Behavior May Have Identifiable Biological Causes

1. Brain Functioning

There is current evidence which would suggest that psychopaths may be different from "normal" human beings ("normals") because of organic differences in physiological functioning reflected in their brain wave patterns. Electrical activity of the central nervous system may be measured with the use of an electro-encephalogram ("EEG"). The devise allows researchers and physicians to record the oscillatory electric characteristics of the cortex of the brain. Many psychopaths have abnormal EEG's. In a pioneering study during World War II,

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84. Caution should be used when evaluating the evidence on its merits. In the experiments which demonstrate that sociopaths respond differently than normals in a variety of experimental situations, the criteria for diagnosis varies from experiment to experiment.

85. C. BARTOL, supra note 30, at 63.
Hill and Watterson investigated the EEG patterns of 151 male British military personnel who were not adjusting to military life. The researchers divided the men into three groups: 1) aggressive psychopaths; 2) mixed psychopaths; and 3) inadequate psychopaths. A group of normals was used as a control condition. The aggressive psychopaths closely resemble the current definition of psychopaths under the DSM-IIIR. Sixty-five percent of the sixty-six aggressive psychopaths demonstrated abnormal EEG's compared to only fifteen percent of a group of normals.

Many other EEG studies have followed. Subsequent studies have been consistent in revealing a significantly higher amount of EEG abnormality in psychopaths. However, this type of research is difficult to interpret because of the correlational nature of the studies. In correlational research, cause and effect cannot be determined because two events may occur simultaneously with neither causing the other. The events may be caused by some third variable which is not being measured. In the case of this research, it is difficult to determine whether the EEG abnormalities cause the psychopathic behavior, whether the behavior causes EEG abnormality, or whether there is any causal relationship between the two.

In addition to the abnormal EEG's during waking periods, there has been some evidence that psychopaths exhibit an abnormal brain rhythm during sleep. Highly aggressive individuals, including psychopaths, display spontaneous bursts of brain waves during otherwise slow-wave activity. These brain wave bursts are called positive spikes. Several researchers have suggested that positive spikes occur with regularity in the EEG's of psychopaths who display explosive aggressive behavior without feeling guilt but who are completely aware of the violent act.

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87. The psychopathic groups, however, were not representative of Cleckley's criteria of psychopathy but instead represented heterogenous clusters of personality disorders. C. BARTOL, supra note 30, at 65.
88. Id.
90. PSYCHOPATHIC BEHAVIOUR: APPROACHES TO RESEARCH (R. Hare & D. Schalling eds. 1978).
91. Id. at 66.
Based on biological brain functioning research, some researchers have argued that slow-wave activity represents delayed brain maturation. This theory is called the maturation retardation hypothesis.\(^9\) This makes intuitive sense because the EEG patterns of many psychopaths resemble those of children, and it is arguable that the behavior of the psychopath is immature and child like, \(i.e.,\) self-centered, impulsive.\(^{94}\)

2. Stimulation Seeking

A number of studies have suggested that the psychopath acts to maximize exposure to stimulation.\(^9\) Stimulation in this context refers to the amount of sensation and/or information processed by the cortex of the brain.\(^{95}\) Wiesen,\(^9\) for example, did an experiment in which he found that psychopaths would work harder for exposure to colored lights (visual stimulation) and exposure to radio music (auditory stimulation) than a group of normals. A second experiment found that normals worked harder than psychopaths to obtain three seconds of silence and relative darkness.

A study by Orris\(^9\) found that psychopathic boys showed poorer performance on a boring task requiring continuous attention. Instead, psychopaths demonstrated a greater degree of participation in boredom-relieving activities such as singing and talking to themselves.

A study by Chesno and Kilmann\(^9\) tested the effects of aversive white noise and shock on psychopaths and normals. The procedure involved an avoidance learning task, with electric shock being administered for incorrect choices made by the subject. During the avoidance learning task, subjects received either thirty-five, sixty-five, or ninety-five decibels of white noise, \(i.e.,\) sounds like a hissing radiator through earphones. The results of the study indicated that psychopaths made significantly more avoidance errors than the other groups.

93. \textit{See R. Hare, supra note 40.}
94. \textit{C. Bartol, supra note 30, at 65-66.}
95. \textit{See, e.g., Hare & Thorvaldson, Psychopathy and Response to Electrical Stimulation, 76 J. ABNORMAL PSYCHOLOGY 370 (1970); Thomas & McDonagh, Motivational Dominance in Psychopaths, 21 BRIT. J. CLINICAL PSYCHOLOGY 153 (1988).}
96. Insufficient amounts of stimulation may lead to boredom. Boredom may be reduced by increasing stimulation, while exceptionally high levels of stimulation may be relieved by avoiding further aversive stimulation to reduce arousal levels. \textit{C. Bartol, supra note 30, at 68.}
99. Chesno & Kilmann, Effects of Stimulation Intensity on Sociopathic Avoidance Learning, 84 J. ABNORMAL PSYCHOLOGY 144 (1975)(psychopaths were classified according to Cleckley's criteria).
as the stimulation decreased, suggesting that they prefer punishment to boredom.

With regard to stimulation seeking behavior, many theorists suggest a biological basis for this behavior. These individuals believe that the complex nerve network located in the central portion of the brain stem called the reticular activating system ("RAS") is in some way deficient. Either the RAS does not activate the cortex sufficiently to receive the full impact of incoming information, or it adapts too quickly, thus shutting the cortex activation down before receiving complete information. The psychopath is unable to reach optimal arousal levels with normal stimulation. Therefore, the psychopath engages in thrill-seeking behavior in order to reach satisfying cortical arousal.

3. Anxiety Reduction

The autonomic nervous system controls heart rate, gland secretion, and smooth muscle activity. The autonomic nervous system is especially important because it activates emotional behavior and responds to stress and tension. The autonomic nervous system can be divided into the sympathetic and parasympathetic nervous systems. The sympathetic nervous system activates the "fight or flight" mechanism during a fearful or emergency situation. The parasympathetic system relaxes the individual after the fearful or emergency situation.

