PSYCHOPATHY AND CULPABILITY: HOW RESPONSIBLE IS THE PSYCHOPATH FOR CRIMINAL WRONGDOING?

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ABSTRACT

Recent research into the psychological and neurobiological underpinnings of psychopathy has raised the question of whether, or to what degree, psychopaths should be considered morally and criminally responsible for their actions. In this article we review the current empirical literature on psychopathy, focusing particularly on deficits in moral reasoning, and consider several potential conclusions that could be drawn based on this evidence. Our analysis of the empirical evidence on psychopathy suggests that while psychopaths do not meet the criteria for full criminal responsibility, they nonetheless retain some criminal responsibility. We conclude, by introducing the notion of rights as correlative, that even if psychopaths were to be fully non-responsible, it would still be warranted to impose some form of civil commitment.
INTRODUCTION

Psychopathy presents an acute problem for the criminal legal system. As a general matter, there is a prohibition both in law and in common intuitions of morality that people cannot be punished for actions over which they lack control, or of which they did not understand the moral nature. However, there is also an expectation that people ought to comply with the law, even if it requires great effort or, in some cases, knowledge the particular defendant did not happen to have at the time. Additionally, in the case of dangerous, repeat offenders, there is a tendency to look to consequentialist concerns when deciding what to do with a defendant, for fear of imposing continued risk of harm upon society.

Psychopaths lack a number of attributes that are ascribed to an ordinary moral agent: (1) they lack the ability to empathize with the aversive conditions of others, (2) they do not understand the difference between conventional and moral rules, and (3) they do not learn from error in a way that non-psychopathic persons do. This appears to dispose a psychopath toward being able to commit antisocial acts remorselessly, without regard for needs beyond his own, in a manner that is otherwise consistent with an ordinary agent, but nonetheless in the presence of a substantially diminished capacity for ordinary moral reasoning.

The problem, then, for the criminal legal system is justifying the punishment of such persons when, in other contexts, there is a tendency to mitigate or excuse conduct when there is some intervening cause, such as insanity.
or mental retardation (Atkins v. Virginia 2002), which would seriously undermine
the perceived justice in treating such individuals as though they were normally
functioning adults. Therefore, psychopaths are not normally functioning adults,
but are they functional enough to deserve full punishment for the commission of
criminal acts?

With this question in mind, first a general overview of psychopathy as it is
currently treated in the law will be presented. We then examine recent
psychological research and commentary on the nature of psychopathy and its
impact on moral reasoning. Arguments regarding the nature of moral
responsibility are considered, along with possible justifications for non-punitive
institutionalization of psychopathic individuals. Finally, a concluding overview is
provided.

**CURRENT TREATMENT OF PSYCHOPATHY AT LAW**

Psychopathy is perhaps one of the least favorable traits one could possess
in terms of legal ramifications, as (1) it disposes a person greatly toward the *most*
severely punished forms of aggression, (2) it is not considered a mental illness for
the purpose of mitigating responsibility, and (3) in practice, it functions as an
aggravating condition in criminal sentencing.
Instrumental Aggression And Its Treatment At Law

Instrumental aggression is typified by calculated efforts toward accomplishing a goal of personal gain (Fontaine 2007). This is in contrast to reactive aggression, which occurs in response to a perceived provocation with the purpose of harming the perceived provocateur. At law, reactive aggression is treated less culpably than instrumental aggression, at least in the context of homicide, under the theory that it involves a lower degree of cognitive processing and control, and thus responsibility (Morse 2003).

Psychopathy As A Mental Illness

For a number of reasons, psychopathy is a particularly controversial psychiatric construct (Arrigo & Shipley 2001). First, it is not recognized as a mental illness by the *Diagnostic and Statistical Manual of Mental Disorders IV-TR (2000)*, the primary clinical manual used by psychiatrists and psychologists today, with psychopaths typically receiving a diagnosis of Antisocial Personality Disorder (ASPD) instead. However, research suggests that while up to 85% of incarcerated individuals meet the clinical criteria for ASPD, less than 15% meet the criteria for psychopathy (Hart & Hare 1996)

Similarly, psychopathy is not recognized as a mental illness in American law for the purpose of excusing a particular criminal act under the M’Naughten rule, which simply inquires into whether the defendant understands the difference
between “right” and “wrong” (DeMatteo & Edens 2006, 230). Likewise, psychopathy does not facially appear to qualify as a mitigating factor under the Model Penal Code Section 4.01:

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

As discussed below, psychopathy does not impair the ability to understand that a particular act is classified as wrongful. Rather, the deficits present in psychopaths impair their ability to understand the concept of moral wrong and why a particular act is wrongful. Nonetheless, this type of impairment is not recognized as a mitigating factor under current law.

**Impact Of Psychopathy On Sentencing**

Rather than serving as a source of mitigation or excuse, the characteristics associated with psychopathy frequently serve as an *aggravating* factor (Hare 1996). This appears to be based, at least in part, on the fact that psychopaths have a high rate of recidivism (Hare 2006, 715), though it may also be based in part by
the lack of remorse that a psychopath possesses (Hare & Jutai 1988).

Robert Hare’s Psychopathy Checklist Revised (PCL-R), discussed in
detail in the next section, is considered the most reliable and valid diagnostic tool
in correctional psychiatric populations (DeMatteo & Edens 2006). DeMatteo and
Edens found that the PCL-R is “moderately to modestly” associated with factors
relevant to legal decision makers, such as criminal recidivism, and admission of
PCL-R scores has become increasingly common at criminal trial (DeMatteo &
Edens 2006, 215). In 59 of 87 reported cases between 1991 and 2004 in which
PCL-R scores were introduced as evidence, the prosecution was the sole party to
introduce such evidence (DeMatteo & Edens 2006, 217). PCL-R scores were
frequently used, in particular, in assessing likelihood of violent recidivism
(DeMatteo & Evans 2006, 231).

The consensus view that psychopathy does not qualify as a mental illness
under M’Naughten (DeMatteo & Edens 2006, 232), and the focus on factors such
as recidivism and lack of remorse, may obscure the prior question of whether
psychopaths are properly treated as ordinary adults in the context of moral
responsibility. Current scientific evidence about the nature of psychopathy
appears to weigh in favor of treating psychopathy as some sort of mental deficit
(or combination of deficits), and the deficits appear to directly impair moral
reasoning. Therefore, critical evaluation is warranted of whether criminal
responsibility of psychopaths is properly conceptualized at law.
PSYCHOLOGY OF PSYCHOPATHY

Although psychiatrist Hervey M. Cleckley is typically credited with starting modern psychopathy research (Cleckley 1941), its history as a psychological construct dates back to the pioneering work of Phillipe Pinel (Arrigo & Shipley 2001). Throughout its history, there has been a pervasive focus on the moral deficits of the psychopath (Prichard 1835), but it was Cleckley who most clearly identified the two defining characteristics of psychopathy: (a) an affective deficit in empathy and regard for others, and (b) a lack of control, often manifesting itself in violent or antisocial behavior. Later, Robert D. Hare, a criminal psychologist, built upon Cleckley’s work, using these defining characteristics and developing the Psychopathy Checklist (Hare 1980). This instrument has since undergone many revisions and iterations and has become the most widely used and accepted diagnostic tool for the assessment of psychopathy, repeatedly shown to have both high reliability and validity as a diagnostic tool.

