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A RATIONAL APPROACH TO RESPONSIBILITY†

Christopher Slobogin*

LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP. By Michael S. Moore. New York: Cambridge University Press. 1984. Pp. xiv, 527. Cloth, \$59.50; paper, \$18.95.

INTRODUCTION

“Determinism” — the idea that human behavior is caused by factors beyond the individual’s control — has always been a troublesome subject for lawyers. The basis for the determinist position varies: behaviorism views human action as a mechanistic response to external stimuli;¹ the psychoanalytic contention is that all or most behavior is the product of unconscious drives and conflicts shaped by childhood experiences;² those with physiological perspectives theorize that behavior is ruled by chemical reactions in the body.³ But regardless of etiology, determinism erodes the basis for attributing personal responsibility. If an individual’s behavior *is* caused by factors outside his control, how can we hold him morally and legally responsible for it?

Legal scholars usually have either chosen to ignore this question⁴ or, in what amounts to the same thing, have posited “free will” for legal purposes. Representative of the latter approach is the following statement from Herbert Packer:

Very simply, the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were. It is desirable because the capacity of the individual human being to live his life in reasonable freedom from socially imposed external constraints (the only kind with which the law is concerned) would be fatally impaired unless the law provides a *locus poenitentiae*, a point of no return

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1. See generally B. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1972); K. SPENCE, *BEHAVIOR THEORY AND CONDITIONING* (1956).

2. See generally Freud, *A General Introduction to Psycho-Analysis*, in 54 *GREAT BOOKS OF THE WESTERN WORLD* 449 (R. Hutchins ed. 1952).

3. See generally N. CHOMSKY, *RULES AND REPRESENTATIONS* 217-54 (1980); Rapaport, *On the Psychoanalytic Theory of Motivation*, in *NEBRASKA SYMPOSIUM ON MOTIVATION* 173, 183-212 (M. Jones ed. 1960).

4. See, e.g., W. JAMES, *THE WILL TO BELIEVE* 147-48 (1897).

beyond which external constraints may be imposed but before which the individual is free — not free of whatever compulsions determinists tell us he labors under but free of the very specific social compulsions of the law.⁵

One way of reconciling the apparent tension between the scientific and the legal view of persons is to jettison the notion of retributive justice. If the idea of personal blameworthiness is meaningless, punishment could instead be premised on the need to prevent future crime by the individual in question.⁶

A less jarring resolution of the supposed conflict is to show that it does not exist. In one of the more important recent works on the issue of human responsibility, Professor Michael Moore of the University of Southern California School of Law attempts to do just that. In *Law and Psychiatry: Rethinking the Relationship*, Moore concedes at the outset that behavior can be caused by what he calls “mechanistic” forces — physiology, the environment, and unconscious mental states. But, arguing from a linguistic philosophical perspective, he concludes that merely because a person’s behavior is caused by such factors does not mean that the person lacks responsibility for it. Rather, persons are “caused causers” and therefore responsible, generally, whenever their “actions” are the result of “practical reasoning” (terms to be defined later in this review). According to Moore, only when an actor’s ability to reason practically is impaired may he be excused for his acts. Moore in essence is reasserting a traditional concept of personhood that has undergone severe strain since Freud, Skinner and others have attempted to identify the factors that predict human behavior.

In addition to this substantive thesis, Moore has a less controversial “methodological” thesis. Lawyers and psychiatrists, he argues, both need to pay more attention to the philosophical underpinnings of their respective professions. To the extent they lose sight of these fundamental tenets (and Moore implies that they have), interaction between the two disciplines is likely to be misfocused and the substantial common ground between them obscured.

Critiquing Moore’s substantive thesis is a gargantuan task, because Moore himself attempts to do so much — in effect, he examines and then recasts the principal assumptions of both the law and the behavioral sciences. Because it is the primary thrust of the book, Moore’s approach to the nature of human responsibility will be the focus of this review. The first portion of the review will outline the philosophical foundation for these arguments. The remainder of the review, in implicit recognition of Moore’s methodological thesis, will explore the

5. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968).

6. See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); B. WOOTTON, *CRIME AND PENAL POLICY* 220-39 (1978). A significant practical problem associated with this approach is the difficulty in predicting dangerousness. See generally J. MONAHAN, *PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES* 21-67 (1981).

practical implications of his ideas for criminal "mental health" law, a rubric meant to include the insanity defense, subjective *mens rea* requirements, and the diminished responsibility doctrine, as well as the admissibility of expert testimony on these issues. For the most part, this exploration will take the form of assessing the worth of Moore's own thoughts about the ramifications of his work. Occasionally, however, it will entail application of his substantive thesis to issues which *Law and Psychiatry* considers only tangentially.

I. PRACTICAL REASON AND HUMAN ACTION

Law and Psychiatry is a difficult book. To grasp its contents fully will probably take more than one reading even for those with some sophistication in the area. But the book's major tenets can be summarized briefly.

The concept which is central to Moore's thesis is that of practical reasoning, reasoning which tells us what to do (as opposed to what to believe). The pattern of practical reasoning can be expressed as follows:

1. *X* desires *q* (e.g., Let it be the case that the wine be chilled).
2. *X* believes that doing *p* will produce *q* (e.g., If I open the window, then the wine will be chilled).
3. *X* does *p* (e.g., I open the window).

If in fact *X* does *p* because of a desire for *q* and in the belief that doing *p* will produce *q*, then, asserts Moore, we can say that *p* was an intentional action explained by *X*'s belief/desire set (pp. 13-14). When a person acts according to this type of practical syllogism, he *causes* an action which is *rationalized* by his desires and beliefs.

Moore contends that this type of reason-giving process provides a valid explanation of behavior, regardless of what other factors may have contributed to the conduct.⁷ He defends this contention against several possible attacks, all of which should be examined here because Moore's responses help one comprehend his later analysis of legal and moral responsibility.

First, Moore must deal with the philosophical argument that reasons cannot be causes because reasons serve exclusively a rationalizing function. Under this view, reasons are merely justifications for actions; because we prefer a rational account of human activity, each person views his behavior as done for reasons, when in fact the reasons are irrelevant to the causal chain.⁸

To this objection, Moore makes two responses. First, for any given action, there will presumably always be more than one belief/desire set

7. Moore himself states: "My own determinist and mechanist assumptions are that human behavior is fully determined by mechanistic kinds of happenings in the human body." P. 33.

8. See, e.g., P. WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* 45-51 (1958).

that can rationalize it. How are we to choose one set over another unless through an analysis of which set we think *caused* the action done (p. 23)? Second, our way of becoming aware of our reasons suggests that belief/desire sets are not mere interpretations for the sake of convincing ourselves we are rational. Persons can know the objects of their desires and beliefs in a "nonobservational" way; that is, they become aware of these desires and beliefs in a way an observer seeking to justify the person's actions cannot. For instance, one can know one wants wine to be chilled without even a silent soliloquy about that desire. From this fact (and an assumption that physiological events cause such nonobservational knowledge), Moore deduces that desires and beliefs exist independently of any attempt to provide meaning to behavior (pp. 24-25).

In my view, neither of these arguments *proves* that reasons cause behavior. But taken together, they considerably weaken the interpretivist stance that reasons are mere rationalizations. More problematic is Moore's insinuation that, assuming reasons do cause behavior, we can conclusively ascertain those reasons. He asserts that we can discover causal desires and beliefs through the person's avowals (p. 25). Yet he also admits, as I shall discuss in greater detail later, that a person may act for reasons unknown to him. Moreover, in the practical context addressed in this article — the mental state of individuals charged with crime — it is quite likely that a person's stated reasons for acting will be suspect on other grounds. The point is not that the interpretivist position is correct philosophically, but that when we try to reach conclusions about the true reasons for behavior we often rely, for lack of anything better to go on, upon observer attributions. And when we rely upon such "observational" knowledge, we in effect become interpretivists, whether or not we think reasons cause behavior in the abstract. Moore never confronts this dilemma squarely, but then it is outside the scope of his book.

A quite different attack against reason-giving explanations assumes that desires and beliefs in fact do cause behavior, but suggests that they do not always "rationalize" it.⁹ For instance, to use Moore's example, one's belief that a murderer is prowling in the hall could cause one's heart to palpitate. The threat that this type of event poses to the concept of practical reasoning is that, while it is caused by a belief, it does not involve an agent pursuing intelligible ends; the end result (the palpitation) happens irrespective of any rationalization process.