The most common measure of emotional arousal has been the skin conductance, or galvanic skin response. The skin conductance response ("SCR") is a measure of the resistance of the skin to conducting electrical current. Sweating, for example, corresponds closely to changes in emotional states and has, therefore, been found to be a highly sensitive indicator of even slight changes in the autonomic nervous system. Skin conductance increases as emotional arousal, e.g., anxiety or fear, increases. Perspiration changes can be

100. C. BARTOL, supra note 30, at 69.
101. Id. at 69-70.
102. Id. at 70.
103. For additional studies involving anxiety reduction, see, e.g., Newman & Kosson, Passive Avoidance Learning in Psychopathic and Nonpsychopathic Offenders, 95 J. ABNORMAL PSYCHOLOGY 252 (1985); Sterling & Edelman, Reactions to Anger and Anxiety-Provoking Events: Psychopathic and Nonpsychopathic Groups Compared, 44 J. CLINICAL PSYCHOLOGY 96 (1988).
104. C. BARTOL, supra note 30, at 71.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id.
detected by recording devices such as polygraphs or physiographs.\footnote{Lykken, \textit{A Study of Anxiety in the Sociopathic Personality}, 55 \textit{J. Abnormal \& Soc. Psychology} 6 (1957).}

Lykken\footnote{Id. at 72.} hypothesized that since the psychopath is anxiety-free, the psychopath should have difficulty in learning to avoid unpleasant situations that would cause anxiety in normals. Lykken exposed subjects to an electronic maze in which they were given four choices, of which only one was the correct choice. One of the incorrect alternatives would give the subject an electric shock. Lykken was interested in discovering how quickly subjects learned to avoid the electric shock. Avoidance learning would be rewarded by the reduction of anxiety upon encountering the point at which the psychopaths must make a choice of which path of the maze to take.

Lykken measured skin conductance changes in subjects prior to the maze portion of the experiment. During this time, subjects would hear a buzzer and receive an electric shock after the buzzing sound. Eventually, the buzzer became associated with the shock. The onset of the buzzer produced an anxiety response in normal individuals in anticipation of the shock, and thus, resulted in an increase in skin conductance.

The psychopaths, however, did not seek to avoid the electric shocks in the maze experiment, and in the pre-experiment measure, psychopath’s skin conductance was considerably less than that of normals when they heard the buzzer and anticipated the shock. Psychopaths are either unable to learn to avoid the shock, as the experimenters suggested, or they may simply see no need to avoid shock, particularly if they do not find the shock aversive.\footnote{For additional studies that demonstrate that psychopaths display smaller increases in skin conductance than nonpsychopaths, see Hare, \textit{Temporal Gradient of Fear Arousal in Psychopaths}, \textit{70 J. Abnormal Psychology} 442 (1965); Hare \& Craigen, \textit{Psychopathy and Physiological Activity in a Mixed-Motive Game Situation}, \textit{11 Psychophysiology} 197 (1974); Hare, Frazelle \& Cox, \textit{Psychopathy and Physiological Responses to Threat of an Aversive Stimulus}, \textit{15 Psychophysiology} 165 (1978); Hare \& Quinn, \textit{Psychopathy and Autonomic Condition}, \textit{77 J. Abnormal Psychology} 223 (1971); Ogloff \& Wong, \textit{Electrodermal \& Cardiovascular Evidence of a Coping Response in Psychopaths}, \textit{17 Criminal Just. \& Behav.} 231 (1990); Tharp, Maltzman, Syndulko \& Ziskind, \textit{Autonomic Activity During Anticipation of an Aversive Tone in Noninstitutionalized Sociopaths}, \textit{17 Psychophysiology} 123 (1980). \textit{See also R. HARE, supra note 40.}}

A second study using Lykken’s basic procedure and apparatus was performed by Schachter and Latane\footnote{Schacter \& Latane, \textit{Crime, Cognition and Autonomic Nervous System}, in \textit{12 Nebraska Symposium on Motivation} 221 (1964).} in which each subject was run through a maze two times. The first time the subjects were run through the maze with an injection of a harmless saline solution, and the second time subjects were given an injection of adrenaline, a hor-
mone that stimulates physiological arousal. The experiment revealed that injections of adrenaline dramatically improved the performance of the psychopath in the avoidance learning task compared to those who just received the saline. Thus, the researchers speculated that the drug raised the psychopath’s emotional arousal to those of normals so that they could function in the learning task.\footnote{116}

B. Other Explanations for the Disorder

Past research has tried to find a biological rationale for psychopathic behavior.\footnote{117} However, many contemporary researchers have focused on social-learning theories to explain the psychopath’s behavior.\footnote{118} Behaviorists and social learning theorists emphasize the parents’ reinforcement and punishment practices, as well as the parents’

\footnote{116. Other research has examined cardiovascular indicators of emotional arousal. For example, Hare & Craigen, supra note 114, performed an experiment in which a tone preceded an electric shock by about ten seconds. In anticipation of the shock, psychopaths exhibited a rapid acceleration of heart beat, followed by a rapid deceleration of heart rate immediately before the onset of the shock. In contrast the normals’ heart rates only gradually increased in anticipation of the shock. Hare and Craigen suggest that the accelerated heart response may help the psychopath to modulate the emotional impact of noxious stimuli. See also Hare, Frazelle & Cox, supra note 114.}


\footnote{118. There have been other explanations for sociopathic behavior such as Sigmund Freud’s psychoanalytic explanation. For a short discussion of Freud’s view of psychopathy, see Marshall & Barbaree, supra note 83, at 421-22. There are also genetic theories of sociopathy. See, e.g., MacMillan & Kofoed, Sociobiology and Antisocial Personality: An Alternative Perspective, 172 J. Nervous & Mental Disease 701 (1984). However, the most prominent theories in the psychological literature today are the biological and social-learning theories. Therefore, the other theories will not be discussed further.}
behavior and attitudes.119 Early investigators considered rejection, usually by mothers, as a causal factor in the development of psychopathy.120 Later investigators also emphasized rejection by fathers as such a factor.121 Another investigator found that psychopathic children experience emotional deprivation and neglect, and thus, they have little opportunity to learn socially desirable behavior from adult models.122

In an early study by McCord, McCord and Zola,123 the researchers found parental conflict, cruelty, erratic punishment and neglect in the psychopaths' homes.124 Other studies have shown that inconsistent discipline by parents is a common fact of life for psychopaths.125 Not only is the punishment inconsistent, but it is often harsh.126 It is thought that once inconsistent punishment becomes ineffectual, the parents increase the intensity of the punishment.127

