Commentary: Personality Disorders and Criminal Law

Ralph Slovenko, JD, PhD

The history of the personality-disorder diagnosis in law and psychiatry—in particular, the antisocial personality disorder—is recounted along with the arguments of renowned forensic psychiatrists as well as public opinion. Jurisdictions around the world are divided on the impact of the diagnosis on criminal responsibility or on sentencing.

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In "Personality Disorders and Criminal Law: An International Perspective,"[1] Dr. Landy F. Sparr examines the criminal defense of diminished responsibility based on the personality disorder of a detention camp guard charged with acts of murder and torture. In the trial at the International War Crimes Tribunal, the detention camp guard was found guilty of war crimes and sentenced to 15 years' imprisonment. Sparr notes that the court cited the guard's mental condition as a mitigating factor. The court used expert witness testimony, even though that evidence did not reach the level of the abnormality-of-mind standard relative to a specific psychiatric diagnosis.

Sparr points out that mental incapacity defenses based on personality disorders are often used in The Netherlands, England, Germany, and Belgium, but seldom in Canada and rarely in the United States and Sweden. He points out, however, that contemporary British psychiatrists apparently do not regard personality disorders as a psychiatric illness. Although his article is essentially expository, he seems to advocate the use of the defense in the case of personality disorders.

In the United States and some other countries, the insanity plea or diminished responsibility is the route that must be taken when evidence of mental illness is offered to negate responsibility. Thus, the U.S. Congress in the Insanity Defense Reform Act of 1984 stated that mental disease or defect constitutes a defense only under the insanity defense. Thus, unless a personality disorder falls within the meaning of mental disease or defect in the test of criminal responsibility, psychiatric testimony is precluded.[2]

To no avail, the late Bernard Diamond, a pioneer in American forensic psychiatry, argued that special restrictive clauses aimed at excluding certain specified categories of individuals from exculpation simply do not make any psychiatric sense. He wrote, "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 defined by legislative fiat what is and what is not a psychiatric condition" (Ref. 3, p 194).

In another place, Diamond argued that the definition of mental illness ought not to differ in the legal context from that which has been accepted in the clinical context. He wrote:

> I believe it is wrong to concede any threshold definition of mental illness other than that determined by scientific and clinical knowledge. . . . The diagnosis of mental illness is strictly a clinical matter to be determined in all instances by clinical criteria and definitions. But the point at which society determines a mentally ill person to be sufficiently disabled to warrant invoking a *parens patriae* intervention is a social and legal decision whose threshold can be much higher than that required to establish a diagnosis of mental illness. Similarly, it is not up to the law to establish the threshold for the existence of mental illness in a criminal defendant. But it is up to the law to determine the particular forms and degree of psychopathology it will recognize as exculpatory [Ref. 4, p 126].

Writing about people with a diagnosis of severe personality disorder, Diamond said, "Their appearance of normalcy, their apparent ability to exercise free will, choice and decision (and somehow invariably choose the wrong instead of the right) is purely

Ralph Slovenko is Professor of Law and Psychiatry at Wayne State University Law School, Detroit, MI. Address correspondence to: Ralph Slovenko, JD, PhD, Wayne State University Law School, 471 W. Palmer, Detroit, MI 48202.

a façade, an artifact that conceals the extent to which they are victims of their own brain pathology" (Ref. 4, p 198). At the same time, 14 years ago, he ventured the following prediction:

> [W]ithin ten 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 then if the concept of mental disease and exculpation from responsibility applies at all, it will apply most appropriately to them" [Ref. 3, p 198].

In another opinion, George B. Palermo, on the basis of his extensive forensic psychiatric experience and a review of national and international literature, strongly suggested that the United States judicial system reassess and amend its approach to individual offenders who have a severe personality disorder. For years, Palermo was director of the Center for Forensic Psychiatry and Risk Assessment in Milwaukee and is now at the University of Nevada Medical School. He is editor of the *International Journal of Offender Therapy and Comparative Criminology*. In his unpublished manuscript, "Severe Personality-Disordered Defendants and the Insanity Plea in the Unites States: a Proposal for Change," he says:

> Individuals who have a severe personality disorder should be allowed to enter a plea of total or partial insanity based on evidence of a decompensation into irrational behavior at the time of the alleged crime, and should be allowed to present all exculpatory evidence available to them to prove their claim. The best approach for non-responsibility pleas would be to adopt a more inclusive formulation with less specific terminology, such as disease of the mind, abnormality of the mind, or impairment of the mind.

He also points out that neuroimaging of individuals with a diagnosis of antisocial personality has revealed brain scans similar to those of individuals with psychosis. Hence, in view of the development of neuroimaging, he urges a change in the law (Palermo GB, personal communication, March 2, 2009).

The American Experience

The jurisdictions in the United States are divided on the definition of mental disease or defect for an insanity plea or diminished capacity. For example, the New Jersey Supreme Court has ruled that a personality disorder can form the basis for a diminished-capacity defense. The court said:

> All mental deficiencies, including conditions that cause a loss of emotional control, may satisfy the diminished-capacity defense if the record shows that experts in the psychological field believe that the kind of mental deficiency can affect a person's cognitive faculties, and the record contains evidence that the claimed deficiency did affect the defendant's cognitive capacity to form the mental state necessary for the commission of the crime [Ref. 5, p 631].

