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# “CRIMINAL” INSANITY, DIAGNOSIS, AND PUBLIC MORALITY

WILLIAM WALLER\*

## INTRODUCTION

The insanity defense contains at its core an intractable tension between the insane as sick and the insane as criminally deviant. The very phrase “mentally-ill offender” “epitomizes the social vectors of therapeutic concern for and punitive attack against those who deviate from our sexual habits, deprive us of our property, or threaten our physical well-being.”<sup>1</sup> Sociopaths represent the apotheosis of this contradiction in that they suffer from a mental disease defined in terms of criminality. As such, these individuals have traditionally been treated differently from the insane and incompetent; they are denied the therapeutic approaches normally accorded to the mentally ill and routinely hammered with punishment within our criminal justice system.<sup>2</sup>

This state of affairs provokes at least two worthy lines of inquiry: first, why the special treatment of sociopaths in the insanity defense and criminal law generally? And second, should it be otherwise? The answers to these questions, I will argue, move us far beyond the treatment of sociopaths to a general indictment of the social order and the criminal justice system that regulates it. In reality, sociopaths are a creation of psychiatric discourse, embraced by the criminal justice system for its convenience, and the contours of the insanity defense reflect this fact. While more critical considerations of moral responsibility might exculpate them, alongside numerous others, their persistence in the dominant ideology serves to conceal far more powerful—and hence far more threatening—sources of social harm.

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1. Lawrence Zelic Freedman, *Psychopathology and Social Offense*, in *BY REASON OF INSANITY: ESSAYS ON PSYCHIATRY AND THE LAW* 101 (Lawrence Zelic Freedman ed., 1983).

2. Nancy Beran & Beverly Toomey, *The Mentally Disordered Offender: A Historical Perspective*, in *MENTALLY ILL OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM* 5, 12 (Nancy Beran & Beverly Toomey eds., 1979).

## I. SOCIOPATHY AND CRIMINAL PUNISHMENT

A. *The Nature of Sociopathy and the Criminal Law's Concern*

Neither “sociopath” nor “psychopath” is rigidly defined, though both appear frequently in the literature.<sup>3</sup> To the extent the conditions are objectively meaningful, they can be found in the DSM-IV-TR<sup>4</sup> under “antisocial personality disorder.”<sup>5,6</sup> Symptomatic behaviors are generally

3. SAMUEL JAN BRAKEL & ALEXANDER BROOKS, LAW AND PSYCHIATRY IN THE CRIMINAL JUSTICE SYSTEM 91 (2001). I will use “sociopath” to refer first to a person diagnosable or diagnosed with antisocial personality disorder or the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) predecessors, and second to the sort of pathological criminal that most concerns the justice system. Some of the psychiatric literature notes different connotations for sociopathy and psychopathy: for instance, sociopathy describes a behavioral disorder found in the DSM, whereas psychopathy “emphasizes personality traits, such as lack of empathy.” Maya Mei-Tal, *The Criminal Responsibility of Psychopathic Offenders*, 36 ISR. L. REV. 103, 105 (2002). The extent to which the concepts are exclusive is unclear, however, as antisocial personality disorder is loosely associated with the same personality traits as psychopathy. See, e.g., BENJAMIN WOLMAN, THE SOCIOPATHIC PERSONALITY (1987). Because the DSM’s behavioral classification is most relevant with respect to the insanity defense, I will prefer use of the terms “sociopath” and “sociopathy.” It should be noted, however, that much of the literature conflates these terms or refers to “psychopaths” in particular, and the concept of psychopathy becomes relevant, for instance, in the context of the death sentence.

4. The current iteration of the Diagnostic and Statistical Manual of Mental Disorders, the definitive catalogue of diagnostic criteria within the psychiatric profession, but also immensely influential in the general culture.

5. The behaviors constitutive of the disorder—with additional requirements based on age, life course, and the exclusion of certain Axis I disorders—are as follows:

There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC CRITERIA FROM DSM-IV-TR 291-2 (2000).

6. Prior to 1968, the American Psychiatric Association referred to individuals with a “psychopathic personality,” describing a person “whose behavior is predominantly amoral or characterized by impulsive, irresponsible actions satisfying only immediate and narcissistic interests without concern for obvious and implicit social consequences accompanied by minimal outward evidence of anxiety or guilt.” Beran & Toomey, *supra* note 2, at 13 (footnote omitted) (quoting American Psychiatric Association) (noting that this older description is decidedly imprecise and vague). Then there was DSM-II, which reserved the category for “individuals who are basically unsocialized and whose behavior patterns bring 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.” BRAKEL & BROOKS, *supra* note 3, at 91. “Psychopathy” has been pathologized outside of antisocial personality disorder and the DSM, first by Harvey Cleckley, and more recently in R.D. Hare’s Psychopathy Checklist, both of which mostly eschew specific behavioral symptoms in favor of more

construed as “violat[ing] the rights of others,” and include specifically a “failure to conform to social norms with respect to lawful behaviors,” “irritability and aggressiveness, as indicated by repeated physical fights or assaults,” “reckless disregard” for the safety of others, and “lack of remorse” after hurting, mistreating, or stealing from others.<sup>7</sup> In short, the disorder is constituted by behaviors proscribed by the criminal law and described in terms from its lexicon.<sup>8</sup>

While antisocial personality disorder is in diagnostic terms entirely behavioral, there are other characteristics that have been built into the clinical picture over time. The most enduring of these, perhaps as a result of its disturbing implications, is the notion that the sociopath’s criminal depravity lies buried beneath a dissimulating “mask of sanity.”<sup>9</sup> Said mask serves to hide the fact that sociopaths “appear to lack a conscience,”<sup>10</sup> which presumably accounts for the ease of their criminality: sociopaths are expected to reoffend, and frequently.<sup>11</sup>

Of further concern, the condition is only likely to be acknowledged through the meting out of criminal punishment. The conventional psychiatric wisdom is that “[p]atients with antisocial personality disorder can fool even the most experienced clinician. In an interview, patients can appear composed and credible, but beneath the veneer . . . lurks tension, hostility, irritability, and rage.”<sup>12</sup> Stress interviews, in which patients are vigorously confronted with inconsistencies in their histories, may be

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general personality traits. See James R.P. Ogloff, *Psychopathy/Antisocial Personality Disorder Conundrum*, 40 AUSTL. & N.Z. J. PSYCH. 519, 520–22 (2006) (listing characteristics of psychopathy as it is conceived by both Cleckley and Hare).

7. BRAKEL & BROOKS, *supra* note 3, at 92.

8. *But see* BENJAMIN & VIRGINIA SADOCK, *SYNOPSIS OF PSYCHIATRY* 798 (10th ed. 2007) (“Although characterized by continual antisocial or criminal acts, the disorder is not synonymous with criminality . . .”).

9. SADOCK, *supra* note 8, at 798. See *U.S. v. Currens*, 290 F.2d 751 (3d Cir. 1961) (“There are grave disturbances in the patient’s affective life as well as in foresight and the control and organization of behavior . . . Although the patient outwardly presents a ‘convincing mask of sanity’ and a ‘mimicry of human life,’ he has lost contact with the deeper emotional accompaniments of experience and with its purposiveness.”) (quoting ROBERT WHITE, *THE ABNORMAL PERSONALITY* 404 (1948)). *But see* BRAKEL & BROOKS, *supra* note 3, at 96 (“Cleckley’s thesis was never mainstream psychiatry and moreover appears to be overread by Judge Biggs when he states that the psychopath is medically judged to be ‘very ill indeed’ and ‘very distinguishable’ from the mere criminal.”); *see generally* HARVEY CLECKLEY, *THE MASK OF SANITY: AN ATTEMPT TO REINTERPRET THE SO-CALLED PSYCHOPATHIC PERSONALITY* (1941) (advancing for the first time the notion of a “mask of sanity”).

10. SADOCK, *supra* note 8, at 798.

11. The DSM cautions that “Only when antisocial personality traits are *inflexible, maladaptive, and persistent* . . . do they constitute Antisocial Personality Disorder.” BRAKEL & BROOKS, *supra* note 3, at 92 (emphasis added).

12. SADOCK, *supra* note 8, at 798.

necessary to reveal the pathology, as may neurological examinations (whatever they may be looking for).<sup>13</sup>

If this is the level of paranoia felt by clinicians, one can imagine much is warranted for officers of the court, unschooled in and unpracticed at clinical psychiatry. Barring a history of formal sanctions evincing the disorder, which the savvy sociopath is presumably well-equipped to evade,<sup>14</sup> a person disposed to the antisocial behaviors condemned by the criminal law may well appear sympathetic and reasonable to juries, or to pose little future risk to judges deliberating sentencing.<sup>15</sup>

Here then is the picture of the sociopath as conceived by the criminal law: an autonomous actor committing significantly more than his share of crimes, intelligent, manipulative, and lacking in remorse. Such persons appear conveniently to the public to be the *raison d'être* of the criminal law, and consequently ought to feel its force most heavily.<sup>16</sup> Or, to understate the case: “considering the enormous destructive effect psychopaths may have on individuals and social relations, bringing them within the network of criminal liability is convenient in terms of the restraint of dangerous persons.”<sup>17</sup>

### *B. Forms of the Insanity Defense and Their Application to Sociopaths*

The ostensive purpose of the insanity defense is to exclude from criminal sanction those we adjudge to fall short of some threshold of personal or moral responsibility for the crime which they committed. The particular rationales for exculpation vary with the different jurisdictional tests. Nevertheless, the Anglo-American legal system has generally

13. *Id.*; Compare with the discussion of the diagnostic “gold standard,” *infra* Part C.