Moore admits that this type of bodily movement is not performed for reasons, despite its being caused by a belief. But he also points out that reason-giving explanations are only meant to explain human *actions*. Here, he argues, no such "action" is involved because there is

9. See, e.g., Fay, *Practical Reasoning, Rationality and the Explanation of Intentional Action*, 8 J. THEORY SOC. BEHAVIOUR 77 (1978).

not the requisite connection between the bodily movement and the actor's knowledge. Unless the actor *knows* he can do a particular movement and *knows* when he is exercising that power, the movement cannot be called an action by the actor. Moore quotes Wittgenstein's pithy statement to the same effect: "Human actions are marked by the absence of surprise."¹⁰ Given this definition, the heart palpitation in the above example is not a human action but rather what Moore calls a "nonaction event," just as is a reflex or an arm movement during sleep. Nonaction events do not require rationalizations and thus do not threaten the concept of practical reasoning (pp. 15-19).¹¹

One final objection to the concept of practical reasoning is the reductionist argument that reasons cannot be separated from other causes and thus do not, by themselves, either cause *or* rationalize behavior. The reductionist claim comes in two forms. The behaviorist argument is that reasons are mere constructs; they have no existence independent of behavioral criteria because the only way to verify such mental states is through observation of behavior.¹² The physiological reductionist, on the other hand, argues that reasons are identical to certain kinds of brain states.¹³ If either of these contentions is correct, then reason-giving explanations cannot be seen as causal factors separate from other factors (*i.e.*, behavior or neuron firings), and actions, despite the above definition, would be nothing more than bodily movements.

With respect to the behaviorist reductionist claim, Moore's principal response is the observation that mental words such as "desire" and "belief" are individuated by the objects they take. One does not desire or believe in the abstract; one desires *that q* will occur and one believes *that* doing *p* will cause *q* to occur. To speak of desires and beliefs in any other way makes no sense (p. 38). But the behaviorist approach cannot account for this individuation. As Moore states in one of his other works:

One could not, for example, distinguish a desire to stand on Cicero's grave from a desire to stand on Tully's grave on the basis of behavior of someone tending to place himself on that grave, for Cicero and Tully

10. P. 74 (citing L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 162 (2d ed. 1958)). For a more detailed discussion of Moore's treatment of actions, see text at notes 32-36 *infra*.

11. It is also possible for desires and beliefs to cause *actions* without rationalizing them. Moore imagines a prisoner who rattles the bars of his cell "because he wants out." P. 16. The bar-rattling is an action because the prisoner knows he is doing it, and the action is admittedly "caused" by the desire to escape. Is the prisoner therefore acting for reasons? Moore would say no, because, unlike the person who opens the window in order to chill the wine, the prisoner is not *motivated* to perform his action by a desire; rather his bar-rattling merely *expresses* the desire to escape. Only if the prisoner actually believed that this action would lead to escape could it be said he acted for "reasons."

12. See, e.g., G. RYLE, *THE CONCEPT OF MIND* 83-115 (1950); Carnap, *Psychology in Physical Language*, in *LOGICAL POSITIVISM* 165 (A. Ayer ed. 1959).

13. See e.g., A. GARFINKEL, *FORMS OF EXPLANATION: RETHINKING THE QUESTIONS IN SOCIAL THEORY* 49 (1981); Rapaport, *supra* note 3, at 187-89.

were one and the same person, and thus, there is only one grave. . . . An actor may desire to stand on Cicero's grave, but ignorant of the fact that Cicero was Tully, not want to stand on Tully's grave. . . . Thus, no equivalence may be asserted between behavioral criteria and a mental word such as "desire."¹⁴

Even assuming this problem can be overcome, Moore points out that behaviorists are merely stipulating, rather than proving, that behavior is the only criterion for mental states. In fact, desires and beliefs may be physiologically rooted (p. 38). Until this latter hypothesis is disproved, the behaviorist equation of mental states with behavior is specious.

Precisely because we do not have sufficient scientific information about the physiology of mental states, Moore has more trouble dealing with the second reductionist argument. He admits that desires and beliefs may in fact be identical to brain states. But he ultimately adopts what he calls a "functionalist" perspective on mental states: because we do not yet know whether the identity thesis is true, we can view desires and beliefs as *provisionally* independent of brain states, and thereby focus on "the role such states play in [the] person's intelligent functioning" (p. 35), rather than on how they are physically realized in that person. This assumption is crucial to Moore's approach to responsibility, detailed in Part II of this review. It allows one to believe (as does Moore) that "mechanistic kinds of happenings in the human body" cause human behavior (p. 33), while at the same time permitting one to attribute causal power to belief/desire sets. Moreover, "it makes intelligible how belief/desire states could cause behavior even if such states do not turn out to be physical states of the brain" (p. 35).

This brief recounting of Moore's arguments for viewing reasoning explanations as legitimate explanations of human behavior does not reveal the elaborate nature of his reasoning. But it does expose his central premises: (1) that whether a bodily movement is an action depends on what a person knows he can do and on what he knows himself to be doing; and (2) that reasons (belief/desire sets) can both cause and rationalize behavior independently of other factors. The question now becomes what importance these conclusions have for the moral issues faced by the criminal law.

II. SOME IMPLICATIONS OF MOORE'S THESIS FOR THE SUBSTANTIVE CRIMINAL LAW

In Moore's view, the concept of practical reasoning makes it possible for a retributive system of justice and a scientifically based determinism to co-exist. Moore's central moral assertion is that one is

14. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 212 (1981) (footnote omitted).

responsible for one's actions, *however* they are caused, so long as they are not the result of "disturbed"¹⁵ practical reasoning. When a person acts for reasons, *he*, as a person, is the "proximate" cause of his actions. He should thus generally be held responsible for them.

Moore calls this position "soft determinism" or "compatibilism" (p. 361). To understand the concept fully, it should be distinguished from "hard determinism," which adopts the view that persons are compelled to act in certain ways because of internal or external factors.¹⁶ Moore argues that compulsion and causation are two separate concepts. Put simply, a causal factor is not a compulsion unless it interferes with one's practical reasoning process.

Moore fleshes out this point with several examples:

That I am caused to go downtown by my desire to get a haircut is hardly a case of compulsion. This is my un-compelled act, the product of my undisturbed practical reasoning.

Similarly, if I am caused to engage in sharp practices by my greedy character, this is not to say I am compelled. My greed is my characteristic way of unconstrained dealing with others in financial matters. It does not constrain my powers of practical reasoning so much as describe how I decide when I am unconstrained.

Similarly, there are doubtlessly large numbers of physiological states and events necessary for each of us to engage in various kinds of basic acts. . . . Such causes hardly disturb our practical reasonings; rather, they are the conditions that make possible the execution of our desires in action.¹⁷

Finally, Moore states, "[s]imply because what a person desires or believes is caused by his environment in no way makes the exercise of [the capacity to reason practically] difficult" (p. 364). A poverty-stricken childhood may lead one to believe that crime is the best way to earn a living, which belief may in turn cause crime, but to the extent the person with such a history retains the ability to formulate desires and beliefs in an undisturbed fashion he cannot be said to be compelled to commit crime.

Has Moore proffered any new theoretical insight here? Or has he merely gerrymandered the concepts of causation and compulsion? In one sense, he, like Packer, is simply "positing" personal agency. He admits that a soft determinist must "show that determinism is compatible with the principle that punishment is unjust unless the actor 'could have done other than he did' " (p. 488 n. 34), yet he makes no

15. Moore's conception of disturbed or invalid practical reasoning is described in this review's sections on the insanity defense and the diminished responsibility notion. See Parts II.A. & II.D. *infra*.

16. For examples of this point of view, see Hospers, *Free Will and Psychoanalysis*, in *FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW* 463 (H. Morris ed. 1961); Rapaport, *supra* note 3, at 187.

17. P. 363 (footnote omitted).

attempt to do so himself.¹⁸ All that his formulation of compulsion suggests is that only a few causal factors actually disturb practical reasoning; it does not show that in any given case a person, with or without the capacity to reason practically, could have acted differently.

What Moore *does* claim to have established, as he says elsewhere in the book, is the "possibility of there being differing sets of equally sufficient conditions existing to cause the same event" (p. 226):

To say that a bodily movement is the product of an abnormal condition of the brain does not preclude one from describing that movement as an action performed by an agent for reasons. We have two vocabularies: that of movement and mechanical causation, and that of actions and reasons. Merely because scientists may discover lesions in the brain is not to preclude the application of the language of action and reasons. When there are mechanically caused movements there may nonetheless be intelligent actions.¹⁹

Assuming (as discussed earlier) the provisional independence of reason-giving language from the language of natural science, the next step for Moore is an admittedly semantic one. The set of causal conditions (and vocabulary terms) which should be used to explain a bodily movement depends quite literally on what one is talking about. If, as is true in the law and in everyday existence, we are seeking to explain behavior in terms of *moral accountability*, the language of actions and reasons is both necessary *and* sufficient. The language of mechanical causation, while it may explain behavior scientifically, is not germane to our understanding behavior in the moral sense (p. 226). Thus, whatever causes might be considered "compelling" in the scientific context, in the moral context they consist only of those causes (such as a gun to the head or addiction) which dominate one's reasons for acting.

The linguistic approach to such issues can be attacked, of course.²⁰ But if we can accept the closely related propositions that reason-giving explanations are the linchpin of responsibility analysis and that causation does not mean compulsion, then we have a powerful conceptual tool at our disposal. It is the burden of the remainder of this review to demonstrate this point.

A. *Recasting the Insanity Defense*

The area most dramatically affected by the concept of practical reason is the insanity defense, to which Moore devotes an entire chapter. Before discussing his conclusions about the scope of the defense, it

18. However, Moore does address this issue in his most recent work, Moore, *Determinism and the Excuses*, 73 CALIF. L. REV. (forthcoming 1985).

