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Christian Francis Richeson  
*University of Missouri-St. Louis*

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An Insanity Defense Should Be Available to Psychopaths

Christian F. Richeson

J.D., University of Michigan, 2003

M.Sc., Classics, University of Edinburgh, 1997

B.A., Classics, Truman State University, 1995

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Advisory Committee

Gualtiero Piccinini, Ph.D.  
Chairman

Anna Alexandrova, Ph.D.

John Brunero, Ph.D.

C. F. Richeson

### An Insanity Defense Should Be Available to Psychopaths

**ABSTRACT:** Current law allows certain criminal defendants —not including psychopaths —an insanity defense. Both Utilitarian and Retributivist rationales can be cited for the defense. This essay argues that affording a defense like the insanity defense to criminal psychopaths is justified on much the same rationales. Integral to the psychopathy syndrome is a set of neurocognitive deficits that render psychopaths significantly less deterrable than non-psychopaths: first, psychopaths’ relative inability to recognize when a behavior pattern that once netted benefits now nets costs, and to change their behavior accordingly; second, their relative inability to form the mental associations between an aversive experience and the events which herald it; and third, their relative insusceptibility to fear, which results in the dread of further punishment being much reduced in them. Psychopaths are also less subject to general deterrence, because the psychopath’s typical inability to conjure and be moved by emotional mental imagery blunts the warning effect of other offenders’ run-ins with the legal system. Psychopathy undercuts the Retributivist rationale for punishment because, due to their characteristic empathy deficit, psychopaths lack the concept of normativity, and so are not morally responsible agents. Those who are not morally responsible do not deserve criminal blame. It is therefore wrong to inflict criminal punishments on psychopaths.

#### I. Introduction

I will argue that psychopaths should be allowed a defense analogous to the defense of insanity. The criminal law, which does not presently allow such a defense, should be changed accordingly. The extent to which psychopaths can avail themselves of such a defense should depend on the extent of their impairment and on the type of crime with which they are charged. I lack the space to answer in detail the question of how society should respond to the threat posed by dangerous psychopaths. In future work, I will argue that psychopaths who are deemed to be dangerous should be subject to “civil commitment” under procedures like those recently upheld by the United States Supreme Court.<sup>1</sup>

Current law allows certain criminal defendants —not including psychopaths<sup>2</sup>—an insanity defense. Both Utilitarian and Retributivist rationales can be cited for the defense. On the Utilitarian rationale, it would be useless to punish those who, due to mental illness, cannot be deterred from

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<sup>1</sup> See *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>2</sup> Robert Hare, *Without Conscience: The Disturbing World of the Psychopaths Among Us* (1993) [hereinafter “Hare, Without Conscience”], at 143; Laura Reider, Comment, Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories, 46 UCLA L. Rev. 289, 292 (1998) (“[C]riminal offenders who are psychopaths are not candidates for the insanity defense”).

breaking the law. On the Retributivist rationale, a person who has broken the law because he is mentally ill does not deserve criminal blame and punishment.

I will argue that affording a defense like the insanity defense to criminal psychopaths is justified on much the same rationales. Integral to the psychopathy syndrome is a set of neurocognitive deficits that render psychopaths significantly less subject to special deterrence than non-psychopaths. The most important of these deficits are: first, psychopaths' inability, relative to non-psychopaths, to recognize when a behavior pattern that once netted benefits now nets costs, and to change their behavior accordingly; second, their relative inability to form the mental associations between an aversive experience, on the one hand, and the events which herald it, on the other; and third, their relative insusceptibility to fear, which results in the dread of further punishment being much reduced in them. Psychopaths are also less subject to general deterrence, because the psychopath's typical inability to conjure and be moved by emotional mental imagery blunts the warning effect on him of other offenders' run-ins with the legal system.<sup>3</sup>

As for the Retributivist rationale for punishment, it hinges on the criminal's desert: the offender should be punished because, and to the extent to which, he deserves punishment for his criminal act.<sup>4</sup> I will argue that it is wrong to punish psychopaths retributively because, much like those to whom the law already affords an insanity defense, psychopaths are not morally responsible agents. They are not morally responsible agents because they lack the concept of normativity. A grasp of normativity is necessary for moral responsibility, because without it, we cannot understand or be motivated by moral reasons, and such capacity is necessary for moral responsibility. One who is not morally responsible is not blameworthy. Thus, psychopaths are not blameworthy. But blame is an element of retributive criminal punishment, particularly punishment by imprisonment or execution: whenever such punishments are inflicted, the infliction of them expresses blame. It is therefore wrong to inflict criminal punishments on psychopaths.

The paper will proceed as follows. In Section II, I will focus on the two chief Utilitarian rationales for punishment, special and general deterrence, and will argue that neither rationale justifies the

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<sup>3</sup> Blair, R. J. R., Jones, L., Clark, F., and Smith, M., "The psychopathic individual: A lack of responsiveness to distress cues?" *Psychophysiology* 34: 192-98 (1997) [hereinafter "Blair et al. (1997)"]; Patrick et al. (1994).

<sup>4</sup> See, e.g., Nicola Lacey, *State Punishment: Political Principles and Community Values* (1988) [hereinafter "Lacey"], at 16 ("classical retributivism in its strong form" claims that "the state has both a right and a duty to punish, in the sense of inflicting unpleasant consequences upon an offender in response to her offence to the extent that, and by reason of the fact that, she deserves that punishment.").

criminal punishment of psychopaths. In Section III I will make the analogous case with respect to Retributivist rationales for punishment.

## II. The Failure of the Various Utilitarian Theories of Punishment In Regards To Psychopaths

Theories of punishment fall into two main categories: Utilitarian and Retributivist.<sup>5</sup> Utilitarian theories attempt to justify punishment on the grounds that the benefits it yields will outweigh the costs it imposes on those punished and on society.<sup>6</sup> All the Utilitarian theories of punishment are geared towards crime-reduction,<sup>7</sup> but each theory explains in a different way how punishment seeks to achieve this goal. The standard list of Utilitarian theories comprises incapacitation, special deterrence, general deterrence, denunciation, and rehabilitation.<sup>8</sup> This section will focus on how special and general deterrence fail to justify criminal punishment of psychopaths.

### II.1 Special Deterrence

#### II.1.1 The Criminological Facts

One of the two main Utilitarian justifications for punishing offenders is that punishment deters them from re-offending. The state responds to the offender's crime by subjecting him to an experience so memorably unpleasant, and so inextricably associated in his mind with criminality, that he subsequently recoils from committing further offenses.<sup>9</sup> The success or failure of such a penological strategy can therefore be assessed by considering the rates at which offenders recidivate upon completion of their sentence. For example, if 100% of offenders committed another crime after their release from prison, we would be able to conclude that special deterrence, for whatever reason, was not working.

Criminal psychopaths recidivate at a rate far higher than that of the average offender. An early study involving the Psychopathy Checklist-Revised<sup>10</sup> followed the post-release careers of 231

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<sup>5</sup> Michael S. Moore, "A Taxonomy of Purposes of Punishment" from *Law and Psychiatry: Rethinking the Relationship* (Cambridge U. Press: 1984), pp. 233-39, excerpt published in Leo Katz, Michael S. Moore & Stephen J. Morse, *Foundations of Criminal Law* (Foundation Press: 1999) [hereinafter "FCL"], at 64, 67.

<sup>6</sup> FCL, at 67.

<sup>7</sup> FCL, at 64.

<sup>8</sup> FCL, 64-65; Wayne R. LaFave, *Criminal Law* (4<sup>th</sup> ed. 2003) [hereinafter "LaFave"], at 26-29 (listing the same theories, though referring to "special deterrence" as "[p]revention," "denunciation" as "[e]ducation," and "incapacitation" as "[r]estraint").

<sup>9</sup> LaFave, at 26-27.

<sup>10</sup> Also known as the "PCL-R," this is the standard tool for diagnosing psychopathy.

offenders.<sup>11</sup> Three years after their release from prison, twenty-five percent of the non-psychopaths in this cohort were back in prison, while eighty percent of the psychopaths had been re-incarcerated.<sup>12</sup> A later study which followed a different group of 299 offenders found that, within three years, sixty-five percent of the psychopaths had been convicted, versus twenty-five percent of the non-psychopaths.<sup>13</sup> A meta-analysis published in 1998<sup>14</sup> concluded that, within one year of release from prison, psychopaths were three times more likely to recidivate, and four times more likely to recidivate violently, compared with the average offender; relative risk for re-offending ranged between 1.7 times and 6.5 times that of the average offender across the studies.<sup>15</sup> Finally, a study which sought to establish the predictive power of the PCL-R followed 278 offenders after their release from prison.<sup>16</sup> Of those offenders who qualified as psychopathic on the PCL-R, eighty-two percent were reconvicted, compared with forty percent of the non-psychopaths.<sup>17</sup> Moreover, thirty-eight percent of those classified as highly psychopathic violently recidivated, compared with only 2.7% of those deemed mildly psychopathic.<sup>18</sup>

Why is special deterrence so much less effective for psychopaths than for the average former prisoner? One possible answer is that psychopathic offenders find the experience of punishment (that is, prison life) somehow less unpleasant than non-psychopathic offenders do, with the result that their memory of it fails to deter them from committing more crimes after their release. The present essay, however, will focus on a different, though possibly related, explanation – that, due to a set of neurocognitive deficiencies characteristic of psychopathy, psychopaths are significantly less able than non-psychopaths to profit from their punishment in the ways society expects them to.

Three of these characteristic deficits are especially germane. First, psychopaths are significantly less able than non-psychopaths to recognize when a behavior pattern that once netted benefits now

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<sup>11</sup> Hart, S. D. Kropp, P. R., Hare R. D., "Performance of male psychopaths following conditional release from prison, *J. of Consulting & Clinical Psych.*, 56, 227-232 (1988) [hereinafter "Hart et al. (1988)"].