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120. See Haller, Some Factors Related to the Adjustment of Psychopaths on Parole from a State Hospital, 13 SMITH C. STUD. SOC. WORK 193 (1942); Knight, A Descriptive Comparison of Markedly Aggressive and Submissive Children, 4 SMITH C. STUD. SOC. WORK 168 (1933); Partridge, A Study of 30 Cases of Psychopathic Personality, 7 AM. J. PSYCHIATRY 953 (1928).
121. See R. Lindner, Rebel Without a Cause: The Hypoanalysis of a Criminal Psychopath (1944); Greenacre, Conscience in the Psychopath, 15 AM. J. ORTHOPSYCHIATRY 495 (1945); Szurek, Notes on the Genesis of Psychopathic Personality Trends, 5 PSYCHIATRY 1 (1942).
The inconsistent administration of punishment should either render events irrelevant or shape them into signals for oppositional behavior. If the child is beaten and verbally abused when he or she is “good” and “bad,” the punishment does not serve to differentiate between proper and improper behavior. The child will see no advantage in behaving in appropriate ways. The negative consequences of such actions will not influence the individual’s choice of behavior except to elicit opposition. In addition, if the punishment is excessive, the individual will gradually become desensitized to its effects, and thus, the punishment will no longer be able to alter behavior.

From this type of childhood experience, an adult would be expected to be insensitive to both verbal and physical punishment and be less responsive to socially provocative feedback. Furthermore, because of the inconsistency in punishment and reward, it would be expected that psychopaths would only engage in positive and refrain from negative behavior when the consequences of their actions are immediate.

Given the family history of psychopaths, it might also be expected that these individuals will begin to exhibit oppositional acts in response to the inconsistent and abusive parental behavior. Although punishment may be forthcoming, one researcher suggests that parents may withhold punishment if the child either promises not to do it again, feigns repentance, or offers a seemingly plausible, but false, explanation. When the authority figure withholds punishment, he or she reinforces the untruthful and superficial behavior of the child.

In addition to erratic punishment, parents often are inconsistent in

129. Id.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id. at 427-28.
135. Marshall & Barbaree have recognized the legal implications of this response: At least one of the motivating factors in criminal behavior [may] be some form of this oppositional disposition. After all, society has essentially taken over the role of the parents, and, from the perspective of the offender, this “society” may be considered to be behaving in much the same way. The psychopath may see society as being inconsistent in meting out punishment and, indeed, it has often been observed that the law deals quite inconsistently with different kinds of offenses and differentially with individuals of different ethnic or socioeconomic backgrounds who have been charged with similar offenses.

136. Id. at 428 (citations omitted).
137. Id.
dealing affectionately with these children. Individuals with antisocial personalities experience few consistent and supportive affectionate relationships when they are young, so they do not have the opportunity to model appropriate interpersonal behavior. Thus, psychopaths learn to be self-interested and may fail to respond to others in emotionally appropriate ways because others serve as no source of reinforcement to them.

C. A Response to the Causal Explanations of Psychopathy

From psychological literature, it seems clear that psychopathy has a distinct set of characteristics, and its origin may have a biological or social cause. Some psychologists believe that because of the causal origin of sociopathy, whatever that cause may be, an individual diagnosed as having this condition should be excused from criminal responsibility. Psychopathy becomes an excusing condition because the individual has become "ill" for specific reasons. The illness may result from improper social development, e.g., parental abuse, poor parenting, or biological causes.

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139. Id. Modeling has been shown to be important in child development. See, e.g., A. Bandura, Social Learning Theory (1977); A. Bandura, Aggression: A Social Learning Analysis (1973).
140. Yet, the psychopath may be able to discern others' feelings well enough to charm and manipulate them. For example, a man with the antisocial personality disorder may live with a woman in order to take advantage of her money and home, all the while displaying appropriate charm and affection. However, there is some question whether this is real affection or just feigned affection designed to get what he wants. The problem may be that the sociopath may have some degree of empathy, while at the same time having social skills he may use to his advantage; or it may be that empathy has little to do with the accurate person perception required of successful manipulators. Marshall & Barbaree, supra note 83, at 429-30.
142. Many mental health professionals believe that diseases of the body and diseases of the mind or emotions are truly analogous. See Diamond, supra note 14, at 192-93. When the disease model is used, all "symptoms" which can properly receive a diagnosis under the DSM-III-R are regarded as mental diseases. Thus, the sociopath, no less than the schizophrenic, is to be regarded as having mental abnormalities. The medical model poses serious problems for the legal system. Psychiatric diagnoses may be given to sets of behavior that should not be exculpating, but the psychiatrist does not recognize the distinction between these diagnoses because he or she views all diagnostic categories as representing "diseases."
One commentator predicted:

[W]ithin ten years biochemical and psychological tests will be developed that will demonstrate beyond a reasonable doubt that a substantial number of our worst and most vicious criminal offenders are actually the sickest of all. And that if the concept of mental disease and exculpation from responsibility applies at all, it will apply most appropriately to them. And further, that it will apply equally to the vast horde of minor, habitual, aggressive offenders who form the great bulk of the recidivists. The law and the public, whether they like it or not, will be forced by the stark proof of scientific demonstration to accept the fact that large numbers of individuals who now receive the full, untempered blow of social indignation, ostracism, vengeance, and ritualized judicial murder are sick and helpless victims of psychological and physical disease of the mind and brain.\textsuperscript{143}

Yet, even if physical causes were to be found for the antisocial personality disorder, would this finding "force us, as a society, to conclude that antisocial personality meets the mental disease threshold of legal insanity?"\textsuperscript{144}

Regardless of whether a biological or other social-environmental cause\textsuperscript{145} may be involved, a causal analysis of sociopathy is improper with respect to legal responsibility. The confusion results from the fact that if physical or social \textit{causes} of behavior are discovered, the actor is automatically exculpated.\textsuperscript{146}

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\textsuperscript{143} Diamond, \texttextit{supra} note 14, at 198 (footnote omitted).

\textsuperscript{144} Bursten, \texttextit{What if Antisocial Personality is an Illness?}, 10 \texttextit{Bull. Am. Acad. Psychiatry \\& L.}, 97, 99 (1982).

\textsuperscript{145} See supra notes 85-140 and accompanying text.