19. P. 226 (footnote omitted).

20. See generally A. LOUCH, EXPLANATION AND HUMAN ACTION (1966); THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD (R. Rorty ed. 1967).

is worth noting — if only because of recent antipathy toward exculpatory doctrines based on mental illness — that his thesis strongly affirms the role of the insanity defense as a necessary and integral aspect of criminal justice. If responsibility and the ability to form practical syllogisms are so closely connected, then one whose ability to reason practically is significantly impaired cannot justly be held responsible. Yet without the insanity defense, such an individual *would* be held responsible for his actions. The defense is therefore central to our view that moral agents are beings who have some capacity to act for reasons.²¹

The methodological question here, of course, is when a person's practical reasoning ability is so impaired that responsibility cannot be ascribed to him. One could say that the bare capacity to think in the *form* of practical syllogisms is sufficient for this purpose. Thus, to paraphrase one of the classical illustrations of insanity, if a person desires lemon juice and believes that squeezing his wife's neck will produce the juice (because he thinks she has juice in her veins), then he would be responsible for strangling his wife, if he in fact did so as a result of this belief/desire set.

Moore would agree with virtually everyone else that this person is "insane," despite the fact that his reasons caused and rationalized his action. Where he differs from the current approach to insanity is in his explanation of why this person should not be held morally responsible. Most states rely either on the M'Naghten test (excusing a person who because of mental disease or defect did not know the nature and quality of his act or that the act was wrong), M'Naghten and the so-called "irresistible impulse test," or the American Law Institute test (excusing a person who, because of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his act or to conform his conduct at the time of the offense to the requirements of the law).²² Moore argues that these tests do not capture the core notion of why mental disability excuses behavior. As he puts it, "there is something about mental illness itself that precludes responsibility, irrespective of there being any ignorance about the nature of the par-

21. The view that responsibility and the ability to reason practically are intimately associated also rebuts the argument that the insanity doctrine *must* take into account environmental factors such as poverty. Judge Bazelon has straightforwardly argued for such an expansion of the defense on the ground that no valid distinction can be made between actions caused by mental illness and those caused by external factors. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 396 (1976). Professor Morris, also seeing no such distinction, contends conversely that the defense should be abolished, since to allow it its logical scope would swallow the criminal law. N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 61-63 (1982). Moore shows that when the issue is personal responsibility rather than mere causation, external factors are irrelevant unless, as discussed above, they interfere with practical reasoning.

22. For a complete list of state and federal rules of insanity as of 1981, see Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 247, 257-69 (J. Monahan & H. Steadman eds. 1983).

ticular crime or its prohibited nature, and irrespective of there being any excuse of compulsion" (p. 230). For Moore, the distinguishing characteristic of the mentally ill is their "irrationality":

One is a moral agent only if one is a rational agent. Only if we can see another being as one who acts to achieve some rational end in light of some rational beliefs will we understand him in the same fundamental way that we understand ourselves and our fellow persons in everyday life. We regard as moral agents only those beings we can understand in this way. [Pp. 244-45.]

From this assertion, Moore concludes that the appropriate test for insanity is whether the accused is "so irrational as to be nonresponsible" (p. 245).

One first notices that Moore's test lacks the "mental illness" predicate found in virtually all other insanity formulations. I think this omission is a sensible one. The expanded definition that psychiatry has given the term is, as he asserts, a type of "conceptual imperialism" which results more from an effort to define the types of conditions psychiatrists might "treat" than from a disciplined effort to grapple with the problem of what constitutes an improperly functioning mind (pp. 198-210).²³ In light of the psychiatric baggage that now comes with the idea of mental illness, Moore is right to eschew its use in his definition of insanity, and to focus instead on the legally relevant debilitating aspects of mental dysfunction.

I also believe that Moore is correct in his conclusion that "irrationality" is the aspect of mental dysfunction which excuses behavior (*if* that term is appropriately defined, a problem which will be deferred for the moment). As I shall discuss in this review's section on diminished responsibility, Moore concedes that ignorance and compulsion due to mental abnormality — the traditional prongs of the insanity defense — are at least partial excuses in their own right. Presumably each might also easily *lead* to irrationality. But Moore argues, I think convincingly, that it is the latter attribute which most directly undergirds our traditional notion of "mental illness," and thus our traditional notion of "insanity" (pp. 195-98). Typically, when we say a person is mentally ill or "crazy" or "mad," we are not referring to his knowledge of right from wrong or his ability to control his behavior, but to the fact that his actions do not make sense in a fundamental way. These labels apply when a person's reasons for acting are wildly irrational — when they are difficult, if not impossible, to empathize with. As Moore points out, the ancients' synonym for mental illness was "loss of reason" (p. 196).

23. At times Moore seems even to suggest that the modern psychiatric definition of mental illness should be coextensive with the law's definition of insanity. Compare pp. 207-10 with pp. 243-45. If so, he may be conflating normative and descriptive concerns. In any event, the proper clinical parameters of mental illness is a topic far beyond the scope of this discussion of criminal mental health law.

Of course, there is considerable overlap between current tests of insanity and an irrationality test. Conceptually at least, the latter test and the cognitive formulas (M'Naghten and the first half of the ALI rule) would seem to be almost congruent. There is a direct relationship between the rationality of one's reasons and the ability to perceive and understand the nature or wrongfulness of what one is actually doing. Without the latter capacities, desires and beliefs are bound to be irrational. Moore recognizes this point when he says, "the mental abilities of perception, memory, imagination, and particularly reasoning are necessary in the acquisition of rational beliefs and in maintaining consistency between belief sets and desire sets" (p. 197).

The same relationship does not exist, however, between an irrationality test and the volitional or control components of traditional insanity rules (e.g., the second half of the ALI test and the so-called "irresistible impulse" rule). While a person whose acts are "compelled" or "irresistible" is, by Moore's definition, one whose practical reasoning is disturbed by external or internal factors, that reasoning may still be rational. The "compelled" individual, according to Moore, is merely one who finds it particularly difficult to avoid choosing a particular action, not one who necessarily acts for grossly irrational reasons.

If this latter point is correct, it provides theoretical support for the current movement toward elimination of volitional impairment as an independent component of the insanity test,²⁴ a movement which to date has been bottomed more on practical concerns relating to the difficulty of proving such impairment than on solid conceptual grounds.²⁵ More generally, the observations made above suggest that an irrationality test for insanity is the most forthright manner of addressing the moral concerns which originally gave rise to the insanity defense.

Moore's insanity formulation is thus a step forward. It suffers significantly, however, from a failure to provide an adequate definition of rationality. Like mental illness, the term is subject to multiple interpretations, and jurors, as reliable as their intuitions may usually be, are unlikely to reach consistent results on the issue with no guidance from the law.

Elsewhere in the book, Moore himself implicitly recognizes this point when he constructs a multi-level definition of rationality using practical reasoning terminology (pp. 100-08). The least demanding definition of a rational being is one who has "intelligible" desires and

24. See, e.g., Act of Oct. 1, 1982, ch. 143, 1982 Alaska Sess. Laws; CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 & commentary on ¶ (a) (First Tentative Draft 1983); STATEMENT ON THE INSANITY DEFENSE 10-12 (American Psychiatric Assn. 1982); see also note 52 *infra*.

25. It can still be argued, of course, that compulsion by reason of mental illness should be an independent ground of excuse. But see note 55 *infra* and accompanying text.

beliefs, meaning one whose desires and beliefs are not wildly "inconsistent[t] or incoherent[t] with popularly held [desires or] beliefs of a society" (p. 105). A second, more rigorous definition of rationality requires not only that the person's desires and beliefs be intelligible but that they be consistent with one another, at least such that the person can identify and act upon what he most wants when faced with conflicting desires or upon what he most strongly believes when faced with conflicting beliefs. An even more constraining requirement is that of "transitivity," meaning that one's desires and beliefs are intelligible and free from direct contradiction and, additionally, that they logically cohere with and are implied by one another. Finally, the strongest sense of rationality includes the first three requirements and adds the idea that the desires and beliefs be "correct" or "true."

Moore's dissection of the rationality concept is a decided advance over previous efforts.²⁶ But his application of this framework to the insanity inquiry is questionable. He appears to take the position that to be sane a person must be judged rational in the first three senses, but not in the fourth.²⁷ That is, if a person's desires and beliefs are relatively intelligible, consistent with one another, and coherent, then he is sane for legal and moral purposes; to require further that his desires be "correct" and his beliefs "true" is not morally necessary or appropriate. On this latter point, I agree. Otherwise, very few individuals charged with crime would be responsible; most criminal acts spring from an obviously incorrect desire or from an untrue belief. And where the "correctness" of the person's reasons is *not* obvious, it would often be impossible to determine fairly.

On the other hand, Moore's apparent stance that to be insane a person's reasons for acting must not only be unintelligible, but inconsistent and incoherent as well, denies clinical reality. Many psychotic individuals, including conceivably the lemon-squeezer, have hallucinatory belief systems which are internally coherent.²⁸ Yet we would still find these individuals insane.