<sup>12</sup> Hart et al. (1988).

<sup>13</sup> Serin, R. C. & Amos, N. L., "The role of psychopathy in the assessment of dangerousness," *Int'l J. of L. & Psychiatry*, 18, 231-38 (1995).

<sup>14</sup> Hemphill, J. F., Hare, R. D., Wong S., "Psychopathy and recidivism: a review," *Legal and Criminological Psych.*, 3, 139-70 (1998) [hereinafter Hemphill et al. (1998)].

<sup>15</sup> Hemphill et al. (1998).

<sup>16</sup> Hare, R. D., Clark, D., Grann, M., Thornton, D., "Psychopathy and the predictive validity of the P. C. L-R: an international perspective," *Behavioral Sciences and the Law*, 18, 623-45 (2000) [hereinafter "Hare, Clark, et al. (2000)"].

<sup>17</sup> Hare, Clark, et al. (2000).

<sup>18</sup> Hare, Clark, et al. (2000).

nets costs, and to change their behavior accordingly.<sup>19</sup> Second, psychopaths are significantly less able to form the requisite mental associations between an aversive experience, on the one hand, and the events which herald it, on the other.<sup>20</sup> Third, it is, baldly put, significantly harder to frighten a psychopath than it is to frighten a non-psychopath, with the result that the dread of further punishment, a desideratum of deterrence, is much reduced in them.<sup>21</sup>

## II.1.2 Psychopath's Passive-Avoidance-Learning, Response-Reversal, and Extinction Deficits

### II.1.2.1 The Neuroscience Studies

Passive avoidance learning ("PAL") is one's ability to identify those stimuli responding to which will result in punishment to oneself and to inhibit one's responses to those stimuli.<sup>22</sup> Neuroscientific experiments involving psychopaths have shown them to be characteristically deficient in PAL.<sup>23</sup> For example, in a study<sup>24</sup> of seventy-nine prisoners, the subjects were shown eight two-digit numbers on a computer screen. Each number was displayed ten separate times, for a total of eighty trials. Some of the numbers were associated with a reward, others with a punishment. Rewards consisted of chips which the subjects could cash in after the study for soft drinks and snacks, while punishments consisted of subtractions of one of these chips from their total winnings. The subjects' task was to determine which numbers would yield a reward and which a punishment, and not to respond to the latter.<sup>25</sup> White prisoners who scored a 23 or higher on the PCL-R were significantly more likely to respond to punishment-associated stimuli (i.e., commit "errors of commission") than non-psychopaths.<sup>26</sup>

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<sup>19</sup> Thornquist, M. H. & Zuckerman, M., "Psychopathy, Passive-Avoidance Learning and Basic Dimensions of Personality," *Person. Individ. Diff.*, Vol. 19, No. 4, pp. 525-534 (1995) [hereinafter "Thornquist et al. (1995)"]; Mitchell et al. (2002) (same); Newman, J. P. & Schmitt, W. A., "Passive Avoidance in Psychopathic Offenders: A Replication and Extension," *J. of Abnormal Psych.* 3, 527-532 (1998) [hereinafter "Newman et al. (1998)"], at 527.

<sup>20</sup> Hare & Quinn (1971) (audio cue for imminent painful electric shock elicits only attenuated dermal response in Ps); Hare, *Without Conscience*, at 54 n. 16; Flor et al. (2002) (replicates these results using an aversive odor); Christianson et al. (1995).

<sup>21</sup> Flor et al. (2002)

<sup>22</sup> Newman et al. (1998), at 527.

<sup>23</sup> Newman et al. (1998), at 528 (this result "regarded as one of the best replicated findings in psychopathy research[,] with citations).

<sup>24</sup> Thornquist et al. (1995).

<sup>25</sup> Thornquist et al. (1995), at 528.

<sup>26</sup> Thornquist et al. (1995), at 530. Oddly, in Black psychopaths, no correlation between PCL-R score and errors of commission was found. Thornquist et al. (1995), at 532.

In an earlier study of prisoners,<sup>27</sup> also, the psychopaths among them committed significantly more commissive errors than the non-psychopaths.<sup>28</sup> In addition, when the possibility of reward was removed, the psychopaths performed no differently from the non-psychopaths,<sup>29</sup> leading to the conclusion that psychopaths “show a passive-avoidance learning deficit in situations involving a reward-punishment or approach-avoidance conflict.”<sup>30</sup> That is, when the experiment situation contained possibilities both for reward and for punishment, psychopaths characteristically failed, significantly more than did the non-psychopaths, to learn to inhibit those responses that resulted in punishment.

A different approach to establishing much the same deficiency is the so-called “four pack card-playing task.” One study that incorporated this task involved 51 prisoners drawn from various high-security prisons around London.<sup>31</sup> Those who scored 30 or higher on the PCL-R were deemed psychopathic for the study’s purposes, while those scoring 20 or below were qualified as non-psychopaths; those whose scores fell between were excluded from the subject pool.<sup>32</sup> The subjects were presented with a computerized version of a card game. Picture representations of four packs of cards appeared on the computer screen, all face down, their backs all identical to one another just as if the packs were real. The subjects were instructed to play the cards so as to maximize their points. Unknown to them at the start, play from two of the packs yielded high point rewards, but even higher punishments, while the other two packs yielded lower point rewards, but also lower punishments. Playing only from the low-reward-lower-punishment packs maximizes the player’s point total, while playing from either of the high-risk packs results in a net negative score.<sup>33</sup>

The non-psychopaths in the group gravitated towards the low-risk, point-maximizing decks over the course of the game, averaging twelve selections from the high-risk packs in the first block of twenty turns and seven in the last, with just under ten, just under nine, and just under eight sequentially in the

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<sup>27</sup> Newman, J. P. & Kosson, D. S., “Passive avoidance learning in psychopathic and nonpsychopathic offenders,” *J. of Abnormal Psych.*, 3, 252-256 (1986) [hereinafter “Newman & Kosson (1986)”].

<sup>28</sup> Newman & Kosson (1986).

<sup>29</sup> Newman & Kosson (1986).

<sup>30</sup> Thornquist et al. (1995), at 526.

<sup>31</sup> Mitchell, D. G. V., Colledge, E., Leonard, J. & Blair, R. J. R., *Neuropsychologia* 40, 2013-2022 (2002) [hereinafter “Mitchell et al. (2002)”], at 2014.

<sup>32</sup> Mitchell et al. (2002), at 2015.

<sup>33</sup> Mitchell et al. (2002), at 2015.



intervening blocks.<sup>34</sup> The psychopaths, on the other hand, did not. Their initial average was just under twelve, and ended at just under eleven.<sup>35</sup>

A variation (termed “extinction”) on this task is particularly relevant here.<sup>36</sup> In the task subjects have to play a card. While initially playing a card is rewarded with money, as the game progresses the probability of reward decreases. Psychopaths persist in playing the cards even when this is associated with punishment.

#### II.1.2.2 Significance for Psychopaths’ Recidivism

The environment of the newly-released psychopathic offender is analogous to the situations presented by the passive-avoidance learning, response-reversal, and extinction studies. First, like them, it presents possibilities for both reward and punishment. In the experiment situations, chips or points could be won or lost depending on whether the subject learned, through trial and error, which responses yielded reward and which punishment and chose the rewarding response. Likewise, the newly-released offender’s environment is fraught with such possibilities. In any given transaction he can choose the lawful option, one that yields comparatively low immediate reward but also no potential for punishment, or he can choose the option associated with high immediate rewards but also high risk: to re-offend. This same choice is, of course, faced by all ex-prisoners now on the street. But the psychopaths among them have particular difficulty, due to the very neurocognitive deficits spotlighted by these studies.

Second, like them, the former prisoner’s environment requires him to take account of information regarding disparate reward and punishment expectancies and to use it to change his pattern of choices on the fly. Though this dynamic is also present in the four-pack card playing task and the numbers recognition task, the extinction task frames the issue most starkly. There, the subject must recognize that a choice which once rewarded him – playing a particular card – now more often results in loss, and refrain from it. Likewise, the newly released ex-convict’s environment requires him to take account of the information which society has provided him in the form of punishment, and to change his

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<sup>34</sup> Mitchell et al. (2002), at 2016-2017.

<sup>35</sup> Mitchell et al. (2002), at 2016-2017; see also (a single-pack version of this task, with results analogous to those of Mitchell et al. (2002)).

<sup>36</sup> Newman, J. P., Patterson, C. M., Kosson, D. S., “Response preservation in psychopaths,” *J. of Abnormal Psych.*, 96:145-148 (1987) [hereinafter “Newman et al. (1987)”].

pattern of choices accordingly. Psychopaths, however, in the extinction task as in life,<sup>37</sup> characteristically persist in a losing bet long after non-psychopaths have cut their losses.

Third, the normal parole situation strikingly resembles the end phase of the extinction task, when a formerly rewarding option is very likely to impose a loss if chosen. Supervision of the parolee by the parole officer dramatically increases the risk to the parolee of illegal acts. As the relevant statistics show, however, psychopathic parolees persist in crime to a much greater degree than non-psychopathic parolees.

### II.1.3 Psychopaths' Relative Immunity to Threats of Pain or Punishment

#### II.1.3.1 The Neuroscience Studies

Psychopaths are characteristically less able, relative to non-psychopathic control subjects, to form mental associations between a painful or otherwise unpleasant sensory event or stimulus and the cues that herald its occurrence.<sup>38</sup> A technique typically employed by researchers to establish this deficit involves the administering of an electric shock to the subject, cued by a tone, and an apparatus to measure how readily the subject's skin conducts electricity in the interval between the cue tone and the shock, relative to the pre-tone period.<sup>39</sup> The subject's skin conductance is a direct measure of his arousal in anticipation of the painful shock he is about to receive.<sup>40</sup> Weaker arousal indicates weaker aversive conditioning to the painful stimulus.<sup>41</sup> Psychopaths characteristically show much weaker skin conductance than non-psychopaths in studies like these.

