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RESPONSIBILITY STATUS OF THE PSYCHOPATH: ON MORAL REASONING AND RATIONAL SELF- GOVERNANCE

*Paul Litton**

TABLE OF CONTENTS

I. INTRODUCTION	350
II. CAPACITIES REQUIRED FOR MORAL RESPONSIBILITY	352
<i>A. The Disagreement and its Basis</i>	352
<i>B. Addressing the Disagreement</i>	358
III. IS THERE ANY MEANINGFUL DISAGREEMENT?	360
<i>A. Candidates for the Area of Disagreement</i>	360
<i>B. Conceptual Doubts</i>	363
IV. INDIVIDUALS WITH PSYCHOPATHY	366
<i>A. The Disorder</i>	366
<i>B. Psychopathy and the Capacity for Moral Competence</i>	371
V. PSYCHOPATHS' DIMINISHED CAPACITY FOR RATIONAL SELF-GOVERNANCE.....	375
<i>A. Weak Capacity to Possess Evaluative Standards</i>	375
<i>B. Signs of Diminished Capacity for Rational Self-Governance</i>	380
VI. REMARKS ON PSYCHOPATHY AND CRIMINAL RESPONSIBILITY	383
<i>A. Psychopathy and Current Tests for Legal Insanity</i>	384
<i>B. Should the Criminal Law Excuse the Psychopath?</i>	387
VII. CONCLUSION	391

* Associate Professor of Law, University of Missouri School of Law; J.D., Ph.D., University of Pennsylvania. I am very grateful to Kim Ferzan for inviting me to participate in this stimulating panel discussion on personhood. I also thank Stephen Easton, Kim Ferzan, Samuel Freeman, Rahul Kumar, Matthew Lister, Susan Meyer, Liam Monahan, Stephen Morse, Robert Schopp, Mary Sigler, and Rod Uphoff for their very helpful comments on previous drafts. Finally, I thank James Blair for speaking with me about psychopathy.

"They wanted to know why I did what I did. Well, Sir, I guess there's just a meanness in this world."¹

I. INTRODUCTION

The psychopath is a character who frequently appears in the academic literature on responsibility theory.² He poses a difficult challenge for various accounts of the capacities required for appropriate ascriptions of moral and legal responsibility. As he is often described, the psychopath has the capacity to reason practically (he suffers no delusions about the physical world, can pursue the means to his ends, has an effective will, etc.); but he appears to lack the capacity to grasp and control his behavior in light of distinctly *moral* considerations. He is constitutionally void of empathy and incurably blind to reasons to treat others in morally acceptable ways. As portrayed, then, the psychopath resides in the area of disagreement between two sets of moral responsibility theorists: (i) theorists who put forth the general capacity for practical reasoning or rational self-governance as sufficient for an agent to be appropriately held morally responsible for his conduct,³ and (ii) theorists who view that general capacity as necessary but not sufficient for moral responsibility, additionally requiring the capacity to grasp and respond to

1. BRUCE SPRINGSTEEN, *Nebraska, on NEBRASKA* (Columbia 1982) (sung from the perspective of Charles Starkweather who went on a killing spree, murdering eleven people, in the late 1950's).

2. See HERBERT FINGARETTE, *ON RESPONSIBILITY* 28 (1967); JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* 78 (1998); JONATHAN GLOVER, *RESPONSIBILITY* 137-38 (Ted Honderich ed., 1970); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 177-78 (1994); Piers Benn, *Freedom, Resentment, and the Psychopath*, 6 *PHIL. PSYCHIATRY & PSYCHOL.* 29, 30 (1999); John Deigh, *Empathy and Universalizability*, 105 *ETHICS* 743, 745 (1995); Antony Duff, *Psychopathy and Moral Understanding*, 14 *AM. PHIL. Q.* 189, 190 (1977); Ishtiyaque Haji, *On Psychopaths and Culpability*, 17 *LAW & PHIL.* 117, 117 (1998); Vinit Haksar, *The Responsibility of Psychopaths*, 15 *PHIL. Q.* 135, 135 (1965); Stephen J. Morse, *Deprivation and Desert*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE* 114, 123 (William C. Heffernan & John Kleinig, eds., 2000) [hereinafter Morse, *Deprivation*]; Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 *U. ILL. L. REV.* 363, 375-76; Jeffrie G. Murphy, *Moral Death: A Kantian Essay on Psychopathy*, 82 *ETHICS* 284, 289 (1972); Michael S. Pritchard, *Responsibility, Understanding, and Psychopathology*, 58 *THE MONIST* 630, 631 (1974).

3. See, e.g., T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 280 (1998).

distinctly moral reasons.⁴ On the former view, we may appropriately hold psychopaths responsible for their wrongful actions, but not on the latter.

This Article addresses this debate about the capacities required for moral responsibility and the moral responsibility status of persons with psychopathy. My aim is not to describe the opposing views and argue why one is more persuasive than the other. Rather, I propose to deflate the debate as far as possible, attempting to reduce the area of disagreement between the two camps. Meaningful disagreement exists only if there are, or could be, agents who have an undiminished capacity for practical reasoning or rational self-governance, yet truly are incapable of grasping and acting on moral reasons. However, I suggest that the capacity for rational self-governance entails the capacity to comprehend and act on moral considerations; thus, to the extent that an individual truly is incapable of grasping moral reasons, we should expect to find deeper, more general deficiencies in that individual's rational capacities. I appeal to the work of leading researchers who study individuals with psychopathy to determine whether the latter do represent rational self-governors without the capacity to grasp and apply moral considerations. I argue, though, that the researchers' accounts of psychopathic individuals strongly suggests that the psychopath's incapacity for moral reasoning is, indeed, evidence of more general deficits in the rational capacities required for fully accountable agency.

In Part II, I discuss the relevant opposing views on the capacities required for appropriate ascriptions of moral responsibility, with particular focus on the underlying bases for the disagreement. In Part III, I ask whether agents exist who fall into the area of disagreement between these views, and then briefly consider whether any such agents are conceivable. I introduce the psychopath, based on the psychological literature, in Part IV, explaining why he appears to be a candidate for the area of disagreement. Then, in Part V, I argue that the psychological literature supports the hypothesis that the psychopath's incapacity for moral reasoning is symptomatic of deeper incapacities of rationality. My closing remarks in Part VI sketch relevant considerations for thinking about practical implications for criminal law.

4. See, e.g., FISCHER & RAVIZZA, *supra* note 2, at 76-81; WALLACE, *supra* note 2, at 154-55; SUSAN WOLF, FREEDOM WITHIN REASON 87-88 (1990).

II. CAPACITIES REQUIRED FOR MORAL RESPONSIBILITY

A. *The Disagreement and its Basis*

Responsibility requires control. An agent whom we may appropriately hold responsible has a certain kind of control over what she does. But what kind of control is required? On one traditional view, control requires the ability to act otherwise.⁵ An agent exercises the requisite control over an action and thus is responsible for it only if she truly had alternative possibilities for action at the time.

This intuitive conception of control raises the classic debates regarding whether moral responsibility is compatible with causal determinism, given that the latter seemingly precludes the possibility of alternative possibilities.⁶ The truth of causal determinism implies that every event that occurs is causally determined, given the state of the world at any prior time and holding fixed the physical laws of nature.⁷ If each event (including human acts, deliberations, choices, etc.) is causally determined, then we seemingly never have the ability to do other than what we actually do.⁸ There are no forks in the proverbial road: our intentions, choices, and actions were determined before we were born. This threat to responsibility posed by determinism has, of course, spawned a fascinating literature on how we should understand the “alternative possibilities” conception of control and other related questions about free will.

However, many theorists who defend the compatibility of our ascriptions of moral responsibility and causal determinism endorse a different conception of control, one that does not require alternative possibilities. On one such compatibilist view—the “reasons-responsive” approach—the general capacity that persons possess in virtue of which they may be held morally responsible is the capacity to act for and respond to reasons.⁹

5. John Martin Fischer & Mark Ravizza, *Introduction* to PERSPECTIVES ON MORAL RESPONSIBILITY 33-34 (John Martin Fischer & Mark Ravizza eds., 1993).

6. For an excellent introduction to these debates, see generally ROBERT KANE, A CONTEMPORARY INTRODUCTION TO FREE WILL (2005).

7. John Martin Fischer, *Recent Work on Moral Responsibility*, 110 ETHICS 93, 99-100 (1999).

8. T.M. Scanlon rightfully points out that “our moral ideas also seem to be threatened by a weaker claim,” which he labels the “Causal Thesis.” SCANLON, *supra* note 3, at 250. He states that “all of our actions have antecedent causes to which they are linked by causal laws of the kind that govern other events in the universe, whether these laws are deterministic or merely probabilistic.” *Id.* (emphasis added).

9. Fischer, *supra* note 7, at 127.

Regardless of whether our actions, choices, or even our reasoning processes are causally determined, the important distinction between responsible and non-responsible agents is not that the former alone have some ability to step outside the causal forces of the universe, but rather that they have the capacity to reason practically.¹⁰ We exempt the insane from moral and legal obligations, not because their conduct is caused, but because they are irrational.¹¹

A related compatibilist strategy is to cast the fundamental requirement of responsible agency in terms of the capacity of persons to act in accordance with their deeply held values¹² or, using Harry Frankfurt's terms, their higher-order desires about the kinds of persons they want to be.¹³ Persons, distinct from other animals, do not merely act on unevaluated desires and urges, but have the capacity to step back and assess their first-order desires as good or bad, choiceworthy or not, noble or base, etc.¹⁴ A person may have a first-order desire to smoke a cigarette, but may also judge that desire unworthy to satisfy. (Or, again in Frankfurt's terms, she may have a second-order desire not to have or act upon that first-order desire).¹⁵ On these "hierarchical views" about what is distinctive about persons, an agent acts of her own free will when she acts in accordance with her higher-order desires

10. The law conceives responsible agents as practical reasoners, not as agents who are uncaused causers—agents who act outside the causal forces of the universe. MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 44-112 (1984); Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 252-53 (2000).

11. Stephen J. Morse, *Excusing and the New Excuse Defense: A Legal and Conceptual Review*, in 23 CRIME & JUSTICE: A REVIEW OF RESEARCH 329, 339 (Michael Tonry ed., 1998). Thus, for our purposes, it is not important to go into detail into the ultimate causes of psychopathy, including biological causes. With regard to assessing an agent's responsibility status, our focus must be on the agent's rational capacities. Accord Duff, *supra* note 2, at 191 (arguing that the presence of physiological abnormalities does not imply any rational incapacities; such abnormalities could provide evidence of rational incapacities if they were correlated with the latter).

12. This view is also referred to as the "real self" or "self-disclosure" view, in that it maintains that a person is responsible for her actions that express her commitments. Gary Watson, *Two Faces of Responsibility*, 24 PHIL. TOPICS 227 (1996), reprinted in GARY WATSON, *AGENCY AND ANSWERABILITY: SELECTED ESSAYS* 260-61 (2004); see also Fischer, *supra* note 7, at 125-27 (discussing such views, though calling them "identification approaches").

13. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 6-7 (1971), reprinted in HARRY G. FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT* 11, 12-14 (1988).

14. See *id.*; see also Charles Taylor, *Responsibility for Self*, in *THE IDENTITIES OF PERSONS* 281, 282-85 (Amélie Oksenberg Rorty ed., 1976).

15. Frankfurt, *supra* note 13, at 6-7.

or values.¹⁶ Determinism does not undermine free will on this account: even if determinism is true, there is a distinction between our actions that accord with our higher-order desires and those that do not. One might argue, then, that a person is responsible for acts of her own free will, as that term is defined on this account.

More plausibly, though, one might argue that responsibility requires the capacity to have acted in accordance with one's higher-order desires or deeply-held values, and not necessarily that one did act in accordance with them. That we sometimes are weak-willed yet remain responsible for such moments of weakness supports this more plausible formulation. When I am weak-willed and eat that extra-large piece of chocolate cake despite the fact that I do not want my first-order desire for the cake to be motivationally effective (I have a higher-order desire to stay healthy), I may not be acting freely on the hierarchical account of free will. However, the fact that I acted with a weak will does not seem to undermine the judgment that I am and should hold myself responsible for acting on my first-order desire for the cake, given that I had the capacity to refrain.

Now, one might raise an objection to both the reasons-responsive and hierarchical compatibilist accounts of the requirements for *moral* responsibility: That is, an agent might have the capacity to respond to reasons, or conform her will to her values, yet lack the distinct capacity to act for moral reasons or have the right moral values. For example, Susan Wolf rejects hierarchical views, arguing that an agent may act in accordance with his deeply-held values yet lack the capacity to live according to the *right* values.¹⁷ An agent may be responsible in a superficial sense if his act reflects his values (or, his "true self"); but *holding* an agent responsible, particularly for a wrongful act, has a distinct significance or special depth, according to Wolf.¹⁸ To blame is to judge the "moral quality of the individual herself . . . [in a] seemingly more serious way."¹⁹ Because of the seriousness and implications attached to blaming someone, Wolf argues that someone who is incapable of endorsing and acting in conformity with morally right values does not deserve blame (i.e., may not be held morally responsible for

16. *Id.* at 13-15.

17. WOLF, *supra* note 4, at 117.

18. *Id.* at 40-41.

19. *Id.* at 41.

wrongdoing), even if that agent's acts reflect his true self or higher-order desires.²⁰

For reasons similar to Wolf's, Jay Wallace includes the capacity to grasp and respond to distinctly moral reasons in his reasons-responsive account of responsibility.²¹ Building on Strawson,²² Wallace argues that our practice of holding each other to moral obligations exposes persons to the risk of moral blame and its expression through moral sanctioning behavior, such as censure, rebuke, and punishment.²³ This possibility of moral sanction requires that we hold morally responsible only those agents whom it is *fair* to hold to moral obligations.²⁴ Wallace argues that it is unfair, or unreasonable, to hold an agent responsible unless she has the capacity to grasp and apply the moral reasons that support and can motivate compliance with such obligations.²⁵

Stephen Morse endorses Wallace's account of the interpersonal significance of holding agents morally responsible and that fairness must guide our inquiry into the capacities required for responsibility.²⁶ Morse concludes that beyond the capacity to reason practically, accountable agents must have "the ability to empathize and to feel guilt."²⁷ He continues: "Unless an agent is able to put himself affectively in another's shoes, . . . and is able at least to feel the anticipation of unpleasant guilt for breach, that agent will lack the capacity to grasp and be guided by the primary rational

20. *Id.* at 117 (stating that on her view, a person's status as a responsible agent requires not only the ability to act in accordance with her deepest values, but also the ability to assess and revise those values in light of what reasons truly exist).

21. WALLACE, *supra* note 2, at 154-55.

22. In his renowned article, "Freedom and Resentment," P.F. Strawson argues that our practices of holding each other responsible must be understood in light of the web of reactive attitudes we experience within our interpersonal relationships, such as resentment, indignation, gratitude, hurt feelings, and forgiveness. P.F. Strawson, *Freedom and Resentment*, xlviii PROCEEDINGS OF THE BRITISH ACADEMY 1 (1962), reprinted in *FREE WILL* 59 (Gary Watson ed., 1982). To hold a person to expectations or demands is to be prone to these attitudes in our dealings with her, on Strawson's account. *FREE WILL*, *supra*, at 77. Strawson argues that we need not look to justify our practices of holding each other responsible by appealing to a set of metaphysical requirements for responsible agency that exist independently and externally to these social practices. Instead, that most persons are responsible for their conduct is implicit in the demands we place on each other. These demands are inherent in the attitudes and feelings we naturally experience within our interpersonal lives. *Id.* at 77.

23. WALLACE, *supra* note 2, at 52-62.

24. *Id.* at 16.

25. *Id.* at 154-55.

26. Morse, *Deprivation*, *supra* note 2, at 119-23.

27. *Id.* at 122.

reasons for complying with moral expectations.”²⁸ It is unfair, on Morse’s account, to blame and sanction someone who lacks the capacity to be moved by such moral considerations, although we may incapacitate that agent insofar as he represents a danger to us.²⁹

T.M. Scanlon also endorses a reasons-responsive view, arguing that agents capable of rational self-governance may be held responsible for their intentions and other attitudes that are sensitive to reasoning.³⁰ It is reasonable, at least in principle, to ask a rational creature to justify her intentions or other attitudes (including other attitudes conveyed through her conduct) in terms of reasons; in contrast, it is unreasonable to demand a justification for one’s height or eye color.³¹ However, Scanlon rejects including among the requirements for responsibility any special capacity for grasping and being guided by distinctly moral reasons.³² Underlying his disagreement with Wallace and others on this matter is Scanlon’s opposing account of what it means, within our interpersonal lives, to be held morally responsible for wrongdoing.

The essence of holding an agent responsible for wrongdoing on Scanlon’s view is tied to his contractualist account of the content of moral reasoning about what we owe to one another.³³ Scanlon depicts moral reasoning as an inquiry into principles for the regulation of behavior that no one could reasonably reject insofar as each person is motivated to find such principles.³⁴ Guiding our behavior by principles no one could reasonably reject expresses our mutual respect for one another as persons—as ends in ourselves.³⁵ An act is wrong then, on Scanlon’s account, “if any principle that permitted it would be one that could reasonably be rejected,”³⁶ and thus fails to respect the value of another person as a person. Moral criticism, when addressed to an agent, calls on her to reconsider her intentions or other

28. *Id.*

29. *Id.* at 123.

30. SCANLON, *supra* note 3, at 21-22.

31. *Id.* at 289.

32. *Id.* at 287-90.

33. Scanlon does not talk in terms of “holding agents responsible,” but rather in terms of “moral criticism.” *See id.* at 288. But the essential idea is similar: to judge that moral criticism of an agent is appropriate is to hold that agent to a moral demand and to judge that the agent has violated that demand.

34. *Id.* at 4.

35. Rahul Kumar, *Defending the Moral Moderate: Contractualism and Common Sense*, 28 PHIL. & PUB. AFF. 275, 278 (1999).

36. SCANLON, *supra* note 3, at 4.

reason-sensitive attitudes and “either to explain why the criticism is unjustified or to modify or withdraw them.”³⁷

In light of that claim regarding moral criticism, one might argue that to hold fairly an agent responsible for wrongdoing, that agent must be capable of modifying or reconsidering her morally relevant attitudes, i.e., that agent must not only be able to reason practically, but also to grasp and be guided by distinctly moral considerations.³⁸ Indeed, Wallace argues that Scanlon should agree with that conclusion given Scanlon’s account of moral criticism.³⁹ Wallace asks how an appeal to an agent to reconsider, explain, or modify his relevant attitudes could “be warranted if the agent is not capable of understanding the moral principles upon which the appeal rests?”⁴⁰

Nonetheless, Scanlon rejects adding moral competence to the conditions of responsibility in light of his account of the interpersonal significance of holding an agent morally responsible. Holding someone at fault for violating a moral obligation should not be understood in terms of the reactive attitudes associated with moral blame or their expression through sanctioning behavior, according to Scanlon.⁴¹ To wrong another person, on his account, is to flout requirements founded on the value of the other person as a fellow rational creature.⁴² Failing to see the value of chess or music might place limitations on one’s relationships with others who care deeply about those things, but failing to see another’s value as a rational self-governor—as an end in herself—precludes any kind of meaningful or decent relationship. Even if I do not share your love of music, I “can still be a good neighbor, co-worker, or even a friend.”⁴³ However, the implications of failing to see your value as a person are wide-ranging and severe. Scanlon agrees that our feelings of resentment and expression of moral sanction evidence the importance we attach to being treated respectfully, but the primary significance of holding someone responsible for a wrong lies not in what one might do in response, “but rather in what is, if the criticism is correct, already the case.”⁴⁴ If one fails to respect another’s value as an end in herself, their

37. *Id.* at 275.

38. *Id.* at 287.

39. R. Jay Wallace, *Scanlon’s Contractualism*, 112 *ETHICS* 429, 444 (2002), reprinted in R. JAY WALLACE, *NORMATIVITY AND THE WILL: SELECTED PAPERS ON MORAL PSYCHOLOGY AND PRACTICAL REASON* 263, 276 (2006).

40. *Id.*

41. See SCANLON, *supra* note 3, at 271.

42. See *id.*

43. *Id.* at 159.

44. *Id.* at 272.

relationship is fundamentally altered regardless of whether the wronged party expresses any response.

Scanlon then suggests a way to decide whether to include a condition among the requirements of moral responsibility: "A plausible test for deciding whether a given condition should be taken to rule out moral criticism is to ask whether the behavior of a creature which has that condition would, for that reason, lack the distinctive significance that moral failings generally have for relations with others."⁴⁵ The question, when applied to the present question would be the following: would the wrongful actions of an agent capable of practical reasoning have different implications for his relations with others depending on whether he also has the distinct capacity to grasp and apply moral reasons?

Scanlon answers this question in the negative, rejecting moral competence as a criterion of responsibility. As long as an agent, capable of reasoning, fails to respect the value of others, her actions "would have implications for [her] relations with others that are at least very similar to (if not identical with) those of an agent who understood the relevant moral reasons but simply rejected them."⁴⁶ Being unable to see the force of moral reasons still qualifies as failing to respect the value of others.⁴⁷ Scanlon concludes with an appeal to common sense: "If [someone] commits . . . crimes because he does not place any value on other people's lives or interests, what clearer grounds could one have for saying that he is a bad person and behaves wrongly?"⁴⁸

B. Addressing the Disagreement

We might start to address the debate concerning the criteria of moral responsibility by turning to the issue that underlies the different views held by Scanlon and Wallace: their accounts of the "special depth" of moral judgments or, rather, the interpersonal significance of being held responsible. If one theorist's account of the significance of responsibility judgments is more persuasive, then that fact would support that theorist's account of the criteria of responsibility.