For me, unintelligibility of reasons alone is a sufficient basis for insanity. This concept must itself be defined, however, so as to encompass only those desires and beliefs which are inconsistent with those held by others in the individual's societal group. Otherwise a "rational" individual from an alien or isolated subculture might be excused on insanity grounds merely for engaging in his normal, if

26. See, e.g., H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 218-39 (1979).

27. See p. 207.

28. This is particularly true of those psychotic individuals with paranoid disorders. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 197 (3d ed. 1980) (defining the essential feature of paranoia as "a permanent and unshakable delusional system accompanied by preservation of clear and orderly thinking"); see also descriptions of *Shared Paranoid Disorder* and *Acute Paranoid Disorder*. *Id.* at 197.

sociologically rare, behavior, because of its unintelligibility to the majority.²⁹

If what has been outlined above is the morally appropriate standard for the insanity defense, and I think it is, then irrationality should be defined accordingly, rather than left open to other interpretations. So modified the test might be:

An insane person is one who is so irrational at the time of the offense that he is not responsible for it. Irrationality is measured by the extent to which the desires or beliefs which motivated the offense are unintelligible in light of what the person's society commonly desires and believes.

This test captures the essence of rationality as it should be defined for insanity purposes and thus provides better guidance for the factfinder than does Moore's vague formulation. It should inhibit any tendency on the part of the factfinder to find "irrational," and thus probative of insanity, incorrect but intelligible desires (such as a jealousy-inspired urge to kill one's spouse) or beliefs (such as a belief that stealing is justified when you are poor). It also properly ties intelligibility to the person's cultural background, thus avoiding insanity acquittals in those infrequent cases involving desires and beliefs foreign to the factfinder but intelligible to the defendant's subgroup. At the same time, the test makes clear that the data relevant to the insanity inquiry are the individual's mental states — his actual desires and beliefs — and not what one might infer from looking solely at his behavior. A poor person who robs a store may appear rational, but determining whether he is in fact so requires an investigation of his practical reasoning capacity.

The final difference between Moore's test and the one proposed above may be the most important. Unlike the proposal, Moore's formulation makes no effort to tie the finding of irrationality to the offense which triggers the individual's involvement in the legal system. It is probable that this was not an oversight on Moore's part. He criticizes current insanity tests because "[t]hey assume that legal insanity is an *excuse* for the particular acts done, not a general *status* attached to a class of human beings who are not accountable agents."³⁰ I agree that an insane person should be excused because of the type of being he is (a bad practical reasoner). Yet surely such a person can murder for irrational reasons one day and rob for rational reasons the next. Under such circumstances, the robbery should not be excused. Conversely, while there may be no such thing as truly temporary insanity, there are "normal" people whose ability to reason practically is seri-

29. Cf. *Rex v. Esop*, 173 Eng. Rep. 203 (Cent. Crim. Ct. 1836) (defendant, a native of Baghdad, convicted for committing an "unnatural offence" despite argument his act was no crime in his native land). It is conceivable that the acts of some terrorist groups would appear "unintelligible" to juries in this country, yet considered in the terrorist milieu they "make sense."

30. P. 222 (emphasis in original).

ously deficient for a short period of time;³¹ if they happen to commit a criminal act during this period, they should be excused. To the extent that Moore's emphasis on insanity as a status leads him to ignore these possibilities, he is inappropriately restructuring the relevant moral inquiry.

B. *The Misnamed Voluntary Act Doctrine*

Law and Psychiatry takes on many legal issues other than the insanity defense. An important issue both for its own sake and because it sets the stage for Moore's discussion of intentionality is the scope of the *actus reus* requirement. In describing this requirement, some commentators speak of the need to show the accused's act was "voluntary."³² Use of this word can cause confusion: is someone who steals with a gun to his head, while experiencing a strong craving for drugs or in a last-ditch attempt to feed a starving child acting voluntarily? Is the person who discovers his wife being beaten by a stranger acting voluntarily when he kills the assailant in a sudden fit of rage? Traditionally, of course, none of these individuals could claim an "involuntary act" defense. Given the emphasis on practical reasoning up to this point, a tempting rationale for this result might be to say that the *actus reus* requirement is met if one moves for reasons; in fact that is the stance many legal scholars take.³³ Yet while the thieves described above would probably be said to be acting for reasons, the "involuntary" act claim of the impulsive killer — the person who acts "without thinking" — is not so easily dismissed.

Moore's definition of action³⁴ better explains why the impulsive killer would have no *actus reus* claim. To Moore, the determination of whether one is responsible for a bodily movement is primarily concerned with knowledge, and with whether an "act" can be said to have occurred at all. Practical reasoning and the related idea of "voluntary action" are only tangential to the inquiry.

Moore makes a standard philosophical distinction between basic acts and complex actions. The former are those acts which do not

31. See, e.g., the case of Joy Baker, described in P. LOW, J. JEFFRIES & R. BONNIE, *CRIMINAL LAW: CASES & MATERIALS* 660-69 (1982). The American Psychiatric Association's Diagnostic and Statistical Manual recognizes two relatively brief types of psychosis, reactive schizophrenia (of rapid onset and brief duration with the affected individual appearing well both before and after the schizophrenic episode), and schizophreniform disorder (clinical features same as schizophrenia but duration of less than six months). See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 28, at 199-202; see also description of *Atypical Psychosis*. *Id.* at 202-03.

32. See, e.g., J. AUSTIN, *LECTURES ON JURISPRUDENCE* 427, 1095 (4th ed. 1873); G. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.4 (1978); O. HOLMES, *THE COMMON LAW* 54 (1881); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 25 (1972). But see H. HART, *Acts of Will and Responsibility*, in *PUNISHMENT AND RESPONSIBILITY* 90 (1968).

33. See, e.g., J. AUSTIN, *supra* note 32, at 426-27; Mackie, *The Grounds of Responsibility*, in *LAW, MORALITY AND SOCIETY* 175-88 (P. Hacker & J. Raz eds. 1977).

34. Discussed briefly in text at notes 9-11 *supra*.

require any antecedent action (such as raising one's arm) (p. 68); the latter require a basic act or acts and some type of practical reasoning aimed at achieving some goal (such as opening the window, driving a car, or robbing a bank) (pp. 75-76). The so-called voluntary act doctrine is not concerned with complex actions,³⁵ but rather with whether basic movements, such as raising one's arm, can morally be called the actor's. Moore asserts that when a person's arm is blown upward by the wind, rises because of a reflex action to some stimulus, or goes up during sleep, we cannot say the *person* performed the movement. Nor can the muscle flexings necessary to raise one's arm be called an act, because although the actor knows he can raise his arm he does not "know" how to move his muscles in just the way that will raise the arm (p. 73). But when the person knows he can raise his arm and also knows that he is exercising that power, he is directly involved in the bodily movement. Thus, Moore arrives at what he calls an "epistemic indicator" of action: "An actor's bodily movement is a basic action only if he knows that he can perform that movement as an action and knows that he is doing so on that particular occasion" (p. 73). The word "know" in this definition contemplates not only actual awareness of the movement at the time it occurs, but "dispositional" knowledge as well, in the sense that the person, if asked, could say that he knows he is raising his arm on the occasion in question (pp. 339-40).

Under Moore's formulation, the impulsive killer — as well as the threatened, addicted and desperate "property takers" described above — meet the *actus reus* requirement so long as they know, in the conscious or dispositional sense, that they are going through the bodily movements associated with killing or taking from another. On the other hand, movements during a hypnotic trance, an epileptic attack or sleepwalking are not acts, since they are not movements over which the person has conscious control (p. 74). While Moore's conclusions on these points are not departures from commonly accepted doctrine,³⁶ they do avoid reliance on the problematic concept of "voluntariness" as a predicate for basic action. In practice, it is extremely rare for someone to do a basic act for no reason; theoretically, however, one can "act" even if one does not do so because of a belief/desire set.

C. *Parsing the Concept of Intention*

Moore's approach to the concept of intention parallels his definition of act. One acts when one knows one can perform, and knows

35. As Moore points out, a person's responsibility for a complex action such as driving depends upon whether the practical syllogism that governed the person's basic acts made reference to the rules associated with driving. P. 76. This determination is more analogous to an analysis of whether an act is intentional, see Part II.C. *infra*, than to whether it is an "act" to begin with.

36. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 32, at § 25; H. HART, *supra* note 32, at 96.

one is performing, the movement in question. One intends the act when one knows its consequences. To use Moore's example:

A killing will be X's *action* if the victim's death follows as a consequence of some basic action performed by X, the performance of which X had knowledge; but a killing will be X's *intentional* action only if death follows as a consequence of some basic action by X and X knew that it would so follow. [P. 79.]