Thus, for example, a 1971 study<sup>42</sup> featured three distinct tones of 10 seconds' duration, each cuing a different stimulus – nothing; the two-second visual representation of a nude female; or a painful shock lasting a half-second.<sup>43</sup> The psychopaths in the group “gave much smaller electrodermal

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<sup>37</sup> Hervey Cleckley, *The Mask of Sanity* (5<sup>th</sup> ed. 1978), at 54-55, 58, 68, 262 (“[W]hen serious criminal tendencies do emerge in the psychopath, they gain ready expression, and ... no punishment can discourage them.”), 346 (“It is my opinion that no punishment is likely to make the psychopath change his ways.”)

<sup>38</sup> Flor, H., Birbaumer, N., Hermann, C., Ziegler, S. & Patrick, C., “Aversive Pavlovian conditioning in psychopaths: Peripheral and central correlates,” *Psychophysiology* 39: 505-518 (2002) [hereinafter “Flor et al. (2002)”], at 505 (“Deficient emotional responding and especially a lack of conditioned aversive responses have been viewed as one of the core features of psychopathy.”).

<sup>39</sup> Lykken, D., “A Study of Anxiety in the Sociopathic Personality,” *J. of Abnormal & Social Psych.* 55: 6-10 (1957) [hereinafter “Lykken (1957)”], 7-8 (the classic study).

<sup>40</sup> Lykken (1957), at 9; Flor et al. (2002), at 506.

<sup>41</sup> Flor et al. (2002), at 506.

<sup>42</sup> Hare, R. D. & Quinn, M., “Psychopathy and Autonomic Conditioning,” *J. of Abnormal Psych.* Vol. 77 No. 3, 223-235 (1971) [hereinafter “Hare & Quinn (1971)”].

<sup>43</sup> Hare & Quinn (1971), at 225.

responses to the shock” cues than the other subjects.<sup>44</sup> Another, similar study used an unpleasant odor as the cued stimulus instead of an electric shock,<sup>45</sup> with similar results.<sup>46</sup> These and other studies suggest that psychopaths are characteristically impaired in the formation of conditioned aversive responses on an autonomic level.<sup>47</sup>

### II.1.3.2 Significance for Psychopaths’ Recidivism

The situation presented in skin-conductance studies is analogous to that of the newly-released offender who is in the process of considering whether to re-offend. Special deterrence depends on the offender’s ability to associate criminality with the remembered pain of punishment. When it works properly, the criminal is deterred from re-offending by the aversive emotional response he has to cues in the situation – the weapon in his hand, for example, or the fear on the face of his would-be victim. These cues remind him of imprisonment, an experience much more painful and arduous than a simple electric shock, and the resulting dread causes him to change course.

The psychopath, however, is characteristically impaired in forming the necessary associations on an emotional level, so that the threat of further punishment gains significantly less of a purchase on his mind. He can understand that punishment is likely to follow upon his commission of a crime – no relevant intellectual impairment typifies psychopathy – but the threat lacks for him the deep emotional force which special deterrence depends on. Put differently, the deck is stacked against the remembered pain of punishment deterring the psychopathic offender from re-offending.<sup>48</sup>

## II.2 General Deterrence

According to the general deterrence theory of punishment, “the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate.”<sup>49</sup> On the general deterrence rationale, “those who are deterred are

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<sup>44</sup> Hare & Quinn (1971), at 232; see also Hare, R. D., *Without Conscience* (1992), at 54 (“Laboratory experiments using biomedical recorders have shown that psychopaths lack the physiological responses normally associated with fear.”) (referring to skin-conductance experiments like this); Hare, R. D. (1998) “Psychopathy, affect, and behavior” In D. Cooke, A. Forth, & R. Hare (Eds.), *Psychopathy: Theory, research, and implications for society* (pp. 105–137). Dordrecht: Kluwer (review of skin-conductance research on psychopaths); Raine, A., “Schizotypal and borderline features in psychopathic criminals,” *Personality and Individual Differences*, 13, 717–722 (1992).

<sup>45</sup> Flor et al. (2002), at 506.

<sup>46</sup> Flor et al. (2002), at 515.

<sup>47,48</sup> Blair, James, Mitchell, Derek & Blair, Karina, *The Psychopath: Emotion and the Brain* (Blackwell: 2005) [hereinafter “Blair et al. (2005)”], at 49.

<sup>48</sup> In this connection, see also Patrick et al. (1994), at 523 (“the emotional component of cognition is intrinsic to future planning. That is, in normal individuals stimuli that have previously been associated with aversive consequences subsequently evoke unpleasant emotional images. These images cue inhibition and avoidance and may thus block new antisocial behavior. In psychopaths, this affective component of memory is diminished.”).

<sup>49</sup> LaFave, at 28.

in the general population rather than the offenders themselves.”<sup>50</sup> In order for general deterrence to work, then, the would-be offender must learn that those who commit a crime, and are caught and convicted of it, are punished. He must view the likelihood of punishment following crime as high enough to make the game not worth the candle. Most relevantly for present purposes, he must imagine being punished in the threatened ways, and be frightened enough by these mental images to avoid committing a crime.

Psychopaths, however, are characteristically impaired in responding emotionally to mental imagery. A 1989 study involving non-psychopaths found pronounced elevation in heart rate as part of their response to frightening mental imagery versus neutral imagery.<sup>51</sup> Subsequent studies involving psychopaths have consistently found much smaller elevation, “reflecting an impairment of the normal associative processes by which symbolic stimuli ... prompt affect.”<sup>52</sup> For example, a 1994 study<sup>53</sup> involved a subject pool of 54 imprisoned sex offenders, equal thirds of whom were non-psychopaths, moderately psychopathic, and highly psychopathic.<sup>54</sup> Each subject was asked to memorize three pairs of sentences, one pair at a time, each pair consisting of one neutral and one frightful sentence.<sup>55</sup> The playing of a tone would cue him to silently repeat the corresponding sentence, whether the neutral or the frightful one; the tone played shortly thereafter would cue him to imagine himself, as vividly as he was able, to be participating in the situation which the sentence described. Heart rate, skin conductance, and EMG activity were all monitored. In psychopathic subjects, the difference in their physiological responses between the neutral and frightful stimuli was significantly smaller than those of

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<sup>50</sup> *FCL*, at 64.

<sup>51</sup> “Recently, Vrana, Cuthbert, and Lang (1989) developed a cue-controlled imagery task in which responses were measured during brief (6-s[econd]) image periods. Subjects memorized affective sentences and then listened to a series of tones; changes in tone pitch signaled the subjects to recall and imagine the memorized material. Large differences in heart rate (HR) response were found during imagery of fear-related as opposed to neutral sentences. The average HR wave forms for the two types of sentence ... showed a distinct, time-locked HR increase during fear image periods.” Patrick, C., Cuthbert, B., and Lang, P., “Emotion in the Criminal Psychopath: Fear Image Processing,” *J. of Abnormal Psych.* Vol. 103 No. 3 523-534 (1994) [hereinafter “Patrick et al. (1994)”], at 524 (citing Vrana, S. R., Cuthbert, B. N., & Lang, P. J., “Processing fearful and neutral sentences: Memory and heart rate change,” *Cognition and Emotion*, 3, 179-195 (1989)).

<sup>52</sup> Patrick et al. (1994), at 524.

<sup>53</sup> Patrick et al. (1994).

<sup>54</sup> The average PCL-R scores for the three groups were 13.4, 25.8, and 33.3, respectively. Patrick et al. (1994), at 525.

<sup>55</sup> “Neutral sentences described mildly pleasant, relaxing situations (e.g., ‘I am relaxing on my living room couch, looking out the window on a sunny autumn day’); fearful [*sic*] sentences described threatening, arousing situations (e.g., ‘Taking a shower, alone in the house, I hear the sound of someone forcing the door, and I panic’).” Patrick et al. (1994), at 525.

either the moderately psychopathic subjects or the non-psychopathic ones.<sup>56</sup> “Text cues that prompted large physiological reactions in low-psychopathy subjects elicited much smaller responses in subjects with features of psychopathic personality[.]”<sup>57</sup> The authors go on to state:

In naturalistic settings, an affective imagery deficit would be manifested as a failure to review the harmful consequences of one's actions [citation] and as an inability to entertain new behavioral strategies [citation]. *This helps to account for the reckless, impulsive life-styles of psychopaths.*<sup>58</sup>

General deterrence depends on a robust aversive emotional response on the part of the person to be deterred. He must picture himself being punished for committing a crime and find his emotional reaction to this mental image so unpleasant that it motivates him to avoid offending. Non-psychopaths exhibit this sort of visceral response to unpleasant mental imagery, with salutary results for them and for society at large. Psychopaths’ responses thereto, however, are much attenuated, and as a consequence the punishment of others deters psychopaths far less than it does non-psychopaths.

### II.3 The Deterrence Rationales Fail to Justify the Punishment of Psychopaths

In sum, punishment does not deter psychopaths as well as it deters non-psychopaths due to a set of neurocognitive deficiencies characteristic of psychopathy. Psychopaths perform poorly on tasks that require passive avoidance learning, response reversal, and extinction, all of which are analogous to abilities which the special deterrence theory assumes the public to possess. General deterrence, for its part, assumes that accounts of the punishment offenders receive will conjure, in the minds of those who presently obey the law, images frightening enough to keep them honest; but psychopaths cannot respond to such accounts in the expected ways. To rely on deterrence theories to justify the punishment of psychopaths is therefore much like forcing one with a badly sprained ankle to play tennis, and then relying on the rules of the game to justify adjudicating a loss to him where the consequences thereof are deprivation of liberty or life.