Because of the controversy surrounding the diagnosis of psychopathy as well as the previously mentioned confusion surrounding the relationship between psychopathy and the more accepted diagnosis of ASPD, proper psychometric assessment is especially important. For this reason we have chosen in this paper to focus on the body of research that explicitly assesses psychopathy using Hare’s PCL-R.

Contemporary research has focused on the emotional, cognitive, and
neural bases of psychopathy. Individuals with psychopathy have been found to possess processing deficits relevant to their capacity for moral judgment and social learning (Blair 2007). These deficits appear to relate, at least in part, to the processing tasks described in the study of moral reasoning (Greene et al. 2004; Cushman et al. 2008). In sum, the psychopath appears to be someone who not only possesses the personality traits commonly associated with a highly antisocial individual, but lacks the sorts of processing capabilities typical of ordinary persons in the course of moral reasoning.

“Diagnosing” Psychopathy

As mentioned, the PCL has been updated in light of ongoing research, and the version currently in use is the PCL-R, 2nd Ed. (Hare 2003). The PCL-R uses a checklist which scores an individual from 0 to 40 based on 20 items on a three-point continuous scale, with 30 being the threshold for a diagnosis of psychopathy. Assessments are made by a trained clinician based on a combined file review and semi-structured interview.

Factor analysis of the 20 items on the PCL-R initially revealed two distinct factors (Harpur et al. 1989). The first factor related to emotional and interpersonal characteristics, while the second related to impulsive and antisocial behavior. More recent factor analyses have confirmed the two-factor model, but have identified two facets within each factor (Hare 2003). The four facets have
been labeled: interpersonal, affective, lifestyle, and antisocial.

Interpersonal items concern the manner in which psychopaths interact with others, and so consider: (1) glibness/superficial charm, (2) grandiose sense of self-worth, (3) pathological deception, and (4) whether the person is conning or manipulative. Affective items are: (5) lack of remorse or guilt, (6) shallow affect, (7) callousness and lack of empathy, and (8) failure to accept responsibility for actions. Lifestyle items are: (9) need for stimulation and proneness to boredom, (10) parasitic lifestyle, (11) lack of realistic long-term goals, (12) impulsivity, and (13) irresponsibility. Antisocial items are: (14) poor behavioral controls, (15) early behavior problems, (16) juvenile delinquency, (17) revocation of conditional release, and (18) criminal versatility.

What appears distinct about psychopathy, as opposed to other sorts of antisocial psychopathological conditions, is the combination of ‘interpersonal’ and ‘affective’ traits. Such traits are not only antisocial, but appear to be great instigators of continued antisocial behavior and a block to attempts to correct it (Hare 2006).

**Characteristic Deficits**

Psychopaths exhibit a few defining characteristics: (a) the presence of specific learning deficits, and (b) impaired affect representation, which lead to (c) impaired understanding of the conventional/moral distinction in rules, as well as
deficits in moral socialization generally, and (d) impairment in response-reversal and extinction (Blair 2005, 873-879).

**Learning Deficits**

Psychopaths have consistently been found to show deficits in passive avoidance learning (Blair 2005), the process of learning to avoid a behavior in order to prevent a negative outcome from occurring. Blair et al. (2004) tested age and IQ matched incarcerated individuals with and without psychopathy and found that while the non-psychopathic individuals were easily able to learn to avoid responding to stimuli associated with a negative outcome, psychopaths were not. Particularly troubling was that while non-psychopathic individuals showed a significant effect of learning over time, approaching baseline error rates by the end of the task, psychopathic participants appeared to stop learning almost entirely early in the task, with large error rates persisting even after many opportunities for learning.

Psychopaths also possess deficits in aversive conditioning, the process of learning a negative response to a previously neutral stimulus on the basis of its correlation with a negative stimulus. In tests of aversive conditioning, a stimulus which produces a negative response is repeatedly paired with one which does not. After repeated pairing, the neutral stimulus will produce a negative response even in the absence of the negative stimulus. Flor et al. (2002) used a range of
psychophysiological measures (skin conductance, startle response, electromyogram, heart rate, and event-related potentials) to measure effects aversive conditioning and found that, unlike control individuals, psychopaths failed to develop a conditioned aversive response when neutral faces were repeatedly paired with negative odors. The extent of their impairment in aversive conditioning was quite severe, with psychopaths showing no indication of conditioning at all across the measures. Related to this is that psychopaths show a decreased fear response as compared to non-psychopaths (Mitchell et al. 2006).

In sum, psychopaths show a deficit in being able to learn to respond to “good” stimuli and avoid “bad” stimuli (Blair 2005, 876). The deficit in stimulus-reinforcement is not of a uniform degree, however. It appears that it is aversive stimulus-reinforcement, in particular, that is impaired in psychopaths (Blair 2005, 877). Considering the generalized impairment in aversive conditioning, coupled with an impairment in recognizing the appropriate responses toward appetitive stimuli, it appears as though psychopaths are substantially better at learning to act (or not act) as to obtain reward than to act (or not act) as to avoid punishment.

Affect Representation

Psychopaths possess a deficit in representation of affect, which manifests itself in a number of ways. One of the ways in which this occurs is in processing of affective language, where psychopaths show a distinct inability to recognize
the affective content that ordinary persons detect without trouble (Hare & Jutai 1988, 329; Blair et al. 2006). When presented with words in groups of three, such as “foolish”, “shallow”, and “deep”, and then asked to group two together, non-psychopathic subjects grouped “foolish” and “shallow” together, owing to their negative affective content, whereas psychopaths grouped “deep” and “shallow” together, owing to the two words possessing a linguistic relationship of antonymy. Additionally, when given an affective priming task, psychopaths showed no effect by either positive or negative affect words, whereas comparison individuals showed substantial effects (Blair 2006).

As noted previously, these results are important not only because they indicate a difference between psychopaths and controls, but because they illustrate the depth of deficit on the part of the psychopath. Psychopaths were not merely impaired compared to the normal population, but showed no significant influence of affect at all.

These findings appear consistent with studies conducted in which psychopaths are presented with stimuli intended to provoke an emotional response. In most humans, the distress of another individual is considered aversive, and the perception of an individual’s sadness or fear during aggression reduces the likelihood of future physical aggression (Blair 2005, 873). In contrast, while psychopaths have been found to emotionally respond to threatening cues, they consistently show weaker emotional responses (than non-
psychopathic individuals) when presented with stimuli having to do with the distress of others (such as a crying child’s face) (Blair et al. 2004).