14. “[T]heir mental content reveals the complete absence of delusions and other signs of irrational thinking. In fact, they frequently have a heightened sense of reality testing and often impress observers as having good verbal intelligence. [They] are highly representative of so-called con men. They are extremely manipulative . . .” SADOCK, *supra* note 8, at 798.

15. A representative expression of what we might call “sociopath panic” in the popular culture can be found in the 1996 Gregory Hoblit film *Primal Fear*. In the film, a sociopath (played by Edward Norton) manipulates his lawyer, a psychiatrist, and the judge into believing he is afflicted by dissociative identity disorder, and hence cannot be criminally responsible for the two brutal murders he committed. This film in particular illustrates our fear of the sociopath as a dissembling “false negative”—the individual predicted to be not dangerous who subsequently commits a violent act.” MICHAEL PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 176 (1994) (juxtaposing the public and systemic fascination with such cases with their empirical nonexistence).

16. This seems to be the case. Sadock & Sadock note that “in prison populations, the prevalence of antisocial personality disorder may be as high as 75 percent.” SADOCK, *supra* note 8, at 798; *see also* Ogloff, *supra* note 6, at 522 (“[R]esearch shows that the prevalence of Antisocial [personality disorder] ranges from 50% to 80% in prisons.”) (footnote omitted).

17. Mei-Tal, *supra* note 3, at 107–08.

assumed sociopaths are responsible agents to whom the defense does not apply.<sup>18</sup> Yet there is a prima facie case to be made that at least a portion of jurisdictions should allow the defense for individuals with antisocial personality disorder.

The earliest and most prevalent American test for exculpatory insanity comes down the ages from the 1843 *M’Naghten* case.<sup>19</sup> For a successful defense, the test requires proof that

at the time of the committing of the act, the party accused was labouring under such a defect of reason, from 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.<sup>20</sup>

As noted, sociopaths generally have a strong sense of reality-testing and are generally rational; no delusion or defect of reason will excuse them under the *M’Naghten* test. However, the strongest argument for applying this test to relieve sociopaths of criminal responsibility exists in those states where the word “know” is read broadly to encompass “affective” or “emotional” knowledge.<sup>21</sup> The lack of such knowledge in the form of conscience or empathy is considered a primary characteristic of the sociopath. Furthermore, some jurisdictions have added an “irresistible impulse” test, which allows the defense where a mental disease prevents the defendant from controlling his or her conduct.<sup>22</sup> Insofar as a conscience or capacity for remorse can be construed to be prerequisites for morality-driven behavior,<sup>23</sup> the irresistible impulse test may also apply to

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18. *Id.* at 106; see also Heidi L. Maibom, *The Mad, the Bad, and the Psychopath*, 1 NEUROETHICS 167, 167 (2008) (“Current US legal practice is to regard the psychiatric condition of psychopathy to be irrelevant to a defendant’s legal responsibility. The insanity defense is generally not available to psychopaths.”) (footnote omitted).

19. WAYNE R. LAFAVE, CRIMINAL LAW 390 (5th ed. 2010).

20. *M’Naghten’s Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718, 722 (H.L. 1843).

21. RITA SIMON & DAVID AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT IN THE POST-HINCKLEY ERA 14 (1988) (noting the construction but not making such an argument).

22. LAFAVE, *supra* note 19, at 390.

23. See Mei-Tal, *supra* note 3, at 106 (“[The psychopath] may be portrayed as an island unto himself, lacking the capacity to establish bonds that connect individuals to each other and which are essential for meaningful participation in human exchanges and compliance with social norms and law.”) (footnotes omitted). Note that Mei-Tal disagrees that the insanity defense is conceptually applicable to sociopaths, focusing on their cognitive normalcy and the concern with cognition inherent to the defense: “[B]ecause psychopaths have unimpaired cognitive faculties, they are presumed to be rational and therefore sane and are excluded from the system’s established exemptions from criminal responsibility.” *Id.* at 107 (footnote omitted). But see Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349 (2008) (arguing that incapacity to comprehend and act on moral reasons is a relevant cognitive deficit).

sociopaths—there is no cognitive mechanism inhibiting those antisocial desires that all of us, at one time or another, experience.

In the years following *M’Naghten*, a minority of jurisdictions adopted the *Durham* rule that:

An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

We use “disease” in the sense of a condition which is considered capable of either improving or deteriorating. We use “defect” in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury or the residual effect of a physical or mental disease.<sup>24</sup>

It appears that by explicitly noting and describing both mental disease and defect, the court opened up a large expanse of territory in which a mentally ill defendant might ground the defense. In addition, the causal ambiguity embodied in the word “product” would seem to allow for antisocial personality disorder—as much as any other clinically accepted disease or defect—to excuse the sociopath from criminal sanction. On balance, even if tentatively, the *Durham* test seems amenable to exculpating sociopaths.

The clear case in which individuals with antisocial personality disorder are excluded from employing the insanity defense is under the Model Penal Code test.<sup>25</sup> Under this test, 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 the law.”<sup>26</sup> While only a minority of states use this approach,<sup>27</sup> it is significant in this context because it specifically precludes—though not by name—an insanity defense undergirded by antisocial personality disorder: “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.”<sup>28</sup> While presumably antisocial personality disorder may be related to a “failure to apprehend the significance of [one’s] actions in some deeper sense,” the authors of the Model Penal Code “reject[] the position that, for purposes of

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24. *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954).

25. MODEL PENAL CODE § 4.01(1) (2001).

26. *Id.* (alteration in the original).

27. LAFAVE, *supra* note 19, at 390.

28. MODEL PENAL CODE § 4.01(2) (see comments).

determining criminal responsibility, repeated wrongful conduct suffices in itself to establish mental disease or defect.”<sup>29</sup> It may be hard to disagree on first instinct—why would the criminal law excuse its most flagrant violators, those who pathologically defy its dictates?<sup>30</sup>

Yet the Model Penal Code is just that—a scholarly model of reconstituted criminal law, employed only in a small minority of jurisdictions. It appears that in most jurisdictions sociopaths could be able to find a theoretical foothold, and yet they clearly are not doing so. One compelling response to this puzzle has been to deny that the defense is actually aimed at absolving certain persons of criminal responsibility on the basis of abnormal mental functioning. In this respect, there are two surprising aspects of the defense (one theoretical, and one with respect to how it is applied): in the first place, while exact numbers are difficult to determine, it is clear that the defense is raised in only a small percentage of criminal cases.<sup>31</sup> No doubt this is due in large part to the prospect of indefinite civil commitment, which may seem harsh in comparison to a plea bargain or even a normal carceral sentence. Yet what is also surprising is that if mental illness actually nullifies criminal responsibility, it ought to do so in many cases by nullifying the requisite *mens rea* of most crimes.<sup>32</sup> In other words, if we are serious about the mentally ill lacking responsibility for criminal conduct, we do not need an insanity defense—we can just start finding them not guilty.

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29. *Id.*

30. The Supreme Court of California in *People v. Fields* gives a more detailed rationale for the explicit exclusion of sociopaths:

[W]e foresee harmful legal and social consequences if an expert’s diagnosis of mental illness and opinion of insanity could be based solely on recidivist behavior. If a pattern of antisocial behavior is sufficient basis for an insanity defense, then a substantial proportion of serious criminal offenders would be able to assert this defense . . . . But the assertion of the insanity defense by recidivists with no apparent sign of mental illness except their penchant for criminal behavior would burden the legal system, bring the insanity defense itself into disrepute, and imperil the ability of persons with definite mental illness to assert that defense.

*People v. Fields*, 35 Cal. 3d 329, 371 (1984) (internal citations omitted).

31. See LAFAVE, *supra* note 19, at 424–25; see also ABRAHAM GOLDSTEIN, *THE INSANITY DEFENSE* 171–91 (1967).

32. Joseph Goldstein & Jay Katz, *Abolish the “Insanity Defense”—Why Not?*, 72 *YALE L.J.* 853, 862–63 (1963). *But see* HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 137 (1972) (“[I]n fact the typical insanity-test phrases associated with absence of *mens rea* are all excessively vague or often inapplicable, [and] the usual criteria for absence of *mens rea* only infrequently obtain in the typical case where the insanity plea is used.”).



Goldstein and Katz argue, accordingly, that the real function of the defense:

is to authorize the state to hold those “who must be found not to possess the guilty mind *mens rea*,” even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged. . . . The insanity defense is not designed, as is the defense of self-defense, to define an exception to criminal liability, but rather to define for sanction [i.e. restraint] an exception from among those who would be free of liability.<sup>33</sup>

We as a society show some level of resistance to making the seriously mentally ill feel the full force of the criminal sanction; nevertheless, socially undesirable conduct from ostensibly unaccountable actors is threatening and must be addressed.