Several features of this formulation should be noted. First, as in the definition of action, "knowledge" as used here does not require simultaneous conscious awareness but merely the ability to state what one knows when one is asked to call it forth. As Moore states, "One does not, for example, consciously think or deliberate about going to lunch, yet doing so is an intentional action for which one may justly be held responsible . . ." (pp. 339-40). Secondly, because intentionality, like action, is based on knowledge, it need not be the result of practical reasoning. If one opens the window for the purpose of waving to one's friends, but knowing that it will also chill the wine, one has, under Moore's definition, intentionally chilled the wine even though that result was not the reason the window was opened (pp. 78-79). Moore explains that his conclusion "is based on the moral notion that one who does an act knowing it will lead to some bad result is equally culpable as the person who performs that act having the bad result as his purpose" (p. 79).

These features of Moore's approach to intentionality tend to expand the concept. But Moore would also restrict the idea in two ways. First, he rejects the inference that one *knows* the consequences of one's act merely because one did just the act that would cause those consequences:

One's personal self does not know these [behavioral inferences] because the extended memory, the device by which one integrates new beliefs or other mental states into one's personal self, is not operative. This behavioral sense of knowledge or belief treats one as a purely physical system. In this sense, like any other information-processing system with input subsystems, one can be said to perceive and believe all sorts of things. [P. 329.]

Similarly, Moore would not include within his definition of knowledge what might be called one's general propositional knowledge. If, instead of being able to say, "I know that opening this window will chill the wine," the person is only able to say, "Opening a window to a room when it is cold outside will chill wine in the room," the act of chilling the wine should not be seen as intentional. Moore points out that equating general propositional knowledge with intention "collapses the important distinction between what one actually knew, and what one should have known. . . . This sense of knowledge, like the pure behavioral sense, rejects the subjective mental states required for culpability" (pp. 330-31).

Moore can be faulted for somewhat loose terminology. The last quoted statement suggests that Moore believes one cannot be culpable for negligence, when in fact, as he makes clear elsewhere in the book, he actually believes that negligent omissions can make one responsible for harm, although perhaps to a lesser degree (pp. 81-84, 342). Similarly, in his definition of intention, Moore does not seem to account for the fact that one rarely *knows* the consequences of one's acts before they occur. Rather, as modern criminal statutes recognize, the most that can be said is that one is "practically certain" of such consequences.³⁷ But these oversights are not fatal to his general thesis concerning the connection between knowledge of consequences and intention.

Perhaps a more pertinent observation is that this portion of Moore's analysis is not particularly innovative. Many commentators have recognized the moral distinctions he makes concerning the meaning of knowing.³⁸ What is creative is his effort to examine the relevance of *unconscious* desires and beliefs to the issue of intent.

Two preliminary questions, of course, are whether unconscious desires and beliefs exist and whether they can be said to cause behavior.³⁹ Moore answers both questions affirmatively.⁴⁰ The more impor-

37. See, e.g., MODEL PENAL CODE § 2.02(2)(b) (Proposed Official Draft 1962) ("A person acts knowingly with respect to a material element of an offense when: . . . (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result."). With one possible exception, see note 42 *infra*, Moore makes no mention anywhere in the book of the possibility that recklessness — the awareness and disregard of a substantial risk of harmful consequences, see MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962) — might also be a basis for criminal liability. Yet "cause and effect are always matters of probability." P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 31, at 240.

38. See, e.g., G. FLETCHER, *supra* note 32, at § 6.5; W. LAFAVE & A. SCOTT, *supra* note 32, at § 28; H. HART, *supra* note 32, at 116-22.

39. See generally A. MACINTYRE, *THE UNCONSCIOUS* (1958); T. MILES, *ELIMINATING THE UNCONSCIOUS* (1966).

40. According to Moore, the modern philosophical challenge to Freud's assertion that the unconscious exists is linguistic in nature, in that it is based on an effort to discern the distinctive features of mental words such as intentions, hopes, desires and beliefs. P. 254. A principal claim of those that suggest there is no such thing as unconscious intentions, hopes and so on has to do with the notion of "privileged access." See, e.g., Alston, *Varieties of Privileged Access*, 8 AM. PHIL. Q. 223 (1971). True mental states, according to this theory, are those we can become aware of in a nonobservational, noninferential way. See text following note 8 *supra*. Thus, we can be said to have "privileged" access to these mental states relative to the rest of the world. Since we cannot, by definition, have such access to any unconscious material, "the unconscious" cannot be considered an actual mental state. See Siegler, *Unconscious Intentions*, 10 INQUIRY 251, 257 (1967).

Moore responds to this argument by positing the idea of "deferred" privileged access. While we cannot be aware of unconscious material at the time it may be affecting our actions, we can, through psychoanalysis or some other route, *eventually* become aware of it. What psychoanalysis can occasionally produce (at least according to Freud, *supra* note 2, at 626, and Moore, p. 257) is a *memory* of an unconscious mental state. This memory is produced by reexperiencing the unconscious material at a conscious level. Thus, concludes Moore, unconscious mental states exist because they have the same primary characteristic as conscious mental states — they can be recognized in a nonobservational manner. P. 257. The mere fact that such access is deferred does not mean that mental states so discovered could not have caused behavior.

tant inquiry is whether unconscious mental states can ever be a *motive* for acting. The argument that they cannot is based on the assertion that one is infallible, or "incurable," about one's own state of mind (at least when one sincerely makes an effort to describe that state of mind), and thus one's conscious motives are always the true reasons for acting.⁴¹ But, as Moore points out, there are occasions when one is puzzled about one's motives or does not think one has any motives at all (p. 262). More importantly, even if one does have clearly statable motives, and if one further assumes that they are incurable (which is a questionable assumption in itself), this does not mean that they are the person's true reasons for acting (p. 264). One could say (correctly) that one believes one's reason for opening the window is to chill the wine, when in fact the reason is a simultaneous (unconscious) desire to chill an unpleasant person who is also in the room. As Moore concludes, "there is nothing suspect about attributing unconscious motives even when the subject believes his motives to be something entirely different" (p. 265).

This conclusion has obvious implications for the insanity defense, because under that rubric the law is interested in a person's reasons for acting, even if they happen to be unknown to the actor at the time he acts. But does it also mean that what appear to be consciously motivated acts may in fact be "unintentional" if it is discovered they were unconsciously produced? To Moore, the answer to this question will usually be no. Using his definition of intention, it should be clear that one can "intend" one's acts even if one is ignorant of the motives behind them. Unconscious desires and beliefs are irrelevant to whether one knows (is aware of or can, by being asked, be made aware of) the consequences of one's basic acts. Precisely because our access to unconscious motives is "deferred," if it occurs at all, these motives do not affect our knowledge of what our actions cause at the time they take place.⁴²

Moore's moral justification for fixing one's conscious and dispositional knowledge as the threshold for responsibility is summed up in the following passage:

Whatever else the principle of responsibility might include, it should include the power or ability to appraise the moral worth of one's proposed

41. Cf. R. PETERS, *THE CONCEPT OF MOTIVATION* 60-61 (1960) (In many cases, conscious reasons are "sufficient to explain what a man does; *his* reason coincides with *the* reason why he acts.") (emphasis in original).

42. Although Moore generally believes that one should not be responsible for what one should have known but did not know, he makes an exception for the "self-deceiver" — the person who (presumably unconsciously) "keeps himself" from knowing that a particular act will cause a particular consequence. P. 331. In this sense, unconscious desires can *confirm* intentionality. Arguably, the self-deception idea could encompass the idea of recklessness (which contemplates awareness of a risk and a conscious disregard thereof). See note 37 *supra*. Both recklessness and Moore's self-deception idea involve the problematic distinction between actual awareness of a risk and ignorance of a risk of which one should have been aware.

actions. A person has such ability only if he has moral and factual knowledge of what he is doing and is able to integrate the two to perceive the moral quality of his action. [P. 339.]

Once a person has this moral and factual knowledge, however, he can be responsible for his actions even if he has not engaged in practical reasoning,⁴³ or even if his true reasons are unconscious.

Moore expresses one reservation to this conclusion: unconscious motivations may be relevant to intentionality when the criminal law *requires* (and morality demands?) that culpability rest on some type of practical reasoning, rather than on mere knowledge. To Moore, the clearest examples of this type of crime are the so-called "anticipatory offenses," such as attempt.⁴⁴ Because the conduct in such cases does not represent a completed act, it is crucial to determine whether the individual acted with the "purpose" of achieving (or as Moore puts it, with the "further intent" to achieve) the end which is the subject of criminal sanction (pp. 80-81).⁴⁵ This determination, asserts Moore, involves ascertaining the person's reasons for acting. Even if the person charged with attempted murder consciously believed he wanted to commit murder, he should not be guilty of attempted murder if his real (unconscious) motive was merely to scare the purported victim (p. 371). To use the terminology of practical reasoning, the individual's conscious belief would rationalize his action but would not cause it.

One can easily accept Moore's assertion that our conscious mental states may not explain our actions. Everyone has experienced situations in which the reason we thought we acted was not our real reason for acting. What is not as convincing is his apparent conclusion that the law is interested in a person's unconscious reasons for acting when the issue is purposive behavior. Arguably, if an individual thought he wanted to murder the victim, the fact that his "true" reason for acting was something short of this is irrelevant even for "specific intent" crimes such as attempted murder. The person still *thinks* he is acting from a desire to kill, which is all an assessment of culpability would seem to require. This situation could perhaps best be analogized to one of "factual impossibility," which under both the common law and modern statutes is not a defense in attempt cases.⁴⁶ If Moore is argu-

43. Virtually every intentional action, however, will be the indirect, if not the direct, result of some form of practical reasoning, because the basic act which undergirds it will almost always, if not always, be done for reasons.