Levenston et al. (2000) presented psychopaths and incarcerated controls with affect-laden images that contained scenes of threat, assault, or mutilation. They found that while incarcerated controls showed a significant startle response to all three image types (with threat images producing the largest effect), psychopaths showed only a slight trend toward a significant startle response to threat images and no response at all to assault or mutilation images. In fact, startle responses to assault and mutilation images were actually smaller than comparable responses to neutral stimuli. The overall characteristic is that psychopaths have trouble understanding and processing the affect of others and thus possess an acute lack of empathy as well as a diminished capacity for aversive conditioning that would ordinarily suppress aggressive behavior (Blair 2005, 873).

Moral/Conventional Distinction

Performance on Elliot Turiel’s moral/conventional task has been particularly useful for assessing the moral capacity of psychopathic individuals (Turiel 1983). The moral/conventional task is designed to test whether individuals are able to appreciate different types of social norm violations. Turiel has found that children, typically around age four, are capable of categorizing
Social norm violations into two categories: moral and conventional. This has also been described as the distinction between authority dependent (conventional), and authority independent (moral) (Blair 1995, 23). Authority dependent transgressions are considered permissible in the absence of an authority (such as rules) prohibiting them, whereas authority independent transgressions are treated as prohibited even in the absence of an authority prohibiting the act (Blair 1995, 6).

Because it captures an important distinction in moral reasoning, the moral/conventional task has become a key tool in the assessment of moral development. Individuals (typically children) are presented with a series of transgressions, some of which are moral and some of which are conventional. The individual is then asked to rate each transgression for how wrong it is, why it is wrong, and whether it would still be wrong if there wasn’t a rule against it. By age four, children typically rate moral violations as worse than conventional violations. Additionally, when providing justifications for why the action is wrong, children typically appeal to harm based justifications in moral cases, and social order justifications in the case of conventional justifications. Lastly, children typically say that it would be acceptable to commit conventional violations if there were no prohibition against it, while they maintain that moral violations would still be wrong even if there were no rule against it (Smetana & Breages 1990).
James Blair has conducted a series of studies to test whether psychopaths and children with psychopathic tendencies show deficits on the moral/conventional task (Blair 1995; Blair et al. 1995; Blair 1996). In these studies, participants were presented with hypotheticals involving various moral and conventional transgressions, and asked to evaluate (1) permissibility, (2) seriousness, and (3) authority jurisdiction. Blair found that, like normal individuals, psychopaths report that moral violations are more serious than conventional violations. However, when justifying the wrongfulness of either moral or conventional violations, psychopaths appeal almost exclusively to the fact that there are rules against the violation, apparently failing to distinguish moral transgressions as authority independent. Paradoxically, psychopathic individuals also report that both conventional and moral violations would still be wrong even if there were no rule against it.

As participants were incarcerated, Blair theorized that this was due to a desire to show themselves as having accepted the norms of society, in order to gain more favorable treatment, rather than an honest representation of belief (Blair 1995, 26). Non-psychopathic subjects (who were also incarcerated) had no less of an apparent desire to be released, yet made the distinctions without trouble. Additionally, a thesis that psychopaths really do view all rules as though they were of moral import would be inconsistent with their psychology taken as a whole.\textsuperscript{7} An additional study (Blair 1997) has found that children with
psychopathic tendencies show these same characteristic deficits on the task.

In a more recent replication, the severity of the psychopath’s deficit in discriminating moral and conventional wrongs was revealed (Blair & Cipolotti 2000). While the overall pattern of results is consistent with previous research, the published ranges of performance by psychopathic and non-psychopathic are revealing. As before, psychopaths were found to over-report the number of conventional transgressions that would be wrong in the absence of a rule prohibiting it. Psychopaths on average reported that 16.8 out of 18 conventional wrongs would be wrong even without a prohibition, with a range from 16 to 18 across the sample. Alternately, non-psychopaths on average reported that only 7.4 would still be wrong, with a range from 4 to 10.

In summary, psychopaths appear to be capable of classifying moral violations and conventional violations into separate categories. However, their moral reasoning capacity, and, in particular, their ability to provide justification for the wrongfulness of the violation and the ability to recognize moral violations as less malleable than conventional violations, show that they are not capable of moral reasoning even at the level typically attainable by a normally developing four year old.

Response Reversal and Extinction

Psychopaths face pronounced deficits in their ability to change a learned
behavior in light of new information. These deficits have been studied extensively using two types of tests: Newman’s card playing task, and the Intradimensional-Extradimensional Task (ID-ED) (Blair 2005, 879). Psychopaths face pronounced difficulty in such tasks, possibly due to reduced sensitivity to temporal difference errors, which is the difference between expected and received reward. As the magnitude of error to be detected decreases, the impairment a psychopath presents increases (Blair 2005, 879).

In the Newman task, the study participant has to decide whether to play a card in the hope of winning points or money. Initially, the choice to play always results in a reward (e.g. it is always reinforcing). As the participant continues to play, the probability of reward decreases, such that he ought to stop playing before receiving a greater degree of punishment than reward. In the ID-ED task, the participant is presented with two stimuli to which he can respond, one of which gives reward, while the other gives punishment. Once the participant learns the association of reward or punishment with each stimulus, the association is reversed.

One of the principal differences between the two types of tests is the obviousness of the change in probability of reward and punishment. In Newman’s task, there is a gradual shift in probability, whereas in the ID-ED task, the change is immediate, full reversal. Adult psychopaths have been found to show impaired performance on both tasks.
Psychopathy and Neuroscience

Two main neural areas have been implicated in studies of the neurobiological basis of psychopathy: the amygdala and the orbitofrontal cortex. Current data appear to favor a thesis that the amygdala is at least more responsible, however, as instrumental violence appears to more closely corresponds with amygdala dysfunction than OFC dysfunction (Blair 2005, 878). Orbital and ventromedial prefrontal cortex dysfunction still appears to play a part in psychopathic behavior in association with deficit in response reversal and extinction. Such damage to the brain, however, may be caused by drug use, rather than serving as part of the early neural basis for developing psychopathy (Blair 2005, 876).

Individuals with psychopathy have also shown decreased posterior cingulate/retrosplenial cortex function as compared to normal subjects, which has been implicated in moral reasoning as well as deficiencies in tests involving detection of affective language (Greene & Haidt 2002). Some patients have been found to exhibit psychopathic behavior whose ventral, medial, and prefrontal cortices were damaged at a very young age, areas which have been implicated in moral judgment, as well (Greene 2005).

Nonetheless, while psychopaths may show OFC dysfunction, this appears to be more closely tied with reactive aggression, which is displayed by some
psychopaths but isn’t exclusive to them, and the propensity for instrumental aggression appears to be the more salient and peculiar feature of psychopathy (Blair 2004). Additionally, OFC dysfunction is not associated with the aversive conditioning deficits presented by psychopaths (Blair 2005, 879), nor is it associated with deficits in stimulus-reinforcement learning (Blair 2005, 876).