We can then see some ulterior reasons that sociopaths are not good candidates for the insanity defense, even if on the literal terms of a majority of permutations it ought to apply. Apart from self-selection, sociopaths can be handled routinely under the criminal law because their mental illness is, diagnostically speaking, behavioral. It need not, therefore, abrogate the requisite *mens rea* for more or less any offense. In addition, their essential dangerousness makes the criminal sanction eminently rational; there is little ambiguity about whether to take a punitive or therapeutic approach.<sup>34</sup> Because the defense serves to control retribution, at least to some extent,<sup>35</sup> society has enough reservation with applying the defense outside of situations where the accused possesses “certain overt, graphic, physiological characteristics.”<sup>36</sup> Faced with a

33. Goldstein & Katz, *supra* note 32, at 864–65 (footnotes omitted).

34. *Id.* at 868–69. Note, however, that when courts initially denied the insanity defense to sociopaths, many state legislatures responded by providing for their indefinite commitment (particularly in the case of “sexual psychopaths”) based on their “exceptional dangerousness to society.” Beran & Toomey, *supra* note 2, at 13. This may be reconciled with the ostensibly huge number of sociopaths in normal jails and prisons in several ways: most states with such legislation apply it only or primarily to “sexual psychopaths,” a population which deserves its own analysis; vague definitions of psychopathy found in such statutes allow the court to apply it only where the criminal offense is most serious or appalling (where execution is not contemplated or available, as indefinite commitment is arguably *more* punitive than a normal carceral sentence); and the courts desire to address perceived pathology more strenuously than normal criminality, and while defendants desire to avoid indefinite commitment to the extent possible. Additionally, not every court has held that sociopaths are “sane” as a matter of law for purposes of the defense. *Cf.* U.S. v. Currens, 290 F.2d 751 (3d Cir. 1961).

35. PERLIN, *supra* note 15, at 172.

36. *Id.* at 173.

disorder defined only in terms of a tendency toward antisocial behavior, however, and of which sufferers are sensationalized as evil, society will revert to its baseline of the criminal sanction:

The insanity defense . . . is seen as “cheating” this degradation [due to criminals] and as dissipating the opportunity for expressing hatred . . . by downplaying emotions of vengeance, it threatens social solidarity and raises “the terrifying anxiety that the forces of good might not triumph against the forces of evil after all.” As a “moral judgment that mental illness is relevant to our determination of criminal culpability,” it is a judgment that society frequently wishes to decline making.<sup>37</sup>

### C. *The Role of Psychiatry Within the Law and Vis-à-vis Sociopaths*

The controversy surrounding the insanity defense is premised on the distinction, commonly made in legal positivist thinking, between moral responsibility and legal responsibility.<sup>38</sup> Moral responsibility boils down to whether one is a moral agent, and is therefore predicated on one possessing those cognitive capacities relevant to moral reasoning. Legal responsibility, on the other hand, is only actualized through the court’s assignment of blame and concomitant punishment. In the context of the insanity defense, it is thought that moral responsibility prefigures legal responsibility; moral agents can be held accountable by the criminal law, while infants and lunatics are to be exculpated for otherwise criminal acts.<sup>39</sup> Yet psychiatry—the ideological apparatus that gives us “sociopath”

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37. *Id.* at 172 (footnotes omitted).

38. For an extensive exploration of the distinction between the two types of responsibility see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (2d ed. 2008). The distinction has also been described as between “constative” and “performative” responsibility or between “basic” and “consequential” responsibility. See John Gardner, *Hart and Feinberg on Responsibility*, in THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 129, 131 (Claire Grant et al. eds., 2008).

39. For instance: “Punishment makes little sense unless those who are punished are indeed responsible for the wrongs that trigger a punitive response.” George P. Fletcher, *Punishment and Responsibility*, in A COMPANION TO PHILOSOPHY OF LAW & LEGAL THEORY 514, 519 (Dennis Patterson ed., 1996). In tune with this sentiment, many scholars who argue against the criminal responsibility of sociopaths cite deficits in moral reasoning or other cognitive impairments relevant to moral agency as reasons for their position. See *infra* note 74. Those who truly disagree with this directionality of the relationship between the two types of responsibility are either realists who contend, like Goldstein and Katz, that other, ulterior legal motives determine (at least in the context of the insanity defense) legal responsibility; compatibilists who believe criminal responsibility is a function of social utility, like Daniel Dennett (see the discussion of his view *infra* note 78); or those like Joel Feinberg who see it as a matter of tautological “competence.” Gardner, *supra* note 38, at 126–

as a cognizable category—with its discourse of pathology, functions to collapse the distinction between these two types of responsibility. Explaining our society’s treatment of sociopaths therefore requires grappling with the very nature of psychiatry, particularly as it interfaces with the criminal law.

This collapsing phenomenon is important because, whether court-ordered or requested by defense counsel, diagnostic conclusions play a critical role in the application of the insanity defense.<sup>40</sup> As a DSM disorder diagnosis often functions as a threshold requirement for asserting the defense,<sup>41</sup> the judgments of the psychiatrist concerning defendant pathology and mental state<sup>42</sup> are the data considered in the application of the various insanity defense tests. In this respect, differential diagnosis is crucial: “mental disease” is the only element of a defendant’s mental state appearing in every insanity defense test in Anglo-American law.<sup>43</sup> But the phenomenon is also important in light of the cultural influence that psychiatry and its practitioners wield. The way that mentally ill populations are categorized and described predisposes the way we tend to think about them.

Interwoven with the criminal process are two distortional aspects of psychiatry that do much of the work of collapsing the distinction between moral and legal responsibility. First, the process of diagnosis itself serves to reify the raw material relevant to determinations of moral responsibility into cognizable, normatively charged categories. Second, the psychiatrist’s role in conveying her impressions to the court exacerbates the diagnostic distortion by concealing both society’s and her own normative presuppositions within an authoritative clinical picture.

Diagnosis reifies into cognizable categories the various data of an individual’s mental states and behavior. Broadly speaking, differential diagnosis is nosology without regard for etiology. Psychiatric pathologies

27 (“[D]ogs, infants, and lunatics have the ability to kill, and perhaps to do so deliberately. They may, in other words, have the ability to act in ways that, if they were not dogs, infants, or lunatics, would qualify as murder. But they still lack the ability to murder, which is a normative ability.”) (describing Feinberg’s view).

40. LAFAVE, *supra* note 19, at 443 (“Upon completion of the examination, a report is prepared and copies are furnished to the court, the prosecutor, and defense counsel. The report is likely to have a very significant impact upon the outcome of the case.”) (footnote omitted).

41. BRAKEL & BROOKS, *supra* note 3, at 61.

42. While a diagnosis of antisocial personality disorder does not, strictly speaking, require an inquiry into mental states (as it is, clinically, a behavioral disorder), antisocial personality disorder is never presented *per se* as an exculpatory condition. Presumably, in the hypothetical case where the defense is applied to sociopaths, the diagnosis would be elaborated by impressions of mental states anyhow.

43. FINGARETTE, *supra* note 32, at 19.

are discerned almost exclusively by a clinician’s judgment, whereas in physical medicine “more objective investigatory procedures” are the norm.<sup>44</sup> Psychiatric judgment apprehends clusters of symptoms resembling recognized disorders, and as such determines whether or not a particular symptom is present in the first place. While such symptoms are often broader than exhibited behaviors<sup>45</sup>—encompassing, for instance, affect and perceptual states—they almost never countenance causation.<sup>46</sup> To know an individual’s diagnosis is to have no insight whatsoever into the phenomenological wellspring of his or her behavior,<sup>47</sup> the grounds on which moral responsibility rests.

Even if we were to accept the rosy view that “a diagnostic system asserts that observable attributes are manifestations of unobserved categorical realities”<sup>48</sup>—i.e., that there is a discrete pattern of causation, whether in terms of neurons or mental actions, underlying a given disorder—we would still face a persistent epistemic problem:

If a diagnosis is to add information to the attributes themselves, that information must come from other research. The research must show that an underlying reality produces a characteristic profile of observable attributes, and that its presence or absence can be inferred from the profile with reasonable accuracy. This additional information, however, is largely unobtainable . . . .<sup>49</sup>

Unfortunately, the epistemic problem is inherent to psychiatry. Iterations of the Diagnostic and Statistical Manual are created and then refined on the basis of epidemiological observations concerning the aforementioned clusters of symptoms—there is no “gold standard,” or mental thing itself, observed, noted, and then looked for in other patients.<sup>50</sup>

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44. DAVID MECHANIC, *MENTAL HEALTH AND SOCIAL POLICY: BEYOND MANAGED CARE* 35 (5th ed. 2008).

45. As noted previously, while antisocial personality disorder is defined solely in terms of exhibited behaviors, other traits are associated with the disorder in a sort of clinical folk wisdom. *See supra* part A.

46. Except, in some cases, to rule out symptoms caused by drug use or medical afflictions.

47. *See, e.g.*, John Mirowsky & Catherine E. Ross, *Psychiatric Diagnosis as Reified Measurement*, 30 J. HEALTH & SOC. BEHAV. 11, 19 (1989) (“Diagnosis ignores the structure of causal relationships among the variables on which it is based. It collapses causes, consequences, and spurious associations.”).

48. *Id.* at 15.

49. *Compare id.* with Robert Kendell & Assen Jablensky, *Distinguishing Between the Validity and Utility of Psychiatric Diagnoses*, 160 AM. J. PSYCHIATRY 4, 8 (2003) (“[T]he crucial issue in determining validity is not understanding of etiology but rather the existence of clear boundaries or qualitative differences at the level of the defining characteristic.”).