44. See W. LAFAVE & A. SCOTT, *supra* note 32, at §§ 58-62.

45. Under the Model Penal Code, the *mens rea* for conduct associated with attempt is "purpose," defined as one's "conscious object." MODEL PENAL CODE §§ 2.02(2)(a)(i), 5.01(1)(a) (Proposed Official Draft 1962).

46. Some controversy exists over whether criminal sanctions — specifically, those associated with attempt — should be imposed when circumstances make a crime impossible to commit. See generally Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20 (1968). Factual impossibility is usually distinguished from legal impossibility. An example of the former is picking an empty pocket. Illustrating the latter is the individual who receives goods

ing that "purpose" or "specific intent" *should*, on moral grounds, be equated with motive, then his conclusions with respect to the relevance of unconscious reasons may be appropriate. But under the law as it stands today, these conclusions are not as persuasive.

Unconscious mental states, then, will rarely, if ever, negate criminal intent. As Moore convincingly argues, however, such mental states can mitigate responsibility even when an individual does act intentionally.

D. *The Resurrection of a Diminished Responsibility Defense?*

Diminished responsibility — the idea that a person's mental condition may reduce his responsibility for crime even though he is neither insane nor lacking the requisite intent — has been explicit doctrine at least since 1957, when Britain's Parliament provided, in the Homicide Act of that year, for a conviction of manslaughter rather than murder when a person's mental abnormality "substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."⁴⁷ To date, however, no legislature or court decision has extended the doctrine to crimes other than homicides,⁴⁸ and there appears to be a retreat even from this limited application.⁴⁹

While Moore's focus on practical reasoning ability and knowledge produces conservative formulations of insanity and intention, respectively, his willingness to consider the possibility that unconscious mental states can affect behavior leads him to consider, if not forthrightly recognize, what most legislatures and courts have rejected: a "partial" defense based on ignorance or compulsion caused by mental dysfunction. As to the former, he hypothesizes that some individuals,

believing (incorrectly) that they are stolen. See *Booth v. State*, 398 P.2d 863, 870-72 (Okla. Crim. App. 1965). Although the common law usually permitted a defense in cases of legal impossibility, the Model Penal Code denies a defense in both situations. MODEL PENAL CODE § 5.01(1)(a) (Proposed Official Draft 1962). In the attempted murder example in the text, the individual is unaware that it is "factually impossible" for him to complete the offense, just as the pickpocket is not aware, before he reaches into the empty pocket, that his crime is impossible.

47. 5 & 6 Eliz. 2, Ch. 11, Part I, § 2(1).

48. P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 31, at 815.

49. The California Supreme Court appeared to adopt a version of the diminished responsibility idea in *People v. Wolff*, 61 Cal. 2d 795, 821, 394 P.2d 959, 40 Cal. Rptr. 271 (1964) (holding that a first degree murder conviction requires a finding that the defendant "could *maturely and meaningfully* reflect upon" the killing) (emphasis in original), but the California legislature has since passed a statute declaring that "[t]o prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." CAL. PENAL CODE § 189 (Deering Supp. 1985).

The Model Penal Code permits a finding of manslaughter for what would otherwise be murder if the homicide "is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. . . . [R]easonableness . . . shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962). Even under this liberal formulation, a quasi-objective standard is imposed, reflecting some discomfort with open-ended inquiries into mental states short of insanity. But see text at notes 68-69 *infra*.

because of unconscious mental states, may be emotionally ignorant of the normal consequences of their actions. With respect to compulsion, he suggests that unconscious desires can make the choice between law-abiding and criminal behavior particularly hard for some people.

To illustrate these points, Moore uses the facts of *United States v. Pollard*,⁵⁰ which involved a police officer who robbed or attempted to rob a string of stores and banks. Psychiatrists testified that Mr. Pollard, who claimed that he chose to rob for the money, was actually "governed" by an unconscious urge to be punished for the death of his first wife and child, both of whom had been brutally murdered by a neighbor when Pollard was not home. Although Moore emphasizes that the psychiatric evidence presented in the case was extremely weak, he hypothesizes that Pollard could have been experiencing a high level of anxiety before and during the time of the offense, stemming from his unconscious belief that he had caused the death of his wife and child. This anxiety, Moore suggests, could have rendered him unable to appreciate, in an emotional sense, that he was endangering innocent lives, even though he knew, in a dispositional sense, that he carried a gun. His complex action of robbing the bank would still be intentional (because he knew that robbery was what he was doing), but he would not be fully cognizant of nor desire its consequences, thus making him less responsible for it (p. 368).⁵¹

Alternatively, Pollard could have been compelled to rob by his unconscious desires. Again, Moore hypothesizes that if Pollard's "unconscious guilt and consequent need to be punished truly explain his action of robbing the banks, then it may have been very difficult for him to act in any way but to alleviate this guilt feeling" (p. 378). If such were the case, the unconscious mental states would not merely cause the crime but make the choice to remain law-abiding an especially hard one.⁵²

50. 171 F. Supp. 474 (E.D. Mich. 1959), *revd.*, 282 F.2d 450 (6th Cir. 1960).

51. Moore does not explain how this variant of diminished responsibility differs from unconscious self-deception about the consequences of one's acts, which he suggests should confirm culpability, not reduce it. See note 42 *supra*. He analogizes the latter situation to the legal notion of "willful blindness," p. 331, which perhaps entails a keener awareness of the high probability of risk in one's actions than exists in the hypothesized *Pollard* case. See MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."). But the distinction is a subtle one at best, and thus particularly troubling, because the validity of a diminished responsibility claim could rest upon it.

52. Moore admits that "[t]he compulsion sufficient to excuse will be difficult to determine since it is a matter of degree and relative to the gravity of the offense." P. 378. Thus, although Moore may have better conceptualized the notion of compulsion, he has not provided any practical way of distinguishing between compulsion and mere causation. Many other writers have concluded that such a distinction is impossible to make, at least in most cases. Professor Bonnie has written:

[T]here is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of that capacity. There is, in short, no objective basis for distin-

Moore speaks of emotional ignorance as an "affirmative excuse" (p. 368), and of unconscious compulsion as an "excuse in its own right" (p. 374). Whether he means to imply by this language that the type of evidence described above should be considered at *trial* is unclear. My own feeling is that, consistent with what was said earlier in the context of the insanity defense, such evidence should only be exculpatory to the extent that it suggests gross irrationality. Unless the factfinder believes, first, that the unconscious desires or beliefs do motivate the defendant's actions and, second, that they are unintelligible, they should not be considered exculpatory.

At least two arguments — one persuasive, the other much less so — can be advanced to support this position. Most fundamentally, diminished responsibility evidence which does not suggest irrationality is no more important on a moral scale than many other variants of compromised, but still rational, functioning which the law does *not* consider relevant in adjudicating guilt. For example, the panicky parent who steals for his starving child and the addict who robs due to physiological cravings are generally not excused for their behavior despite their significantly disturbed practical reasoning.⁵³ Yet, to the extent such phenomena can be measured, the parent is probably as emotionally ignorant and the addict as compelled as the individual who acts for unconscious reasons in the situations hypothesized by Moore. If the law is not willing to accord exculpatory significance to the disturbed practical reasoning of the former individuals, it should not do so for Pollard unless his reasons for acting were unintelligible.⁵⁴

guishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment.

Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983); see also Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 589 (1978) ("We simply do not and cannot have a scientifically proven answer to the question of whether crazy persons or normal persons have free will."); Wootton, Book Review, 77 YALE L.J. 1019, 1027 (1968) ("[I]t is not only difficult to devise a test of volitional competence the validity of which can be objectively established: it is impossible."). Even the American Psychiatric Association has stated:

The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk. . . . The concept of volition is the subject of some disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding.

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53. The parent obviously intends the act. He could claim necessity or duress, on the ground that his act was the lesser of two evils (because otherwise the child would die). See W. LAFAVE & A. SCOTT, *supra* note 32, at § 49. Yet if the parent could be seen as having choices other than theft, if the child's death were not imminent, or if the parent's action was in any other way an unreasonable response to the threat of starvation, no defense would be available. *Id.*

Likewise, a claim that addiction compelled a theft will usually be considered only at sentencing, if at all. "[T]here is no discernible trend toward recognizing a defense in such a case." *Id.* at § 45.

54. If Pollard, due to emotional disassociation, truly believed that he did not have a gun in

Where the law does, and should, freely consider all such individualized factors is at sentencing.⁵⁵

A second ground for prohibiting evidence concerning unconscious mental states at trial is a practical one: because such evidence deals with slippery notions of "emotional appreciation" and "compelling guilt," it should be tolerated only at the less formal sentencing stage. Precisely this kind of evidence, however, is commonly introduced at trial under current insanity tests.⁵⁶ Even under Moore's insanity formulation, testimony about unconscious mental states would be relevant to the extent they truly explain an agent's actions and are irrational (p. 373). For that matter, virtually any trial evidence about subjective mental states is of suspect reliability. To prohibit similar consideration of diminished responsibility evidence on uncertainty grounds alone would throw into question other inquiries that Moore and others have noted are clearly pertinent to the issue of guilt. Therefore, the sole legitimate rationale for restricting questions of diminished responsibility to sentencing is the moral ground advanced above.