\textsuperscript{146} Moore, \texttextit{Legal Conceptions of Mental Illness}, in \texttextit{MENTAL ILLNESS: LAW AND PUBLIC POLICY} 25, 34 (B. Brody \\& H. Engelhardt eds. 1980). Of course, whether the actor actually will be exculpated will depend upon whether he or she meets the
The biological and social theories discussed above imply that the resulting antisocial behavior was either caused respectively by organic brain problems or social factors such as bad parenting. These theories presuppose that all behavior can be explained according to some principle, either discoverable at the present time or discoverable in the future. Implicit in this principle is the notion that the resulting behavior was "determined" by either the biological or social phenomena.

Causal determinist theories have used psychological explanations as a basis for excuse without sufficiently explaining what makes a psychological problem any more excusing than other causal factors. One such factor might be poverty, in the case of a robbery committed to get money to pay bills. Causal determinist theories subscribe to the view that human behavior is causally necessitated by antecedent events according to law-like generalizations. For example, biological causal theories posit that behavior can be primarily explained by the workings of the brain and the endocrine and nervous systems, which operate on chemical and biological principles.

The difficulty with this deterministic or causal view is that if it were followed to its logical conclusion, no one would ever be responsible for his or her actions because all behavior is "caused." Yet, no one would argue that the "typical" defendant charged with robbery should be excused because he or she can point to poverty as the reason that he or she stole ten thousand dollars to pay off gambling debts, to buy a car, or to provide for a sick grandmother.

However, if this defendant was atypical and stated, "I robbed the bank because God told me to take the money and give it to the poor," one might be inclined to excuse this defendant. One would say that this defendant was "crazy," if he or she was having conversations with God, and that by virtue of the mental impairment, this defendant should be excused from criminal liability. However, what is it about this mental condition that should result in differential treatment in the legal system? Why should this defendant and other such individuals be excused from legal accountability?

Causal determinist theories clearly do not provide answers to such questions. If causal determinist theories were to be taken literally, both the poverty-ridden robber who wants to pay off gambling debts

other substantive criteria of the test. MODEL PENAL CODE § 4.01 (proposed Official Draft 1962).

147. Cf. Morse, Psychology, Determinism, & Legal Responsibility, in 33 NEBRASKA SYMPOSIUM ON MOTIVATION 35, 43 (1985) (social psychological explanations that explain deviant behavior).

148. Id. at 56-61.

149. Id. at 44-45. See also Kierulff, Sheep in the Midst of Wolves: Personal-Responsibility Therapy with Criminal Personalities, 19 PROF. PSYCHOLOGY RES. & PRAC. 436, 438 (1988)(the law treats even those criminal acts that are necessitated by psychological compulsion as resulting from the exercise of free will).
and the robber who took instruction directly from God would have to be excused from liability because their behavior was "caused" by something.

To say that psychopathy has causes does not specifically state why, or if, it should be a condition which, even if the other substantive criteria of the Model Penal Code test were met, should be excused from legal responsibility.150 As will be discussed in Part IV, another conception of responsibility must be established in order to evaluate why certain types of mental impairments should operate as excusing conditions. In Part V, sociopathy will be addressed as a possible excusing condition and will be shown to be an improper subject for the insanity defense.

IV. A LEGAL CONCEPTION OF “MENTAL DISEASE OR DEFECT”

Certain types of mental disorders provide intuitively clear cases for exculpation. Consider the following example:

A experiences delusions of persecution and grandiosity, and he receives hallucinatory commands from the voice of God. He is convinced that he is the second coming of Christ and that only he can prevent nuclear holocaust. He also believes that Satan is trying to kill him in order to prevent him from saving the world. In response to a hallucinatory divine command, he shoots a salesman who comes to his door, convinced that the salesman is an agent of Satan who is there to prevent him from saving the world.151

What is it about A’s hallucinations that makes him blameless in the resulting murder? Although one could say that the murder was caused by hallucinatory thoughts, that does not explain what it is about hallucinatory thoughts that somehow makes him incapable of being criminally responsible. To say that the murder was caused by hallucinatory thoughts does not distinguish A from B, a woman who simply kills the salesman because she did not like the salesman and did not want to be bothered with buying a vacuum cleaner at that time. In the case of both A and B, the resulting murder was caused by some thought pattern in the defendants’ minds. If the causal determinist theories152 discussed in Part III above were accepted, both A

150. According to MODEL PENAL CODE § 4.01(1), “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” Almost certainly, the expert testifying will be able to link the "mental illness" to the crime and, in addition, will be able to describe to the jury the psychopath’s inability to control his or her behavior. Thus, almost by virtue of the diagnosis, the rest of the Model Penal Code test can be supported.


152. One legal test that adopts a causal determinist perspective is the irresistible impulse test. See, e.g., Parsons v. State, 81 Ala. 577, 597, 2 So. 854, 866-67 (1887).
and B would have to be exonerated, because A and B would be treated as if they could not have acted otherwise. Yet, in practice, it is unlikely that B would be exonerated. Rather, B would be treated as a "self-conscious being" who acted for specific reasons.153

A "normal" human being is believed to be an autonomous being who possesses the "ability to understand, reason, and direct his or her actions through reasoned choice. These capacities allow him to participate effectively in a cooperative social system in light of the applicable norms, facts, and reasonable expectations."154 Normals possess the ability to understand what they are doing and the consequences of their actions. Normals think about their actions and reason that a particular act is appropriate under the circumstances. Normals have reasons for their actions which are logical. Further, normals are not coerced or pressured, but choose to commit any given act. Thus, the normal individual is held criminally liable for his or her actions. However, when a person is unable to understand, reason, and direct his or her actions through reasoned choice, that person may not be held criminally liable. A person's inability to understand, reason, and direct his or her actions through reasoned choice, may be thought of as a mental impairment.155

Having this type of mental impairment, an individual should not be held criminally responsible. Rather than speaking in terms of causality that do nothing to explain the "why's" of excuse, but rather are conclusory, this conception of mental impairment as a basis for excuse posits that there is some impairment in rational thought processes that renders the person unable to make autonomous choices.156

If this conception of mental impairment was to be used to define the legal phrase "mental disease or defect," psychological testimony used to present an insanity defense could address the defendant's irrational thoughts or behavior. The ALI does not give any specific guidance in understanding what the phrase "mental disease or defect"