Wallace argues that the reactive attitudes and their expression through sanctioning behavior help explain the distinctive significance of moral blame. If we were to define what it means to hold someone morally

45. *Id.* at 287-88.

46. *Id.* at 288.

47. *Id.*

48. *Id.* at 284.

responsible for wrongdoing simply in terms of a belief that the agent has violated a moral obligation, then “[b]lame would be rendered superficial on this account, reduced to a way of describing what an agent has done, and perhaps registering a causal connection between the agent and the action so described.”⁴⁹

However, the reactive attitudes and their expression do not seem capable of explaining any *distinct* significance to holding an agent responsible for wrongdoing.⁵⁰ As Wallace highlights, reactive attitudes such as resentment and indignation can be characterized as moral or non-moral, depending upon the content of their underlying propositional content.⁵¹ Indignation may be characterized as moral insofar as it is felt in response to a belief that an agent has violated a moral obligation. However, we may also experience indignation upon belief that an agent fails to appreciate, or perhaps denigrates, something we take to be of important value, although she did not violate any moral obligation owed to anyone. For example, one might feel indignation towards someone who believes there is nothing of value about the Arctic National Wildlife Refuge except its oil.

Moreover, even if resentment and indignation were exclusively moral reactive attitudes, it is unclear why they provide their accompanying judgments a depth that other emotions do not supply. What is especially “deep” about resentment and indignation, as opposed to other attitudes we feel towards others, such as disgust or jealousy? I am not sure; perhaps there is a persuasive answer.

Nonetheless, the “special depth” of holding an agent morally responsible on Scanlon’s account is not mysterious. The judgment that an agent fails to respect others’ value as persons more deeply “affect[s] the range of relations we can have with that person.”⁵² That someone does not share your interest in music might prevent a close friendship; but if someone cannot be trusted, that damages more thoroughly—or more deeply—the kinds of interpersonal relationships that are possible with him. To use Wallace’s helpful description of Scanlon’s account, “[m]oral faults introduce basic rifts into the social fabric” that other evaluative judgments do not create.⁵³

49. WALLACE, *supra* note 2, at 78.

50. I discuss in more detail Wallace’s Strawsonian account of the special force of moral judgments in Paul Litton, *The Insignificance of Choice and Wallace’s Normative Approach to Responsibility*, 26 LAW & PHIL. 67, 83-92 (2007).

51. WALLACE, *supra* note 2, at 33-40.

52. SCANLON, *supra* note 3, at 159.

53. Wallace, *supra* note 39, at 442.

If Wallace's Strawsonian account of the special depth or interpersonal significance of holding an agent responsible for wrongdoing is not persuasive, then we lose the basis for his claim that fairness must guide our inquiry into the criteria for moral responsibility. Accordingly, there is no basis for claiming that fairness requires that we hold morally responsible only those practical reasoners who have the capacity to grasp and apply the distinctly moral reasons that support our moral obligations.

However, though Scanlon's account of the interpersonal significance of blaming judgments is more persuasive, that fact does not imply that his conclusion regarding the criteria of moral responsibility is correct. Scanlon acknowledges the tension between his claim that moral criticism calls on an agent to modify, justify, or explain his behavior, and his conclusion that we need not include moral competence as a criterion for responsibility. In the end, he excludes moral competence on the ground that it makes no practical difference for an agent's interpersonal relations whether he lacks the capacity to understand moral reasons or whether he simply ignores moral considerations that he does grasp. Perhaps Scanlon's empirical observation is correct. Nevertheless, maybe it *should* make a difference within our interpersonal lives as to whether an agent has no capacity to grasp moral considerations or whether he simply ignores them. As Wallace suggests, if it would be pointless to ask an agent incapable of moral reasoning to modify or justify his behavior in light of moral considerations, maybe it is inappropriate to hold that agent morally responsible for any apparent wrongdoing.⁵⁴

Here, I do not reach any firm conclusion on this debate about the interpersonal significance of holding responsible and its relation to the criteria for responsibility. For present purposes, I am satisfied to view it as a stalemate. Instead, I will address the debate indirectly by questioning whether there is any meaningful disagreement here regarding the conditions of responsibility.

III. IS THERE ANY MEANINGFUL DISAGREEMENT?

A. *Candidates for the Area of Disagreement*

Meaningful disagreement exists between the opposing views on the criteria for responsibility only if there are or conceivably could be agents who do have the capacity for rational self-governance but lack the capacity to grasp and apply moral considerations. Put differently, if an agent's

54. *See id.* at 444.

diminished or lack of capacity for grasping and applying moral considerations tracks more general deficits in her capacity for rational self-governance, then meaningful disagreement would not seem to exist.

John Martin Fischer and Mark Ravizza, who defend a sophisticated reasons-responsive approach to responsibility, argue that moral competence is a criterion of responsibility based on the assumption that there are, in fact, agents who are reasons-responsive but lack the capacity for moral competence.⁵⁵ They argue that inclusion of the capacity for moral competence among the responsibility criteria helps explain why we “ordinarily judge[]” young children, intelligent animals, and psychopaths to be non-responsible.⁵⁶ Because these agents have some capacity to respond to instrumental reasons, Fischer and Ravizza argue that the rationale for deeming them non-responsible is that they lack the capacity to “understand[] and appreciat[e] . . . moral reasons.”⁵⁷

Fischer and Ravizza’s argument is unpersuasive, though. First, it is a mistake to include psychopaths among this group because there is no shared firm commitment that psychopaths are non-responsible. We normally hold psychopaths criminally responsible, and that fact provides at least some evidence that there is no widespread firm commitment that psychopaths are not morally responsible for their wrongdoing. Robert Hare, perhaps the leading researcher of psychopathy, opines that “psychopaths certainly know enough about what they are doing to be held accountable for their actions.”⁵⁸ Second, we do not need to add any distinct capacity to grasp moral reasons to explain our ordinary judgment that animals and young children are not responsible agents, given that they do not have developed rational capacities. Young children, for example, are not able to fully appreciate prudential reasons either. We need not to point to something special about moral reasoning because they lack general reasoning capacities.

Older children and adolescents also do not occupy the area of disagreement between the two camps of theorists. We recognize that these young persons, as a class, are hastier, immature, and not as well equipped to appreciate the long-term consequences of their actions. Because they have not invested comparably much time and energy in life projects, they also do not have the experience required to appreciate what is of great importance to others. Certainly, these characteristics are relevant to their abilities to reason

55. See FISCHER & RAVIZZA, *supra* note 2, 76-81.

56. *Id.* at 76.

57. *Id.*

58. ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* 143 (1993).

morally; but they also support our belief that young people frequently do not know what is even in their own best self-interest. Whether or not the criteria of responsible agency include a special capacity to grasp and apply moral considerations, there is good reason that we do not hold older children and adolescents as responsible as we hold normal functioning adults.

Another important reason why we do not hold and consider young persons fully responsible is because they are still developing their personalities.⁵⁹ They are in the process of trying to discover what they stand for and how to view the world. When their actions express negative characteristics, we are reluctant to fully attribute a stable negative trait to them, because they are still learning and because we are still responsible for their development. In fact, it is quite clear from our practices that any special requirement for moral competence is not that relevant to our judgments about older youth. Many adolescents are probably more morally sensitive and have better moral reasoning skills than many adults whom we hold fully responsible. Nonetheless, we still consider all members of the class of older children and adolescents less than fully responsible because they are still developing their personalities.

Perhaps in thinking that the capacity to grasp and apply distinctly moral reasons is a criterion of responsibility, one has in mind an agent who has been severely and thoroughly abused throughout childhood, such that this person has never been shown the value of participating in relationships based on mutual respect. Or perhaps, as a result of years of abuse, this person feels unworthy of respectful relationships and engages in antisocial, self-destructive behavior that “confirms [his] sense of failure and worthlessness.”⁶⁰ Such abuse can cause deficits in rational capacities, perhaps by weakening an agent’s capacity for controlling impulses, particularly in stressful and threatening situations.⁶¹ But a theorist might have in mind the possibility that a person could have the capacity for practical reasoning but, because of an unspeakably tragic childhood, is understandably unmoved by moral considerations. Many people might find such an agent less than fully responsible for adult antisocial acts, and the proposed

59. See SCANLON, *supra* note 3, at 281 (“The circumstances of childhood . . . block the attribution of [negative] characteristics to the agent we are judgment. Overcoming these effects is a process of growth, not of reform.”).

60. WALLACE, *supra* note 2, at 233.

61. Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1165 (1999); see also JAMES BLAIR ET AL., *THE PSYCHOPATH: EMOTION AND THE BRAIN* 35-37 (2005) (discussing the relationship between environmental stressors, such as abuse, and an increased risk for reactive aggression).

underlying rationale would be that the agent has a diminished capacity for moral competence given the abuse he suffered.

However, assuming that the agent's capacity for rational self-governance is not compromised, his lack of motivation to conform to moral norms is not best characterized as an incapacity to grasp and apply moral considerations. Rather, it is just that: a lack of motivation, a failure (an understandable one) to see the force of moral reasons and of the value of interpersonal interaction based on mutual respect. The fact that someone does not see the force of reasons associated with a particular value does not imply that the person lacks the general capacity to understand claims based on those reasons.

I am not arguing that a person's history of suffering relentless abuse is irrelevant to thinking about how it is appropriate to treat that person generally or in response to her wrongdoing.⁶² Rather, I submit that the practical reasoner who fails to appreciate the force of moral considerations—perhaps due to his tragic exposure to relentless childhood abuse—does not appear to be a candidate for the area of disagreement between the two camps of responsibility theorists.⁶³

B. Conceptual Doubts

Before turning to the prime candidate for disagreement—the psychopath—I want to raise some thoughts on why it is difficult to conceive an agent who truly has an undiminished capacity for rational self-governance yet lacks the capacity to understand moral considerations. As noted above, normal functioning adults have the capacity to reflect on and evaluate their motivation. We do not merely experience first-order desires and act on those that, at any given time, are motivationally strongest. We act for reasons, and

62. I argue that capital juries are indeed justified in viewing evidence of severe childhood abuse as mitigating in Paul Litton, *The 'Abuse Excuse' in Capital Sentencing Trials: Is It Relevant to Responsibility, Punishment, or Neither?* 42 AM. CRIM. L. REV. 1027 (2005).

