

What If Antisocial Personality Is An Illness?

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The Model Penal Code¹ drafted by the American Law Institute in 1962 contains the following paragraph: "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." This paragraph was meant to exclude the designation of antisocial personality as an illness, which could result in a plea of insanity in criminal cases. The reasoning behind this exclusion was set out in an earlier draft of the Code² and was adopted from the British view of psychopathy,³ which was "(psychopathy) is a statistical abnormality; that is to say, the psychopath differs from the normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality." Essentially, since antisocial personality was considered to be coextensive with social irresponsibility, it was felt that there would be a basic circularity in attempting to explain this irresponsible behavior by a "diagnosis" that was itself based entirely on irresponsible behavior.

This exclusionary paragraph was seriously challenged in the United States. In 1962, Overholser⁴ argued that

a moderate proportion of criminals may fall in the (sociopathic) group and some very decidedly do so. The notion that there is a "mental abnormality manifested only by repeated criminal or otherwise antisocial conduct" is, however, unpsychiatric. There is no such entity, even though the proposed Model Penal Code of the American Law Institute purports to exclude persons with a diagnosis of sociopathic personality. There are many criminals who are not sociopaths, but the sociopath who comes into conflict with the law has numerous symptoms in addition to his antisocial behavior, and is decidedly a mentally sick man.

Diamond⁵ said that such exclusionary clauses did 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 benefit of the law of criminal responsibility. They define by legislative fiat what is and what is not a psychiatric condition."

The Court in *Currens*,⁶ while agreeing "fully" with the ALI exclusionary paragraph, did not adopt it. It maintained that the paragraph did not properly apply to sociopaths, because these people *were* mentally ill and therefore could reach the threshold of qualification for the insanity defense. Five years later, the *Freeman*⁷ decision, while not ruling out sociopathy as a mental disease, included not one, but two exclusionary clauses. It adopted

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the ALI exclusionary paragraph, and it expressly excluded narcotics addiction from the threshold class of mental illnesses. The Courts in *Smith*⁸ and *Wade*⁹ explicitly chose NOT to endorse the exclusionary paragraph because they felt it referred to "persons who may be labeled by experts as psychopathic" and they felt that such persons were indeed mentally ill and merited consideration for the insanity defense. Thus, paragraph 2 of the ALI has had a checkered career—being accepted in some courts and rejected in others.

It is not difficult to understand how such a controversy could arise. There are no scientific guidelines for determining what is or is not a mental illness. On the contrary, what we decide to call "mental illness" is a matter of social convention.^{10,11} Psychopathic personality, called a "waste basket category" by Partridge in 1930,¹² is an Axis II diagnosis (that is, a personality disorder) in DSM III.¹³ It is not clear, however, whether Axis II disorders are any more or less diseases than Axis I disorders. Furthermore, as Frances¹⁴ has pointed out, there is a certain arbitrariness about the division between Axis I and Axis II conditions.

This uncertainty surfaced in the courts in the classic cases of 1957.^{15,16} Dr. Duval of St. Elizabeths Hospital in Washington, DC, testified that at a staff meeting in 1954, it was decided that people with sociopathic personalities would be considered to be without mental disorder. However, Duval continued, on November 18, 1957, "the superintendent and I have both agreed that hereafter we will eliminate from our records the words 'without mental disorder'." People with sociopathic personalities would henceforth be described as being somewhere "between what has been called normal and what has been called insane or psychotic." It is interesting to note that the superintendent in question, who in 1954 agreed that sociopathy was not a mental disease and in 1957 said that it was a disease somewhere between normal and psychotic was that same Dr. Overholser who in 1962 stopped temporizing and said that a sociopath "is decidedly a mentally sick man." The effects of this 1957 reversal in hospital policy were not long in coming. Blocker, a sociopath who had been convicted of murder, appealed his conviction on the grounds of "new medical evidence," that is, the fact that St. Elizabeths now had decided that sociopathy was a mental disease. The Appeals Court (1959)¹⁷ agreed that this new evidence entitled him to a new trial.

This problem, of course, is not confined only to the classification of antisocial personality. Burger's dissent in *Campbell*¹⁸ complained that the category of mental disease had been expanded to include emotionally unstable personality.

As in the prior instance when "psychopathic personality" was added to the list of "insanities" we are left totally uninformed as to any scientific basis for the change. It is not suggested that any medical discovery or recent scientific revelation accepted generally by psychiatrists warrants this change in "administrative" policy which has such far reaching impact on the administration of criminal law.

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This same question could be raised regarding other personality disorders as well as many other diagnostic categories. I have previously^{19,20} discussed this problem with respect to people with narcissistic personality disorders. Attempts to set out criteria by which to define mental illness, such as those elaborated in *McDonald*²¹ are of little help; the criteria are inevitably vague and ambiguous.