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153. Morse, supra note 147, at 49.
154. Schopp, supra note 151, at 90.
155. Many believe that the capacity to understand and reason is a necessary condition for criminal liability because the criminal law is intended to deter proscribed behavior. If individuals are unable to make choices based on rational reasoning, they may be undeterrable. See A. Goldstein, THE INSANITY DEFENSE 11-15 (1967).
156. This is particularly true for the M'Naghten test of insanity which requires the accused to be suffering from such a "defect of reason, from the disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." Regina v. M'Naghten, 8 Eng. Rep. 718, 722 (1843). Nevertheless, concern for the impairment in rational thought processes is implicit in the Model Penal Code test that incorporates the accused's inability to appreciate the criminality of his or her conduct in the test. The inability to appreciate the wrongfulness of criminal conduct certainly relates to an accused's rationality.
should mean. However, the above conception of mental impairment could be applied to the phrase “mental disease or defect.” A concise method for applying the concept as a useful test has been developed by Michael Moore. Under Moore’s theory, a person can only be held criminally responsible if he or she is a rational agent. Only if the person acts to achieve some intelligible end in light of some rational beliefs will he or she be seen as responsible.

Moore states that the unintelligibility of the actions of mentally ill persons stems from the fact that the actions of the mentally ill cannot be explained by the following practical syllogism:

(1) Agent X wants result R to obtain; (2) X believes that in situation S action A will cause R to obtain, and that he is in situation S; (3) if X desires R, then ceteris paribus, X will do A; (4) ceteris paribus. Therefore, X does A. In other words, we need to know (1) what the agent wanted, (2) what he believed about the situation and his ability to achieve through action what he wanted. In addition, we need to know (3) that he is a rational creature (that is, other things being equal, one who will act so as to further his desires in light of his beliefs), and (4) that the agent does not have desires and beliefs that conflict with the desires and beliefs on which he is about to act.

Moore explains his syllogism and how it applies to mental illness in the following terms. For some cases, it may be that there is no set of beliefs or desires by which an action can be seen as rational. For example, epileptics during a seizure seem to be engaged in nonrational activities in this sense. They will jerk in motions that are not directed by any conscious thought processes. These motions constitute involuntary actions caused by spasms and reflexes.

In addition, to say that an individual's actions are irrational may be to look beyond the individual's actual goal. Although actions themselves may appear to be rational, when one looks at the specific reasons for the actions, the actions become irrational. Moore gives another example: If a woman believes she is made of glass, she may avoid physical contact with other people because she believes she will shatter if touched. This avoidance may seem rational in light of her thoughts and perceptions, but it does not meet the criteria of rational action.

157. A court could give the jury a definition for mental disease or defect. For example, in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), the court developed a specific definition which would aid a jury in determining whether the defendant had a mental disease or defect. According to the court, a “mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.” Id. at 983. However, this definition still gives considerable deference to medical testimony. Thus, another definition of mental disease or defect is desirable.

158. Moore, supra note 146, at 58-61.

159. Id. at 61.

160. Id. at 58-59.

161. Id. at 59.

162. Id.
goal to prevent being shattered, but the belief that she will shatter is itself irrational. Actions predicated on irrational beliefs are themselves irrational.  

Further, the individual may be deemed to act irrationally because it is not intelligible to others that one could want what the agent apparently wants. To be a proper motive for action, a consequence must be intelligible as an object of desire in a given culture. Moore gives an example of a man carrying books up the stairs because he wants to put the books in his library “on the roof.” Such a goal is unintelligible, i.e., no one has a library on the roof.  

Moore contends that the fourth premise of the syllogism is rarely satisfied in cases of mental illness. He states that most of the desires of a mentally ill person are unconscious, and, as such, cannot be resolved into a “coherent, consistent set of wants.” Although the “normal” individual may have inconsistent desires, i.e., to lose weight and yet to eat a piece of chocolate cake, the “normal” individual recognizes those desires and tries to consciously resolve these conflicts.  

When an individual’s actions become irrational, i.e., when some significant portion of his or her actions pursue ends that are unintelligible in light of societal norms and expectations, when the actions are predicated on beliefs that are irrational, or when the actions are based on gross inconsistencies of desires or beliefs or perhaps are not based on desire or belief sets at all, the individual’s mental incapacities are labeled a “mental illness.” Moore summarized: “Rationality is the fundamental premise by virtue of which we understand ourselves as human beings; that is, as creatures capable of adjusting their actions as reasonably efficient means to intelligible ends. Being mentally ill means being incapacitated from acting rationally in this fundamental sense.”  

If Moore’s definition of the type of mental impairment that should afford exculpation were combined with the language of the Model Penal Code, the jury would have to initially determine whether the defendant suffers from a “mental disease or defect.” This would require a finding of irrationality in the sense described above.  

In the hypothetical case of A who killed the door-to-door salesman because he believed the salesman was an agent of Satan, a jury could easily find that A suffered from a “mental disease or defect” by applying Moore’s syllogism. A fails at least two of the parts of the syllogism. First, A’s goal of saving the world because he is the second
Christ may be seen as irrational. Irrationality must be tested in light of "applicable norms, facts, and reasonable expectations." Many Christians have a certain expectation about what the second coming will be like; that is, the second coming will not be for the purpose of saving the world from nuclear holocaust but will instead be to claim the remaining souls for the kingdom of heaven. Thus, A's goal of believing that as Christ he will save the world from nuclear holocaust is inconsistent with applicable norms and expectations. Therefore, this belief may be seen as irrational.

Second, if it were true that this salesman were an agent of Satan trying to prevent A from saving the world, it would be perfectly logical for A to kill him so that he could achieve his goal of preventing nuclear holocaust. However, the simple fact is that this salesman is not an agent of Satan but is probably just an agent of the Acme Vacuum Cleaner Company. A's actions are only rational if they are viewed in the light of the facts and circumstances as A sees them.

A's case is an easy one. It is intuitively appealing because most people, without necessarily having to consult a psychiatrist, would agree that there is something "not quite right" about A. However, what happens in a not-so-clear case of mental impairment is a question that still remains. Is psychopathy a condition, like A's problems, that can be clearly seen as a "mental disease or defect?" Whether a jury should find that a psychopath suffers from a "mental disease or defect" is discussed in Part V.