The amygdala has received considerable attention within psychopathy research as another region of particular importance. The role of the amygdala in emotional processing is well known (LeDoux 1998). Amygdala dysfunction has also been implicated in increased levels of aggression (Van Elst et al. 2000), and in particular has been associated with increased levels of instrumental aggression (Blair 2004). Rilling and colleagues (2007) found that non-clinically diagnosed individuals with psychopathic traits showed reduced activation in the amygdala during a social economic game. Kiehl et al. (2001) found that individuals diagnosed with psychopathy show reduced amygdala activation when presented with emotional words in a task involving emotional memory. Individuals with psychopathy have also been found to have decreased amygdala activation during a task involving aversive fear conditioning (Mitchell et al. 2006). An additional study involving non-clinically diagnosed individuals who scored high on an inventory of psychopathy-related traits showed lower than normal levels of amygdala activation to negatively valenced emotional expressions (Gordon et al. 2004).
These neuroimaging studies of individuals either diagnosed with psychopathy or who scored highly for psychopathic traits provide substantial evidence for the role of the amygdala in psychopathy. However, amygdala damage alone does not lead to all of the symptoms associated with psychopathy. Blair (2004) has proposed that although psychopathy can be traced back to a dysfunctional amygdala, it is not properly considered a neurological disorder. Under his model, psychopathy results when amygdala dysfunction early in development leads to an inability to be properly morally socialized. Moral socialization is the process by which individuals learn what is right and wrong, good and bad. This process relies on aversive conditioning, and when the amygdala is dysfunctional during this developmental process, the psychopathic individual is unable to form the associations that normally developing individuals typically form.

According to Blair, this explains why psychopaths are at an especially elevated risk for instrumental aggression. Because they never learn to associate harming others with negatively valenced emotions, as do most individuals during moral socialization, they feel no inclination not to harm others when it can bring about some end that they are interested in obtaining. Although more research is needed to fully understand the neurological underpinnings of psychopathy, Blair’s theory provides a powerful framework by which to understand the disorder.
The Role Of Affect In Moral Psychology

Traditionally, emotion and reason, as sources of moral judgment, have been treated as dichotomous positions. While current research suggests that both affect and rationality are involved in moral judgment in the ordinary person, affect appears to play a special role in reinforcing the sorts of other-regarding behavior involved in ordinary moral judgment. Affect also appears to reinforce the sort of behavioral dispositions which ensure that, when someone has the capability to conceive of moral choices, she proceeds to make good on those obligations in her actions (Bandura 2002, 101).

Moral Judgment

Recent research in moral psychology has led some commentators to suggest both emotion and reason may play a part in moral judgment (Cushman et al. 2008). Cushman and colleagues found that evidence weighs in favor of intuition and emotion largely driving moral judgment, however conscious reasoning appears to play a role as well, varying in degree depending on the nature of the moral question to be answered and the context in which it is posed.

Greene and colleagues developed their model in order to explain the “trolley problem” (Greene et al. 2001). In this problem, two hypothetical moral dilemmas are posed to the subject, both of which involve a runaway trolley on its way to running over five people. In the first hypothetical, it is stipulated that the
subject may switch the track over and, instead of running over five people, it will divert and hit one person. In the second hypothetical, the subject is to imagine that she is standing on a footbridge with another person, and may push that person over the bridge in order to save the five people. Thus, in both cases, one person will be killed in the course of saving the five others. A series of studies (Greene et al. 2001; Greene et al. 2004; Koenigs et al. 2007) have now consistently found that most people consider switching the tracks to be permissible, but pushing the other person over the footbridge to not be, despite the fact that either choice involves an intentional act that results in the death of another.

Greene and colleagues explain the difference by distinguishing between ‘personal’ and ‘impersonal’ moral violations (Greene & Haidt 2002, 519). A moral violation is ‘personal’ if it meets the following criteria: (1) it is likely to cause serious bodily harm, (2) to a particular person, and (3) in such a way that the harm does not result from the deflection of an existing threat onto a different party. Greene and colleagues monitored participants’ neural activity through fMRI when posing moral dilemmas, and found that, when a personal moral violation was at issue, increased activity occurred in areas associated with emotional processing, as compared to when participants were presented with impersonal moral violations. In addition, they found that impersonal moral and non-moral judgments showed little difference in activity. (Greene et al. 2001)

What is particularly interesting about these findings is how they appear to
track the findings of James Blair (2005) with regard to the processing of psychopaths toward issues of morality. Greene et al. (2001) found that when participants contemplated personal moral dilemmas, increased activity occurred in both the posterior cingulate cortex and the amygdala—two regions associated with decreased activity and response in psychopaths.

According to Greene, this makes up part of an “affective system” which contributes to moral judgment, is selectively triggered by personal moral violations and, as noted, is selectively damaged in psychopaths. Thus, psychopaths appear to possess an acute impairment toward the affect-laden personal moral reasoning available to non-psychopaths, which appears to be critical to judgments regarding actions that impose harm upon others (Cushman et al. 2008, 11).

There remains an issue of, even if psychopaths are potentially impaired in personal moral judgment, whether they can still process impersonal moral judgment to such a degree that it is sufficient to approximate the reasoning of an ordinary moral agent. Greene et al. appear to suggest that all moral judgment, at least on some level, is potentially rooted in affect, at a minimum in the form of a nonspecific, less acute aversion to harm (Cushman et al. 2008, 10). If so, this influence of affect may be relevant in understanding frontal lesion patients who favored utilitarian reasoning (Koenigs et al. 2007) in a moral judgment task, but it remains unclear how this would apply to psychopaths. The research from Blair,
however, at least facially appears to indicate psychopaths have some sort of basic knowledge of social rules, which may open the door to an argument considering impersonal moral judgment as a gateway to approximating the reasoning of an ordinary person.  

*Moral agency and disengagement*

Professor Albert Bandura describes human agency as the ability “to influence intentionally one’s functioning and life circumstances” (Bandura 2006, 167). We do not think of ourselves as simply automata whose mental life is epiphenomenal, and whose actions are products of non-conscious processes. Bandura lists the “core properties of human agency” as: (1) intentionality, (2) forethought, (3) self-reactiveness, and (4) self-reflectiveness (Bandura 2006, 164).

Intentionality concerns the formation of plans to act in order to accomplish goals. Forethought involves anticipating likely outcomes to help guide a plan’s development and motivate the individual toward its pursuit. Self-reactiveness involves the ability to actually construct appropriate courses of action, and to motivate and regulate the plan’s execution. Self-reflectiveness involves the examination of one’s ability to accomplish goals (“personal efficacy”), contemplation of the meaning of one’s goals and the soundness of one’s judgment, and the use of corrective measures when necessary. This is an elegant description of agency that appears to capture the common sense intuitions and
experience of conscious agency involving deliberative decision-making in an environment of continuous, introspective self-evaluation and management.

Moral agency involves the adoption of standards of conduct against which people monitor and evaluate their own conduct. People act in ways which reinforce a sense of self-worth and satisfaction, and refrain from acting in ways which violate their adopted standards out of aversion toward the self-sanction that will result. Bandura cautions however that, even if a person has the capacity for moral reasoning and a working understanding of the meaning of moral concepts and duties, a sort of cognitive disengagement may emerge which undermines him as an effectual moral agent (Bandura 2002, 101). He links this to a collapse of self-regulation brought on by various “strategies” which inhibit negative judgment of one’s actions.  