The popular conception of illness, of course, rests on physical abnormality. Although attempts to find some physiological underpinnings for antisocial personalities have not as yet been particularly fruitful, that does not mean that they will not be more so in the future. Some family studies^{22,23} suggest that there may be significant genetic contributions to the production of this type of personality disorder. Indeed, it is not at all impossible that there may be significant genetic contributions to every personality disorder.²⁴ What then? Will we be more willing to call antisocial personality a disease?

Twenty years ago, "at the risk of future mortification," Diamond⁵ predicted

within 10 years biochemical and physiological 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 if the concept of mental disease and exculpation from responsibility applies at all, it will apply more appropriately to them. And further, it will apply equally to the vast hoard 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 this dark 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.

While Diamond's timetable was off, his predictions of finding a physiological substrate may yet come true. It is important to note that Diamond did *not* imply that sociopathy would be explainable entirely on physiological grounds; he noted that social and psychodynamic factors also would be of great significance.²⁵

But let us look at the other implications of Diamond's prediction. Would the finding of physiological substrates for antisocial personality disorders cause society to temper its "social indignation, ostracism, vengeance, and ritualized judicial murder"? Would it force us, as a society, to conclude that antisocial personality meets the mental disease threshold of legal insanity? I think not. I believe that the confusion and debate would still continue. Societal classifications are based on a very different philosophical system than those of science. The assumptions of free will and choice that underlie the legal system and that prompt the sense of outrage described by Diamond are very different from the deterministic assumptions of science and medicine. Burger's dissent in *Blocker*²⁶ discusses this difference exten-

sively, and more recently I²⁰ have considered its impact on psychiatric testimony.

What we are talking about when we use the term "mental illness" is the conviction that the person could not help him or herself.²⁷ Are we going to react to the offense with outrage and blame or with compassion? This is a societal decision, not a medical one. Even if we demonstrate a physiological substrate for antisocial and other personalities, I believe that society generally would tend to blame those people who are "not any sicker than that." Personality disorders abound—in fact I have never seen anyone who is truly normal "save thee and me, and sometimes I wonder about thee." People with only this degree of "mental illness" are expected to behave themselves. And yet, any individual case that our study of the factors involved, physiological and psychological, may stir compassion and raise the cry of "mental illness." This debate will go on and on.

But what if people with antisocial personalities are deemed mentally ill? What consequences will flow from this designation? Let us return once again to society's sense of outrage, for in contrast to Diamond's predictions, made in the 1950s when compassion and understanding were the order of the day, we live in 1981 when outrage and moral indignation seem to be the name of the game. There is increasing pressure to "get the deviants off the streets." Tennessee²⁸ has recently enacted a law whereby the court will supervise the coerced outpatient treatment of formerly dangerous people who are mentally ill. As far back as 25 years ago, the Court in *Rosenfield*¹⁶ took the position that someone found not guilty by reason of insanity could be under enforced medical supervision until he or she improved. As recently as 1981, the Court in *Harris*²⁹ was entangled in the semantics of the classification of "a personality disorder." Its ultimate conclusion was that whatever the disorder was, the defendant, having been acquitted on grounds of insanity could not have improved from such a chronic condition during the brief time he was at St. Elizabeths. Therefore, despite the hospital's report of recovery, he must be detained longer. Under the guilty-but-mentally-ill statutes, such as those enacted by Michigan,³⁰ enforced outpatient treatment is also a consequence of successful plea.

In the case of antisocial personalities, what is this treatment we are talking about, and what improvements are we looking for? If we find a genetic base for this "mental illness" what new, and perhaps shocking, treatments will be devised and ordered? Will sterilization be advised? After all, these are not harmless mentally defective people, merely dependent on society; they are antisocial. Will the enormous overcrowding of our prisons lead to people having the "mental illness" of antisocial personality being transferred in increasing numbers to our mental hospitals? And beyond the realm of criminal law, will these bothersome "sick" people be subject to commitment or at least to enforced outpatient treatment? As the pendulum of popular opinion and the law begins to swing away from emphasizing the liberty interest of mentally ill people, the consequences of including antiso-

cial personalities among the legally defined mental illnesses can be very serious, and in my opinion unfortunate.

How do we prevent this? I suggest one approach, that taken by the drafters of the Model Penal Code. Attempts to define mental illness affirmatively have not been successful. However, it might be possible to devise exclusionary paragraphs, such as those in *Freeman*,⁷ which would reflect society's opinion that we do not mean to excuse *these* kinds of people—these are the kind of people who *should* act responsibly and therefore we will treat them as if they have the capability of acting responsibly. The exclusion need not be absolute but the mental illness element should be something other than that which is a component of the excluded diagnostic category.

What I am suggesting, then, is that antisocial personalities (and probably other personality disorders) should be specifically excluded from the label of "mental illness" in legal considerations. Bear in mind that when society says that we will not *excuse* this kind of person without more, it may also be saying we will not *commit* this kind of person without more or we will not *coerce* into treatment this kind of person without more. In an era when we may see an increasing use of indeterminate "mental illness" sentences based on outrage, the label of "mental illness" may be of enormous consequence indeed.

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