V. SHOULD PSYCHOPATHY BE SEEN AS A "MENTAL DISEASE OR DEFECT?"

Psychopaths have enjoyed a colorful status among medical professionals and, in turn, among legalists. In Washington, D.C., when the Durham test of insanity was widely used, psychiatrists from St. Elizabeth's Hospital were often called to testify about defendants' mental conditions with regard to the applicability of the insanity defense. The staff at St. Elizabeth's made a policy decision that psychopathic personality disturbances would not be regarded as mental illnesses within the meaning of the Durham rule. Yet, three years later, St. Elizabeth's policy was changed to allow psychiatric testimony that the psychopathic personality disturbance should be considered a mental disease for legal purposes.

169. Schopp, supra note 151, at 90.
170. See id. at 81-82.
171. Moore, supra note 146, at 37-39. See also Bursten, supra note 144, at 98 (discussing lack of scientific guidelines for determining what is or is not a mental illness).
172. See supra note 5 for a discussion of the Durham test.
173. Moore, supra note 146, at 37-38.
174. Id. Because of the policy change, a court even granted an individual a new trial.
The Court of Appeals for the District of Columbia appeared to willingly give the power to determine which types of mental illnesses would suffice for exculpation under the insanity defense to the psychiatrists at St. Elizabeth’s Hospital. The court stated:

Mental “disease” means mental illness. Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. . . .

Many psychiatrists had come to understand there was a “legal insanity” different from any clinical mental illness. That of course was not true in a juridical sense. The law has no separate concept of a legally acceptable ailment which per se excuses the sufferer from criminal liability. The problems of the law in these cases are whether a person has committed a specific criminal act . . . was suffering from a mental disease, that is, from a medically recognized illness of the mind . . . .

However, the court later noted that it had granted power to the hospital to “alter drastically the scope of a rule of law.” The reason the court made this “illegitimate transfer” of power to psychiatrists to decide the meaning of a legal rule of criminal responsibility was because the court incorrectly interpreted the term “mental illness” as a medical concept. The court further noted that what psychiatrists may consider a “mental disease or defect” for treatment purposes may or may not be the same as “mental disease or defect” for the jury’s purpose of determining criminal responsibility.

Although a psychiatric conception of mental illness may not be sufficient to negate criminal liability, what type of “mental disease or defect” should exonerate an individual? As discussed above, the reason “normal” people are held responsible for their actions is because they are seen as autonomous, rational agents. For certain people to be exculpated, they would have to be individuals who suffer from an inability “to understand, reason, and direct [their] actions through reasoned choice.” If Moore’s test for irrationality, which is based upon a conception of human beings as autonomous, were applied to psychopathy, would psychopathy properly be considered a “mental disease or defect”?

From the DSM-III-R diagnostic description of a psychopath, it would appear that the psychopath is not suffering from irrationality in because he was deprived of “a verdict based upon the most mature expert opinion available on an issue vital to his defense.” Blocker v. United States, 274 F.2d 572, 573 (D.C. Cir. 1959).

178. Recall that the term “mental disease or defect” is not specifically defined by the AL. See supra note 157 and accompanying text.
179. Schopp, supra note 151, at 90.
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any of the senses Moore would see as exculpatory conditions. According to the diagnostic criteria of the DSM-IIIR, the psychopath is identified as being at least eighteen years old; having had the onset of his problem before age fifteen with no intervening problem-free period of five years or more; and having had no evidence of mental retardation, schizophrenia, or mania. These criteria also describe the psychopath as having at least four of the following: 1) inability to sustain consistent employment; 2) inability to function as an effective parent; 3) failure to accept social norms evidenced by persistent criminal behavior; 4) inability to maintain enduring sexual/affectionate relations; 5) irritability and aggressiveness; 6) failure to honor financial obligations; 7) impulsivity; 8) disregard for the truth, including conning others for profit; 9) recklessness; and 10) lack of remorse.180 Judging from the diagnostic criteria for determining whether an individual is a sociopath, there is no requirement of irrational thinking patterns and no requirement of irrational actions. While it may be socially unacceptable to be a poor employee in light of the American work ethic, violate the law, engage in bigamy or adultery, be aggressive, reneg on debts, be impulsive rather than a careful planner, lie, or be reckless, such traits in and of themselves are not "irrational."

An example of a clinically diagnosed psychopath would be useful here to contrast the clinical view with what the legal view should be:

Donald S., 30 years old, has just completed a three-year prison term for fraud, bigamy, false pretenses, and escaping lawful custody. The circumstances leading up to these offenses are interesting and consistent with his past behavior. With less than a month left to serve on an earlier 18-month term for fraud, he faked illness and escaped from the prison hospital. During the ten months of freedom that followed he engaged in a variety of illegal enterprises; the activity that resulted in his recapture was typical of his method of operation. By passing himself off as the "field executive" of an international philanthropic foundation, he was able to enlist the aid of several religious organizations in a fund-raising campaign. The campaign moved slowly at first, and in an attempt to speed things up, he arranged an interview with the local TV station. His performance during the interview was so impressive that funds started to pour in. However, unfortunately for Donald, the interview was also carried on a national news network. He was recognized

180. DSM-IIIR, supra note 75, at 342-46. It should be noted that a great deal of controversy exists surrounding the diagnostic criteria for psychopathy. See Hare, Diagnosis of Antisocial Personality Disorder in Two Prison Populations, 140 Am. J. Psychiatry 887 (1983); Hare, A Research Scale for the Assessment of Psychopathy in Criminal Populations, 1 PERSONALITY & INDIVIDUAL DIFFERENCES 111 (1980). In fact, the bulk of the psychological literature indicates that the DSM-IIIR approach is wrong. Other diagnostic techniques such as the use of the Minnesota Multiphasic Personality Inventory (MMPI) or Hare's Psychopathy Checklist can be used that may, in fact, be more descriptive of the psychopath's behavior. See Hare, Comparison of Procedures for the Assessment of Psychopathy, 53 J. CONSULTING & CLINICAL PSYCHOLOGY 7 (1985) [hereinafter Assessment of Psychopathy]. Nevertheless, the DSM-IIIR is widely accepted and is used by the court system.
and quickly arrested. During the ensuing trial it became evident that he experienced no sense of wrongdoing for his activities. He maintained, for example, that his passionate plea for funds “primed the pump” — that is, induced people to give to other charities as well as to the one he professed to represent. At the same time, he stated that most donations to charity are made by those who feel guilty about something and who therefore deserve to be bilked. This ability to rationalize his behavior and his lack of self-criticism were also evident in his attempt to solicit aid from the very people he had misled. Perhaps it is a tribute to his persuasiveness that a number of individuals actually did come to his support. During his three-year prison term, Donald spent much time searching for legal loopholes and writing to outside authorities. He requested them to intercede on behalf and in the name of justice they professed to represent.