Bandura argues that “it is difficult to mistreat humanized people without risking personal distress and self-condemnation” (Bandura 2002, 109). He also refers to “impersonalisation” in this context. What is particularly interesting about this claim is that, as noted previously, psychopaths lack empathy and do not find the distress of others aversive. Dulled affect, and impairment in aversive conditioning, appears to plausibly foreshadow deficits in the sorts of regulatory mechanisms suggested by Bandura as a necessary condition to active moral agency. Therefore, perhaps, psychopaths may be less likely to “self-censure” in the course of contemplating and then engaging in aggression against others.
Successful Psychopathy.

Although we have presented what we believe to be the current consensus view on the psychological and neurological deficits involved in psychopathy, there remain a number of outstanding issues related to the construct. In particular, it has recently been pointed out that psychopathy may be more prevalent in the general population than traditionally believed. Recent research has begun to try to understand the so-called “successful psychopath”: individuals who meet the criteria for psychopathy and yet manage to remain unincarcerated (Ishikawa et al 2001; De Oliveira-Souza et al 2008a; Mullins-Nelson et al 2006). The issue of successful psychopaths is of particular interest when considering the implications of the construct for moral and criminal responsibility. If indeed there are significant numbers of psychopaths that manage to avoid incarceration, is it because they commit fewer crimes, or merely that they manage to avoid being caught? If the former is the case, then it may turn out that psychopathy is less associated with criminal behavior than previously believed.

We believe that while the issue of the successful psychopath remains largely an open question in need of substantial research, there is some suggestion that the association of psychopathy and criminal misconduct appears to remain strong even among successful psychopaths. Ishikawa et al (2001) found that while successful psychopaths did indeed report significantly fewer criminal
incarcerations, they nonetheless reported similar levels of criminal behavior. The differences in incarcerations were at least partially explained in that study by differences in socioeconomic status and age (with successful psychopaths being younger and of higher socioeconomic status).

De Oliveira-Souza et al. (2008b) found that in a community sample they were able to distinguish successful psychopaths from what they classified as True Community Antisocials (TCA), a variant of ASPD. Of particular interest is that, based on ratings of interpersonal callousness between the two groups, psychopaths were consistently (14 of 17) rated as “predators”, a category associated with increased levels of instrumental aggression, whereas TCAs were rated overwhelmingly (34 out of 38) as “parasites”, a category associated with increased reactive aggression. Additionally, they report that successful psychopaths in their sample managed to avoid incarceration not because of a lack of criminal misconduct, but because of financial help from relatives or “breaches in the Brazilian penal system” (De Oliveira-Souza et al. 2008b).

Although research on successful psychopathy is still quite limited, the available data does not appear to dramatically change the portrait of psychopathy that we have presented. Importantly, after distinguishing between true successful psychopaths and individuals with other antisocial behavioral disorders, it appears that successful and incarcerated psychopaths are similar both in terms of criminal
behavior as well as psychological profile. However, more research may be needed to provide additional insight into this important issue.

Recap

Psychopaths possess both the personality traits commonly associated with a highly antisocial individual, and show an apparent deficit in abilities associated with moral reasoning in non-psychopaths. In addition, psychopaths display deficits in ability to correct behavior in the face of negative stimuli, such as punishment. If indeed psychopaths are prone to “moral disengagement”, a picture starts to emerge of the psychopath as not only a person who is impaired in his capacity to engage in moral reasoning, but also a person who is impaired in his capacity to act as a moral agent.

ARE PSYCHOPATHS CRIMINALLY RESPONSIBLE?

As details about the moral reasoning of the psychopath emerge, a tension mounts between competing notions of how desert applies to such a person. The question the law asks, in a retributive system such as ours, is what sort of punishment is proportional to the mental state (“mens rea”) possessed by the defendant at the time the crime was committed (Morse 2004).\textsuperscript{12}

Research in moral psychology, in light of the empirical work on psychopathy, provides a plausible account for the sort of agent a psychopath may
commonly be in practice. However moral psychology cannot, on its own, answer the philosophical question of what qualifies a person to be considered a moral agent for the purposes of culpability. Three types of approaches will be considered, in light of this problem: (1) moral culpability does not require the functions impaired in the psychopath, and so he is fully responsible, (2) the deficits possessed by a psychopath exculpate him completely, and (3) psychopathy mitigates responsibility.

To be clear, the question is whether to punish the psychopath fully or to partially or completely excuse her of culpability. Excuse-based affirmative defenses recognize that culpability and punishment should not be assigned where an individual is not responsible for undisputedly wrongful and socially harmful conduct. Justification-based affirmative defenses recognize that an actor may not be blamed or punished for conduct that is not wrongful or socially harmful. The issue of psychopathy and the condition’s associated mental deficits can only be related to excuse, not justification. Individual differences in psychological functioning capacities are irrelevant to justifications. Put in other terms, psychopathy may be argued to excuse objectively-defined wrongful conduct, but never to justify it. Though utilitarian goals often inhabit discussion of criminal sanction, criminal law is still entrenched in retributive tradition, as is the distinction between justification and excuse, and thus arguments of a retributive nature are the most germane (Fontaine 2009a; Fontaine 2009b; Fontaine 2010).
Full Responsibility

The argument for holding psychopaths fully responsible touches upon three factors: (a) psychopaths do not appear to lack control in a manner consistent with absence of agency, (b) psychopaths can understand the concept of rules, and (c) lack of empathy for moral rules does not exonerate their disregard.

Control

Loss of control is most closely associated with reactive aggression, as opposed to the deliberate, controlled behavior associated with instrumental aggression (Blair 2007; Ray 2009; Vitacco & Rogers 2001). Psychopaths may show some propensity for impulsivity and reactive aggression, but the salient characteristic of the disorder is instrumental aggression. Additionally, it does not follow from the sole premise that, given psychopaths show a propensity for reactive aggression, it is induced by a stimulus so cognitively overwhelming as to meet the “hard” determinism generally associated with excuse by means of loss of control. Psychopaths choose aggressive behavior, though may do so more often compared to non-psychopaths, because of their deficits (Blair 2007, 328).
**Ability to Understand Rules**

While psychopaths show acute deficits in understanding the justification of moral rules, tests such as Blair’s involving questions of moral rules still appear to show psychopaths as understanding the general concept. Subjects appeared to understand the association between a rule and its proscriptive function as ‘don’t do this!’ (Blair 1995, 746).\(^{15}\) Thus it may be argued that, while psychopaths are impaired in appreciating why moral transgressions are particularly wrongful, they can still appreciate that when they commit transgressions, a wrong is committed and they are morally responsible.

**Emphasis on Reason**

The retributive tradition, at least in many incarnations, leans on the deontological philosophical tradition, with an emphasis on reasons and rule-following as the basis for moral agency, as opposed to affect and intuition (Cushman et al. 2008, 9). Without broaching the issue of whether deontological philosophers came to valid conclusions, the mere existence of such philosophical work seems to indicate that there is at least an argument to be made for thinking moral reasoning is based in principled, reasoned judgment about moral duties based on deduction from stipulated\(^{16}\) premises. Psychopaths appear to be rational insofar as possessing the ability to make reasoned judgments but, as discussed previously, this capability does not appear to motivate the psychopath to refrain
from prohibited conduct (Cima et al. 2010).