63. I realize that I am making a stark distinction between the psychopath—who could not have been socialized—and the sociopath who is unmotivated to respect others because of a terrible childhood, though, in actuality, there are agents whose failure to respect others is due to both biological and environmental causes, and who do not clearly represent one category to the exclusion of the other. However, I am relying on the work of psychopathy researchers, such as David Lykken, showing that there are significant differences in traits between agents who “failed to acquire the attributes of socialization . . . because of a failure of the usual socializing agents” (sociopaths), and the psychopath, “whose innate temperament made him unusually difficult to socialize.” DAVID T. LYKKEN, *THE ANTISOCIAL PERSONALITIES* vii-viii (1995).

treating a consideration as a reason for action involves, at least implicitly, some evaluation about the desirability of the end of that action. We have the capacity to evaluate the desirability of our first-order desires, to decide whether we should treat any particular desire as providing a reason—a justifying end—for action.⁶⁴ Some philosophers discuss these points in terms of our capacity to form higher-order desires, to have values, to have standards, etc. Though use of different terms may represent different views about the nature of practical reason, I do not think that such disagreements are pertinent here. Thus, though we may talk about higher-order desires, etc., I will refer to our capacity to step back and evaluate first-order desires in terms of our capacity to possess evaluative standards, standards according to which we evaluate and assess what we have good reason to do.

Consider some facts about reasoning agents who have stable, coherent evaluative standards that they endorse over time. Certain plans, projects, relationships and people *matter* in some way to agents with evaluative standards. Having standards involves “having some conception of the kinds of actions we wish to perform or to avoid, the kinds of persons we wish to be, the kinds of characteristics we wish to have or to avoid having, and so forth.”⁶⁵ We take certain things, kinds of lives, characteristics, etc., to be valuable or important.

When faced with particular desires, we must decide whether such desires provide us with reason for action in light of what it is that we care about it and find important. But it is not only our desires that we must evaluate. As social creatures, we have no choice but to consider other people and their interests in our deliberations, having to decide whether their interests provide us with any reasons.

One might wonder, then, why an agent would be able to reflect on and assess whether her desires provide reasons for action but not whether someone else’s interests provide reasons for or against certain actions. Why should we believe that the capacity for assessing whether other people’s interests provide reasons for action is distinct from the capacity to assess whether any other facts about the world provide reasons for action?

Moreover, given that rational agents have standards regarding what matters to them—what they take to be important—it would seem that they would have at least the capacity (even if not the motivation) to understand the claim that other people’s interests are also important and, as such,

64. Michael E. Bratman, *Valuing and the Will*, 14 PHIL. PERSP. 249, 258 (2000), reprinted in MICHAEL E. BRATMAN, *STRUCTURES OF AGENCY: ESSAYS* 47, 61-62 (2007).

65. HILARY BOK, *FREEDOM AND RESPONSIBILITY* 126-27 (1998).

provide reasons for and against certain actions.⁶⁶ An agent might reject the idea that other people's interests provide him any reasons for or against action, but rejecting that idea does not imply an incapacity to grasp what it asserts. In fact, rejecting the claim assumes at least some level of understanding.

It is particularly difficult to conceive an agent who values at least some other person, whether a friend or family member, and yet simultaneously lacks the capacity to grasp moral considerations that speak in favor of respecting the interests of all people. Valuing an interpersonal relationship involves holding oneself to certain standards that regard the well-being of the other person. To care about another person involves caring about that other person's interests for their own sake, not because of any instrumental value to oneself. As Bernard Williams clearly states, someone who has attachments to other persons has the capacity to grasp moral considerations, even if this person exhibits no regard for persons to whom he is not attached. This person must have

the notion of doing something *for* somebody, because that person needs something. He operates with this notion in fact only when he is so inclined; but it is not itself the notion of his being so inclined. Even if he helps . . . people [to whom he is attached] because he wants to, or because he likes them, and for no other reason . . . , what he wants to do is to *help them in their need*, and the thought he has when he likes someone and acts in this way is "they need help," not the thought "I like them and they need help." *This is a vital point: this man is capable of thinking in terms of others' interests*, and his failure to be a moral agent lies (partly) in the fact that he is only intermittently and capriciously disposed to do so. But there is no bottomless gulf between this state and the basic dispositions of morality. There are people who need help who are not people who at the moment he happens to want to help, or likes; and there are other people who like and want to help other particular people in need. To get him to consider their situation seems rather an extension of his imagination and his understanding, than a discontinuous step onto something quite different, the "moral plane."⁶⁷

66. See Duff, *supra* note 2, at 198 ("If [someone] exhibits some conception of, and concern for, interests of his own, he is in a position to understand the interests of others, as providing them with reasons for action . . .").

67. BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 9-10 (1972) (third emphasis added); see also Duff, *supra* note 2, at 198 ("[I]f he displays love or friendship for another, he is in a position to understand the significance of such relationships for others, and

If an agent truly is incapable of grasping and being guided by moral considerations, then we should also expect this agent not to value—and to be incapable of valuing—*any* persons or interpersonal relationships. (And, as described below, this expectation is met with regard to the psychopath).

As stated, I offer these remarks to suggest that there might not be significant disagreement between the responsibility theorists. But perhaps empirical evidence proves otherwise. Maybe there are agents—psychopaths—who do lack the capacity to grasp and apply moral reasons but otherwise possess a normal capacity for rational self-governance. On the other hand, if psychopaths have a diminished capacity for moral reasoning which is a symptom of deeper, more general deficits in rational capacities, then an investigation into the relationship between their rational and moral capacities can inform our thinking on whether any agents could conceivably occupy the area of disagreement between the responsibility theorists.

IV. INDIVIDUALS WITH PSYCHOPATHY

A. *The Disorder*

Psychopathy is not listed as a condition in the *Diagnostic and Statistical Manual* (“DSM-IV”), published by the American Psychiatric Association. Rather, researchers identify psychopathic individuals as a subclass of persons having antisocial personality disorder (“ASPD”), which is a DSM-IV diagnosis.⁶⁸ To understand psychopathy, then, let us start with ASPD.

ASPD is classified as a personality disorder,⁶⁹ conveying a “pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.”⁷⁰ A

already has the kind of concern for another which is closely related to a moral concern” (citing WILLIAMS, *supra*).

68. The DSM-IV does state that antisocial personality disorder “has also been referred to as psychopathy, sociopathy, or dyssocial personality disorder.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645 (4th ed. 1994) [hereinafter DSM-IV]. However, researchers who study psychopathic individuals describe them as a particular subclass of the population with antisocial personality disorder. See *infra* notes 72-87 and accompanying text.

69. According to the DSM-IV, a “personality disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.” DSM-IV, *supra* note 68, at 629.

70. *Id.* at 645.

“pervasive pattern” of disregarding others’ rights is diagnosable when a subject presents with three of the following:

- (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
- (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
- (3) impulsivity or failure to plan ahead
- (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
- (5) reckless disregard for safety of self or others
- (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
- (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.⁷¹

These criteria focus solely on whether a person engages in certain kinds of behavior.

Because of ASPD’s sole focus on “actions rather than . . . psychological dispositions or traits,” many researchers find it to be medically and scientifically unhelpful, classifying together a heterogeneous group of persons.⁷² One individual satisfying criteria one, two and four (repeatedly

71. *Id.* at 649-50. In addition, an individual diagnosed with ASPD must be eighteen years of age or older; the “occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode;” and there must be “evidence of Conduct Disorder . . . with onset before age 15 years.” *Id.* at 650. Conduct disorder is the analogue to ASPD for minors. *Id.* at 646. It involves a “repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated.” *Id.*

72. LYKKEN, *supra* note 63, at 4; *see also* BLAIR ET AL., *supra* note 61, at 8, 12; HARE, *supra* note 58, at 24-25 (“The diagnostic criteria for antisocial personality disorder consist primarily of a long list of antisocial and criminal behaviors. . . . ‘Psychopathy,’ on the other hand, is defined by a cluster of *both* personality traits and socially deviant behaviors.” (emphasis added)). Hare claims that when the criteria for antisocial personality disorder were being developed, “it was felt that the average clinician could not reliably assess personality

breaks the law, lies, and assaults) might represent a typical repeat violent offender. Other individuals might qualify as having the disorder even though they are not criminals at all. Someone might satisfy criteria three, five, and six (fails to plan ahead, recklessly disregards own safety, and fails to sustain consistent work) due to having a drug or alcohol addiction, without assaulting other persons.⁷³

Based on recent research, Blair and colleagues distinguish between at least two groups of aggressive individuals.⁷⁴ First, they refer to individuals who engage primarily in *reactive* aggression: aggression in response to a frustrating or threatening event without aiming toward any further goal.⁷⁵ Individuals diagnosed as psychopaths, however, belong to a second group. In addition to presenting with high levels of reactive aggression, this second group also engages in elevated levels of *instrumental* aggression:⁷⁶ aggression “used instrumentally to achieve a specific desired goal . . . [such as] the victim’s possessions or to increase status within a group hierarchy.”⁷⁷

Blair and colleagues argue that normal socialization methods are ineffective with individuals who become diagnosable with psychopathy because of “an impairment in performing specific forms of emotional learning [which is] symptomatic of an underlying dysfunction involving specific neural and neurotransmitter systems.”⁷⁸ These researchers argue that, in light of twin studies, “a strong case can be made” that the underlying cause of the dysfunction of the neural and neurotransmitter systems is genetic, not environmental.⁷⁹ Environmental causes (including birth complications and exposure to abuse) increase one’s risk for *reactive* aggression.⁸⁰ For example, environmental stress is correlated with increases in hormonal responses to perceived threats and other physiological responses

traits such as empathy, egocentricity, guilt, and so forth.” HARE, *supra* note 58, at 24-25. Therefore, the developed criteria included only objective behaviors. *Id.* Cf. Duff, *supra* note 2, at 190 (“[I]f crime is *the* criterion of psychopathy, the label becomes utterly uninformative: it neither explains nor illuminatingly re-describes criminal conduct, but simply marks its occurrence; it precludes any distinction between psychopathic and other criminals.”).

73. LYKKEN, *supra* note 63, at 4-5.

74. BLAIR ET AL., *supra* note 61, at 12. The authors do not indicate that these two distinct populations of aggressive individuals include all people who would present with antisocial personality disorder. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (citing LEONARD BERKOWITZ, *AGGRESSION: ITS CAUSES, CONSEQUENCES, AND CONTROL* 7 (1993)).

78. BLAIR ET AL., *supra* note 61, at 28.

79. *Id.* at 30.

80. *See id.* at 12, 37.

that cause someone to more readily react with aggression.⁸¹ On the other hand, Blair and colleagues report that no data support the claim that environmental stressors can give rise to the emotional dysfunction and combination of reactive/instrumental aggression that is definitive of psychopathy.⁸² Social causes do influence the “behavioral manifestation of the underlying cause[;]” there could be individuals with the emotional dysfunction of psychopaths who, because of more fortunate social circumstances, do not need to engage in antisocial behavior to get what they want, and thus would not present with the full syndrome.⁸³ Nonetheless, Blair and colleagues argue that the underlying cause of psychopathy is an emotional dysfunction that impedes socialization.⁸⁴ Their argument echoes the distinction that David Lykken, who was a leading researcher of antisocial personalities, drew between the “sociopath” and the “psychopath.” Lykken referred to the “psychopath” as the agent who, from birth, “possesses inherent peculiarities of temperament that make him unusually intractable to socialization.”⁸⁵ He used “sociopath” to refer to persons who could have been socialized through normal methods but rather became the “feral products of indifferent, incompetent, or overburdened parents.”⁸⁶

The different etiologies are important not as causes per se, but because the characteristics of antisocial persons seem to vary depending upon the underlying cause(s) of their antisocial natures.⁸⁷ We now turn to the peculiar characteristics of agents who, from birth, appear immune to socialization methods.