I do not mean to imply that the difficult proof problems associated

his hand or that he was withdrawing money from his own account in a polite and nonthreatening manner, then it may be that his beliefs were so irrational as to make him nonresponsible. Alternatively, if Pollard truly believed (consciously or unconsciously) that robbing banks was the only way in which he could be punished for his wife's death, then perhaps a jury would find his motivations and beliefs at the time of the offense to be so unintelligible that he should be found insane.

55. See, e.g., MODEL SENTENCING AND CORRECTIONS ACT § 3-108, 10 U.L.A. 277 (Supp. 1980-83).

I realize I am glossing over the fact that some forms of compulsion, e.g., volitional impairment due to mental illness and duress, are considered at trial rather than at sentencing, and that an argument can thus be made that all "compulsions" should be considered at the former stage. Indeed, there is a strong intuitive appeal to the idea that a person who finds it very hard to keep from doing a particular act is not responsible for it. But I think a reasonable limitation, using the justification rationale, can and should be placed on the mitigating effect of compulsion. The limitation would be as follows: regardless of how compelled one feels to make the choice to commit crime, an intelligible choice to do so is justifiable only when it prevents a *greater crime*. To illustrate this stance, a defense would exist in the classical "gun to the head" scenario if the harm prevented (e.g., murder of the defendant) is a greater *crime* than the harm committed (e.g., robbery by the defendant). But the addict or kleptomaniac is not preventing a crime by giving in to his craving; rather, he is attempting to avoid personal pain. Thus, I would argue, he should not have a defense.

I base this approach on the premise that the primary aim of the criminal law is to punish those who choose to commit crime. If this is the case, then a person's choice to commit crime is excused only when the reasons for doing so are unintelligible. If the person's choice is intelligible, it is justified only when the alternative choice is committing a greater crime. All other choices to commit crime should be punishable. However, the degree of difficulty in making these other choices can and should be considered at the sentencing stage.

56. See, e.g., the American Law Institute's insanity test, which states, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962). This test is used in over half the states. See Favole, *supra* note 22, at 257-69.

with criminal mental health law issues can be ignored. Indeed, once the appropriate forum for addressing these issues has been fixed, the manner in which they are addressed should become paramount. Understandably, given the philosophical nature of his effort, Moore pays scant attention to the technical task of gathering useful evidence concerning the various inquiries he concludes are relevant. But the law does not have this luxury. In order to round out the discussion of the implications of Moore's thesis for criminal mental health law, the remaining substantive section of this review examines how these inquiries can best be answered. More specifically, it looks at the role mental health professionals should play in addressing these issues.

III. THE USEFULNESS OF PSYCHIATRIC TESTIMONY IN CRIMINAL CASES

Traditionally, the law has turned to mental health professionals to help it address the questions about mental states raised by the insanity defense, the diminished responsibility notion, and the act requirement. To a lesser extent, it has also sought clinical expertise in making *mens rea* determinations. Moore's conceptualization of responsibility would curtail clinical testimony about unconscious mental states in the latter two contexts.⁵⁷ And in all of these contexts, it would place limits on evidence about characterological, physiological, or external factors which merely "cause" behavior rather than affect the capacity to act intentionally or act for reasons.⁵⁸ But even if one adopts Moore's ap-

57. See text at notes 35-36 & 41-45 *supra*.

Evidence about unconscious mental states may be relevant to the insanity and diminished responsibility inquiries. Should such evidence be admissible even when the actor's *conscious* mental states appear to explain his actions quite adequately? Moore seems to think so, though he does state: "For seemingly quite rational actors, . . . one may be more suspicious of the *truth* of the psychoanalytic explanations in terms of their unconscious mental states." P. 373 (emphasis in original).

A more restrictive rule of thumb might be that whenever one's conscious desires and beliefs do not seem rational in the transitive sense, see text preceding note 26 *supra*, the law should permit investigation into unconscious mental states. It will be recalled that under Moore's formulation, the transitive sense of rationality contemplates desires and beliefs that are implied by one another. Although he is speaking of all reasons for acting, not just conscious ones, the idea could perhaps be confined to conscious reasons for the sole purpose of establishing a threshold for determining when unconscious reasons are material for legal purposes. Thus, in *Pollard*, if it could be shown that Pollard both consciously wanted to rob banks for the money and in addition consciously believed he did not need money, the factfinder would be entitled to evidence concerning unconscious mental states, since it would be quite possible that those states, and not the conscious ones, would be the true explanations for the behavior.

58. See text at notes 15-20 *supra*. In Moore's view much of what is currently common in clinical testimony — evidence about the defendant's childhood, employment "stressors" or "character" — would probably be immaterial to criminal mental health issues. The practical problem, of course, is determining when a particular factor is irrelevant to understanding a person's unconscious mental states, knowledge at the time of the offense, or difficulty in making a particular choice. See note 52 *supra*. Given this problem, Moore's conceptual limitation may not have a major impact on the types of clinical evidence considered admissible.

As one illustration of this point, take evidence about an individual's character. Moore states that an individual's character does not "constrain his choices in the way in which a gun at his

proach to criminal health law, considerable latitude remains for opinions from mental health professionals.

The principal question has been not whether psychiatric testimony is relevant in criminal cases, but whether its usefulness is outweighed by its lack of trustworthiness.⁵⁹ It is generally conceded that mental health professionals are better than laypersons at gathering the behavioral data relevant to criminal law questions.⁶⁰ It is also agreed by most, if not all, that clinicians should be prohibited from offering opinions about the moral issues the jury alone is supposed to address.⁶¹ The controversy centers on the extent to which clinicians should be allowed to provide the factfinder with inferences derived from their behavioral observations which fall short of trenching upon the ultimate legal question.

There are in essence two arguments which have been advanced in favor of excluding such clinical inferences from criminal trials. The first is that these inferences are so speculative that they are lacking in probative value. The second is that, even if they do have some probative worth, they add nothing to what the factfinder can discern for itself once it has access to the relevant behavioral data.

There is no doubt that clinical theories, and opinions based upon them, are generally suspect. Stephen Morse's conclusion about psychodynamic formulations — that "external, empirical investigations have produced, at best, only equivocal and pallid confirmations of Freud's theory"⁶² — could probably well be applied to most psychiatric and psychological theories. But in the context at issue here — when the defendant wishes to rely on clinical testimony to raise a doubt as to the culpability of his mental state — a blanket prohibition on theory-based psychiatric evidence should not be countenanced. All that the evidentiary formulation should require (and all that the fed-

head would. . . . [R]ather, characters are themselves constructs created by generalizing about what one does when one's choices are unconstrained." P. 88. Yet, in addition to this "evaluational character," Moore also admits the existence of an "appetitive character," which *can* compel actions. Pp. 440 n.123, 488 n.41. He provides no useful way of differentiating between the two concepts, with one result that even under his approach testimony about character is not likely to be restricted appreciably. Moreover, even if character testimony is not generally material to compulsion issues, it could easily be relevant to intent. *See, e.g., United States v. Staggs*, 553 F.2d 1073, 1075-76 (7th Cir. 1977) (testimony by psychologist that defendant was more likely to hurt himself than others held relevant on issue of ability to form intent to assault with a deadly weapon).

59. *See generally* J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* (2d ed. 1975); Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 466-95 (1980); Morse, *supra* note 52, at 601-11; Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539 (1979).

60. *See, e.g., Morse, supra* note 52, at 611-19.

61. *See, e.g., CRIMINAL JUSTICE MENTAL HEALTH STANDARDS* 7-3.9(a), 7-6.6 (First Tentative Draft 1983); Bonnie & Slobogin, *supra* note 59, at 456-57; Morse, *supra* note 52, at 602-03.

62. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1014 (1982).

eral rules do require)⁶³ is that such testimony have *some* tendency to prove a fact at issue,⁶⁴ and that it come from a qualified professional⁶⁵ who has followed adequate evaluation procedures⁶⁶ and who avoids addressing issues which are outside his specialized knowledge⁶⁷ (such as whether the defendant is morally and legally accountable).

This stance is based on two separate justifications, one normative, the other evidentiary. First, as Professor Bonnie and I have argued elsewhere,

The law's tolerance for speculation and imprecision varies according to the context and consequence of the inquiry. When a defendant claims that his psychological aberration has, or ought to have, exculpatory or mitigating significance, the risk of unreliable decisionmaking is often accepted in deference to the perceived ethical imperatives of individualization.⁶⁸

Thus, for instance, modern formulations of excusing conditions such as insanity and diminished responsibility (including Moore's) provide only "that degree of specificity necessary to give the jury adequate normative guidance regarding the nature of the question being

63. See Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 128-48 (1984) (discussing FED. R. EVID. 401, 403, 702, 703, 704).