However, under this view, lack of care and empathy for moral reasoning does not exonerate the choice to avoid it. In fact, this sort of choice may be considered the height of moral turpitude, as the psychopath intends a prohibited result, and does so with the explicit knowledge and in spite of the consequences to others. Indeed, this understanding of psychopathy appears to reflect the dominant response in the law today. Thus, one might conclude that the psychopath, in spite of his deficits, is someone who deserves the full punishment the law may afford.

**Criticism**

Psychopathy presents a type of agent who is unlikely to arrive at the same conclusions as an ordinary moral agent, if given the same instructions upon which to formulate moral duties as that given to an ordinary agent. The difficulty is twofold: (1) impaired social learning appears to prevent the practical ability of the psychopath to rely on moral authorities in order to engage in appropriate behavior, and (2) the particular impairments presented by psychopathy appear to undermine the philosophical credibility of treating such persons as ordinary moral agents.

There are three basic ways in which this problem appears to manifest in the case of the argument for full responsibility: (1) the argument overstates the degree to which psychopaths exercise control over their behavior, (2) the
argument’s treatment of capacity to understand and follow rules threatens other doctrines already existing in law and imposes an unreasonable degree of moral luck into the criminal legal system, and (3) the psychological profile of the psychopath may adversely impact the integrity of a deontological schema.

Control

Recall the discussion of moral disengagement, self-reflection, and self-regulation. While psychopaths may infrequently be provoked into aggression, it may be the case that they are also infrequently provoked into moral reasoning due to the impact their cognitive impairments have on the self-regulatory mechanisms discussed by Bandura. If so, this might in some sense be considered a non-culpable type of uncontrolled behavior, insofar as the psychopath’s deficits in conditioned responsivity and ability to empathize with moral concepts seriously undermines the feedback mechanisms that operate in moral agency.

Rule-following and moral luck

Doctrines involving diminished capacity do not necessarily question the capacity of the person to understand “right and wrong” or ability to recognize that rules exist, but rather focus on non-culpable sources of poor judgment and failure to adequately condition into an ordinary moral agent. Thus, the premise that psychopaths can engage their practical reason in some capacity may be
insufficient to reach the conclusion that they have a capacity, and duty, to apply it as though they were an ordinary person.

Insofar as moral reasoning is based on application of premises from which one must develop an account of his or her moral duties in a specific context, deficits which impair the formation of accurate premises may undermine even a purely rationalist approach to moral judgment. Psychopaths have trouble detecting the sort of essential facts about the world with which others furnish their understanding of conventional and moral norms. Therefore, it appears that even if a psychopath hypothetically took it upon herself to attempt moral reasoning, she would be unlikely to come to accurate moral judgments.

Thus, given the deficits presented by psychopathy, full responsibility may be considered inappropriate due to its introduction of moral luck in the decision to punish the psychopath. This criticism concerns the idea that the moral quality of one’s acts cannot be determined by factors which are considered fortuity, such as innate capability or skill (“constitutive luck”), environmental factors outside the person’s control (“circumstantial luck”), and the consequences that flow from one’s actions (“causal luck”) (Goldberg & Zipursky 2007, 1127).

Psychopathy presents the problem of moral luck due to impaired social learning (“constitutive luck”) in addition to ineffective stimulus to induce the sort of productive social learning that would help guide the development of moral agency (“circumstantial luck.”) Therefore, even if moral reasoning could be done
in a principled, reasoned manner, it does not necessarily follow that a person who
is greatly impaired in his ability to reason as an ordinary person accrues an
affirmative duty to succeed at this alternative.

The Place of Psychopaths in the Moral World

Deontological reasoning typically involves reference to the nature of the
agent engaging in the type of reasoning at hand. Psychopaths may be capable of a
type of agency that resembles ordinary adults, but they clearly are not ordinary in
terms of overall mental construction. First principles such as a categorical
imperative would likely yield patently bizarre results if one were to imagine a
world of psychopaths and the resulting ends and maxims that would be chosen.
Likewise, one may come to different conclusions about what, exactly, is involved
in respecting their agency, due to the unusual nature of their response to appetitive
and aversive stimuli.

Thus, psychopaths appear to exist outside of the moral community implicit
in the deontological, and thus retributivist, account of the duties of ordinary
persons. As such, it may be considered unreasonable to impose the same moral
duties as those of an ordinary agent.

No Responsibility

As noted previously, psychopaths do not understand, nor are they similarly
motivated by, moral imperatives in the manner of an ordinary moral agent (Morse 2008). A psychopath simply does not appear to resemble a member of the ordinary moral community. Therefore, under this view, psychopathy should be treated as a complete excuse to criminal responsibility.

While the full responsibility argument appears to weigh the intact faculties of the psychopath too heavily, the full excuse option may exaggerate the impairment. Psychopaths do not appear to be automata, and they do appear to be capable of practical reason and at least a rudimentary sort of moral reasoning in terms of basic manipulation of the concepts as indicia of proscribed behavior. However, psychopaths do possess a diminished understanding of the content of moral reasoning, and their learning deficits dispose them to mistake. Thus, while psychopaths may possess a non-culpable developmental impairment which undermines their capacity for moral agency, it does not necessarily mean that it legitimizes excusing criminal responsibility.

Nonetheless, the psychopath’s position outside of the moral community of ordinary agents, combined with a general appearance of lacking most major faculties associated with moral reasoning, such as remorse, shame, regret, or empathy (Morse 2008, 209), may make it difficult to perceive psychopaths as capable of criminal responsibility. Two alternative approaches to justifying criminal punishment will be considered, taking into account the specific deficits associated with psychopathy.
Alternative Approaches

While psychopaths appear to exist outside of the ordinary moral community, it does not necessarily follow that no basis exists for justifying punishment. Two possible lines of thought will be considered: (a) the guilty but partially responsible argument of Stephen Morse (Morse 2003), and (b) analogizing the punishment of the psychopath with punishment on the basis of conventional transgression.

**Diminished Rationality, Diminished Responsibility**

Stephen Morse presents a compelling argument for the idea that diminished rationality should result in diminished responsibility (Morse 2003, 289). He proposes the idea of a guilty but partially responsible (GPR) verdict in the case of diminished rationality. The requirements are that, (1) “the defendant’s capacity for rationality was substantially diminished at the time of the crime” and (2) “that the defendant’s diminished rationality substantially affected his or her criminal conduct” (Morse 2003, 299-300). The first element requires that (1) the impairment results in a substantial deficit in rational capacity relative to ordinary persons, and (2) the impairment is non-culpable. Non-culpable impairments are ones that are not voluntarily created, and are not culpably reinforced through will or negligence. Morse proposes an additional caveat as well: degree of
mitigation available should inversely track the seriousness of the crime, such that serious crimes receive proportionally less mitigation (Morse 2003, 303-304).