50. Kendell & Jablensky, *supra* note 49, at 8. This issue can also be expressed in terms of a

This is not to say that differential diagnosis is clinically useless. To the extent a clinician is not assigning a diagnosis on normative grounds, diagnosis serves a practical purpose for the patient:

The terms are not designed to assist in the determination of whether or not a particular form of social control should be applied to a particular individual; they are designed merely to reduce the therapist's margin of error when he seeks to help the patient . . . . When they are not arguing with judges and lawyers, psychiatrists recognize full well that their terminology is no more than a method of classifying types of conduct and courses of therapy.<sup>51</sup>

Yet with respect to personality disorders like antisocial personality disorder, it is unlikely that diagnosis can serve medical utility very well. Robert Weisberg conveys this sentiment by describing personality disorders as “vexing,” in that

[t]he things we call personality disorders are simultaneously unresolved in their causation and remarkably hard to cure. Thus, it is sometimes hard to see the medical utility of these disorder diagnoses—their value may lie more in cultural anthropology or sociology. When we look at the definitions of antisocial personality, as with other disorders, we often encounter a somewhat tautological sum of its symptoms. . . .

. . . .

. . . The psychology of personality disorders does not inspire scientific confidence. Each personality disorder seems to blend genetic, neurobiological, and environmental causes.<sup>52</sup>

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signal-to-noise ratio. In psychiatric diagnosis, there is a tension between reliability (“the exactness of reproduction that can be achieved with a given measure”) and certainty (how likely it is that the diagnosis is accurate). Mirowsky & Ross, *supra* note 47, at 18. Certainty that a diagnosis applies increases as we broaden diagnostic categories (with the broadest being a dichotomous yes or no). Yet broadening categories, while it increases certainty, causes the ratio of information-to-static to decline in the individual case. *Id.* at 18–19. Why is this a problem? For the insanity defense to operate within the boundaries desired by those fearful of exculpating too many criminal elements, it should at the very least be restrained by clinical judgments and diagnostic boundaries. However, fitting the situation of an individual into a diagnostic category must, barring perfect overlap, necessarily diminish the information (particularly causal) we have to work with about the individual's situation. And if our goal were to ascertain moral responsibility, this is precisely the opposite of the approach we ought to take.

51. Frank Cummings, *Psychiatric Justice by Thomas Szasz*, 66 COLUM. L. REV. 212, 217 (1966) (citing Bleuler, *Research and Changes in Concepts in the Study of Schizophrenia*, 1941–1950, 3 Bull. of the Isaac Ray Medical Library 1, 76 (1955)).

52. Robert Weisberg, *The Values of Interdisciplinarity in Homicide Law Reform*, 43 U. MICH.

Though the passage hints at the existence of a variegated etiology associated with personality disorders generally, it tentatively concludes that such disorders may be meaningful only in terms of “cultural anthropology” or “sociology”—that is, in terms of the predominate social norms.<sup>53</sup>

Thomas Szasz, psychiatry’s most vehement iconoclast, is inclined to agree. He sees mental illnesses not as diseases that inhere in the individual, but as expressions of establishment norms with respect to ways of behaving.<sup>54</sup> As opposed to physical diseases, where “judgments about the mobility or immobility of a person’s joint rest on a biological standard . . . judgments about the rationality or irrationality of a person’s reasoning or thinking rest on a personal or societal standard.”<sup>55</sup> Similarly, Szasz posits that “psychosis is [merely] behavior judged to be bad—injurious to the self or others.”<sup>56</sup> If these assertions hold true, then they clear up some of the perplexities surrounding the treatment of antisocial personality disorder under the law.<sup>57</sup> Yet they also tell us that, with respect to mental

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J.L. REFORM 53, 68–69 (2009).

53. Apart from the reified category of antisocial personality disorder, there is a body of literature concerned with the connection between damage to the frontal lobe of the brain—that portion heavily associated with impulse control—and the onset of antisocial behavioral tendencies. *See, e.g.*, Antonio R. Damasio, *A Neural Basis for Sociopathy*, 52 ARCH. GEN. PSYCHIATRY 128, 128 (2000) (“Some prefrontal [cortex] sectors . . . seem to play an indispensable role in the achievement and maintenance of a normal social personality. Lesions that compromise these frontal sectors . . . impair the ability to make appropriate decisions in the personal and social realms.”) (footnotes omitted); Mario F. Mendez, *The Unique Predisposition to Criminal Violations in Frontotemporal Dementia*, 38 J. AM. ACAD. PSYCHIATRY LAW 318, 318 (2010) (“Epidemiological data and clinical information indicate a relationship between criminal behavior and brain disorders . . . . Acquired sociopathy, or antisocial acts with disturbances in the moral emotions linked to the interests or welfare of others, occurs in those with brain lesions affecting the inner or ventromedial prefrontal cortex.”) (footnote omitted). We might conclude thereby that such behavior is neurobiologically rooted. However, this connection between somatic conditions and behavior does not represent the same thing as sociopathy/antisocial personality disorder as a mental illness, and therefore cannot explain its handling within the criminal justice system.

54. “This, then, is why—absurdly—the subclass called *mental illness* actually comprises more members than does the class called *disease*, of which it is itself supposed to be a member. The category called *mental illness* includes everything from Alzheimer’s disease and brain injury to racism and terrorism, whereas the category called *disease* includes only somatic pathology.” THOMAS SZASZ, *INSANITY: THE IDEA AND ITS CONSEQUENCES* 85 (1997). This is also why “the mythology of mental illness and the rituals of psychiatry now make it virtually impossible for professional and layman alike to distinguish between phenomenon, label, and policy.” *Id.* at 169. For Szasz, the “strategic” and “justificatory” nature of mental illness is a product of the programme of institutional psychiatry. We need not accept this second, more tendentious conclusion in order to embrace his argument that psychiatry is normatively loaded. It is difficult to argue, for instance, that the inclusion and subsequent exclusion of homosexuality from the DSM was the product of anything other than a normative dispute.

55. *Id.* at 252.

56. *Id.* at 253.

57. As antisocial personality disorder consists in a list of behaviors that are apparently the

illness, the law is not determining moral responsibility. Moral responsibility is already built into the various modalities of criminal punishment applied to mental illness.<sup>58</sup>

Part and parcel of this normative function for psychiatry within the law is the role of psychiatric testimony. Psychiatrists deal with the phenomenological concepts related to determining moral responsibility from their own normatively charged perspective.<sup>59</sup> Both teleological judgments (e.g., the defendant committed murder because he is a psychopath) and epistemic judgments (e.g., the defendant knew that what he did was wrong) are smuggled into ostensibly scientific determinations about the defendant's clinical status.<sup>60</sup> In this way, the psychiatrist becomes a normative authority before the law:

[O]nce the idea arises that a person must be “blameworthy” before being punished, we are forced into the position of having to determine when and in what measure “blame” can be assigned to anyone who has violated our criminal laws. It is this social and

product of voluntary and knowledgeable actions, sociopaths are merely a specific class of super-criminals who can be expected to take those actions. Likewise, it elaborates the refusal of the insanity defense to include sociopaths, since to be exculpated, one must be a certain sort of mentally ill, the sort harmless or pitiful enough to be excluded from criminal punishment.

58. That is to say, in the case of sociopaths, these consummate criminals are first legally responsible—in that the law determines what the lawbreaking constitutive of their disorder is—and only by extension morally responsible.

59. FINGARETTE, *supra* note 32, at 85. Fingarette offers a variety of respects in which this is the case, but his main point seems to be that the psychiatrist acts much like a second judge—rather than providing the data relevant to responsibility *simpliciter*, she has already assigned moral responsibility in a way that surely influences the judge's subsequent determination:

To sum up, then, the psychiatrist is constantly and subtly making complex discriminations of various sorts concerning the moral concerns of the patient and the patient's perceptions of the most obvious sorts of communal attitudes and laws. The psychiatrist also tacitly makes certain essentially noncontroversial moral judgments. How, then, can the psychiatrist rise in righteous objection to the request by the courts that he testify concerning the moral perceptions and attitudes of a person and the ability of that person to integrate these perceptions and attitudes into his total conduct?

*Id.* at 117 (footnote omitted).

60. This is a predictable aspect of the vagueness inherent in diagnosis. Before evaluating to what extent behavioral symptoms line up with those specified in the disorder, the behavior of the patient/defendant must be operationalized. With respect to antisocial personality disorder, this may be easy enough where there is a past history of formal sanctions for criminal behavior—in which case the diagnosis is purely tautological—but significantly more elusive where “violating the rights of others” is the factor to be instantiated. Either way, it evinces the criminalizing, normative function of psychiatry. Alternatively, the psychiatrist is liable to simply come out and say what she believes is going on in the sociopathic defendant's head.

scientific gap into which the contemporary psychiatrist has projected himself.<sup>61</sup>

As the psychiatrist is influential or even determinative in the process of assigning blame, how this is done must itself be influenced to an appreciable extent by the psychiatrist’s own moral judgments, which include judgments about when to assign moral responsibility.<sup>62</sup> To the extent that this is true, the objective data relevant to determining moral responsibility are bypassed in favor of an arbitrary normative judgment.<sup>63</sup> Those values employed are implicit and unreflective, which serves to obscure their actual source when proffered to the court.

A prime example of the psychiatrist’s role in making such normative assignments can be found in the context of sentencing in capital cases. In such cases, use of the Hare Psychopathy Checklist—Revised drastically increases the likelihood that juries will sentence a defendant to death.<sup>64</sup> In reality, the instrument is a glaring invitation for a clinician to invoke her own—and society’s—moral judgment. Transgressions of bourgeois morality like “promiscuous sexual behavior,” “many short-term marital relationships,” “need for stimulation/proneness to boredom,” and “lack of realistic, long-term goals” all become indicators of psychopathy.<sup>65</sup> The instrument also indulges in some politically charged (and racialized) tropes common in conservative discourse: “failure to accept responsibility for actions” and a “parasitic lifestyle”<sup>66</sup> are character flaws attributed here

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61. Thomas Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 183, 189 (1958). Szasz, as discussed, argues that diagnosis is “acting simply in the role of one of society’s blame-assigning agencies.” *Id.* This is Fingarette’s logic taken to the extreme: not only are data pertinent to moral responsibility colored by the psychiatrist’s own moral judgment; the two are actually indistinguishable.