### III. The Failure of Retributivism to Justify the Criminal Punishment of Psychopaths

This portion of the essay will argue that it is wrong to punish psychopaths retributively because, much like those to whom the law already affords an insanity defense, psychopaths are not morally responsible agents. They are not morally responsible agents because they lack the concept of normativity. A grasp of normativity is necessary for moral responsibility, because without it, we cannot understand or be motivated by moral reasons, and such capacity is necessary for moral responsibility.

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<sup>56</sup> Patrick et al. (1994), at 528.

<sup>57</sup> Patrick et al. (1994), at 528.

<sup>58</sup> Patrick et al. (1994), at 533 (emphasis added).

One who is not morally responsible is not blameworthy. Thus, psychopaths are not blameworthy. But blame is an element of retributive criminal punishment, particularly punishment by imprisonment or execution: whenever such punishments are inflicted, the infliction of them expresses blame. It is therefore wrong to inflict these criminal punishments on psychopaths.

### III.1 Psychopaths Are Not Morally Responsible Agents Because They Lack The Concept of Normativity

#### III.1.1 On the Retributivist Rationale, the Law Excuses Those Whom It Deems Insane on the Grounds that They Are Not Morally Responsible for their Offense

On the Retributivist rationale, a person who has broken the law because she is mentally ill is not criminally punished because she does not deserve such treatment. She does not deserve punishment because her illness deprived her of the rational capacity to form the mental state necessary to be morally responsible for the crime with which she is charged.<sup>59</sup> In short, the law excuses the insane on the grounds that they are “mad, not bad.”<sup>60</sup>

This section will argue that psychopaths, like those to whom the law already grants the insanity defense, lack moral responsibility for crimes they commit. This is because psychopaths, due to a set of neurocognitive deficits characteristic of their disorder, lack an understanding of the concept of normativity. This lack of understanding is apparent from their failure to appreciate the distinction between moral and merely conventional rules.

#### III.1.2 Psychopaths’ Failure to Understand the Distinction Between Moral and Conventional Transgressions Indicates that They Lack a Concept of Normativity

##### III.1.2.1 The Moral/Conventional Distinction

The moral/conventional distinction is the distinction between moral rules, on the one hand, and conventions, on the other. The distinction was first used in child development research in the early 1980s for the purpose of studying the process by which young children develop a moral sense.<sup>61</sup> It goes

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<sup>59</sup> Morse, Stephen J. ‘Psychopathy and Criminal Responsibility.’ *Neuroethics* 1 (2008): 205–12 [hereinafter “Morse”], at 208.

<sup>60</sup> Morse, at 208.

<sup>61</sup> Turiel, E., “The development of morality,” in N. Eisenberg (Ed.), *Handbook of Child Psychology: Vol. 3, Social, emotional, and personality development* (pp. 863-932) (New York: Wiley) (1998) [hereinafter “Turiel (1998)”], at 904-05).

back at least to Aristotle, however,<sup>62</sup> and “is, in part, derived from criteria given in philosophical analyses[.]”<sup>63</sup> Conventions are social rules, “shared behaviors ... whose meanings are defined by the constituted system in which they are embedded.”<sup>64</sup> They are “constitutive [of] or defined by existing social arrangements,”<sup>65</sup> and are intended to “serv[e] functions of social coordination[.]”<sup>66</sup> So, for example, social rules regarding what attire is appropriate for a given social occasion, which member of a party is entitled to pass first through a doorway, and how loudly one should speak in various social settings are all conventional rules.<sup>67</sup> Such rules are in force only because of prevailing social consensus.

Moral rules, by contrast, “are unconditionally obligatory, generalizable, and impersonal insofar as they stem from concepts of welfare, justice, and rights[.]”<sup>68</sup> Unlike conventional rules, moral rules “are not seen as solely determined by consensus, agreement, or received wisdom.”<sup>69</sup> In short, “within the literature on this distinction [citations], moral transgressions have been defined by their consequences for the rights and welfare of others, and social conventional transgressions have been defined as violations of the behavioral uniformities that structure social interactions within social systems.”<sup>70</sup>

In using this distinction, researchers were seeking answers of two sorts. First, what criteria do individuals use to tell moral transgressions apart from conventional ones? And second, how do individuals reason about courses of action? The first inquiry involves questions of “whether the action would be right or wrong in the absence of a rule or law, if the act would be all right if permitted by a person in authority ..., whether an act would be all right if there were a general agreement as to its acceptability, and whether the act would be all right if it were accepted in another group or culture.”<sup>71</sup>

Researchers typically presented stories to children which involved various sorts of transgressions and asked them these questions. In more than sixty such studies, performed in many different cultures, children and adolescents consistently judge transgressions involving physical or

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<sup>62</sup> Turiel (1998), at 904 (quoting Aristotle, *Nicomachean Ethics*, Bk. 5, Ch. 7).

<sup>63</sup> Turiel (1998), at 904.

<sup>64</sup> Turiel (1998), at 904 (quoting Turiel, E., Killen, M., & Helwig, C. C., “Morality: Its structure, function, and vagaries,” in J. Kagan & S. Lamb (eds.), *The emergence of moral concepts in young children* (pp. 155-244) (U. Chicago Press: 1987), at 169-70).

<sup>65</sup> Turiel (1998), at 904.

<sup>66</sup> Turiel (1998), at 905.

<sup>67</sup> See Turiel (1998), at 905.

<sup>68</sup> Turiel (1998), at 904.

<sup>69</sup> Turiel (1998), at 904.

<sup>70</sup> Blair, R. J. R., “A cognitive developmental approach to morality: Investigating the psychopath,” *Cognition* 57: 1-29 (1995) [hereinafter “Blair (1995)”], at 5.

<sup>71</sup> Turiel (1998), at 905.

psychological harm and fairness or justice to be moral transgressions, and that such acts would remain transgressive even in the absence of authority, rules, or consensus.<sup>72</sup> Transgressions not involving such harms, on the other hand, were viewed as transgressions of conventional rules, which did depend for their transgressive quality on social consensus or authority.<sup>73</sup> Moral transgressions were also usually viewed as being more serious than conventional ones.<sup>74</sup> Though “studies show that a distinction between moral and conventional transgressions becomes more consistent and focused by about the ages of [four] or [five] years[,]”<sup>75</sup> normal children as young as three years of age make the distinction.<sup>76</sup>

### III.1.2.2 Psychopaths Characteristically Fail to Distinguish Between Transgressions of Moral Rules and Transgressions of Conventional Rules

In a 1995 study involving ten psychopathic and ten non-psychopathic<sup>77</sup> inmates of a forensic hospital, all but one of whom had killed, the subjects were presented with eight stories. Four of the stories featured children assaulting other children or destroying property; the other four involved cross-dressing or minor classroom disruption.<sup>78</sup> After each subject was read a story, he was asked a series of four questions, each of which was meant to get at a different aspect of the moral/conventional distinction. These aspects were the transgression’s permissibility, its seriousness, the reason why the act might be bad or wrong, and the authority-dependence or not of the act’s transgressiveness.<sup>79</sup> While the non-psychopaths in the subject group significantly distinguished moral from conventional transgressions on all three of the permissibility, seriousness, and authority-dependence dimensions (“criterion judgments”), the psychopaths did not.<sup>80</sup> In other words, “[u]nlike the non[-]psychopathic offenders, the psychopathic group did not judge the acceptability of moral transgressions to be any less

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<sup>72</sup> Turiel (1998), at 905; see also Blair (1995) (“Children have been consistently found to justify their opinions about moral transgressions by references to the victim’s welfare and by appeals to fairness [citations].”) (italics omitted).

<sup>73</sup> Turiel (1998), at 905.

<sup>74</sup> Blair (1995), at 6.

<sup>75</sup> Turiel (1998), at 906.

<sup>76</sup> Smetana, J. G., “Toddlers’ social interactions in the context of moral and conventional transgressions in the home,” *Developmental Psych.* 25: 499-508, at 504 (1989).

<sup>77</sup> As scored on the PCL.

<sup>78</sup> Blair (1995), at 14 (“The stories used to measure the moral/conventional distinction were all taken from the literature. The four moral stories involved a child hitting another child, a child pulling the hair of another child and the victim cries, a child smashing a piano and a child breaking a swing in the playground. The four conventional stories involved a boy wearing a skirt, two children talking in class, a child walking out of the classroom without permission and a child who stops paying attention to the lesson and turns his back on the teacher.”)

<sup>79</sup> Blair (1995), at 15.

<sup>80</sup> Blair (1995), at 16.



dependent upon authority jurisdiction than conventional transgressions.”<sup>81</sup> These results were replicated later that year with twice as many subjects,<sup>82</sup> and in a 1997 study involving children with psychopathic tendencies.<sup>83</sup>

The objective normative force that philosophers have long viewed as being part and parcel of moral rules,<sup>84</sup> and which even normally developing children as young as thirty-nine months of age associate with them, is thus completely lost on psychopaths. Neil Levy argues that psychopaths’ inability to view transgressions as anything other than transgressions of conventional rules renders them unresponsive to specifically moral reasons to perform or refrain from certain actions.<sup>85</sup> This seems correct, for if all rules of behavior appear to me to be like rules that prescribe the use of salad forks and soup spoons to consume the corresponding food items or that prohibit smoking in the midst of a religious ceremony, I will be much more likely than I would otherwise be to transgress them, including those that forbid inflicting physical harm on others. Cordelia Fine and Jeanette Kennett<sup>86</sup> regard psychopaths’ blindness to the moral/conventional distinction as conclusive evidence that psychopaths are unable to appreciate the difference between moral and conventional transgressions.