In addition to engaging in antisocial conduct, persons with psychopathy have particular interpersonal and affective traits. In 1941, Hervey Cleckley described the characteristics of the psychopathic individual:⁸⁸ superficial

81. *Id.* at 37. Environmental stress also augments the amygdale, which in turn increases one’s risk for reactive aggression. *Id.* at 36.

82. *Id.* at 37.

83. *Id.* at 39.

84. *Id.* at 37.

85. LYKKEN, *supra* note 63, at 6.

86. *Id.* at viii.

87. It is not as if there is only one cause of a person’s antisocial nature. *Id.* at 7 (“The psychopath and the sociopath can be regarded as opposite endpoints on a common dimension with difficult temperament maximized at the psychopathic end and inadequate parenting maximized at the sociopathic end.”).

88. *See generally* HERVEY CLECKLEY, *THE MASK OF SANITY: AN ATTEMPT TO CLARIFY SOME ISSUES ABOUT THE SO-CALLED PSYCHOPATHIC PERSONALITY* (5th ed. 1988). Cleckley’s book “continues to provide a vital point of reference for contemporary researchers in the field of psychopathy as well as clinicians in a range of settings.” Christopher J. Patrick, *Back to the*

charm;⁸⁹ an utter lack of remorse or shame, and the absence of all other indications of accepting responsibility for his own misfortunes or those he inflicts upon others;⁹⁰ antisocial behavior that appears inadequately motivated, and is committed for “astonishingly small stakes . . . in the absence of any apparent goal at all[;]”⁹¹ and pathological egocentrism with an incapacity for love and a “general poverty of affect.”⁹² Cleckley also described the psychopathic individual as void of “strong or tragic feeling”⁹³ and without insight into how others feel about him.⁹⁴ He only has superficial relationships with others,⁹⁵ and “shows a striking inability to follow any sort of life plan consistently.”⁹⁶

Based on Cleckley’s findings as well as his own work, Robert Hare developed the Psychopathy Checklist (which he has since revised) (“PCL-R”), an instrument used to assess psychopathy in adults.⁹⁷ The tool tracks many of the same characteristics reflective of psychopathy noted by Cleckley. With regard to interpersonal and affective traits, reflecting the callousness and narcissism of psychopaths, tested individuals are evaluated on whether they exhibit the following characteristics or conduct: (1) glib and exhibit shallow charm; (2) a grandiose sense of self-importance; (3) lie pathologically; (4) con and manipulate others; (5) a remarkable incapacity for remorse or guilt; (6) otherwise experience shallow affect; and (7) not accept responsibility for their actions.⁹⁸ Other traits assessed regard the psychopath’s antisocial behavior, including the following: (1) poor behavior controls, (2) no realistic and long-term goals, (3) impulsivity, and (4) juvenile delinquency.⁹⁹ In total, the instrument lists twenty behavioral and personality traits, and directs the mental health professional to attribute zero to two points for each trait to the examined subject.¹⁰⁰ Researchers attribute

Future: Cleckley as a Guide to the Next Generation of Psychopathy Research, in HANDBOOK OF PSYCHOPATHY 605, 606 (Christopher J. Patrick ed., 2006).

89. CLECKLEY, *supra* note 88, at 338; *see also* Larry J. Siever, *Neurobiology in Psychopathy*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 231 (Theodore Millon et al. eds., 1998).

90. CLECKLEY, *supra* note 88, at 340, 343; *see also* Siever, *supra* note 89, at 231.

91. CLECKLEY, *supra* note 88, at 343.

92. *Id.* at 348.

93. *Id.* at 349.

94. *Id.* at 350.

95. *Id.* at 354.

96. *Id.* at 364.

97. BLAIR ET AL., *supra* note 61, at 7; *see generally* HARE, *supra* note 58.

98. BLAIR ET AL., *supra* note 61, at 9.

99. *Id.*

100. *Id.*

psychopathy to adults scoring thirty or above, and adults who score less than twenty are not considered to have the disorder.¹⁰¹ Accordingly, psychopathy is a continuum concept afflicting individuals to different degrees.¹⁰² Despite that fact, use of the PCL-R instrument produces strong inter-rater reliability.¹⁰³

B. Psychopathy and the Capacity for Moral Competence

Individuals with psychopathy easily and frequently commit immoral acts, whether or not those acts are illegal and lead to imprisonment. The fact of psychopaths' repeated immoralities, however, cannot show that they are incapable of moral reasoning or that they should not be held morally responsible for their conduct.¹⁰⁴ Evil should not represent its own excuse. So in light of their reasoning abilities, freedom from psychosis, and effective wills, it might not be evident why one would conclude that psychopaths lack the capacity to conform their conduct to morality's demands and, on that basis, should not be considered morally accountable.¹⁰⁵

101. *Id.* at 7.

102. *Id.* at 8-10; *see also* LYKKEN, *supra* note 63, at 7.

103. Siever, *supra* note 89, at 231. It also "has been validated in terms of its predictive power for recidivism in criminal populations." *Id.*

104. After defining "mental disorder" as an "abnormal and harmful impairment of [one's] rational capacities," Antony Duff argues that accounts of agents' criminal and antisocial behavior "provide by themselves no proof of disorder." Duff, *supra* note 2, at 190. Assuming that possession of a *disorder*, according to Duff's definition of that term, implies that an agent is less than fully responsible, Duff writes: "Persistent criminality, for instance, could be a criterion of disorder only within a determinist perspective which, denying responsibility to anyone, takes the fact of crime as proof that 'something has gone wrong.'" *Id.*

105. Indeed, some research purportedly shows that psychopaths are capable of moral reasoning, at least on par with non-psychopathic criminal offenders. BLAIR ET AL., *supra* note 61, at 57. After presenting psychopathic and non-psychopathic offenders hypothetical stories involving moral dilemmas, researchers judged the complexity of the moral reasoning offered by the subjects. *Id.* at 57-58. Some studies concluded that psychopathic offenders exhibited lower levels of moral reasoning than non-psychopathic counterparts, *id.* (citing three studies conducted in the 1970s); but other studies found no difference, *id.* (citing two studies from the late 1980s). However, Blair and colleagues argue that these kinds of studies only measure moral semantic memory without assessing the subjects' understanding of the reasons they offer. IQ and socioeconomic status are correlated with both semantic memory and moral reasoning. Therefore, Blair and colleagues argue, these kinds of "moral reasoning" tests might only "index[] IQ and the individual's cultural experiences rather than their moral reasoning *per se.*" *Id.* at 57.

To understand the claim that psychopaths lack moral capacities, let's turn to Wallace's criteria of responsibility. He argues that responsibility requires two powers of reflective self-control: (1) the power to grasp and apply moral reasons; and (2) the power to control or regulate one's behavior in light of such reasons.¹⁰⁶ The key issue is whether they lack the former. Wallace persuasively emphasizes that that power to grasp and apply moral reasons goes beyond the ability to know what actions are deemed "right" and "wrong."¹⁰⁷ A young child might know very well that lying or kicking a sibling is called "wrong," but we would not attribute to her the power to grasp and apply moral reasons on that basis. Accountable agents have a "participant understanding of the moral reasons that support [our] obligations, enabling one not merely to parrot moral discourse but also to apply moral principles intelligently from case to case."¹⁰⁸ An accountable agent understands moral principles in a way that allows her to apply them in different factual contexts and to negotiate competing reasons for action in circumstances where multiple moral principles are relevant.¹⁰⁹

One reason why psychopaths seem incapable of moral competence on Wallace's account is that research indicates that they have substantial difficulty gauging the varying importance of different human concerns. To start, since the mid-1970s, a significant body of research concludes that normal functioning persons recognize a distinction between transgression of *moral* rules and *conventional* rules.¹¹⁰ Moral rules generally refer to those that regard protections against harm and rights-violations (e.g., prohibitions against killing and stealing).¹¹¹ Generally, the idea advanced by this research

106. WALLACE, *supra* note 2, at 157.

107. *Id.*

108. *Id.* at 178.

109. *Id.* at 157, 178. Duff writes similarly:

For what does the competent and astute discussion of moral issues involve? It involves more than the ability to apply learned formulae which provide descriptive criteria for the identification of actions to which moral labels can then be attached—of this an intelligent psychopath may well be capable. A person who is to exhibit moral understanding must also be able to explain and criticise these moral rules—which involves more than showing how they do or do not derive from other formulae; he must be able to show how these rules may or may not be *extended* to cover new cases, which do not fall exactly under any specified set of descriptive criteria; to discuss rationally the resolution, or the impossibility of resolving, cases of conflict. Following moral rules . . . requires a *creative* capacity to understand the significance of the value in question, and to discuss, extend, and criticise its application.

Duff, *supra* note 2, at 195.

110. Daniel Kelly et al., *Harm, Affect, and the Moral/Conventional Distinction*, 22 MIND & LANGUAGE 117, 117-18 (2007).

111. *Id.*

is that most people recognize moral rules as universally applicable, authority-independent (they exist even if no authority commands them or whether society sanctions such rules); and their violation is judged to be more serious than conventional transgressions. Conventional rules would include mores against cross-dressing and licking clean one's dinner plate.¹¹² According to this research, conventional rules are generally recognized as authority-dependent, relative to time and place, and their justification does not appeal to the importance of rights or protecting persons from harm.¹¹³ Here is the relevance: though children as young as thirty-nine months and people across multiple cultures recognize a distinction between these (purportedly) different kinds of rules,¹¹⁴ “[c]hildren with psychopathic tendencies and adults with psychopathy have considerable difficulty with the moral/conventional distinction task.”¹¹⁵

Recent empirical research may provide good reason to doubt that the studies based on the moral/conventional distinction shed light on the nature of moral judgment (perhaps because further studies show that many people characterize some rules as authority-independent even though violations of these rules do not harm anyone or infringe anyone's rights);¹¹⁶ it is possible that the original studies based on the moral/conventional distinction do not tell us much about the incapacities of the psychopath.¹¹⁷ Nevertheless, accounts of individual psychopathic offenders in the psychological literature paint pictures of people who are shockingly unable to gauge the relative importance of different human concerns—or, at least, incredibly unaware that their voiced opinions about the relative weight of different concerns would be viewed as crazy.¹¹⁸ For example, consider the justification for rape offered by a convicted psychopathic offender, interviewed by Hare. He claimed his actions actually had a positive effect on his victims:

“The next day I'd get a newspaper and read about a caper I'd pulled—a robbery or rape. There'd be interviews with the victims. They'd get their names in the paper. Women, for example, would say nice things about me—

112. *Id.* at 117.