As noted previously, psychopaths do not, outside of their selective deficits, appear to have a diminished rational capacity relative to ordinary persons. Insofar as element (1) would require a psychopath to have a global impairment for rationality, it would not apply and GPR would be of no use. However, psychopaths do appear to possess a “substantial” deficit in moral reasoning. In the domain of criminal responsibility, moral reasoning is associated with the rational capacity of ordinary person. Therefore, within the specific context of criminal responsibility, it may be argued that a deficit in moral reasoning is therefore a deficit in rational capacity. If so, this element of GPR is met.

The second element seems to be less certain in its effect. Psychopaths may be aware that they are psychopaths, and so there may be some question as to whether they have a duty to seek treatment before something like GPR can be raised. This is, of course, assuming a valid treatment for psychopathy exists and is reasonably accessible. It seems plausible to think, though, that the deficits in conditioning and response may impair the thought process responsible for the sort of foresight necessary to take such precautions. If so, then element two may be satisfied. It may be worth investigating, however, whether a psychopath can properly be said to be “on notice”, after the first conviction, of his impairment and
that he must take measures to mitigate its effects in order to successfully raise
GPR in the future.

GPR, as applied to psychopaths, in some sense parallels the sorts of arguments used in support of diminished responsibility for adolescent offenders. For example, it has been argued that adolescents possess immature psycho-social development, and reduced capacity for self-management, risk perception, risk calculation, and “autonomous choice” (Scott & Steinberg 2003). Psychopaths appear to possess these sorts of deficits as well, though not necessarily to the same degree and in the same way. Nonetheless, it may suggest that the law need not depart from current values as much as one may initially be inclined to believe.

Another way to conceive of the GPR approach is that, in the case of those with a diminished rationality, we may impose upon them a duty to try to learn and conform to moral norms, but we do not impose a duty to succeed to the degree we do for adults, due to recognition that it is unreasonably burdensome, impractical, or impossible.

While this approach appears promising, it is worth noting that Morse does not appear to have endorsed it in a recent article (Morse 2008). Instead, he opts for a justification of civil commitment on the basis of harm posed to society; what he calls “desert-disease jurisprudence” Morse concludes that, as psychopaths exist outside the moral community, so too it follows that responsibility on the basis of
moral fault may be inappropriate. It is unclear, though, why GPR is not included in this discussion, as psychopathy’s relation with moral socialization may be conceived of as a developmental disability, in which case GPR would appear to apply. However, it is also possible to conclude that, based on the severely diminished capacity for ordinary moral reasoning, that it is a disability that largely excludes any serious consideration of ordinary criminal responsibility. In such a case, GPR may be inappropriate, however, another approach will be considered which attempts to address this concern.

Conventional Transgression

Another way to approach the issue of partial responsibility is to analogize the relationship between the psychopath and moral wrongs with that of an ordinary moral agent and conventional transgressions. Psychopaths do understand the concept of proscribed behavior, but do not appear to understand the unique character of a moral wrong. However, like an ordinary agent, they do appear to understand that some behaviors are not permitted. Insofar as ordinary agents can be punished for committing conventional transgressions, it may be argued, a psychopath may be similarly punished.

This approach differs from the moral reasoning approach discussed in the section on full responsibility because it does not purport that psychopaths are expected to make use of practical reason in order to comply with ordinary moral
duties. That is, moral agency under this view is not premised upon something like “pure reason” or adapted practical reason. Instead, the approach is based on tying the psychopath’s capacity for reason to a diminished type of duty – the conventional duty.

Moral luck is similarly not a problem because, under this approach, impaired capacity to learn conventions would be treated as a basis for limiting conventional duty to the extent that it would prevent compliance. Similarly, this means that punishment in this case is not “strict liability” because individual capacity (knowledge, self-efficacy, and so forth) is a relevant consideration in applying this type of punishment. Nonetheless, there is some question as to justifying a notion of wrongfulness that would be compatible with an agency-centric tradition of punishment. That is, a tradition in which wrongfulness is tied to notions of wrongful exercise of a free will.

It may be possible to justify punishment on the basis of viewing rights as correlative rather than absolute. Under this view, exercise of an individual’s agency is bounded by its interaction with the rights of other agents. Individual “rights”, insofar as they are to have any meaning and efficacy within the context of a society of many individuals, are in practical terms constrained by the rights of others. When an individual acts, she does not do so in a vacuum; she may interfere with another person’s own agency. Some interferences we allow, typically minor impairments that are simply an unavoidable consequence of living
in society. However, severe threats to the physical (bodily, mental) or material (resources, etc.) sources of another person’s enjoyment of agency, or that of society at large, cannot be defended by referring to one’s own right. Thus, the nature of individual rights is, at its core, correlative rather than absolute in the context of one who lives within a society of individuals.

The “wrong” under this view, in committing a conventional wrong, is exceeding the boundaries of an individual’s correlative right to act in a given context. So, in some sense, it is still a wrongful act, but is of a class of wrongs which are less severe than that of moral wrongs. This type of breach is a capacity psychopaths share with ordinary moral agents, and doesn’t require the sort of fundamental understanding of “moral” wrongs that justify punishment in the context of ordinary moral breach. The distinction in treatment between psychopaths and ordinary moral agents is that what would ordinarily be considered moral wrongs are construed as, structurally, conventional wrongs on the part of the psychopath. However, the approach still appears consistent with long-standing notions of punishment focusing on the nature of the act rather than the consequence. This is because wrongfulness is still premised on the departure from the permissible exercise of will, rather than the mere existence of a “bad” consequence.
Recap

Several approaches were considered in addressing the issue of criminal responsibility: (1) full responsibility, (2) no responsibility, and (3) two approaches to partial responsibility in the form of (i) GPR, and (ii) treatment of a psychopath’s criminal behavior as a conventional transgression. The full responsibility approach could not be justified based on the particular deficits possessed by psychopaths, while the no responsibility approach would require a greater degree of impairment. Despite GPR’s potential, it may not be appropriate as it may still require a prototypical form of moral reasoning absent in individuals with psychopathy. Therefore, the most effective justification may be to handle criminal responsibility as arising out of an expansive schema of conventional transgressions, including those cases classically associated with moral transgression in ordinary moral agents. While it may be possible to hold psychopaths criminally responsible, there is still the issue of whether detainment is permissible in cases where the individual is not found responsible, or where diminished responsibility has mitigated the criminal sentence.

WHAT TO DO WITH PSYCHOPATHS, IF NOT INCARCERATION

One of the major problems that society faces is that, even if psychopathy is grounds for diminished responsibility or complete excuse, psychopaths still pose a heightened threat to the welfare of others. Therefore, decreasing the amount of
time that a psychopath is separated from society is often considered a thoroughly undesirable circumstance. So, the concern then becomes, is there any justified way society can institutionalize or otherwise isolate psychopaths from the general population? It seems there are a few species of justification available: (1) utilitarian, with a subspecies of paternalistic argumentation, and (2) an account based on the notion of rights as correlative.