Both Levy and Fine and Kennett trace psychopaths’ M/C blindness to their notorious empathy deficit, arguing that the essential difference between moral and conventional transgressions lies in the tendency of moral transgressions to directly cause others to suffer, a tendency absent from conventional transgressions.<sup>87</sup> This is an idea with which David Hume would sympathize. Kant, for his part, would agree that psychopaths lack the concept of normativity – not, of course, because they lack empathy, but because their equally notorious egocentrism and grandiosity render them invulnerable to the motivational force which normative rules exert on the moral agent. I will turn now to these classic

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<sup>81</sup> Kennett, J. & Fine, C., “Internalism and the Evidence from Psychopaths,” in 3 *Moral Psychology*, pp. 173-190 (Walter Sinnott-Armstrong, ed.) (MIT: 2008) [hereinafter “Kennett & Fine (2008)”], at p. 174.

<sup>82</sup> Nichols, S., *Sentimental Rules* (2005), at 12 n. 4 (citing Blair, R., Jones, L., Clark, F., and Smith, M., “Is the psychopath ‘morally insane’?”, *Personality and Individual Differences* 19:741-52 (1995)).

<sup>83</sup> Blair, R., “Moral reasoning and the child with psychopathic tendencies,” *Personality and Individual Differences* 26: 731-39 (1997); see also Kennett & Fine (2008), at 174-75 (“[Blair (1997)] subsequently found that children with psychopathic tendencies made a significantly weaker moral[/]conventional distinction than non[-]psychopathic children with emotional and behavioral difficulties.”)

<sup>84</sup> See, e.g., Kant, I., *Grounding for the Metaphysics of Morals* (James W. Ellington, tr.) (Hackett Pub.: 1993), at 23.

<sup>85</sup> Levy, Neil. “The Responsibility of the Psychopath Revisited.” *Philosophy, Psychiatry, & Psychology* 14.2 (2007a): 129–38 [hereinafter “Levy”].

<sup>86</sup> Fine, C. & J. Kennett, “Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment,” *Int’l J. of L. and Psychiatry* 27 (2004): 425–43 [hereinafter “Fine and Kennett”].

<sup>87</sup> Levy, at 131-132; Fine & Kennett, at 431.

views for the light they shed on psychopathic moral blindness. I will then enlist Susan Wolf's "sane deep self view" to argue that psychopaths are morally insane, and so lack moral responsibility.

### III.1.3 Two Classic Views: Hume and Kant on Psychopathy

#### III.1.3.1 Hume

Reason cannot be the source of our moral principles, according to Hume, because any genuine moral principle must be capable of motivating the moral agent.<sup>88</sup> Morals are classed under "practical" philosophy, after all, not "speculative," and if morality had no influence on "human passions and actions," it would be a useless, merely academic study.<sup>89</sup> The purpose of moral philosophy is "to teach us our duty," and to "beget ... habits" of behavior that include avoiding vice and cultivating virtue.<sup>90</sup> Reason, however, has no such motivational power.<sup>91</sup>

For this latter proposition Hume offers several arguments in *Treatise* II.iii.3,<sup>92</sup> the most important of which he revisits (and strengthens)<sup>93</sup> at *Treatise* III.i.1.<sup>94</sup> Reason, he argues, is concerned with discovering truth or falsehood, which "consists in agreement or disagreement either to the real relations of ideas, or to real existence and matter of fact." But neither of these things is the subject matter of morality, because "our passions, volitions, and actions, are not susceptible of any such agreement or disagreement[.]" They are, instead, natural facts, complete in themselves, with no necessary relation or reference to other things; consequently, there is nothing with which they can agree or disagree.<sup>95</sup> In short, morality – the province of our passions, volitions, and actions – is simply not reason's subject matter.<sup>96</sup> Later, Hume writes that reason cannot motivate us because "inferences and conclusions ... of themselves have no hold of the affections, nor set in motion the active powers of men[.]"<sup>97</sup> Virtuous actions "take possession of the heart," he writes, and so move us to emulate them.

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<sup>88</sup> Guyer, P., *Knowledge, Reason, and Taste: Kant's Response to Hume* (Princeton U. Press: 2008) [hereinafter "Guyer"], at 164-67.

<sup>89</sup> Hume, David, *Moral Philosophy* (G. Sayre-McCord ed.) (Hackett Pub. Co.: 2006) [hereinafter "Hume"], at 68 (*Treatise* III.i.1).

<sup>90</sup> Hume, at 189 (*An Enquiry Concerning the Principles of Morals* ["ECPM"], s. 1).

<sup>91</sup> Guyer, at 167-71.

<sup>92</sup> Hume, at 60-64.

<sup>93</sup> Guyer, at 169-70.

<sup>94</sup> Hume, at 69-73.

<sup>95</sup> Hume, at 69.

<sup>96</sup> Hume, at 72-73.

<sup>97</sup> Hume, at 189 (*ECPM*, s. 1).

By contrast, the “intelligible ... evident ... probable ... true” – that is, the products of reason – “procure[] only the the cool assent of the understanding[.]”<sup>98</sup>

Reason therefore, cannot be the source of morality. Instead, our moral judgment and moral motivation “depend on some internal sense or feeling, which nature has made universal in the whole species[.]”<sup>99</sup> The linchpin of this moral sense is “sympathy,”<sup>100</sup> or “fellow-feeling”<sup>101</sup> (what modern English calls “empathy”<sup>102</sup>). “If any man, from a cold insensibility or narrow selfishness of temper, is unaffected with the images of human happiness or misery, he must be equally indifferent to the images of vice and virtue[.]”<sup>103</sup> It is because of our natural proclivity to participate emotionally in the happiness or misery of our fellow human beings that we perceive acts as virtuous or vicious. Our empathy causes us to feel a pleasant sense of approbation at the sight of actions which we perceive to be useful or agreeable to the agent herself or to others.<sup>104</sup> Hume cites the attractiveness of actions which are useful to society at large against the position that all our moral judgments are traceable to self-love.<sup>105</sup> This attractiveness would be completely inexplicable were not “fellow-feeling” an essential part of our faculty of moral judgment.<sup>106</sup> Likewise, Hume explains the sense of approbation which we feel on encountering a stranger’s agreeable demeanor and social graces in part by our imagining how much pleasure they must give to his friends.<sup>107</sup> This moral feeling of approbation simply is our moral judgment that the action is virtuous. Thus, without the empathy on which such approbation depends, we would be morally blind, unable to make distinctions between virtue and vice.

#### III.1.3.1.5 Hume on Psychopathy

Hume holds that we possess a faculty of moral judgment only because we also possess empathy. Evidence from psychopathy seems to be consistent with this proposition, for psychopaths lack empathy, and appear completely insensible to moral distinctions. Two of the PCL-R’s criteria for a

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<sup>98</sup> Hume, at 189.

<sup>99</sup> Hume, at 189.

<sup>100</sup> Hume, at 189.

<sup>101</sup> Hume, at 223 n. 3 (*ECPM* s. 5, pt. 2 n. 3).

<sup>102</sup> Cohon, Rachel, “Hume’s Moral Philosophy”, *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2010/entries/hume-moral/>.

<sup>103</sup> Hume, at 227 (*ECMP* s. 5, pt. 2).

<sup>104</sup> Hume, at 162-63 (*Treatise* III.iii.1) (the “four sources” of moral pleasure or pain); Hume, at xxii (editor’s intro.) (sympathy gives rise to the moral feeling of approbation or disapprobation).

<sup>105</sup> Hume, at 222-23 (*ECPM* s. 5 pt. 2).

<sup>106</sup> Hume, at 223 n. 3.

<sup>107</sup> Hume, at 256 (*ECPM* s. 8).

diagnosis of psychopathy are lack of remorse or guilt (Item 6) and lack of empathy (Item 8).<sup>108</sup> These have long been viewed as among the typifying characteristics of the syndrome.<sup>109</sup> Indeed, Robert Hare views the empathy deficit exhibited by psychopaths as lying at the root of their emotional and interpersonal problems, particularly their egocentricity and lack of remorse. He writes that psychopaths “seem unable to ‘get into the skin’ or to ‘walk in the shoes’ of others, except in a purely intellectual sense. The feelings of other people are of no concern to” them.<sup>110</sup> Whereas some professionals – soldiers, for instance, or doctors – must become less sensitive to the suffering they encounter in their professions in order to remain effective, psychopaths typically “display a general lack of empathy.”<sup>111</sup>

One way in which this deficit expresses itself in a form suitable for neuroscientific measurement is through psychopaths’ reduced emotional autonomic response, as compared with non-psychopaths, to images of people in distress. In a 1997 skin-conductance study,<sup>112</sup> eighteen psychopaths (PCL-R score of 30 or higher) and eighteen non-psychopaths (20 or lower) were shown a series of color slides. Of these slides, five depicted “distress cues” (pictures of a crying face, for example), five depicted threatening images, and eight depicted neutral objects.<sup>113</sup> The psychopaths’ skin-conductance response to the threatening and the neutral stimuli were approximately the same as those of the non-psychopaths.<sup>114</sup> Their response to the distress cues, however, was only slightly more than half that exhibited by the non-psychopaths.<sup>115</sup> The authors link this finding directly to the deficits in the psychopaths’ empathy and guilt/remorse.<sup>116</sup> A follow-up study<sup>117</sup> employing a virtually identical procedure, but involving children with psychopathic tendencies rather than adult psychopaths, found, if anything, an even more profound impairment in the children than in the adults.<sup>118</sup>

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<sup>108</sup> Hare, R. D., *The Hare Psychopathy Checklist – Revised* (1991).

<sup>109</sup> See, e.g., Cleckley, Hervey, *The Mask of Sanity* (5<sup>th</sup> ed. 1978), at 337 (“[l]ack of remorse or shame” and “pathologic egocentricity and incapacity for love” among proposed list of typifying psychopathic characteristics).

<sup>110</sup> Hare, R. D., *Without Conscience: The Disturbing World of the Psychopaths Among Us* (Guilford Press: 1999) [hereinafter “Hare”], at 44.

<sup>111</sup> Hare, at 45.

<sup>112</sup> Blair, R. J. R., Jones, L., Clark, F., and Smith, M., “The psychopathic individual: A lack of responsiveness to distress cues?” *Psychophysiology* 34: 192-98 (1997) [hereinafter “Blair et al. (1997)”].