62. SZASZ, *supra* note 54, at 253 (“How, then, do psychiatrists ascertain whether a particular person who has committed a violent act was or was not psychotic? The answer is: They don’t. That is the wrong question to ask. The right question is: Under what circumstances do psychiatrists (and others) *ascribe* psychosis to the perpetrator of a certain act?”).

63. In the sense that it is the product of the psychiatrist’s personal judgment synthesized with those preferences of society and the law that the psychiatrist has internalized.

64. John F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23(5) BEHAV. SCI. & L. 603, 618 (2005); but see generally Jennifer Cox et al., *The Effect of the Psychopathy Checklist—Revised in Capital Cases: Mock Jurors’ Responses to the Label of Psychopathy*, 28(6) BEHAV. SCI. & L. 878 (2010) (suggesting an absence of juror bias with respect to defendants labeled “psychopath” when sentencing in a capital murder case).

65. See Ogloff, *supra* note 6, at 522 (listing relevant factors).

66. *Id.* As one might expect, several of the instrument creator’s publications display a moralizing and scaremongering orientation toward what he terms “intraspecies predators”—in other words, sociopath panic in its most hysterical clinical dimension. See, e.g., R.D. Hare et al., *Lethal Predators: Psychopathic, Sadistic, and Sane*, 5(3) INT’L J. EMERGENCY MENTAL HEALTH 121 (2003).



to psychopaths; outside this context, these would be charges leveled at welfare recipients or the urban poor.

Given the criminal behavioral construct through which sociopathy is conceptualized, we can conclude in light of these distortional functions of psychiatry that the psychiatrist is merely affirming an individual's fitness for criminal punishment in the process of diagnosing it.<sup>67</sup> On this point a historicizing perspective is revealing:

The labels keep changing, along with changing times. . . . We began with "possessed" youths in the seventeenth century, moved to the "rabble" or "dangerous classes" in the eighteenth and late nineteenth centuries, the "moral imbeciles" and the "constitutional psychopathic inferiors" of the early twentieth century. We continued in the twentieth century with the "psychopath" of the 1940s to the "sociopath" of the 1950s, and finally to more recent labels like "compulsive delinquent," the "learning disabled," the "unsocialized aggressive," even the "socialized aggressive," and finally the "bored" delinquent." "With the growth of professionalism, the number of labels has multiplied exponentially."<sup>68</sup>

The purported objectivity of clinical discourse is belied by the historical fluidity with which clinical labels are applied to mark certain segments of the population as essentially criminal.<sup>69</sup>

In summary, while the insanity defense ostensibly serves to exculpate those mentally ill persons unworthy of criminal punishment, sociopaths nevertheless consistently receive such punishment. This is precisely what we would expect given the contours of antisocial personality disorder and sociopathy as it is commonly regarded. However, the situation also helps to illustrate the normative undercurrent in psychiatry, both conceptually and in the practice of psychiatrists with respect to the criminal justice

67. This is, of course, a generalization. While I share Szasz's view that the underpinnings of psychiatry and psychiatric practice are normative, I do not wish to imply that I share his view of its uniformity of institutional purpose: "Even within psychiatry there is widespread disagreement as to whether psychopathy is a form of mental illness, a form of evil or a form of fiction." BRAKEL & BROOKS, *supra* note 3, at 91 (citing SEYMOUR HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 99 (1967)).

68. RANDALL SHELDEN, *CONTROLLING THE DANGEROUS CLASSES* 289 (2001) (quoting from Jerome Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (1996)).

69. Foreshadowing the conclusion of this work, Miller explains that these labels are a means "whereby we bolster the maintenance of the existing order against threats that might arise from its own internal contradictions;" the existing order reassures us "that the fault lies in the warped offender and takes everyone else off the hook." *Id.*

system. Correspondingly, we understand now that sociopaths are assigned blame through the discourse of pathology because to be a sociopath just is to be someone deemed essentially blameworthy. We should hardly expect the insanity defense to run counter to this fact.

## II. SHOULD SOCIOPATHS BE HELD CRIMINALLY RESPONSIBLE?

Now that we have some sense as to why the criminal justice system treats sociopaths the way it does, it raises the questions whether this state of affairs is right or desirable. Having already raised the distinction between moral and legal responsibility in order to show the manner in which psychiatry mistreats it, we might now take up our analytical retractor and attempt to separate them out. Two implicit frameworks dominate the approaches by which moral responsibility is assigned in relation to mental illness: libertarianism and compatibilism. We will begin by examining how sociopaths fare under both. As it turns out, the results are far from uniform. Criminal punishment, however, requires a sturdier foundation. I wish to argue that a Marxist framework, though it leads to some radical conclusions about the way sociopaths (and other criminal elements) ought to be handled, is the only approach capable of satisfactorily resolving the contradictions at the heart of the insanity defense.

### A. *Libertarian Responsibility as a Matter of Will and Intentionality*

In many ways the colloquial approach, a libertarian account of freedom generally seeks to establish moral responsibility as a function of the individual actor's powers or capacities. Within this framework, perhaps the most vigorous formulation of criminal responsibility vis-à-vis moral responsibility can be found in Hegel's *Philosophy of Right*:

Punishment is the *right* of the criminal. It is an act of his own will. The violation of right has been proclaimed by the criminal as his own right. His crime is the negation of right. Punishment is the negation of this negation, and consequently an affirmation of right, solicited and forced upon the criminal by himself.<sup>70</sup>

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70. Karl Marx, *Capital Punishment*, N.Y. DAILY TRIB., Feb. 17, 1853, available at <http://www.marxists.org/archive/marx/works/1853/02/18.htm> (quoting HEGEL, PHILOSOPHY OF RIGHT (1820)).

According to Hegel in this passage, the necessity of punishment—legal responsibility—inheres in the criminal’s freely willed act—his moral responsibility—as its dialectical counterpart. Other libertarian views are less dialectical, but nonetheless retain this basic form.

Later accounts as to what constitutes moral responsibility often emphasize the intentionality of the action or the agent’s capacity for choosing the right action, independently of the action’s social utility.<sup>71</sup> Unsurprisingly, then, many libertarians view sociopaths to be morally, and therefore legally, responsible creatures.<sup>72</sup> Sociopaths have enough cognitive capacity to perceive that certain behaviors are regarded as wrong by society and as such carry certain consequences, even if they cannot affectively appreciate that wrongness for themselves. Or, more simply, they intend to perpetrate acts that are *malum in se* and to excuse them would be “tantamount to excusing someone for committing a crime because they are bad.”<sup>73</sup>

Other scholars of this persuasion disagree, for various reasons, that sociopaths necessarily possess the relevant intentionality or capacities required for moral and criminal responsibility.<sup>74</sup> Some of these hold to a sort of continuum view, where “the degree to which individuals have the neurological capacity to conform their conduct consistent with shared cooperative norms, ‘lies on a continuum’ shaped by ‘early social,

71. For a representative of the former view, see SZASZ, *supra* note 54, at 222 (“As philosophers have always emphasized, what distinguishes us as human beings from other living things is that we *act*. The idea of the person as moral agent thus presupposes and includes the idea of intentionality.”); for a representative of the latter view, see Gardner, *supra* note 38, at 130 (discussing Hart’s account of basic responsibility in relation to the law).

72. See, e.g., Maibom, *supra* note 18, at 167 (“In short, [psychopaths] do not appear to be either cognitively or volitionally impaired in a way relevant to criminal responsibility.”); Michael Corrado, *What Purposes Does the Insanity Defense Serve, and Are Those Purposes Commensurate with Current Scientific Knowledge Regarding Insanity?*, 42 TEX. TECH L. REV. 481, 508 (2009); Mei-Tal, *supra* note 3, at 107 (“[B]ecause psychopaths have unimpaired cognitive faculties, they are presumed to be rational and therefore sane and are excluded from the system’s established exemptions from criminal responsibility.”) (articulating the criminal law establishment’s view) (footnote omitted).

73. Maibom, *supra* note 18, at 167; see also Corrado, *supra* note 72, at 508 (“The very sentiment that the insanity test should not capture the psychopath argues in favor of a volitional approach.”) (footnotes omitted).

74. See, e.g., Mei-Tal, *supra* note 3 (arguing psychopaths ought to be absolved of responsibility on the basis of their inability to employ moral reasoning); Litton, *supra* note 23 (arguing that psychopaths suffer from a cognitive deficit absolving them of responsibility); Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205 (2008) (arguing that psychopaths lack the capacity for moral rationality, and thus are not responsible for *malum in se* crimes); cf. Walter Glannon, *Moral Responsibility and the Psychopath*, 1 NEUROETHICS 158 (2008) (arguing that a psychopath’s cognitive and affective impairment mitigates, but does not eliminate, responsibility for criminal conduct).

biological, and genetic mechanisms.”<sup>75</sup> With respect to these scholars, for whom there is no discrete volitional mechanism with which to signify moral responsibility, the question of sociopathic responsibility may become ineffably complex—and therefore indeterminate.