The utilitarian account, of course, focuses on maximizing social benefit through mitigating the exposure society faces to psychopaths. The rights-as-correlative account, while it in some sense reflects the concept of general welfare, places more emphasis on the limitation of right, on the part of the psychopath, to expose other persons to such a heightened risk of harm. Finally, the paternalistic justification involves some sort of appeal to the idea of the state acting as a vanguard of a person’s own interests.

**Utilitarianism**

Ultimately, the concern expressed in a utilitarian account is that psychopaths pose a very serious, continuous threat to the general welfare of members in society who are subject to their behavior. As a general matter, institutionalization can and does appear to happen on the basis of utilitarian concerns. In *Kansas v. Hendricks*, the U.S. Supreme Court concluded that the “constitutionally protected interest in avoiding physical restraint may be
overridden even in the civil context”, based on *Jacobsen v. Massachusetts* which argued that Constitutionally-protected liberty interests are subject to restraint on the basis of “the common good”, as otherwise “organized society could not exist with safety to its members.”

Utilitarian justification could also involve a paternalistic account which, to some degree, is a familiar force in public policy. Commitment to drug rehabilitation, for example, is at least in part based on the idea that it aids the well-being of the subject of the commitment, even if he may at the time find it aversive. To the extent that one might think that, if future research discovers effective means of conditioning psychopaths, then it is of benefit to them, civil commitment may be seen as justified.

The problem of handling the consequential dangers of releasing psychopaths into society can be construed as an issue of distributive justice. There is a cognizable benefit to the psychopath and burden to society-at-large in his release, and likewise a burden to the psychopath and benefit to society in his detainment. Thus, the decision to release the psychopath can be considered in light of how those benefits and burdens are distributed. This approach appears to lead to treating the problem as a matter of utilitarian concern. A pure utilitarian justification, however, is often found unpersuasive as it appears to undermine individual rights in service of the interests of society at large. The solution to this problem involves referring once again to the notion of individual rights as
correlative, rather than absolute.

**Rights as Correlative**

Civil commitment of a psychopath essentially impairs, at least in some part, her agency and bears upon her rights. While the Supreme Court has expressed a view that such rights must be balanced against the interests of society at large, the rights of the psychopath may be considered in the context of their correlative nature. For example, individuals are regarded as possessing a right to liberty, along with rights to safety and property. All of these factors are necessary to effect protection of the individual’s agency, since she must be both physically and economically able to pursue her individual goals.

Psychopaths present a threat to all of these rights, due to a high probability of causing both physical and economic harm to other members of society. In posing such a threat, society is confronted with a conflict between protecting the same rights of many individuals, including the psychopath’s. In doing so, it may be unjustifiable to preference the enjoyment of that right of one individual (the psychopath) over others who are ordinarily able to strike a more favorable correlative balance. In other words, the psychopath takes from society to a degree for which his own rights do not afford, and society may be justified in preventing such a taking.

The advantage of this approach is that it recognizes, albeit as a
consequence rather than as its justification, the distributive justice concerns that are handled by the utilitarian approach. However, the approach is fundamentally grounded in the notion of individual rights, which makes it more philosophically compatible with existing law, as well as addresses the problem utilitarianism presents in which it appears to divest individuals of their rights when they conflict with broad societal interests. The psychopath is not divested of his rights nor are his interests ignored. Rather, he is prevented from enjoyment of those rights beyond their scope because of their correlative, as opposed to absolute, nature.

CONCLUSION

In this paper, we explored the complicated relation between psychopathy and criminal responsibility by applying an interdisciplinary analysis that builds from scholarship in law, psychology, neuroscience, philosophy, and public policy.

Psychopathy presents a peculiar challenge for the law, as balancing competing interests in respecting human agency, holding persons responsible for the exercise of their agency, and protecting the public at large all weigh heavily in any attempt toward treating psychopathy as a mitigating factor of culpability and punishment for wrongdoing. Yet, the nature of psychopathy appears to involve a sort of agency that bares a striking departure from that of a normally functioning adult, and so it becomes difficult to justify a finding that full punishment and responsibility attaches to said wrongdoing.
However, scientific evidence does not adequately support the position that psychopaths are devoid of *all* agency, as adult human agency is recognized by the law. As such, an argument that the psychopath is at least partially responsible for wrongful, socially harmful, legally prohibited conduct is defensible. This means that some punitive recourse is in order for the wrongdoing psychopath, but it does not resolve the debate as to what may or should be done about the psychopath who has fulfilled the retributive mandate but persists in presenting a chronic, serious danger to others.

Even in the case in which the psychopath is found entirely criminally non-responsible, she does not possess a right to act without restraint. In such cases, civil commitment may be the most appropriate solution to handle the issue of danger posed to society. This resolution was discussed in light of what scientific research in psychology and neuroscience informs us as to the limitations of the psychopath’s mental capacities as related to human agency and criminal responsibility.
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That is, in the sense that they lack a critical understanding of how their activity bears on moral considerations, and that such considerations have no bearing on their decision to act, as a general matter.

This is the general issue of “compliance luck”; that is, the moral luck of having possessed the qualities necessary for compliance with the law. This is reflected in the common notion of “ignorance of the law is not a defense.”

Possesses a capacity for moral reasoning. This will be discussed later.

Ability to form goals and develop a plan to accomplish them

Reactive aggression also includes defensive aggression, such as that represented by self-defense and defense of other criminal law doctrines.

It is left to the jurisdiction whether they employ the ‘criminality’ wording or the ‘wrongfulness’ wording of section 4.10, although for our purposes they are roughly equivalent.

Consult the later section on moral psychology for more detail on this

That is, as long as a psychopath can process the basic semantics and syntax of moral reasoning, even without understanding intuitively the justification, this may qualify as adequate moral reasoning

That is, the subjective quality of consciousness

He calls this “self-reactive selfhood”

aka the principle of penal proportionality: “Each crime carries a penalty that in principle is proportionate to desert.”

This is not to say, of course, that psychopaths do not exhibit characteristics that are more often associated with reactive aggression, as well, such as impulsivity.

This is simply in reference to the idea that events antecedent to any sort of conscious decision-making process are sufficient conditions for the subsequent act. Most people have the view that, if the world is “hard” determinist, then moral responsibility cannot exist.

Psychopaths, while having trouble distinguishing between moral and conventional rules, did not have trouble responding that transgressions were not permissible.

often considered a priori

Here we refer to aforementioned deficits in stimulus-related learning as well as affect-deficiency related mistake in justification for moral concepts.

Morse says ingestion of “mind-altering substances” doesn’t count, mental disorders and other involuntary sources of diminished rationality may count, so long as the person does not incur responsibility due to failure to take adequate measures in response to the impairment. Note that this would also seem to address issues of culpable and non-culpable recidivism.

Consider the synthesis of material from the work of Blair, Greene, and Bandura: the psychopath appears as someone who possesses an impaired capacity to learn social norms and internalize them into a system of self-management and regulation.

Note that, if recidivism in psychopathy would diminish the use of GPR, it would appear beneficial to the psychopath that he receives conditioning that is effective in suppressing repeat criminal offense