64. The basis of admissibility for any evidence is relevance, which is defined by FED. R. EVID. 401 to mean "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Clinical evidence which is material, *see* notes 57-58 *supra*, and which is presented by appropriately qualified professionals, *see* notes 65-67 *infra*, will generally meet this test, which only requires that evidence rise above mere speculation. *See* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 690-91 (1941).

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. The factors listed in Rule 403 will generally not apply when the defendant is presenting expert testimony in criminal cases because, for reasons discussed in the text at notes 70-75 *infra*, one purpose for admitting such testimony is to combat undue prejudice against the defendant asserting a claim of mental abnormality.

65. FED. R. EVID. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In the context at issue here, the proffered witness would need to show both educational and experiential qualifications relating to the study of human behavior in order to meet this requirement. For a more detailed description of these qualifications, *see* Bonnie & Slobogin, *supra* note 59, at 457-61.

66. FED. R. EVID. 703 appears to require an investigation into evaluation procedures because it states that the facts or data upon which an expert opinion or inference is based must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Given the speculative nature of the endeavor, it is imperative that the expert attempt to assess past mental state in as rigorous a manner as possible. *See* Bonnie & Slobogin, *supra* note 59, at 504-22 (suggesting methods of maximizing the reliability of clinical assessment).

67. FED. R. EVID. 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, if the "ultimate issue" is one that is moral rather than scientific in nature (as is the case with the issue of whether a person is "insane"), then Rule 702 would bar such testimony because it is not based on "specialized knowledge." *See* note 65 *supra*.

68. Bonnie & Slobogin, *supra* note 59, at 434-35.

asked.”⁶⁹ The vagueness of these doctrines implies a tolerance for some amount of imprecision in applying them to specific cases. Individualization under standards such as these would be frustrated if the defendant were forced to forgo using the informed speculation of experts and to rely instead solely on his own statements and those of lay witnesses.

A second, independent justification for permitting clinical testimony rests on an admittedly debatable perception of the realities of criminal adjudication. The perception is that, despite the “presumption of innocence” accorded criminal defendants,⁷⁰ in fact a judge or jury is likely to assume just the opposite. After all, the factfinder might reason, the state would not have gone to the trouble of prosecuting the defendant were he not guilty. Anyone who has read a newspaper account of the latest indictment or arrest can understand this notion.⁷¹ Of course, an instruction that the prosecution must prove all elements of the crime beyond a reasonable doubt may have a powerful effect on an otherwise biased factfinder.⁷² And when the defendant is claiming he did not commit the *actus reus* for the crime, objective evidence is usually available to overcome any predisposition to convict the defendant. But when the defendant admits he committed the criminal act, which he in effect does by asserting a mental defense, the type of evidence which he can present in support of his case is more subjective, more amorphous, and more likely to be seen as self-serving than evidence relating to the *actus reus*.⁷³ Under these circumstances,

69. *Id.* at 435 n.17.

70. As LaFave and Scott have pointed out, the so-called presumption of innocence is actually not a presumption at all because it does not contemplate the typical logical pattern of a presumption, namely that once an underlying fact has been proved, another fact may (or must) be taken as proved. It is in fact an instruction to the jury designed to counteract the fact that the defendant has been accused. W. LAFAVE & A. SCOTT, *supra* note 32, at § 8.

71. Professors Saks and Kidd conclude that there is a considerable amount of evidence suggesting the existence of a “hindsight effect.” As the authors describe this phenomenon, “input information is perceived as far more predictive of the outcome once the outcome is known than when the outcome is still in doubt.” Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC. REV. 123, 143-44 (1980-81). They suggest that a criminal trial may produce this effect because the factfinder is given the “answer” — the defendant — before it is asked to consider the evidence and decide whether the evidence proves the suggested conclusion that the defendant committed the act charged. *Id.* at 145.

72. *Id.*

73. As Professor Bonnie and I have said in the context of testimony on *mens rea*:

In a criminal case involving subjective *mens rea* requirements, the prosecution usually has no direct evidence concerning the defendant's state of mind; it must rely on “common sense” inferences drawn from the defendant's conduct. This has the practical effect of shifting the burden to the defendant to demonstrate that he did not perceive, believe, expect, or intend what an ordinary person would have perceived, believed, expected, or intended under the same circumstances. Restriction of clinical testimony on *mens rea* thus compromises the defendant's opportunity to present a defense on an issue concerning which he, in reality, bears the burden of proof. The factfinder is likely to view with considerable skepticism the defendant's claim that he did not function as would a normal person under the circumstances. . . . By precluding the defendant from offering relevant expert testimony, the law unduly enhances the prosecution's advantage on this issue.

a restrictive standard of proof provides decidedly less protection against unwarranted assumptions. Indeed, the jury is often told that it may infer or presume intent from the mere fact the defendant acted.⁷⁴ The defendant should not be forced to rebut this presumption (which exists in fact even when it is not given *de jure* status) without the aid of expert testimony, even if the reliability of such testimony is not verified. The expert functions as a bias rebutter; he helps redress the inequality that would otherwise exist due to the natural tendency to infer intentional, rational action.⁷⁵

For these reasons, psychiatric testimony about past mental state which meets the evidentiary stipulations described earlier should not be barred solely because it is of questionable trustworthiness. Nor should it be barred because of the critics' second argument — that clinical opinion testimony does not assist the factfinder and is therefore not "expert." If the testimony is in fact based on knowledge or skill which is "specialized" it will, by definition, add to what the factfinder can discover for itself. Occasionally, the basis of the expert's opinion may not meet this threshold test;⁷⁶ in such cases it should be excluded. But on a topic as complex as the human mind, any incremental addition to the factfinder's knowledge should be permitted. And surely, increasing a jury's exposure to alternative perspectives is helpful.

Moore does not dwell on these issues. To the extent one can discern his attitude about the reliability or helpfulness of clinical testimony, he appears to be ambivalent. He cites Morse's negative review of Freudian theory with approval (p. 279), and at one point suggests that to the extent psychiatrists subscribe to the hard determinist view⁷⁷ their testimony about unconscious mental states will be of little value (p. 364). But he also states that even in the problematic area of com-

Bonnie & Slobogin, *supra* note 59, at 477. To a lesser extent, similar conclusions could be drawn with respect to the *de facto* burden of proof in insanity and diminished responsibility cases.

74. See W. LAFAVE & A. SCOTT, *supra* note 32, at § 28 ("a maxim much used in criminal law cases states that a person is 'presumed to intend the natural and probable consequences of his acts.'"); J. WIGMORE, EVIDENCE § 2511a (3d ed. 1949). But see *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that it is a violation of due process to give jury an instruction which has the effect of shifting the burden on the *mens rea* issue; however, jurors may be told they may infer intent from such acts).

75. Cf. Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985) (arguing that evidence of rape trauma syndrome should be admissible in part to overcome preconceptions of jurors about rape); cf. Slobogin, *supra* note 63, at 145-48 (arguing that strong assumption on the part of a factfinder that person subjected to commitment or sentencing proceedings is dangerous justifies prohibiting presentation of clinical evidence to prove dangerousness unless defense elects to do so).

76. For instance, testimony that a person is compelled may exceed the bounds of professional knowledge. See note 52 *supra*.

77. See text at note 16 *supra*.

pulsion, "the law may get some help from psychiatry" (p. 379).⁷⁸ Assuming appropriately qualified testimony, the law should not refuse this help.

CONCLUSION

This review of Michael Moore's *Law and Psychiatry: Rethinking the Relationship* has focused on the book's rich implications for criminal mental health law. It has not touched upon several other interesting facets of Moore's work which both lawyers and mental health professionals may find of interest. Lawyers, for instance, should find enlightening his overview of the civil law from the perspective of linguistic philosophy (pp. 44-112). Mental health professionals may benefit from his analysis of psychoanalytic explanation (pp. 281-309). Both groups should find useful his attack on the Szaszian notion that mental illness does not exist (pp. 155-216) and his discussion of the thesis that each of us is composed of multiple selves (pp. 387-415).

If there is a significant flaw to the book, it is that its usefulness is somewhat diminished by its density and occasional lack of clarity. If Moore's methodological objective of prodding lawyers and mental health professionals into reexamining their assumptions is to be realized, philosophical treatment of their respective disciplines must be approachable. A major aim of this review has been to unpack what Moore has said about criminal mental health law and describe it in more accessible terms.

This criticism should not obscure the fact that *Law and Psychiatry* is a remarkable achievement. Although many of its chapters were written as separate articles over a period of thirteen years and "were not originally produced with the intent of joining them as a book with a single theme" (p. xi), the work is a coherent exegesis of the philosophical underpinnings of both law and psychiatry. It should stand as a major contribution to the field for years to come.

78. Moore uses as an example of this possibility testimony about kleptomania. He suggests that if psychiatrists can tie the kleptomaniac's urge to steal to strong sexual feelings, the factfinder, drawing upon its own fund of experience in the latter area, might "begin to understand what it would be like to experience what kleptomaniacs experience before and as they steal." P. 379.