113. *Id.* at 119.

114. *Id.*

115. BLAIR ET AL., *supra* note 61, at 58.

116. Kelly et al., *supra* note 110, at 120-21.

117. *Id.* at 129-30.

118. Cleckley hypothesizes that the essence of the defect in personality of the psychopath “consists of an unawareness and a persistent lack of ability to become aware of what the most important experiences of life mean to others.” CLECKLEY, *supra* note 88, at 371.

that I was really polite and considerate, very meticulous. I wasn't abusive to them, you understand. Some of them thanked me."¹¹⁹

Apparently, this offender knows some things that people like: notoriety from being mentioned in a newspaper, being treated considerately and politely, etc. But if he offers this justification genuinely, its absurdity leaves us without words.

Just to be clear, it is not the case that psychopathic individuals like Hare's convicted rapist provide unpersuasive justifications for their wrongdoing, in the way that mafia or gang members or neo-Nazis might offer reasons for their wrongful violence that reasonable people find unpersuasive. A non-psychopathic mob boss is not incapable of grasping and being guided by moral considerations in virtue of the fact that he rejects some fundamental aspects of common morality. He is capable of grasping moral principles, for he endorses those of his group and tries to live up to them. He can empathize, as he does with his fellow members. Our convicted rapist, on the other hand, endorses no moral principles. He is not, say, some confused utilitarian who mistakenly thinks his crimes maximize happiness. As someone diagnosed with psychopathy, he feels no empathy for anyone. To the extent that he is truly unfamiliar with guilt or remorse, he holds himself to no moral standards at all.¹²⁰ As researchers describe them, psychopathic individuals appear to be mimicking us when they engage in moral reasoning.

As further evidence of their striking lack of moral understanding, the psychopathic individuals described in the literature do not seem to grasp the kinds of behavior that we take to implicate the moral quality of one's character. If an agent does not understand that repetitively harming others intentionally or recklessly, and repeatedly deceiving others, for example, are relevant to the moral assessment others will make of his character, then we cannot fathom a moral dialogue with him.¹²¹ The literature describes people who seem genuinely baffled when confronted with moral criticism or upon

119. HARE, *supra* note 58, at 43.

120. Because of their "notably reduced affective input to linguistic processing," BLAIR ET AL., *supra* note 61, at 62, "individuals with psychopathy have been found to show anomalous concepts for guilt[.]" *id.* at 59 (citing R.J.R. Blair et al., *Emotion Attributions in the Psychopath*, in 19 PERSONALITY AND INDIVIDUAL DIFFERENCES 431-37 (1995)).

121. See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 U.C.L.A. L. REV. 1511, 1525 (1992) (including among the capacities for moral agency "the ability to engage in moral evaluation of one's character and acts").

learning that others do not view them as having good and trustworthy characters. Take, for instance, Cleckley's account of his patient, Roberta, a woman with a significant history of theft and deceiving others for money and whose father stated about her: "It's not that she seems bad or exactly that she means to do wrong. She can lie with the straightest face, and after she's found in the most outlandish lies she still seems perfectly easy in her own mind."¹²² After discharge from Cleckley's care, Roberta, despite knowing that Cleckley was informed of her most recent crimes, would send requests to him for letters of recommendation for job applications.¹²³ Employers, on Roberta's request, would send forms asking whether Roberta possessed "good character" and "high moral standards;" whether her reference would employ her in a position requiring "considerable responsibility."¹²⁴ Cleckley wrote, "Roberta seemed sweetly free of any doubt that such recommendations would be given without qualification and in the highest terms of assurance."¹²⁵ Roberta's ignorance of the kinds of behavior that have moral significance to us provide good reason to conclude that she does not have the power to grasp and understand moral considerations.

V. PSYCHOPATHS' DIMINISHED CAPACITY FOR RATIONAL SELF-GOVERNANCE

A. *Weak Capacity to Possess Evaluative Standards*

In this Part, I discuss evidence that the psychopath's diminished capacity for moral reasoning is symptomatic of a more general diminished capacity for rational self-governance. It is not merely that the psychopath has not internalized any *moral* standards; he has a weakened capacity for possessing any kind of evaluative standards, and that weakened capacity is related to

122. CLECKLEY, *supra* note 88, at 47.

123. *Id.* at 55.

124. *Id.*

125. *Id.* Cleckley's patient, Chester, exhibited the same kind of moral ignorance as Roberta. While in jail, Chester was able to continually convince his psychiatrists that he was fit for parole by promising to turn his life around. *Id.* at 132. Repeatedly, shortly after being released on parole, Chester would find a way to land himself back in jail. *Id.* Then, upon meeting with Cleckley, Chester would demand to be released on parole again, arguing that he had proven himself to be a trustworthy and reliable person. *Id.* He repeated, "You know that I'm a *man of my word.*" *Id.* Cleckley states that after asking Chester how he could think that Cleckley could perceive him as trustworthy and reliable after breaking his word so many times, Chester "showed no sign of being confounded." *Id.* He did not understand Cleckley's basis for doubt.

signs of irrationality, discussed below. Individuals with psychopathy may not exhibit the kind of disordered thinking prevalent in persons with psychoses, but agents can be irrational in other ways. Young children are not responsible due to their lack of rational powers, and in many ways, persons with psychopathy are similar.

Though I hypothesize that psychopaths have a diminished capacity for rational self-governance due, at least in part, to a diminished capacity for possessing evaluative standards, let us first examine why one might argue that psychopaths do, in fact, possess evaluative standards. It might seem quite obvious that psychopaths do care about something: they certainly pursue excitement and pleasure,¹²⁶ and thus psychopaths must care about them. They must deem excitement and pleasure to be the most important worthwhile goals in life, while boredom and pain must be avoided.¹²⁷

Indeed, their actions in pursuit of excitement and pleasure, including their repetitive immoralities towards those ends, are not unintelligible to us in the same way that, say, a mere desire to place green books all over one's roof is unintelligible.¹²⁸ We can see how deceiving and manipulating others can be very exciting, and presumably, we do think that excitement and pleasure are good things. If psychopathic individuals lie and deceive their guardians, psychologists, and judges, it is only to stay out of trouble so that they may freely pursue excitement and pleasure, what they value. They may not be the deepest folks, but shallowness does not imply a lack of evaluative standards or irrationality.

Such an argument would point in favor of concluding that the psychopath is a rational agent who should be held morally responsible. Maybe he is, in fact, capable of grasping moral claims, and only rejects them because moral claims interfere with the pursuit of what is truly valuable, namely, excitement and pleasure. If this were true, then the psychopath's

126. See HARE, *supra* note 58, at 58, 61.

127. In criticizing arguments for the conclusion that psychopaths are non-responsible agents, Vinit Haksar assumes that the psychopath does have values that we can discern by observing the psychopath's behavior. Haksar, *supra* note 2, 141-42. To illustrate, in response to the claim that the psychopath's criminal acts frustrate his own valued end of remaining free, Haksar suggests that, perhaps, the psychopath simply values committing criminal acts more than he values remaining free. *Id.* at 141.

128. This example is from G.E.M. ANSCOMBE, INTENTION 26 (Harvard Univ. Press 2d ed. 2000) (1957). Anscombe argues that if someone were to cover his roof with green books but only answered the question "Why?" with an answer like, "No particular reason" or "I just had the desire to," then his "words would be unintelligible unless as joking and mystification." *Id.* at 26-27. As such, we would not see the agent's behavior as intentional; we would not be able to "make out what the man meant" by giving such a response. *Id.* at 27.

mimicking of moral argumentation would be intelligible to us: his intelligible purpose would be to remain free to pursue worthwhile goals.

However, I think it is more plausible to conclude that psychopathic individuals have no evaluative standards, not even ones related to the pursuit of excitement and pleasure. There is an important distinction between desiring and valuing;¹²⁹ or rather, a difference between efforts to satisfy desires and efforts to live up to evaluative standards. As discussed, normal human agents do not merely act on their strongest first-order desires and try to determine ways to make their first-order desires compossible.¹³⁰ We have the capacity to reflect on the worth of our desires, possibly concluding that some of our desires do not provide any reason for action at all, precisely because they move us toward action that would violate our evaluative standards. A parent may experience a desire to strike or scream at a toddler, but resist because she knows that there is not good reason to do so.¹³¹

Frankfurt's well-known contrast of the willing and unwilling addicts illustrates the distinction between merely desiring and holding oneself to evaluative standards.¹³² Both agents experience recurrent first-order desires to inject themselves with heroin. The willing addict often refrains, but not because he thinks giving in to the desire is base or wrong or otherwise unworthy of satisfying.¹³³ When he does give in, his decision has nothing to do with a view about what is important. He is not, say, taking the heroin because he thinks it helps him achieve a higher state of consciousness in which he gains insight into the world or becomes more artistic. He is, in Frankfurt's terms, a wanton, because he is indifferent to his experience of his first-order desires.¹³⁴ If he experiences the desire to inject, he attempts to satisfy it unless he has some other first-order desire that is stronger and would be frustrated if he were to take the heroin. The unwilling addict, however, struggles with his desire not simply because he has a conflicting first-order desire not to take heroin, but because he also thinks that it is, say, base or shameful or wasteful to spend his life in a drug-induced state of mind.¹³⁵ He is not indifferent to his experience of his first-order desires, but rather reflects on their desirability in light of what he takes to be important, the standards to which he holds himself.

129. Gary Watson, *Free Agency*, in *FREE WILL* 337, 338 (Gary Watson ed., 2003).

130. Taylor, *supra* note 14, at 282.

131. Watson, *supra* note 129, at 342.

132. Frankfurt, *supra* note 13, at 11-25.

133. *Id.* at 19-20.

134. *Id.* at 11, 19-20.

135. *Id.* at 12-13; *see also* Taylor, *supra* note 14, at 281-85.

Psychopathic individuals, depicted in the psychological literature, resemble Frankfurt's wanton. They seem to desire and, thus, pursue excitement and pleasure, but not have evaluative standards. The key evidence for this conclusion is the psychopath's thorough immunity from feelings of regret, remorse, shame, and guilt.¹³⁶ The empirical accounts of psychopaths emphasize their unfamiliarity with these emotions.¹³⁷ We experience these feelings when we fail to act on or miss the reasons we have to act in certain ways required by the standards to which we hold ourselves. If you care about your friend, you have reasons to be loyal, to be concerned with her interests and to stay in touch.¹³⁸ If you fail to act on these kinds of reasons at appropriate times without excuse or justification, you regret or have remorse for the failure.