<sup>113</sup> Blair et al. (1997), at 194.

<sup>114</sup> Blair et al. (1997), at 195 & Table 3.

<sup>115</sup> Id.

<sup>116</sup> Blair, et al. (1997), at 196 (“The first finding, that the psychopathic men were hypo-responsive to distress cues relative to non[-]psychopathic men ... mirrors the diagnostic criteria of psychopathy: the lack of guilt and no feeling of empathy [citations].”).

<sup>117</sup> Blair, R. J. R., “Responsiveness to distress cues in the child with psychopathic tendencies,” *Personality and Individual Differences* 27: 135-45 (1999) [hereinafter “Blair (1999)”].

<sup>118</sup> Blair (1999), at 142-43.

### III.1.3.2 Kant

Hume thinks of moral philosophy as a branch of empirical psychology. In his view, virtue and vice are simply what our moral sense tells us they are, with our moral sense, in turn, firmly grounded in our nature as human beings. Put differently, moral distinctions are what they are because we are such as we are. Kant, in contrast, holds that in order for any principle to be a genuine moral law, it must be able to command all rational beings, insofar as they are rational, however they may otherwise be constituted.<sup>119</sup> No empirical approach will allow us to formulate a moral law, because the only experience we have of rational natures is limited to our own. Empiricism also fails us here because the moral law must command rational natures as such; accordingly, the moral law must be derived *a priori* from the nature of rationality itself.<sup>120</sup>

Like Hume, however, Kant thought that any genuine moral law applicable to human beings must have motivational power.<sup>121</sup> Indeed, one of Kant's main purposes in writing the *Critique of Practical Reason* ("CPracR") was to demonstrate how the categorical imperative, derived *a priori* in the *Grounding* from reason alone, could be valid for us – that is, how it could be an incentive, "a kind of motivation from which human beings can act."<sup>122</sup> Thus, Kant begins the third chapter of the CPracR by reiterating that in order for any action to be morally good, it must be the act of a will which has been determined immediately by the moral law,<sup>123</sup> without any moral feeling in the agent being presupposed as a hook for the moral law to latch onto, à la Hume.<sup>124</sup> Rather, the moral agent's consciousness of the moral law must itself suffice to incentivize moral conduct on her part. Kant then takes his problem to be determining *a priori* precisely how the moral law accomplishes this.<sup>125</sup>

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<sup>119</sup> Kant, I., *Grounding for the Metaphysics of Morals* (James Ellington tr.) (Hackett Pub. Co.: 1993) [hereinafter "*Grounding*"], at 20, 23.

<sup>120</sup> *Grounding*, at 22-23, 34.

<sup>121</sup> Guyer, at 164.

<sup>122</sup> Reath, A., "Kant's Theory of Moral Sensibility," *Kant-Studien* (80), pp. 284-302 (1989) [hereinafter "Reath"], at 284-85.

<sup>123</sup> When Kant talks about the moral law itself doing this or that, he means our *consciousness* of, or *recognition* of the moral law. Beck, Lewis White, *A Commentary on Kant's Critique of Practical Reason* (U. Chicago Press: 1963) [hereinafter "Beck"], at 222.

<sup>124</sup> Kant, I., *Critique of Practical Reason* (Mary Gregor ed. & tr.) (Cambridge U. Press: 1997) [hereinafter "CPracR"], at 62.

<sup>125</sup> CPracR, at 62-63 (5:72-5:73).

Kant's answer is that the moral law becomes an incentive for us through the respect which our recognition of it causes us to feel.<sup>126</sup> In the *Grounding*, Kant wrote that in order for a moral duty to have the force of a command (which all duties must have if they are moral), that duty must be grounded in a law which can be an object of respect.<sup>127</sup> This is why, in Kant's view, desires or envisaged effects cannot ground duties. No mere effect can be an object of respect because reason is the ultimate source of normativity, and any given effect can have come about without any rational agency having wrought it.<sup>128</sup> Hence utility cannot be the basis for duty. Nor can any inclination, however noble, ground a duty, because no inclination on the part of another subjective will like our own has such authority over us as to immediately determine our own will through that authority, as a duty must be able to do if it is truly normative.<sup>129</sup> Only the moral law, founded in reason, can be an object of respect. Respect for the moral law is:

the immediate recognition of its authority, or the direct determination of the will by the law. To be moved by, or to act out of, respect is to recognize the [m]oral [l]aw as a source of value, or reasons for action, that are unconditionally valid and overriding relative to other kinds of reasons; in particular, they outweigh the reasons provided by one's desires. Respect is the attitude which it is appropriate to have towards a law, in which one acknowledges its authority and is motivated to act accordingly.<sup>130</sup>

How, then, does this purely rational<sup>131</sup> recognition of the moral law acquire "influence on the will," as it must in order to be valid for us?<sup>132</sup>

Kant is adamant that the motivational power of the moral law depends neither on any pre-existing emotion<sup>133</sup> nor on any affective force, intermediate between our rational recognition of the moral law and the act which it commands, which moves us towards the act.<sup>134</sup> Rather, the moral law influences our will, not by impelling it affectively towards moral action, but by removing whatever

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<sup>126</sup> CPracR, at 63. This is imprecise. A better way of putting this would be that the consciousness of the moral law simply is the respect which we feel, intellectually and affectively.

<sup>127</sup> *Grounding*, at 13.

<sup>128</sup> *Grounding*, at 13.

<sup>129</sup> *Grounding*, at 13.

<sup>130</sup> Reath, at 287.

<sup>131</sup> Reath calls it "intellectual." Reath, at 287.

<sup>132</sup> CPracR, at 62.

<sup>133</sup> CPracR, at 62 ("If the determination of the will takes place conformably with the moral law but only by means of a feeling ... that has to be presupposed in order for the law to become a sufficient determining ground of the will ... then the action will contain legality indeed but not morality.")

<sup>134</sup> CPracR, at 63 ("What is essential in every determination of the will by the moral law is that, as a free will – and so not only **without** the cooperation of sensible **impulses** but even with rejection of all of them and with infringement upon all inclinations insofar as they could be opposed to that law – it is determined solely by the law.")

obstacles the moral agent's own psychological constitution may present in the form of contrary inclinations.<sup>135</sup> These inclinations come in two varieties, being generated by two forms of selfishness: "self-love" and "self-conceit."<sup>136</sup> Kant defines self-love as "predominant benevolence towards oneself."<sup>137</sup> A natural and necessary kind of selfishness, involved in such vital matters as matching means with ends,<sup>138</sup> self-love is merely checked or curbed by respect for the moral law, and disciplined by it into a self-love which is consistent with the demands of reason.<sup>139</sup> Self-conceit, on the other hand, is a pathological form of "self-satisfaction" and consequent self-assertion. "The object of self-conceit is a form of esteem or personal importance which you can only achieve when you deny it to some others."<sup>140</sup> It considers its own subjective maxims as worthy of being universally legislated.<sup>141</sup> Our recognition of the moral law manifests affectively in us as a "striking down" and "humiliation" of self-conceit.<sup>142</sup> This is the "affective aspect" of the respect which our recognition of the moral law works in us, and it is essentially negative.<sup>143</sup>

#### III.1.3.2.5 Kant on Psychopathy

As Kant writes in the *Metaphysics of Morals*, "The respect for the law, which is, subjectively, called the moral feeling, is identical with the consciousness of one's duty."<sup>144</sup> Psychopaths cannot experience respect for the law, and thus can never be brought to a consciousness of their duty, because (to employ Kant's terminology) their self-conceit cannot be humiliated. In modern clinical parlance, their "egocentricity and grandiosity"<sup>145</sup> are not subject to revision or alteration in light of any contradictory evidence.

Psychopaths are narcissists *par excellence*. They seem to come into the world equipped with an invincible belief in their own specialness and superiority, a highly inflated sense of their own worth

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<sup>135</sup> Reath, at 288.

<sup>136</sup> CPracR, at 63.

<sup>137</sup> CPracR, at 63.

<sup>138</sup> Reath, at 292.

<sup>139</sup> CPracR, at 63 ("Pure practical reason merely infringes upon self-love, inasmuch as it only restricts it, as natural and active in us even prior to the moral law, to the condition of agreement with this law, and then it is called rational self-love."); Beck, at 219.

<sup>140</sup> Reath, at 293.

<sup>141</sup> Beck, at 219.

<sup>142</sup> CPracR, at 63.

<sup>143</sup> Reath, at 287-88.

<sup>144</sup> Beck, at 222 (quoting *Metaphysics of Morals* VI 464).

<sup>145</sup> Hare, at 38-39.

entirely divorced from what more rational persons might consider to be relevant evidence.<sup>146</sup>

Psychopaths “often come across as arrogant, shameless braggarts – self-assured, opinionated, domineering, and cocky.”<sup>147</sup> By the same token, they typically view the ideas and opinions of others as being utterly without value. It is hard not to see instantiated in psychopaths the “self-conceit” which Kant talks about as being an obstacle which respect for the moral law must crush if the moral agent is to become conscious of his duty. Indeed, in a manner consistent with Kant’s depiction of the self-conceited, psychopaths often attempt to counter the observer’s impression of their lawlessness by claiming to live according to their own, self-legislated rules:

“It’s not that I don’t follow the law,” said one of our subjects. “I follow my own laws. I never violate my own rules.” She then described these rules in terms of “looking out for number one.”<sup>148</sup>

Kant would find the moral blindness of psychopaths perfectly explicable within the terms of his theory of moral psychology. Because of a self-conceit which is abnormally resistant to humiliation, psychopaths cannot respect the moral law. For this reason, they cannot be made conscious of their duty, or even, properly speaking, what the idea of a moral duty consists in. With no consciousness of the moral law to guide them, and no respect for duty to check and strike down their self-assertive inclinations, it is no wonder that psychopaths behave as if they were morally insane. They are.