By all accounts Donald was considered a willful and difficult child. When his desire for candy or toys was frustrated he would begin with a show of affection and if this failed he would throw a temper tantrum; the latter was seldom necessary because his angelic appearance and artful ways usually got him what he wanted. Similar tactics were used to avoid punishment for his numerous misdeeds. At first he would attempt to cover up with an elaborate facade of lies, often shifting the blame to his brothers. If this did not work, he would give a convincing display of remorse and contrition. When punishment was unavoidable he would become sullenly defiant, regarding it as an unjustifiable tax on his pleasures.

Although he was obviously very intelligent, his school years were academically undistinguished. He was restless, easily bored, and frequently truant. His behavior in the presence of the teacher or some other authority was usually quite good, but when he was on his own he generally got himself or others into trouble. Although he was often suspected of being the culprit, he was adept at talking his way out of difficulty.

His sexual experiences were frequent, casual, and callous. When he was 22 he married a 41-year-old woman whom he had met in a bar. Several other marriages followed, all bigamous. In each case the pattern was the same: he would marry someone on impulse, let her support him for several months, and then leave. One marriage was particularly interesting. After being charged with fraud Donald was sent to a psychiatric institution for a period of observation. While there he came to the attention of a female member of the professional staff. His charm, physical attractiveness, and convincing promises to reform led her to intervene on his behalf. He was given a suspended sentence and they were married a week later. At first things went reasonably well, but when she refused to pay some of his gambling debts he forged her name to a check and left. He was soon caught and given an 18-month prison term. As mentioned earlier, he escaped with less than a month left to serve.

It is interesting to note that Donald sees nothing particularly wrong with his behavior, nor does he express remorse or guilt for using others and causing them grief. Although his behavior is self-defeating in the long run, he considers it to be practical and possessed of good sense. Periodic punishments do nothing to decrease his egotism and confidence in his own abilities, nor do they offset the often considerable short-term gains of which he is capable.181

Donald appears to qualify for a diagnosis of antisocial personality disorder under the DSM-IIIR. He is over 18 and had problems as a child, including truancy and lying. Furthermore, as an adult he repeatedly engaged in antisocial acts, such as fraud, bigamy, and escaping from prison. He has not sustained monogamous relationships, has repeatedly lied to serve his own purposes, and feels no remorse or guilt for his actions. Yet, just because he may receive a diagnosis for purposes of psychiatric treatment does not mean that such behavior would be viewed as irrational, and thus, seen as a "mental disease or defect" that should lead to being excused from criminal liability.

Taking each of Donald's behavioral traits independently, none appears to be particularly irrational in light of Moore's syllogism for rational action. For example, his childhood behavior that does not directly bear on his present sanity can be evaluated as if he were being charged with "extortion" for candy. When he was a child and wanted candy, he would begin with a show of affection, and if this failed, he would throw a temper tantrum. The goal of having a piece of candy is certainly an understandable goal for a young child. With that motive in mind, Donald sought to solicit the candy from whoever had the candy. If that person was his mother or father, it would appear natural that Donald would be affectionate toward them. Furthermore, being affectionate is often a way to get a reward, whether it be affection in return, or in this case, a piece of candy. Where he was unsuccessful in getting candy, he would become frustrated which would appear to be a natural reaction to not getting what he wanted. His response would be anger and would be exhibited by a temper tantrum. Exhibitions of anger are not in and of themselves irrational. The anger was in response to an anger-provoking situation, and Donald could reasonably believe that such a display of emotion would be effective as it probably had been in the past, i.e., his parents had been conditioned to give him candy when he got upset.

If Donald were being charged with bigamy, adultery, or some sexual offense, one would be hard pressed to find his behavior irrational in the sense that it should be excused. Donald's sexual behavior as a young adult does not seem entirely different from many other people. One cannot evaluate Donald's behavior in a vacuum. One must look to the relevant norms and expectations of the society to determine...
whether any given behavior is irrational.185 In today’s society, extra-
marital affairs are common place. Furthermore, although the major-
ity of individuals do not engage in bigamy because it is illegal, it was
not always illegal, and the fact that some groups such as the Mormons
endorse bigamy is evidence that the behavior is arguably rational.

In addition, Donald’s escape from prison seems quite rational.
Many people would seek to free themselves from incarceration. In
this country, freedom is a fundamental liberty and recognized as a de-
sirable state of being. Because of the strong drive to be free, this goal
of freedom cannot be deemed irrational despite the fact that such ac-
tivity is illegal.

Donald’s action of conning people on television for a fake charity is
simply an example of a purely antisocial act resulting from selfish mo-
tives. Donald wanted money, and again evaluating his actions in light
of societal norms, making money is certainly a laudable goal in a capi-
talist society. This society certainly encourages people to use their
abilities to make money. However, Donald chose to make money by
illegal means. Nevertheless, his reasoning was certainly logical. If he
engaged in this conning scheme, he would be able to have enough
money. This act is antisocial but not inherently irrational. Since he
was “wanted” for escaping from prison, the most irrational thing Don-
ald did was appear on television. However, his resulting arrest was
really accidental since he was unaware that the broadcast would be
television on the national news network and that his captors would see
him.

If a defense attorney were trying to demonstrate that the defend-
ant was insane, the attorney would probably ask a psychiatrist to give
a similar presentation of the above description, including Donald’s
past antisocial behavior. Yet, nothing in the above description seems
to particularly reflect on his inability to act rationally, but rather fo-
cuses on very rational acts that were merely antisocial or criminal.

The only fact that might be indicative of irrationality is the fact
that he lacks remorse and feels no guilt for his
actions.186 Yet, this is a
fact which is not required for a diagnosis of antisocial personality dis-
order under the DSM-III-R and may not be present in all defendants
diagnosed with the disorder.

Lack of remorse may be evidence of a rationality impairment.
Normally, when people do something wrong, their conscience “tells”
them that they should feel bad for having done the wrong thing.