These kinds of emotions are not restricted to the violation of moral standards. If you hold yourself to standards regarding good musicianship, you are prone to reactive attitudes that entail negative self-evaluation when you do not live up to those standards.¹³⁹ It is impossible to be completely immune to these reactive attitudes if you are an agent who holds herself to evaluative standards. Well, perhaps a flawless agent who never frustrates her own ends might be unfamiliar with such attitudes; but we do not have to worry about that possibility. As will be discussed further below, the psychopath frustrates his own ends.

One might point out that psychopaths feel and express frustration and anger—sometimes through violence—when they fail to satisfy their desires or when they are caught by the police for a criminal offense. From this fact,

136. See HARE, *supra* note 58, at 44, 53 (describing psychopaths as “emotionless androids” with “proto emotions”).

137. See, e.g., BLAIR ET AL., *supra* note 61, at 7-11; CLECKLEY, *supra* note 88, at 343. In his article on psychopaths and responsibility, Haksar assumes that psychopaths do have values and, specifically, that they might value their criminal acts more than they value their freedom. Haksar, *supra* note 2, at 141. To support his claim, Haksar asks: “If [the psychopath] did really value his liberty, job, etc., so much more than he values the committing of anti-social actions, shouldn't he have shown regret after he throws them away, and show some desire to change things in the future?” *Id.* Here, Haksar agrees that having values implies being prone to self-directed reactive attitudes like regret. However, in defending the possibility that psychopaths may be held morally responsible for their behavior, Haksar ignores the possibility that the psychopath fails to feel regret when throwing away his freedom because the psychopath is *incapable* of feeling regret, in conjunction with being *incapable* of holding himself to any evaluative standards.

138. SCANLON, *supra* note 3, at 88.

139. See WALLACE, *supra* note 2, at 33-40 (discussing that reactive attitudes, such as resentment and indignation, can be moral or non-moral, depending upon the nature of the underlying belief that gives rise to one's particular experience of the attitude).

one might conclude that individuals with psychopathy do value satisfying their desires. However, there is a significant difference between feeling frustration and anger per se, on the one hand, and experiencing reactive emotions, such as remorse and shame, to which we are prone in virtue of holding ourselves to evaluative standards. Frustration does not entail negative self-evaluation or the deeper sense of loss associated with engaging in conduct that violates what one stands for.

The criminologists William McCord and Joan McCord reference this connection between self-directed reactive emotions and holding oneself to standards when distinguishing the psychopathic offender from other criminals: “[The psychopath’s] guiltlessness . . . is the critical distinguishing trait. The normal criminal has an internalized, albeit warped, set of values. If he violates these standards, he feels guilt.”¹⁴⁰ The psychopath, on the other hand, shows no signs of standards or self-evaluation.¹⁴¹

Cleckley also describes in this manner and in more detail one of his subjects with psychopathy, Max:

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 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

140. WILLIAM MCCORD & JOAN MCCORD, *THE PSYCHOPATH: AN ESSAY ON THE CRIMINAL MIND* 51 (1964). In the beginning of their book on the psychopath, Blair and colleagues introduce the reader to two different, adult criminal offenders who are fictionalized, but are “amalgamations of individuals with whom [they] have worked.” BLAIR ET AL., *supra* note 61, at 1. Only one of these individuals presents with a psychopathic personality. Blair and colleagues describe the non-psychopathic offender as subject to guilt (in this story, for cheating on his girlfriend), while the psychopathic offender showed no signs of accepting responsibility for violating any social, legal, or any other kind of rule. *Id.* at 4-6.

141. “A psychopath is not a rebel, who *rejects* more conventional values and emotions in the light of some favoured conception of the good: he is a man who has never come to understand, or to share in, this dimension of human life.” Duff, *supra* note 2, at 192.

repeat the words and say glibly that he understands, and there is no way for him to realize that he does not understand.¹⁴²

Hare provides a similar description, stating that, “[u]nlike most other criminals, psychopaths show no loyalty to groups, codes, or principles, other than to ‘look out for number one.’”¹⁴³ Unsurprisingly, then, the psychopath’s lifestyle is “chronically unstable and aimless[;]”¹⁴⁴ they “tend to live day-to-day and to change their plans frequently[;]”¹⁴⁵ and do not “show much concern about how little they have done with their lives.”¹⁴⁶

B. Signs of Diminished Capacity for Rational Self-Governance

Generally, the psychopath’s incapacity for holding himself to evaluative standards renders much of his behavior unintelligible to us. Researchers convey self-descriptions that psychopathic subjects offered of themselves, and they are irrational, simply baffling. First, Hare reports psychopathic individuals making claims about valuing certain projects or people, or having certain goals, but their behavior in light of such claims is unintelligible. Their behavior demonstrates that they do not really understand their own claims regarding what they care about. To illustrate, a common story involves a psychopath’s insistent claim to care deeply about another person, yet her behavior shows that she does not understand that claim. Hare tells one story—which he characterizes as typical—about one of his subjects whose infant was removed by authorities from her guardianship. Hare describes her as not seeing any tension between her claim that the child benefitted from her love and affection and the fact that the child was found severely malnourished.¹⁴⁷

Another one of Hare’s patients, asked whether he had any character weaknesses, replied, “I don’t have any weaknesses, except maybe I’m too caring.”¹⁴⁸ There would be no reason to conclude that this inmate (convicted of rape, robbery, fraud, and other crimes) was irrational *if* he made this claim knowing that others would not find it credible. But if, as Hare intimates, this

142. CLECKLEY, *supra* note 88, at 40; *see also* HARE, *supra* note 58, at 27-28 (quoting CLECKLEY, *supra*).

143. HARE, *supra* note 58, at 85.

144. *Id.* at 57.

145. *Id.* at 59.

146. *Id.*

147. *Id.* at 63.

148. *Id.* at 38.

inmate believed what he was saying or, at least, did not have a clue that others would see it as incredible, we have evidence of a diminished capacity for rationality. This individual with psychopathy might not be out of touch with *physical* reality, but he makes claims that are crazy due to his unfamiliarity with the social world. “[I]maging the world as the psychopath experiences it is close to impossible.”¹⁴⁹

Hare reports that individuals with psychopathy often express that they have goals, but show that they do not understand what is entailed by having such a goal and how to achieve it:¹⁵⁰

The psychopathic inmate thinking about parole might outline vague plans to become a property tycoon or a lawyer for the poor. One inmate, not particularly literate, managed to copywrite the title of a book he was planning to write about himself and was already counting the fortune his bestseller would bring.¹⁵¹

If individuals regularly make claims about what they will do in the future, yet there is no connection at all between these claims and what they actually do (and it is apparent to everyone but such agents that there is no connection between these expressed plans and subsequent actions), we have reason to see such agents as having a diminished capacity for rational self-governance.

Cleckley, too, observed that individuals with psychopathy do not consistently follow life plans.¹⁵² Part of the explanation for this characteristic also supports viewing these individuals as less than adequately rational: they have a diminished capacity for resisting impulses and the urge to satisfy a present desire in favor of long-term plans, both those professed by the individual and which he should have, given his complete set of desires. As such, they appear to have a diminished capacity for appreciating prudential reasons, especially those associated with their long-term interests.

One of Cleckley’s patients, Arnold, consistently expressed his desire to live freely, not in prison or the hospital ward in which he was regularly placed with psychotic individuals after each of his violations of the law. Cleckley explains that Arnold’s parole was continually granted, yet Arnold would soon violate the terms of parole, frequently within hours of his release

149. *Id.* at 78.

150. *Id.* at 39.

151. *Id.*

152. CLECKLEY, *supra* note 88, at 364 (“The full psychopath shows a striking inability to follow any sort of life plan consistently, whether it be one regarded as good or evil.”).

from hospital grounds.¹⁵³ “Two or three small acts of defrauding, the temporary misappropriation of an automobile (which he would usually abandon after his whim for a ride had been fulfilled), or some other succession of deeds incompatible with parole status always brought him back under strict supervision.”¹⁵⁴ In describing the psychopathic personality in general, Cleckley writes:

He throws away excellent opportunities to [achieve his professed ends] . . . that he has sometimes spent considerable effort toward gaining. It might be said that he cares little about [these ends], but it is difficult indeed to say that he is not extremely fain to get out of the psychiatric hospital where he has been locked up for months with other patients whom he regards as “lunatics” Be it noted again that the psychopath appears as unwilling to remain in a psychiatric hospital and as impatient to regain his freedom as would be the normal man. I have not in these patients ever found reliable evidence that unconsciously they seek and enjoy as punishment such confinement.¹⁵⁵

From his own experience, Hare conveys similar accounts¹⁵⁶ showing that psychopaths have a weakened capacity to consider present desires in light of their other desires and to respond to them in a rational manner.¹⁵⁷

This inability to resist temptation is perhaps one reason why the recidivist rate for psychopaths is startlingly higher than that for non-psychopathic offenders. According to a meta-analysis of existing data, researchers found that “within a year of release, individuals with psychopathy are three times more likely to recidivate, and four times more likely to recidivate violently.”¹⁵⁸

It is not surprising that agents with a very weak capacity for internalizing standards act on unevaluated whims and impulses. Hare writes that persons acquainted with individuals with psychopathy “typically find themselves . . .

153. *Id.* at 60.

154. *Id.* at 58.

155. *Id.* at 345.

156. HARE, *supra* note 58, at 88; *see also* Jeannette Kennet, *Do Psychopaths Really Threaten Moral Rationalism?* 9 PHIL. EXPLORATIONS 69, 76-77 (2006) (citing Hare’s example in discussing the rational defects of individuals with psychopathy).

157. *See* Kennett, *supra* note 156, at 77 (“[T]hey display a remarkable incapacity to keep track of their supposed ends, to consider whether and how their immediate wants give rise to reasons, to order their wants, or to picture the consequences of their actions.”).

158. BLAIR ET AL., *supra* note 61, at 16 (citing meta-analysis published in J.F. Hemphill et al., *Psychopathy and Recidivism: A Review*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 139, 139 (1998)).

asking . . . what happened—jobs are quit, relationships broken off, plans changed, houses ransacked, people hurt, often for what appears little more than a whim.”¹⁵⁹

The fact that much of their behavior is based on whim leads to another observation that signifies irrationality: much of their conduct appears unintelligible to us, given that it is behavior that requires good reason.¹⁶⁰ Let's return to Cleckley's account of twenty-year-old Roberta. She left her parents' house one day, explaining to Cleckley that she intended to visit a boyfriend, a soldier stationed in another state. She claimed that she thought about marrying him, but according to Cleckley it appeared that “she was moved by little more than what might make a person stroll off into the yard to see if the magnolia tree had bloomed.”¹⁶¹ She eventually got off her bus at a place in which she knew no one, where she had no purpose to visit. When she reached the soldier by phone, he told her not to come. Though she “thought” about marrying him, she was not upset by his rejection.¹⁶² Roberta decided to travel to another city, having “no distinct purpose in mind.”¹⁶³ This episode was one on which Cleckley based his conclusion that it is difficult to understand what Roberta's reasons for actions are. If she had suffered from hallucinations (e.g., heard God's voice telling her what to do), then her behavior “would, in a very important sense, be more rational and appropriate.”¹⁶⁴

VI. REMARKS ON PSYCHOPATHY AND CRIMINAL RESPONSIBILITY

The principal aim of this Article has been to address a debate within the moral responsibility literature regarding the characteristics of agents whom we may fairly hold morally responsible, a debate that primarily implicates

159. HARE, *supra* note 58, at 58.

160. See Duff, *supra* note 2, at 193 (“[T]he absence of recognisably rational purposes and values makes it difficult sometimes even to say that he *acts*, rather than that events and acts happen to and through him.”).