#### III.1.4.1 A Modern View: Susan Wolf and the “Sane Deep Self” View of Moral Responsibility

A compelling modern view which may shed further light on the moral responsibility of psychopaths is Susan Wolf’s “sane deep self” theory. In her essay, “Sanity and the Metaphysics of Responsibility,”<sup>149</sup> Wolf considers each of three mutually similar theories of moral responsibility advanced by philosophers Harry Frankfurt, Gary Watson, and Charles Taylor, respectively. All three accounts, in Wolf’s estimation, reflect a concern to defend moral responsibility against determinism, and all seek to do so by positing the existence of a “deep self” within each moral agent. Their shared

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<sup>146</sup> Maibom, H., “Moral Unreason: The Case of Psychopathy,” *Mind & Language* Vol. 20, No. 2 (April 2005), pp. 237-57 [hereinafter “Maibom”], at 247 (“The most curious thing is that this default idea about their excellence and intelligence is impervious to counter-evidence that most others would consider fairly conclusive, e.g. persistent failure to get any significant education or pursue a career, constant brushes with the law, and so on.”).

<sup>147</sup> Hare, at 38.

<sup>148</sup> Hare, at 38.

<sup>149</sup> Wolf, Susan, “Sanity and the Metaphysics of Responsibility,” in *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (Ferdinand Schoeman ed.) (Cambridge U. Press: 1987), Ch. 3, pp. 46-62 [hereinafter “Wolf”]. (Thanks to Professor John Brunero for directing my attention to this article.)



intuition is that “in order to be responsible for one’s actions, one must be responsible for the self that performs these actions.”<sup>150</sup>

Thus, Frankfurt distinguishes two kinds of freedom, both of which an agent must possess in order to be morally responsible: freedom of action and freedom of the will. The former is simply the freedom to do whatever you will to do, while the latter is the freedom to will whatever you want to will. This distinction motivates another, that between first- and second-order desires. “In order for an agent to have both freedom of action and freedom of the will, that agent must be capable of governing his or her actions by first-order desires and capable of governing his or her first-order desires by second-order desires.”<sup>151</sup> By way of illustration, assume I have a first-order desire to play chess on the internet by the hour every day, but I find this habit cutting into the time I could devote to studying philosophy, which I also have a first-order desire to do. In deciding how best to resolve this apparent conflict, I reason that the benefits of philosophical study far outweigh the benefits of playing internet chess: perhaps I gain a greater understanding of the world and of the human condition by studying philosophy, whereas I merely get a series of intense headaches and a vague disquiet of time-profligacy from playing internet chess. Consequently, I form a second-order desire not to want to play chess on the internet so much, and I end up stopping altogether.

Watson’s and Taylor’s views are similar to Frankfurt’s. Watson distinguishes between ordinary desires and desires that reflect values held by the moral agent. According to him, actions that are truly free are “expressions of judgments on my part that the objects I desire are good. Insofar as my actions can be governed by the latter type of desire ... they are actions that I perform freely and for which I am responsible.”<sup>152</sup> Taylor’s view reflects this too. Our freedom and responsibility depend on “our ability to reflect on, criticize, and revise our selves.” Even though we begin life with some of our character fixed by heredity and upbringing, our freedom and responsibility depend on our ability to look at ourselves, criticize what we see, and change.<sup>153</sup> Wolf succinctly summarizes these views this way:

For Frankfurt, this means that our wills must be ruled by our second-order desires; for Watson, that our wills must be governable by our system of values; for Taylor, that our

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<sup>150</sup> Wolf, at 49.

<sup>151</sup> Wolf, at 48.

<sup>152</sup> Wolf, at 48-49.

<sup>153</sup> Wolf, at 49.

wills must issue from selves that are subject to self-assessment and redefinition in terms of a vocabulary of worth.<sup>154</sup>

Put differently, in order for an agent to be morally responsible, it is not enough that her actions be guided by her will; it must also be the case that her will be “within the control of [her] sel[f] in some deeper sense.”<sup>155</sup>

This shared commitment to a revising and governing “deep self,” however, appears to run aground on a metaphysical problem. For where does the deep self come from? In order for it to serve the anti-determinist function for which its proponents intended it – that is, in order for one to be responsible for one’s own deep self, and so for the actions produced by it – it would appear that one must be the creator of one’s own deep self, a manifestly impossible condition.<sup>156</sup> The proponents of the deep-self view may reply that the ability to *revise* the self and its actions in light of one’s experience is enough for moral responsibility. But Wolf disputes the sufficiency of self-revision. Instead, she argues that only *self-correction* will suffice, and that true self-correction requires what she terms deep-self “sanity”: “the minimally sufficient ability cognitively and normatively to recognize and appreciate the world for what it is.”<sup>157</sup>

In support of this contention, Wolf offers the story of Saïf.<sup>158</sup> Saïf is the favorite son of an evil tyrant, Muammar, who rules his oil-rich country with an iron fist. Because of Muammar’s special feelings for Saïf, Muammar brings Saïf along with him on all his official business. On these occasions, and in the course of his education and training, Saïf absorbs all his father’s despotical values, including the exercise of absolute power and the brutal suppression of all dissent. Naturally, he ends up becoming just like his father. Now, Saïf possesses the ability to revise himself, but due to his upbringing he doesn’t want to. He is just as he wants to be. Nevertheless, we have the intuition that Saïf is not fully responsible for the terrible course he follows upon assuming power. For Wolf, this shows that the capacity for self-revision is not enough for moral responsibility. Saïf’s upbringing has deprived him of the ability to correct himself in light of certain normative characteristics of the world. He can no longer tell right from wrong. His deep self is insane.<sup>159</sup> We, in contrast,

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<sup>154</sup> Wolf, at 49.

<sup>155</sup> Wolf, at 50.

<sup>156</sup> Wolf, at 51-52.

<sup>157</sup> Wolf, at 56.

<sup>158</sup> Actually, the story of “JoJo,” but given current events this minor alteration seems appropriate.

<sup>159</sup> Wolf, at 57.

[b]eing sane, are able to understand and evaluate our characters in a reasonable way, to notice what there is reason to hold on to, what there is reason to eliminate, and what, from a rational and reasonable standpoint, we may retain or get rid of as we please. Being able as well to govern our superficial selves by our deep selves, then, we are able to change the things we find there is reason to change. This being so, it seems that although we may not be metaphysically responsible for ourselves – for, after all, we did not create ourselves from nothing – we are morally responsible for ourselves, for we are able to understand and appreciate right and wrong, and to change our characters and our actions accordingly.

On Wolf's "sane deep self" account of moral responsibility, the psychopath is no more morally responsible than Saif. She is arguably far less. Her empathy impairment is under strong genetic influence. Moreover, even the best parental strategy for inculcating moral values in a child – the strategy known as "induction," which recruits the natural proclivity of children to find the sight of others' suffering unpleasant – is largely ineffective for children with psychopathic tendencies.

#### III.1.4.2 Psychopathy's Characteristic Empathy Impairment Is Under Strong Genetic Influence

The empathy impairment characteristic of psychopathy is under strong genetic influence.<sup>160</sup> A study published in 2005<sup>161</sup> used data from the Twins Early Development Study, "a birth-record-based representative sample of twins born in the U[nited] K[ingdom] 1994-96 [citation]."<sup>162</sup> Among the data published in the twins study were teacher ratings of callousness or seeming lack of emotion ("CU") for 3487 pairs of twins at seven years old.<sup>163</sup> The authors of the 2005 study focused on those children whose CU ratings were 1.31 or more standard deviations above the mean – some 459 twin pairs.<sup>164</sup> They then analyzed how much of this difference could be attributed to genetic influence ("group heritability") and how much to other factors ("group shared environmental influence").<sup>165</sup> The results: "[T]wo-thirds of the difference between the extreme [CU] children and the population can be explained genetically."<sup>166</sup> Results from twelve other twin studies by various authors indicate that genetic influence

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<sup>160</sup> Viding et al. (2005), at 595.

<sup>161</sup> Viding et al. (2005).

<sup>162</sup> Viding et al. (2005), at 593. The original twin study is Trouton, A., Spinath, F. M., & Plomin, R., "Twins Early Development Study (TEDS): A multivariate, longitudinal genetic investigation of language, cognition and behaviour problems in childhood," *Twin Research*, 5: 444-448 (2002).

<sup>163</sup> Viding et al. (2005), at 593, 594 (The teacher survey questions included: "Does not show feelings or emotions," "Feels bad or guilty if he/she does something wrong [reverse scored]" "Considerate of other people's feelings [reverse scored]").

<sup>164</sup> Viding et al. (2005), at 593.

<sup>165</sup> Viding et al. (2005), at 594.

<sup>166</sup> Viding et al. (2005), at 595.

accounts for between 40% and 60% of the CU and impulsive/irresponsible traits in psychopathic children and adolescents.<sup>167</sup>

### III.1.4.3 Implications for Moral Socialization of Children With Psychopathic Characteristics

As Blair and others point out,<sup>168</sup> psychopathic empathy impairment in childhood potentially has grave implications for the moral socialization of children affected. A survey of parenting studies<sup>169</sup> concluded that of the three categories of parental discipline strategies – “power assertion, love withdrawal, and induction”<sup>170</sup> – by far the most effective for inculcating morals in children is induction.<sup>171</sup> Induction is:

characterized by attempts on the part of the disciplinary agent to reason with children. The goal of the disciplinarian is to make children understand why their transgressions are wrong, why they should follow various rules and regulations, and how they might alter their behavior to achieve that end.<sup>172</sup>

Induction is “particularly effective” when it “focus[es] on the child’s intentions and ... stress[es] the harmful consequences that prohibited acts may have on others.”<sup>173</sup> As Blair points out, however, this strategy is largely unavailable to parents of empathy-deficient children.