On the other hand, Oregon, by legislation, amended its law on the insanity defense to exclude persons who have only a personality disorder.[6] The legislators believed that the defense was used as a way to avoid responsibility. Also, it was noted that prosecutors more commonly contested insanity claims involving personality-disordered defendants and that juries who heard these cases were confused by the battle of the experts that ensued. The legislature sought to restrict the insanity defense to those persons with serious mental illness. Moreover, the legislature wanted to devote limited state resources to those persons who had the greatest chance of responding favorably to treatment and achieving community placement.[7]

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, First Edition (DSM-I)[8] listed sociopathic personality as a mental illness, but mental hospital superintendents were concerned that sociopathic criminals would be found not guilty by reason of insanity (NGRI) and sent to hospitals instead of prison. At a staff meeting in 1954 at St. Elizabeths Hospital in the District of Columbia, it was decided that sociopathy would not be regarded as mental illness. Three years later, shortly after the trial of one Comer Blocker, the superintendent of St. Elizabeths, Winfred Overholser, and another doctor on the staff, in an administrative decision, declared that, thereafter, sociopathic personality would be classified as a mental illness. It was not regarded as such at St. Elizabeths at the time of Mr. Blocker's trial.[9] Because of this change of opinion, Mr. Blocker's conviction was reversed. Of this experience, Judge Irving Kaufman commented, "It seems clear that a test which permits all to stand or fall upon the labels or classifications employed by testifying psychiatrists hardly affords the court the opportunity to perform its function of rendering an independent legal or social judgment" (Ref. 10, p 624).

The American Law Institute's Model Penal Code[11] excludes the psychopathic (also known as sociopathic) personality disorder not by a diagnostic category but by a description of behavior. After setting forth its test of mental disease or defect excluding responsibility, it states: "The terms 'mental dis-

ease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct" (Ref. 11, § 4.01). In the courtroom, however, this description is telescoped into the diagnostic category psychopath, sociopath, or antisocial personality—terms used synonymously.

The DSM Classification

In psychiatric circles, the psychopath is one who is morally insane—that is, one without a sense of morals, an unprincipled person, a person whose conscience is full of holes.

There is a lack of guilt or remorse, an absence of anxiety, and a failure to learn by experience. Controversy over the concept developed partly because of the question of whether the morally insane should be committed to a mental hospital or to a prison. The term was used inconsistently, sometimes referring to the whole spectrum of deviant personalities (for example, homosexuality, pedophilia) and sometimes to a subgroup of antisocial or aggressive psychopaths. To reduce confusion, the American Psychiatric Association (APA) in 1952 in DSM-I introduced the term sociopathic personality disturbance for the latter group.[8] Nevertheless, many continued to use the terms psychopathy and sociopathy interchangeably, and others regarded sociopathy as only one form of psychopathy. In a further attempt to reduce confusion, antisocial personality was adopted in Diagnostic and Statistical Manual of Mental Disorders, Second Edition (DSM-II),[12] and in the World Health Organization's International Classification of Disease, as the official diagnosis for the aggressive or antisocial psychopath or sociopath.

The Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM-III),[13] excluded the antisocial personality disorder in the presence of mental retardation or schizophrenia. Many forensic psychiatrists objected to the exclusion as an unwarranted restriction, and Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised (DSM-III-R),[14] retracted. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) states: "The antisocial behavior must not occur exclusively during the course of Schizophrenia or a Manic Episode" (Ref. 15, p 646).

DSM-IV-TR lists 10 specific personality disorders (one fewer than DSM-III-R). The anti-social personality is one of them (Ref. 15, pp 645–6). Needless to say, just about everyone can be found in one or other of the disorders. Which should be exculpatory? Sparr points out that the International Tribunal did not specify which of the disorders described by the expert witnesses was found to be dispositive.[1]

It may seem paradoxical to say that psychopathy, or antisocial personality, is not mental illness and then include it in a diagnostic manual of mental disorders.

In court proceedings, expert testimony is presented to classify or not to classify a person into a category, but, like other disorders, psychopathy is not a matter of either/or. Sparr points out that the Dutch legal system sets out degrees of responsibility.[1] In the celebrated *Scissors* murder trial in South Africa,[16] expert testimony averred that psychopathy should be considered like the grading of a hotel: grade I at one end to grade V at the other. There may be, according to the testimony, half-way psychopathy. Other testimony in the *Scissors* case averred that the accused had psychopathic tendencies or latent psychopathy that would come out when pinched. Presumably, as Diamond might say, it is dormant, waiting to be discovered.[16]

Discussion and Conclusions

To turn to the question posed at the outset: Should personality disorders, or more specifically, the antisocial personality, result in diminished responsibility or exculpation? In his expository essay, Sparr seems to say it should. He does not elaborate on the definition of personality disorders.[1]

Years ago just about every criminal offense constituted a felony, subject to the death penalty. The plea of NGRI was invoked to circumvent it, but now with the near demise of the death penalty, there is far less resort to NGRI. In a lengthy essay, Abraham L. Halpern observed, "What must be recognized is that the death penalty has been eliminated in the United States for all practical purposes, and the utility of the insanity defense has been eliminated with it. . . . [U]ntil recent years the insanity defense was intertwined with the effort to prevent capital punishment" (Ref. 17, p 28).

In the face of the trend of jurisdictions to abolish the death penalty, New Jersey adopted it, but an escape is provided: a personality disorder can form the basis for a diminished-capacity defense.[5]

In any event, when the NGRI plea is urged, even defendants who are floridly psychotic are found

guilty, not NGRI. Assuredly, the personality-disordered defendant is not likely to be found NGRI.

Then, too, one might ask what difference the diagnosis makes. Depending on the circumstances, even the most stable person can become unhinged. In Palermo's observation, quoted earlier, he posits decompensation at the time of the offense. The state of mind at the time of the offense determines criminal responsibility.

The Federal Rules of Criminal Procedure do not require an expert to specify or categorize the mental condition of the defendant.[18]

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