### *B. The Compatibilist Calculus for Determining Moral Responsibility*

In contrast, the compatibilist view of human action and moral responsibility might be summarized as follows: “While human choices are caused—and so are determined—free choice is not precluded. Even if caused, choice can be rational and noncoerced, and that is all that matters for responsibility.”<sup>76</sup> In one sense, the acknowledgement that causal determinism underlies all human action is a mighty leveler. The actions of the criminally insane and the upstanding citizen are equal with respect to responsibility in that both originate causally “outside” of the individual.<sup>77</sup> Having a particular assemblage of characteristics that coalesce into sociopathic behavior is as much a matter of chance as being born into wealth.

The implications of such leveling are troublesome. Our first inclination may be to question how *anyone* can be morally responsible, and hence held to be legally responsible. As the Marquis de Sade put it:

What would become of your laws, your morality, your religion, your gallows, your Paradise, your Gods, your Hell, if it were shown that such and such fluids, such fibres, or a certain acidity in the blood, or in the animal spirits, alone suffice to make a man the object of your punishments or your rewards?<sup>78</sup>

Taking this sentiment to its logical conclusion, our notions of differential punishment can be no more than intersubjective fictions, which realization ought to lead us to “level down” responsibility for all.

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75. Peggy Sasso, *Criminal Responsibility in the Age of “Mind-Reading,”* 46 AM. CRIM. L. REV. 1191, 1208 n.71 (2009) (quoting Adrian Raine, *Psychopathy, Violence and Brain Imaging*, in VIOLENCE & PSYCHOPATHY 35, 50–51 (Adrian Raine & Jose Sanmartin eds., 2001)). Note that the continuum view departs at least in part from the reified diagnostic category of antisocial personality disorder criticized throughout this piece.

76. Samuel H. Pillsbury, *The Meaning of Deserved Punishment*, 67 IND. L.J. 719, 724 (1992).

77. For the diametric view that free will requires causality originating within the agent—so-called “agent-causation”—see generally RODERICK CHISHOLM, *PERSON AND OBJECT: A METAPHYSICAL STUDY* (1976).

78. J.J.C. Smart, *Free Will, Praise and Blame*, in FREE WILL 58, 59 (Gary Watson ed., 2d ed. 2003) (quoting NIGEL BALCHIN, *THE ANATOMY OF VILLAINY* 174 (2000)).

Most scholars would agree this move goes too far. Instead of completely leveling all attributions of responsibility, we might prefer to “draw[] and defend[] a line between exculpating pathology . . . and varieties of falling-short that still leave agents genuinely culpable.”<sup>79</sup> This is in a sense easily done: since everyone is, metaphysically speaking, as responsible or non-responsible as everyone else, the line can be drawn arbitrarily. To avoid this arbitrariness, most compatibilists would insist we do (or ought to) draw the line in accordance with social utility: “whatever responsibility is, considered as a metaphysical state, unless we can tie it to some recognizable social desideratum, it will have no rational claim on our esteem.”<sup>80</sup>

On this sort of social utility compatibilist view, the “mentally incompetent and insane” can be seen as paradigmatic cases of exculpatory pathology.<sup>81</sup> We excuse them from (criminal) liability because

they manifestly do not meet the minimal conditions for deterrability, and the attempt to educate them, to bring them up to the knowledge and comprehension threshold, would be fruitless—or at least too costly. To punish them as if they were responsible citizens would be to undermine the very institution of punishment (which depends on its credibility) by undermining its rationale.<sup>82</sup>

Now, one could question the position that deterrability and social legitimacy are the grounds of drawing the line in this way, but the broader point that we might do so as a matter of social utility would remain.

This sort of compatibilist analysis of the sociopath’s responsibility could lead to the following conclusion: we ought to insulate society from its dangerous elements, but to the extent those elements are understood to be lacking in the capacity for moral action we will generally treat them well in doing so.<sup>83</sup> Or, given the presumed ability of sociopaths to cognitively grasp the social consequences of their actions, this framework might lead to harsh punishment of those with antisocial personality disorder as a means to deter them (and other criminal elements).<sup>84</sup> Either

79. DANIEL DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 157 (1984). In fact, Dennett implicitly assumes the validity of the insanity defense, which he gives as an example of demarcating “exculpatory pathology.” For him, there is no jurisprudential quandary, since its contours should be determined by a mundane calculation of the social utility involved.

80. *Id.* at 163.

81. *Id.* at 161.

82. *Id.*

83. I.e., they are to be institutionalized rather than imprisoned. *See, e.g.,* Mei-Tal, *supra* note 3, at 121.

84. In order to deter both sociopaths and those who would use having the disorder as a calculated

way, for the compatibilist, the determinative inquiry will uncover what our goals are as a society and which approach to this especially criminal population will best serve those goals. Of course, this presumes that “our” goals as a society be mutual, or at least reconcilable, and herein lies the crux of compatibilist disagreement with respect to sociopaths.

### *C. Who is Right? And a Third Way*

Our examination has so far been confined to the realm of mental illness, but these rationales for assigning moral responsibility apply much more broadly than that. Cognizant of this fact, the National Commission on Reform of Federal Criminal Laws noted that “the insanity defense discriminates against persons who commit crimes because of influences on their personalities other than mental disease or defect.”<sup>85</sup> The Commission goes on to quote Professor Norval Morris:

It too often is overlooked that one group’s exculpation from criminal responsibility confirms the inculcation of other groups. Why not permit the defense of dwelling in a Negro ghetto? Such a defense would not be morally indefensible. Adverse social and subcultural background is statistically more criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice which a non-deterministic criminal law (all present criminal law systems) attributes to accused persons. True, a defense of social adversity would politically be intolerable; but that does not vitiate the analogy for my purposes. You argue that insanity destroys, undermines, diminishes man’s capacity to reject what is wrong and to adhere to what is right. So does the ghetto—more so. But surely, you reply, I would not have us punish the sick. Indeed I would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes, I fail to see the difference between these two defenses. To the extent that they serve

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excuse (something like, “your honor, the fact that I am guilty of these crimes indicates I am too sick to be held responsible for my actions”). See, e.g., Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 TEX. TECH L. REV. 523, 536–37 (2009) (“[P]sychopaths still perceive reality accurately and understand that we do not want them to commit criminal offenses. If they nonetheless commit crime, the pragmatic retributivist should have no problem finding psychopaths blameworthy, and from a general deterrence perspective the last thing we should want to do is tell these offenders that they will be excused rather than punished for their harmful behavior.”).

85. 1 Working Papers § 503, 251 (Nat’l Comm’n on Reform of Fed. Crim. Laws, 1970).

rehabilitative, treatment, and curative purposes I fail to see the need for the difference.<sup>86</sup>

While Professor Morris frames his point in the context of “non-deterministic criminal law,” we see here a conditional assent to the compatibilist framework for purposes of “leveling down” assigned responsibility, so that the “grossly deprived” might hypothetically receive the same treatment as the criminally insane.

At least two replies can be offered to Professor Morris, both of which bear on the question of sociopathic responsibility. The first is to deny that the defense, as it exists, must necessarily “inculpate as it exculpates,” at least for the populations he considers relevant. We can briefly examine this possibility by way of the peculiar “black rage” defense, an exculpatory approach to a population that is often regarded in ways analogous to the sociopath. Second, one might take his position to its suggested logical conclusion, as Karl Marx did, and abrogate criminal responsibility for a much larger class of humanity than previously thought justifiable. Given the way in which sociopaths epitomize the normative concern of the criminal law as interpreted through the lens of psychiatry, this radical maneuver covers them as well as (or better than) any other criminal element.

### 1. *Exculpatory Black Rage*

Like sociopaths, Black men have been a persistent focus of the criminal law, and the disproportionate recipients of its harshest punishments.<sup>87</sup> It may come as a surprise, then, that the insanity defense has been in rare instances successfully applied to this population. The “black rage” defense in question was the result of the strategic use of the insanity defense by progressive criminal defense lawyers in the early 1970s to “explain a black defendant’s criminal behavior in terms of the oppressive reality of a black person’s life in the United States.”<sup>88</sup> The insanity defense can be thus deployed by “characterizing the defendant’s anger as a ‘transient situational disturbance,’ a psychiatrically recognized ‘mental disease’

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86. Working Papers, *supra* note 85, at 251 (quoting Norval Morris, *Psychiatry in the Legal Process: “A Knife that Cuts Both Ways,”* 41 S. CAL. REV. 514, 520 (1968)).

87. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that Black criminality is largely a function of racialized criminalization—the War on Drugs in particular—but also indicating ways in which criminalization leads to criminogenic conditions for this marginalized segment of American society).

88. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 REV. L. & SOC. CHANGE 369, 403 (1982) (footnote omitted).

which means that the defendant temporarily cracked under pressure.”<sup>89</sup> In a fitting inversion of the criminalizing discourse of pathology, the use of the defense in this manner exculpates by “present[ing] sociopolitical reality to the jury under the legal rubric of evidence relevant to temporary insanity.”<sup>90</sup> This sort of insanity defense does not require psychiatric expert witness testimony to be successful; instead, lay witnesses testify to the daily microaggressions suffered by the marginalized defendant.<sup>91</sup> Unusually humanizing for defenses in this legal category, the defendant testifies “in an attempt to give the jury some insight into the social pressures which drove him to a criminal act.”<sup>92</sup> It has promisingly not been confined solely to the racial dimension of socioeconomic inequality—it has also been successfully applied, for instance, to the perpetually incarcerated.<sup>93</sup>

The use of the defense in this context is instructive in a number of ways. First, it links a non-diagnostic population of special concern to the criminal law to its psychiatric brethren (as does Professor Morris), and in so doing helps to lay bare the normative judgments concealed by the psychiatric discourse of pathology—as well as the emancipatory potential of that discourse when turned on its head.<sup>94</sup> Second, by invoking the criminogenic tendencies of socioeconomic and racial inequality as an exculpatory factor, it rises to Professor Morris’s challenge. Yet this radical repurposing draws some obvious criticisms. For one thing, it loses the allegedly clear line of demarcation thought to be provided by diagnosis. And, more seriously, it is thought to foster public disrespect for the law because its logic dictates that “[e]veryone is a victim and no one is responsible.”<sup>95</sup>

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89. *Id.*

90. *Id.*

91. *Id.* Thus eliminating the criminalizing normative effects of psychiatric testimony in favor of an exculpatory layperson perspective.

92. *Id.*

93. *Id.* at 404. Generally, this sort of defense has been subsumed under the heading of “welfare criminology,” which, in addition to “black rage,” also includes such criminogenic maladies as “urban psychosis” and “urban survival syndrome.” BRAKEL & BROOKS, *supra* note 3, at 160.

94. As might be expected, conservative reactions to the more recent case of Colin Ferguson disagreed with the emancipatory potential of the defense. See, e.g., Clarence Page, *Black Rage: A Defense For The Times*, CHICAGO TRIBUNE, May 29, 1994, [http://articles.chicagotribune.com/1994-05-29/news/9405290179\\_1\\_whites-poll-results-william-kunstler](http://articles.chicagotribune.com/1994-05-29/news/9405290179_1_whites-poll-results-william-kunstler); Nicolaus Mills, *The Shame Of ‘Black Rage’ Defense*, CHICAGO TRIBUNE, June 6, 1994, [http://articles.chicagotribune.com/1994-06-06/news/9406060097\\_1\\_kunstler-and-kuby-william-kunstler-colin-ferguson](http://articles.chicagotribune.com/1994-06-06/news/9406060097_1_kunstler-and-kuby-william-kunstler-colin-ferguson).

95. BRAKEL & BROOKS, *supra* note 3, at 160.



To the first criticism, it might be replied that diagnosis demarcates clearly only because it is arbitrary.<sup>96</sup> This observation permits us to bring into the official discourse the large-scale and longitudinal nature of the connection between social environment and criminogenic tendencies, which connection is so all-encompassing that it obviates the need for demarcation.<sup>97</sup> To this end, acceptance of the Black rage defense is merely a discursive stepping stone. Incidentally, this move also meets the second objection: where crime is the predictable product of a certain social order, unopposed and even vindicated by a reactive legal regime, why should we continue to regard that legal regime to be worthy of respect?

## 2. *Exculpation on a Mass Scale*

To be intellectually satisfying, the move from an insanity defense to a much broader “criminogenicity” defense requires a radical logic, one that can address itself to the traditional libertarian and compatibilist approaches to moral responsibility. Such a logic has already been articulated by Karl Marx. Marx found Hegel’s aforementioned formula for punishment to be “specious”: “instead of looking upon the criminal as the mere object, the slave of justice, [Hegel] elevates him to the position of a free and self-determined being.”<sup>98</sup> Hegel is superimposing the illusion of libertarian freedom, and the sort of moral responsibility it demands, upon a *socially* deterministic situation. He continues:

Looking, however, more closely into the matter, we discover that German idealism here, as in most other instances, has but given a transcendental sanction to the rules of existing society. Is it not a delusion to substitute for the individual with his real motives, with multifarious social circumstances pressing upon him, the abstraction of “free-will”—one among the many qualities of man for man himself! This theory, considering punishment as the result of the criminal’s own will, is only a metaphysical expression for the old “*jus talionis*” eye against eye, tooth against tooth, blood against blood. Plainly speaking, and dispensing with all paraphrases, punishment is nothing but a means of society to defend itself against

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96. And, in the case of antisocial personality disorder, it merely reflects the attribution of criminality to a particular population.

97. *Id.* (“[W]here is the stopping point once we decide to admit socio-economic and cultural facts in the trial phase?”).

98. Marx, *supra* note 70.

the infraction of its vital conditions, whatever may be their character.<sup>99</sup>

In other words, punishment, like the criminal, is the product of social conditions and the necessities those conditions generate—for instance, the criminogenic oppression uncovered in the use of the “black rage” defense. It is decidedly not the product of a transcendental sense of justice as applied to an *a priori* moral responsibility. Talking of free actions or intentionality, as Hegel and other libertarians do, serves only to maintain the ideological assumption that justice is being done through the criminal law, so that those crime-producing social conditions might remain free from interrogation.<sup>100</sup>

In another sense, the examination of responsibility as intentionality is simply running into the law of large numbers. Regardless of whether the notion that criminals are free actors making bad choices reflects reality, we cannot escape the fact that those with certain origin stories, reflected in certain characters or personalities, are committing their disproportionate share of crimes in *consistent and predictable proportions*.<sup>101</sup> In response to our purported obliviousness regarding this fact, Marx quotes the criminologist Adolphe Quételet:

There is a *budget* which we pay with frightful regularity—it is that of prisons, dungeons and scaffolds. . . . We might even predict how many individuals will stain their hands with the blood of their fellow men, how many will be forgers, how many will deal in poison, pretty nearly the same way as we may foretell the annual births and deaths.<sup>102</sup>

If the criminal law were dealing justly with free actors in a causal vacuum, we would expect to see a wildly fluctuating criminal landscape, not crime for which a budget can be produced. What it must confront, then, are the predictability and the unfairness of a criminal order predicated almost

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99. *Id.*

100. Marx’s position stands most starkly at odds with the libertarian framework, but is also at issue with compatibilism as I have portrayed it. Proffering social utility as an explanation for the criminal law regime, as the compatibilists do, conflates the particular interests concealed within the dominant ideology with social utility as the broad, utilitarian project the phrase suggests. Marx also leaves us to answer the question: in whose interest is it to preserve the current criminogenic social order?

101. Marx himself notes the striking regularity of proportions within crime statistics over time. Yet this is convincing for conceptual reasons as well: the predictability of criminogenic factors is, after all, a prerequisite for the continued existence of criminology in the academy.

102. Marx, *supra* note 70.

entirely on a social one. There is a bright side to this realization, however: criminality, thought to be difficult to reach due to the perceived intermediary of a free and unpredictable actor (or conversely an incorrigible pathology), can be accessed instead through alteration of the actor's social conditions. We have the capacity as a society to prevent crime on the front end, rather than retroactively indulging in punishment by way of the legal regime.<sup>103</sup> Furthermore, with this approach we no longer have need of an insanity defense: its selective exculpatory function, which initially seemed so problematic, is rendered unnecessary.

#### *D. Dealing with Sociopathy*

Where do sociopaths fit within this newly expanded framework? In the first instance we know that sociopaths, like the marginalized and disenfranchised, are predictably criminal elements. We have reason to believe that psychiatry conspires with the criminal law to make them so, by creating and reaffirming their essential criminality through the discourse of pathology. Yet in reality, most of those sociopaths caught up in the criminal justice system—and there appears to be enormous overlap between the two groups, diagnosable sociopaths and inmates<sup>104</sup>—must be those who, whether on account of their race, class, or other form of marginalization, belong to an especially criminogenic (or especially criminalized) population. The American carceral state is the largest in the world, and it beggars belief to suggest that this is on account of our uniquely robust sociopath demographic. To stop at labeling these populations “essentially” criminal, as the concept of the sociopath does, is far too convenient for the current social order. Instead, the eminently predictable criminality of these populations should place them at the crux of an emancipatory argument like that made by Marx.

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103. This view is echoed by no less a figurehead of the legal community than Clarence Darrow. In his “Address to the Prisoners in the Cook County Jail,” Darrow notes the disconnect between “crime” and “right conduct,” the fact that crime seems very much a predictable function of which social class is performing the act in question (and for what reasons), and goes so far as to argue for the abolition of jails. In a particularly moving passage he avers that:

I will guarantee to take from this jail, or any jail in the world, five hundred men who have been the worst criminals and lawbreakers who ever got into jail, and I will go down to our lowest street and take five hundred of the most abandoned prostitutes, and go out somewhere where there is plenty of land, and they will be as good people as the average in the community.

ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM 14 (Arthur Weinberg ed., University of Chicago Press 1989) (1957). *Cf.* SHELDEN, *supra* note 68, at 289 (explaining that the displacement of blame onto criminal elements serves to protect the existing social order).

104. *Compare* SADOCK, *supra* note 8, *with* Ogloff, *supra* note 16.