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<sup>167</sup> Essi Viding and Henrik Larsson, “Genetics of Child and Adolescent Psychopathy” [hereinafter Viding & Larsson (2010)], at 113 & ff., in *Handbook of Child and Adolescent Psychopathy* (Guilford Press: 2010) (Randall L. Salekin & Donald R. Lynam ed.), Ch. 5 (explanation of methodology, at 115-116, and results survey, at 117 & ff., of psychopathic child and adolescent twin studies); see also Viding & Larsson (2010), at 129 (“Overall, psychopathic traits appear to be moderately to strongly heritable and show little shared environmental influence. The same genetic and environmental influences appear to be important in accounting for individual differences in psychopathic personality traits for both males and females. Genetic factors are important in explaining covariance among different aspects of psychopathic personality and stability of psychopathic personality across development. Furthermore, common genes contribute to the relationship between psychopathic personality traits and antisocial behavior.”)

<sup>168</sup> Blair et al. (2005), at 127; Blair, R. J. R., Peschardt, K. S., Budhani, S., Mitchell, D. G. V., & Pine, D. S., “The development of psychopathy,” *J. of Child Psych. & Psychiatry* 47: 262-75 (2006), at 268.

<sup>169</sup> Brody, G. H. & Shaffer, D. R., “Contributions of Parents and Peers to Children’s Moral Socialization,” *Devel. Rev.* 2: 31-75 (1982) [hereinafter “Brody & Shaffer (1982)”].

<sup>170</sup> Brody & Shaffer (1982), at 36.

<sup>171</sup> Brody & Shaffer (1982), at 39, 50.

<sup>172</sup> Brody & Shaffer (1982), at 37.

<sup>173</sup> Brody & Shaffer (1982), at 54; see also Krevans, J. & Gibbs, J. C., “Parents’ use of inductive discipline: Relations to children’s empathy and pro-social behavior,” *Child Devel.* Vol. 67, Issue 6: 3263-3277 (1996), at 3273 (“The results of previous research were replicated and extended: (a) parents who used predominantly inductive discipline as opposed to power assertion had children who were relatively prosocial; (b) children’s empathy predicted their prosocial behavior; and (c) parents who relied on induction as opposed to power assertion had children who were relatively empathic.”)

It is also worth observing that warmth and affection in interactions between parent and child are thought to be “an important determinant of the effectiveness of any particular disciplinary strategy [citations].”<sup>174</sup> Children with psychopathic tendencies, however, are not natural objects of affection; they are “inexplicably ‘different’ from normal children – more difficult, willful, aggressive, and deceitful; harder to ‘relate to’ or get close to; less susceptible to influence and instruction; and always testing the limits of social tolerance.”<sup>175</sup> The unpleasantness of such a child makes it less likely that warmth and affection would characterize his relationship with his parents. Thus, even if the parent employs the induction disciplinary strategy to morally socialize her CU child, the lack of warmth that is likely to characterize their relationship will reduce its effectiveness, over and above the reduction which the child’s empathy impairment already works. Put differently, a child with psychopathic tendencies is disabled from taking full advantage of even the best disciplinary strategy available to his parents, due to an empathy deficit which is under strong genetic influence.

The result is an individual who lacks the capacity for self-correction necessary for moral responsibility. As Cleckley writes, expressing a pathos which those to whom the passage refers will never feel:

To ... consider [the psychopath] on a basis of those values somewhat vaguely implied by “intellectuality,” “culture,” or, in everyday speech, by “depth of mind,” we find an appalling deficiency. These concepts in which meaning or emotional significance are considered along with the mechanically rational, if applied to this man, measure him as very small, or very defective. He appears not only ignorant in such modes of function but stupid as well. He is unfamiliar with the primary facts or data of what might be called personal values and is altogether incapable of understanding such matters. It is impossible for him to take even a slight interest in the tragedy or joy or the striving of humanity as presented in serious literature or art. He is also indifferent to all these matters in life itself. Beauty and ugliness, except in a very superficial sense, goodness, evil, love, horror, and humor have no actual meaning, no power to move him. He is, furthermore, lacking in the ability to see that others are moved. It is as though he were colorblind, despite his sharp intelligence, to this aspect of human existence. It cannot be explained to him because there is nothing in his orbit of awareness that can bridge the gap with comparison. He can repeat the words and say glibly that he understands, and there is no way for him to realize that he does not understand.<sup>176</sup>

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<sup>174</sup> Brody & Shaffer (1982), at 39.

<sup>175</sup> Hare, *Without Conscience*, at 157-58.

<sup>176</sup> Cleckley, 39-40; in this connection, see also Wolf, at 55 fn. 6 (“Strictly speaking, perception and sound reasoning may not be enough to ensure the ability to achieve an accurate conception of what one is doing and especially to achieve a reasonable normative assessment of one’s situation. Sensitivity and exposure to certain realms of experience may also be necessary for these goals.”)

### III.2.1 Criminal Punishment, Particularly Imprisonment and Execution, Expresses Society's Blame of Those on Whom It Inflicts Such Punishment

Criminal punishment derives much of its force from the fact that it expresses society's condemnation of the offender for the act of which she has been found guilty. As Joel Feinberg wrote in "The Expressive Function of Punishment," what all punishments have in common, and that which sets them apart from mere penalties, is that

punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishment authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.<sup>177</sup>

Incarceration amounts to a public shaming, a stigmatizing of the offender for the bad act which he has committed.<sup>178</sup> Much as brides wear white, widows black, and champagne is for celebrations, a sentence of imprisonment signifies society's hatred and fear of, and contempt for, the offender.<sup>179</sup>

### III.2.2 Psychopaths Should Not Be Subjected To Criminal Punishment

Blame is part and parcel of criminal punishment. But, much like those to whom the criminal law already affords a defense of insanity, psychopaths do not deserve blame because, through no fault of their own, they are not full moral agents. They come into the world with a strong genetic predisposition towards a profound empathy deficit. Their lack of empathy, in turn, blinds them to normativity, so that they fail to grasp the concept of moral rules and its attendant concept of moral duty. This same emotional deficit denies them what would otherwise be their best chance to acquire the rudiments of moral socialization in childhood – the inductive parental strategy, which depends on empathy for its effectiveness. Lacking the concept of moral value, or standards by which to assess themselves and the mark they make on the world, they naturally see no need for self-correction, failing even to understand what this could mean. They are, if anything, far more profoundly and hopelessly mired in moral insanity

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<sup>177</sup> Feinberg, Joel, "The Expressive Function of Punishment," in *Doing and Deserving* (Princeton University Press: 1970) Ch. 5, pp. 95-118 [hereinafter "Feinberg"].

<sup>178</sup> Feinberg, at 100; see also *National Public Radio* interview of Wayne Fuselli, president of the Humane Society of America, referring to Michael Vick, the professional football quarterback who was convicted on a criminal charge of cruelty to animals and served an eighteen-month prison sentence: "I think he was jolted by this *public shaming*, his time in jail" (emphasis mine). Broadcast on Saturday, April 9, 2011, on *Weekend Edition*, with interviewer Scott Simon.

<sup>179</sup> Feinberg, at 100.

than Wolf's hypothetical JoJo (and my likely-all-too-real Saïf). As such, they cannot be considered morally responsible, and so do not deserve blame.

#### IV. Conclusion

Both Utilitarian deterrence and Retributivist desert considerations ground the criminal law's insanity defense. From the Utilitarian standpoint, it is pointless to use punishment to deter from criminality those who, due to mental illness, cannot be deterred. From the Retributivist standpoint, those who commit crimes because they are mentally ill do not deserve criminal blame and punishment.

In this essay, I have argued that there is no principled ground on which to distinguish psychopathy from the forms of mental illness for which the law presently allows criminal defendants to invoke the defense of insanity. The specific deterrence rationale assumes that punishing a criminal will render him less willing to engage in criminality afterwards because of the memory of his punishment and his association of that painful experience with criminality. As the above-cited neuroscience studies suggest, however, psychopathy is characterized by deficits in precisely those abilities on which special deterrence depends. Psychopaths are drastically impaired, relative to non-psychopaths, in forming mental associations between a painful stimulus – criminal punishment, for example – and the events that typically precede it. They are drastically impaired in fear response, as well, an impairment which further undermines the memory function of their memory of punishment. And they are drastically impaired in recognizing and reacting to a change in the calculus of costs and benefits, characteristically following a losing course of action far longer than non-psychopaths do.

The general deterrence rationale is similarly undermined where psychopaths are concerned. General deterrence depends on the would-be criminal's emotional response to the prospect of being punished rendering him less willing to follow through to the prohibited act. As the above-cited neuroscience studies suggest, however, psychopaths are dramatically impaired in their response to emotional imagery. Thus, neither form of deterrence finds the sort of mental equipment in psychopaths on which its effectiveness depends.

The empathy deficit which characterizes psychopathy calls into question the desert justification for punishing psychopaths. This deficit is under strong genetic influence, and manifests itself in children with psychopathic tendencies as young as seven years old. It vitiates the otherwise most effective moral-socialization technique – empathy-based induction – thus undermining one of the chief curbs on criminal behavior. It also explains the psychopaths' inability to distinguish between moral and conventional rules, a distinction which is crucial to moral reasoning. Psychopaths' empathy deficit thus

underlies a profound moral reasoning impairment, one which disqualifies them from being full moral agents. Because the deficits characterizing psychopathy so deeply undercut both the Utilitarian and Retributivist rationales for punishment, and dovetail so closely with the respective justifications for the insanity defense, the law should be changed to allow criminal psychopaths to invoke the defense of insanity.

This conclusion raises the question of how society should protect itself from psychopaths who have committed crimes and are deemed to be dangerous. I lack the space to address this question in detail here. In future work, I will argue that dangerous psychopaths should be subject to “civil commitment” under procedures analogous to those recently upheld by the United States Supreme Court for violent sex offenders.