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185. See Moore, supra 146, at 53; Schopp, supra note 151, at 90.
186. The fact that he feels no remorse does not automatically make his actions irra-
tional. He has been successful in short term gains, whether they be financial or
sexual. He may regard these gains as having been at others’ expense, but “what’s
done is done,” and there may be no need to feel guilt. After all what good does
feeling guilty do anyway?
From the time that people are old enough to learn, they are taught that if one wrongs another, one should do penance for the act. Furthermore, what would prompt a person to believe he or she needed to do penance was to be able to recognize that the act was wrong. If Donald does not recognize that any given act was wrong, and he feels no remorse for what he did, he may be suffering from some irrationality. However, using a test of irrationality to find the presence of a “mental disease or defect” would require a jury determination of whether lack of remorse is evidence of irrationality.

The ALI would support a jury instruction that would suggest that evidence regarding the defendant’s past antisocial behavior should not be considered sufficient to excuse him. Yet, the ALI position provides no guidance to a jury as to what other evidence should be examined to find the presence of a “mental disease or defect” that would constitute an excusing condition if the remainder of the Model Penal Code test was satisfied. If Moore’s conception of mental disease or defect was embodied in a jury instruction designed for the determination of whether the defendant has a “mental disease or defect,” the jury would be focusing on the defendant’s rationality. Unless the jury found that the defendant’s actions or thoughts were irrational, they would not consider exonerating him. In the above case of Donald S., except for the fact that the defendant feels no guilt or remorse, the defendant’s actions themselves and the basis for his decisions seem rational.

Nevertheless, the Model Penal Code would not be seen as removing all evidence of antisocial behavior from the jury. After all, among the facts presented may be some evidence of irrationality that might constitute an excusing “mental disease or defect.” However, what the ALI wanted to convey to the jury was that the mere fact of repeated criminal behavior was insufficient to exonerate a defendant.

The current DSM-III-R diagnosis of antisocial personality disorder is primarily one of past antisocial behavior. The diagnosis does not explicitly call for rationality deficits and a jury would have to infer from the behavior itself that some irrationality existed. As in the case of Donald S., evidence of irrationality may not exist.

The ALI would require the jury to determine what the definition of mental disease or defect is, rather than leaving that determination to an expert witness. A jury could certainly get the impression after the long diagnostic description that a defendant possessed a “mental disease or defect.” The defendant may very well have a mental disease for purposes of treatment, but the jury must make a legal determination of what that mental disease or defect is. If Moore’s paradigm

187. See supra note 157 and accompanying text.
188. See supra notes 7-9 and accompanying text.
that rationality constitutes the defining characteristic for the finding
of a mental impairment was accepted, the jury would essentially de-
cide whether the defendant was an irrational actor who should be ex-
cused from criminal responsibility.189 With psychopaths, it is unlikely
that the antisocial actions themselves would be evidence of irrational-
ity.190 As the Model Penal Code caveat paragraph suggested, such evi-
dence should not be relied on as the sole evidence of mental
impairment. Rather, there must be some other evidence for finding
that the defendant possesses a mental disease or defect.

VI. CONCLUSION

For many years, the legal system had divested itself of the power to
define the exculpating conditions for insanity and had given that
to science.191 Psychiatrists and psychologists became the au-
thority on who was legally insane.192

Recognizing that a diagnosis for therapeutic reasons could not be
equated with a definition of legal insanity, the ALI specifically at-
tempted to exclude certain individuals who could possibility be given
diagnoses by the medical community, but for legal and moral reasons
should not be exonerated. The Model Penal Code's definition of
mental disease or defect was not designed to be a psychological con-
cept of mental illness, but rather a legal one. Not every medically rec-
ognized mental disease was intended to be included in the definition of
“mental disease or defect,” in particular, that of the psychopath.193

The DSM-III-R diagnosis of antisocial personality disorder is based
upon a life history of violations of social norms and rules, e.g., truancy,
frequent casual sexual relations, impulsivity, and behavior that vi-
lates the rights of others.194 Unlike other diagnostic categories, the
antisocial personality disorder does not include having delusions or
hallucinations. Psychopaths are not psychotic and do not fail to make
interpersonal contacts.195 Their actions do not seem inherently irra-

189. However, if another conception of responsibility is used, a different result may
follow. See Fairall & Johnston, supra note 2, at 94 (“On legal and conceptual
grounds, the strongest case for allowing [antisocial personality disorder] as a basis
for pleading insanity, occurs when the test of responsibility is couched in terms of
volitional and emotional incapacities”).

190. See M. Smith, THE PSYCHOLOGY OF THE CRIMINAL 146-47 (1983) (stating that psy-
chopaths “are not ‘insane’ “). Cf. R. Lasky, EVALUATION OF CRIMINAL RESPONSIBIL-
ITY IN MULTIPLE PERSONALITY AND THE RELATED DISSOCIATIVE DISORDERS: A
PSYCHOANALYTIC CONSIDERATION 40-43 (1982) (arguing that although a psycho-
logical disorder may be present, observers may be unable to see the “disorder,”
and thus, be unable to correctly evaluate the defendant’s criminal responsibility).

191. See supra notes 175-78 and accompanying text.

192. See supra note 175 and accompanying text.

193. See supra notes 7-29 and accompanying text.

194. See supra note 79 and accompanying text.

tional or based on faulty assumptions. Unlike the schizophrenic who believes that God is commanding him to act, the psychopath may be motivated by selfish aims. These goals may not be inherently irrational.

Legal responsibility should be determined based on legal conceptions rather than medical conceptions of excuse. The ALI attempted to exclude from eligibility for the insanity defense those individuals who are simply habitually engaging in antisocial behavior but may receive a diagnosis for this behavior. The ALI's attempt was laudable, and more courts should recognize the distinction between medical and legal conceptions of a "mental disease or defect" and instruct the jury accordingly.

The jury should excuse a defendant based on legal notions of an excusing condition. The jury should not be allowed to be misled by experts trying to show that the defendant has a clinically recognized illness and make the improper leap from clinical to legal definitions of the terms "mental disease or defect." The ALI wanted to preclude such a result. That result can be prevented by instructing the jury properly and not allowing them to give deference to clinicians, who could theoretically find a mental disease or defect existing for treatment purposes where there is none for legal purposes.

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196. See supra note 151 and accompanying text.
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