If we nonetheless—and hypothetically<sup>105</sup>—refer by “sociopath” to a class of people neurobiologically inclined toward crime, we can still locate several Marxist rationales to avoid dealing with them through punitive modalities. For the non-Marxist compatibilist who is not already convinced that exculpatory measures like the insanity defense ought to apply, the possibility—and therefore obligation, in the interests of utility—to reshape criminogenic social conditions should be of primary importance. Better to have institutions that reflect a desire to change society than to have ones that reflect the sort of sadism that prefers punishment to the alleviation of crime in the first instance. Or, as Marx more eloquently put it: “Now, what a state of society is that, which knows of no better Instrument for its own defense than the hangman, and which proclaims through the ‘leading journal of the world’ its own brutality as eternal law?”<sup>106</sup>

For those who adopt the libertarian view of moral responsibility, retrospection still intercedes on behalf of the sociopath. The cognitive or emotional deficits (with respect to the established order) that *a priori* make compliance with social norms difficult and less likely are transmuted into predictable noncompliance when considered *a posteriori*. A different social order would predict different criminological outcomes. In this sense, the sociopath is as much a victim as a perpetrator, and treatment modalities are far more appropriate than punitive ones.<sup>107</sup>

Yet even for those who embrace the radical logic of Marx’s argument there may still be the occasional temptation, born of certain unremitting cultural messages, to lapse back into sociopath panic. What if there really are super-criminal, “intraspecies predators” that will continue to live among us, irrespective of the social order? We can vaccinate ourselves against this panic by returning to the reasons for which the concept of the sociopath endures. This demands of us that we examine the current social order, where the worst sociopaths are not even on the criminal justice system’s radar.

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105. As hinted at by the brief discussion of the “continuum view,” Sasso, *supra* note 74. That said, establishing a physiological basis for criminality is probably impossible in principle. See Amanda Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183 (2009) (arguing that relevant epistemic assumptions, including the localization of brain function and the otherization of criminal elements, are inherently untenable).

106. Marx, *supra* note 70.

107. Though it may be that the only viable treatment is in fact large-scale social change, as personality disorders like antisocial personality disorder “seem remarkably resistant to treatment, especially any psychoanalytically-oriented approach that requires critical self-consciousness.” Weisberg, *supra* note 52, at 69.

In terms of institutional sociopathy, Joel Bakan has done much to spread awareness of the fact that corporations are, by legal mandate, textbook sociopaths.<sup>108</sup> Furthermore, given their prominence and influence, they are dangerous on a hegemonic scale: “pragmatic concern for its own interests and the laws of the land constrain the corporation’s predatory instincts, and often that is not enough to stop it from destroying lives, damaging communities, and endangering the planet as a whole.”<sup>109</sup> Corporations even hide their disdain for the rights of others behind an analogue to Cleckley’s mask of sanity: corporate social responsibility, while illegal to the extent that it cuts into profit margins,<sup>110</sup> is allowed to exist precisely to the extent it is dissembling—to the extent it distracts from corporate abuses and externalities.<sup>111</sup> On top of all this, our current neoliberal paradigm has deregulated, privatized, and subsidized to the point that corporations are essentially left to regulate themselves.<sup>112</sup> Lawbreaking and compliance with the law have become simply a matter

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108. JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 28 (2004) (“[T]he corporation. . . Remains . . . a legally designated ‘person’ designed to valorize self-interest and invalidate moral concern. Most people would find its ‘personality’ abhorrent, even psychopathic, in a human being, yet curiously we accept it in society’s most powerful institution.”). Interestingly, Bakan employs R.D. Hare and his diagnostic instrument (which I have criticized as applied to individuals, *supra* Part C) to conclude that corporations are psychopaths in the most frightening sense of the term:

The corporation is *irresponsible*, Dr. Hare said, because “in an attempt to satisfy the corporate goal, everybody else is put at risk.” Corporations try to “*manipulate* everything, including public opinion,” and they are *grandiose*, always insisting “that we’re number one, we’re the best.” A *lack of empathy* and *asocial tendencies* are also key characteristics of the corporation, says Hare—“their behavior indicates they don’t really concern themselves with their victims”; and corporations often *refuse to accept responsibility for their own actions* and are *unable to feel remorse*: “if [corporations] get caught [breaking the law], they pay big fines and they . . . continue doing what they did before anyway. And in fact in many cases the fines and the penalties paid by the organization are trivial compared to the profits that they rake in.”

*Id.* at 57 (alteration in original) (footnotes omitted) (quoting from an interview with Dr. Hare).

109. *Id.* at 60.

110. *Id.* at 37 (“The ‘best interests of the corporation’ principle, now a fixture in the corporate law of most countries . . . forbids any other motivation for their actions, whether to assist workers, improve the environment, or help consumers save money.”).

111. *Id.* at 57. While arguing that corporate social responsibility ought to be tolerated only to the extent it is insincere, neoliberal paragon Milton Friedman informs us that “hypocrisy is virtuous when it serves the bottom line. Moral virtue is immoral when it does not.” *Id.* at 34 (quoting from an interview with Friedman).

112. BAKAN, *supra* note 108, at 110 (“No one would seriously suggest that individuals should regulate themselves, that laws against murder, assault, and theft are unnecessary because people are socially responsible. Yet oddly, we are asked to believe that corporate persons—institutional psychopaths who lack any sense of moral conviction and who have the power and motivation to cause harm and devastation in the world—should be left free to govern themselves.”).

of financial costs versus benefits.<sup>113</sup> Yet for all this, corporations are excluded from the discourse of pathology. In fact, their existence and machinations are celebrated.

To the extent our most powerful institutions shape our characters, it is unsurprising that sociopathy as an *ethic*—as opposed to a pathology—has come to exist in our current social order.<sup>114</sup> To see the way in which institutional sociopathy broadcasts itself to the individual, take, for example, the influential “objectivism” of Ayn Rand.<sup>115</sup> Objectivism exemplifies the all-too-often ignored tension between a political philosophy of radical individualism and the very concept of crime as social transgression. This is perhaps best illustrated by Rand’s own intellectual love affair with a conscience-free murderer:

Rand was much taken with the idea of the violent criminal as moral hero, a Nietzschean transvaluator of all values; according to Burns, she “found criminality an irresistible metaphor for individualism.” A literary Leopold and Loeb, she plotted out a novella based on the actual case of a murderer who strangled a 12-year-old girl. The murderer, said Rand, “is born with a wonderful, free, light consciousness—resulting from the absolute lack of social instinct or herd feeling. He does not understand, *because he has no organ for understanding*, the necessity, meaning or importance of other people.”<sup>116</sup>

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113. *Id.* at 79–80.

114. *Id.* at 134 (“Human nature is neither static nor universal. It tends to reflect the social orders people inhabit. . . . As the corporation comes to dominate society—through, among other things, privatization and commercialization—its ideal conception of human nature inevitably becomes dominant too.”). What is this ideal conception? In answer, Bakan quotes philosopher Mark Kingwell: “From the point of view of the corporation, the ideal citizen is a kind of insanely rapacious consumer, [driven by a] kind of psychopathic version of self-interest.” *Id.* at 135 (quoting from an interview with Mark Kingwell). Given the vast influence of the corporation as an institution, this is very likely a primary aspect of the social order working to create, with the support of psychiatry and the criminal law, those sociopaths that the criminal law deals with on a regular basis.

115. Many in government, the corporate world, and the political right regard her as a foundational influence. *See, e.g.*, Frank Bond et al., *Atlas and the World*, CATO POLICY REPORT (Dec. 1997), available at [http://www.cato.org/pubs/policy\\_report/cpr-19n6-5.html](http://www.cato.org/pubs/policy_report/cpr-19n6-5.html) (discussing her influence in these respects); *see also* Corey Robin, *Garbage and Gravititas*, THE NATION, June 7, 2010, available at <http://www.thenation.com/article/garbage-and-gravititas> (“In 1998 readers responding to a Modern Library poll identified *Atlas Shrugged* and *The Fountainhead* as the two greatest novels of the twentieth century—surpassing *Ulysses*, *To the Lighthouse* and *Invisible Man*. In 1991 a survey by the Library of Congress and the Book-of-the-Month Club found that, with the exception of the Bible, no book has influenced more American readers than *Atlas Shrugged*.”).

116. *Id.*

It is no coincidence that what Rand admired in this individual exemplifies the very worst descriptions of sociopathic pathology. For there to be intelligibly “criminal” actions presupposes a restraint on individual desire in the name of the common good, whether by way of institutional norms or the policeman’s truncheon. To both the sociopath of legend and the objectivist, however, the true immorality lies in the restraint of one’s own desires. To the extent that it is not uncommon to entertain philosophies like Rand’s, or to actualize them on a systemic level as the corporate world does, there is a degree to which society both creates and embraces this sort of genuine sociopath.

#### CONCLUSION

How is it possible, then, that those who stand furthest from the criminal law’s punishment—senators, CEOs, and other respectable sorts—profess to be so heavily influenced by Rand, and to wield power in such an antisocial, destructive fashion? Pathology for psychiatry, as with criminalization for law, comes to serve a dual function: on the one hand, it demarcates a realm of unacceptably deviant behavior. On the other hand, by that very same act, it impliedly legitimizes the remainder—irrespective of actual social cost. Our common presuppositions about what conduct is pathological or criminal are shaped by institutions like psychiatry and law, and these institutions are shaped by power. Thus, power may legitimate the most despicable conduct of which humanity is capable, so long as it has appropriate scapegoats on which to foist our fear and blame. And what better scapegoat could there be than the pathological criminal? Unlike the corporation, whose indispensable commodities suffuse and structure our daily existence, the sociopath—a monstrous, alienated Other—is a proper bogeyman. Psychiatry and the criminal justice system immanentize the sociopath through individual actors so that this bogeyman can be caged and punished, and our fears vindicated. Yet so long as the social conditions necessary for crime are maintained, there remain an indefinite number to busy our antipathy down the road.

In this light, it is hard to take very seriously the scaremongering that arises from the possibility of insufficiently punishing sociopaths. When the scale of permissible sociopathy so outstrips that of criminalized sociopathy as it has in our current social order, it is a sign: the social order is awry, and more in need of fixing than those individuals who are sanctioned for transgressing it.