161. CLECKLEY, *supra* note 88, at 51.

162. *Id.* at 52

163. *Id.*

164. *Id.* at 53. For another example, see Cleckley's report concerning Joe. *Id.* at 146-59. Joe randomly chose a train destination to travel to even though he expressed excitement about accompanying his family on a vacation. On his journey, he found himself joining an evangelist's mission, working to urge people to repent for their sins. He had no serious belief in the religion, but, without explicating the reason, reported, “I just sold myself somehow on the idea of doing it.” *Id.* at 155 (internal quotation marks omitted). Eventually, he returned home, but his erratic behavior and idle drifting continued. *Id.* at 155-56.

the responsibility status of individuals with psychopathy. Some compatibilist theorists argue that the capacity for rational self-governance or practical reasoning qualifies an agent to be held morally responsible, though other compatibilists additionally require for moral responsibility a special capacity for grasping distinctly moral reasons. I have attempted to deflate this debate as far as possible by showing that the prime candidate for the area of disagreement - the psychopath - is not a fully responsible agent on either account of moral responsibility.

I have yet to address whether the criminal law should treat the psychopath as criminally responsible, despite the conclusion that he is less than fully morally blameworthy for wrongdoing. This issue of psychopathy and criminal responsibility requires separate extensive treatment. In this section, though, I will briefly discuss the relationship between current legal standards of insanity to psychopathy, and then sketch some relevant considerations about whether the criminal law should treat individuals with psychopathy as responsible or not.

A. Psychopathy and Current Tests for Legal Insanity

Even if it is true that psychopaths have a diminished capacity for rational self-governance or practical reasoning, psychopathy alone does not appear to represent the kind of mental defect that normally disqualifies an individual from being held *criminally* responsible. To see why, first note that insanity tests narrowly focus on a subset of the necessary criteria for responsibility-for-action, regarding specifics about a defendant's understanding of the particular act in question. Insanity tests do *not* require a more general assessment of a defendant's reasoning capacities. Consider the M'Naghten test for insanity:

a person is insane if, at the time of her act, . . . she was laboring under such a defect of reason . . . that she (1) did not know the nature and quality of the act that she was doing; or (2) if she did know it, she did not know that what she was doing was wrong, i.e.[.] the accused . . . did not know the difference between right and wrong.¹⁶⁵

165. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 375 (4th ed. 2006) (describing the test based on the standard from *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.)).

Neither this test nor the ALI's related version in the Model Penal Code ("MPC") captures all the relevant considerations for determining whether or to what extent an agent should be held responsible for her actions. A ten-year old may perfectly understand the nature of her acts and the difference between right and wrong, yet, because of her immature rational capacities, we do not think she should be held responsible for her acts to the same extent that we hold normal functioning adults.

Let's now return to psychopathy. Arguably, an individual with psychopathy is sane under the first prong of the M'Naghten test (unless he suffers from some other condition that precludes knowing the nature of one's act). Psychopaths are in touch with physical reality: they do not suffer from psychosis, as do persons with schizophrenia.¹⁶⁶ And they know the general nature of what they are doing. Indeed, they can have insight into other people sufficient to con and manipulate them successfully.¹⁶⁷

On the other hand, one could argue that they cannot know the true nature of their criminal conduct because their insight into the emotional experience of other people is so feeble that they do not understand the real harmful consequences of their actions. The second prong of the M'Naghten test would be relevant here, as well. The psychopath can know that the law punishes and society deems wrong certain kinds of actions, and in that sense he "know[s] the difference between right and wrong." But one could argue that "formal cognitive knowledge" of right and wrong is insufficient for criminal responsibility;¹⁶⁸ one must also be able to "internalize the enormity of [his] criminal act" and appreciate emotionally its *moral* wrongfulness.¹⁶⁹

The case for excusing the psychopath along this rationale is stronger under law that follows the Model Penal Code ("MPC"), or at least one version of the MPC test. The MPC standard does not require knowledge of the wrongful nature of one's act for responsibility, but rather excuses an offender who lacks substantial capacity to appreciate the criminality or wrongfulness of his conduct (depending upon whether the adopting state legislature chooses the word "criminality" or "wrongfulness").¹⁷⁰ If a law requires substantial capacity to appreciate moral wrongfulness, the

166. CLECKLEY, *supra* note 88, at 339.

167. HARE, *supra* note 58, 46-51.

168. DRESSLER, *supra* note 165, at 375 (drawing a distinction between "formal cognitive knowledge" of right and wrong and "affective knowledge").

169. Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 324 (2003); see also DRESSLER, *supra* note 165, at 375.

170. MODEL PENAL CODE § 4.01(1) explanatory note (1985).

psychopath has a strong argument for excuse.¹⁷¹ The MPC does include an exception, stating that the required “mental disease or defect” underlying an offender’s insanity plea cannot be satisfied by “an abnormality manifested only by repeated criminal or otherwise anti-social conduct.”¹⁷² However, as described earlier, psychopathy involves more than repetitive antisocial behavior.

Regardless of how we interpret these cognitive tests for insanity, ultimately the issue should be whether the reasons to hold the psychopath criminally responsible are stronger than the reasons to excuse, or vice versa.¹⁷³ Do we have good reason to want our criminal responsibility standards to excuse the psychopath, either through a particular interpretation of insanity standards or via a separate excuse analogous to laws that exempt young children from criminal liability ?

171. Christopher Slobogin argues that the psychopath is not insane under the M’Naghten test, but that we would have to excuse them under a straightforward application of the “wrongfulness” version of the MPC test. Slobogin, *supra* note 169, at 323-24.

172. MODEL PENAL CODE § 4.01(2) (1985).

173. The MPC test also includes a volitional prong - based on what has become known as the “irresistible impulse test” - modeled on laws that some states adopted in response to criticism of the M’Naghten test’s sole focus on cognitive functioning. Under irresistible impulse tests, the psychopathic offender appears criminally responsible, despite his weakened capacity to resist urges in light of his long-term interests. The irresistible impulse test has no standard formulation, but generally, it deems a person insane if she lacked volitional control over her actions (perhaps due to an uncontrollable impulse or urge). DRESSLER, *supra* note 165, at 378. Psychopaths do have volitional control over their conduct. HARE, *supra* note 58, at 60. Their wills are effective: they act on their desires. Though they are very impulsive and react overly aggressively to perceived insults, “when they ‘blow their stack’ it is *as if* they are having a temper tantrum; they know exactly what they are doing. Their aggressive displays are ‘cold’; they lack the intense emotional arousal experienced by others when they lose their temper.” *Id.* (emphasis added). Commenting on their own and other empirical research, Blair and colleagues report that psychopathic offenders experience weaker emotional responses, compared to non-psychopathic offenders, to perceived threats. BLAIR ET AL., *supra* note 61, at 49-50. The empirical evidence does not support the conclusion that psychopaths lack control over what they do.

On a separate note, there is reason to doubt that the “irresistible impulse” test, or any other volitional test, is necessary to supplement a cognitive test and should be part of the law. “[V]irtually no one with a mental disorder has a volitional problem because people with disorders are fully able to execute the intentions that their disordered thoughts, perceptions, and desires may motivate.” Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1094 (2007) (citing HERBERT FINGARETTE & ANNE FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 44-65 (1979)). For an argument that a cognitive test can better deal with any plausible excuse made under a volitional test, see Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1054-63 (2002).

B. Should the Criminal Law Excuse the Psychopath?

Before exploring some relevant considerations, first note the limitations of the arguments I presented concerning the responsibility-status of psychopaths. Even if their rational capacities are diminished (to the extent that they truly lack the capacity to grasp moral reasons), no argument presented indicates the extent to which one must have the disorder in order to be considered morally non-responsible. Remember that psychopathy is a continuum concept and its diagnosis is not based on considerations relevant to law. Mental health experts diagnose an individual with psychopathy when he scores thirty or above on the *Psychopathy Checklist-Revised*.¹⁷⁴ The arguments I have offered do not indicate where on the psychopathy continuum an individual's rational or moral capacities are too diminished to be fairly held morally or criminally responsible for wrongdoing. In fact, my arguments do not show that any individual diagnosed with psychopathy is *not at all* morally responsible for his conduct. Whether a psychopath's rational and moral capacities are sufficient for criminal responsibility is a separate question. In addition, my arguments regarding the psychopath's diminished capacity for rational self-governance are based on generalizations and individual vignettes from the psychological literature. More research would be required to assist the construction of standards to guide a legal inquiry into whether a particular defendant's psychopathic condition represents an excusing condition. Presumably, the first practical concern with the idea of excusing psychopaths would be the serious difficulty the system would face in trying to distinguish who should be excused among those diagnosed with psychopathy. With these caveats, let us turn to whether we have more reason to treat psychopaths as criminally responsible instead of excusing, even on the assumption that some of them do not have sufficient rational capacities to be considered morally responsible for their conduct.

A retributivist, of course, views moral desert as a necessary condition (as well as the justifying reason) for criminal punishment;¹⁷⁵ and a mixed theorist could also endorse retributive desert as a necessary condition, even if she views consequentialism as justifying the institution of punishment,

174. BLAIR ET AL., *supra* note 61, at 7.

175. For a most helpful discussion of the retributivist's justification for criminal punishment, see Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179-85 (Ferdinand Schoeman, ed., 1987); MICHAEL S. MOORE, PLACING BLAME 104-10 (1997).

itself.¹⁷⁶ Both these theorists would reject a purely consequentialist analysis of whether we should afford a legal excuse to the non-responsible. But non-consequentialists need not believe at all in retributive desert to reach the same conclusion.¹⁷⁷ For example, one might take the justifying aim of the criminal law to be deterrence, yet argue that fairness (as opposed to moral desert) limits the reach of the criminal law to those who have the rational capacities required for a fair opportunity to avoid violating the criminal law.¹⁷⁸ Under any of these approaches to punishment, each individual has a right not to be punished if she was not a responsible agent at the time of her crime.

Legally excusing individuals with psychopathy, though, carries troubling implications. Some practical considerations represent reasons why it is not time *now* to clarify the law to excuse individuals with psychopathy, and other practical considerations likely will continue to speak against excusing them.

A first set of considerations regard whether better consequences would result from punishing psychopaths or, in deeming at least some set of them non-responsible, rendering them eligible for involuntary civil commitment upon a showing of dangerousness. Civil commitment would seem to require special segregated units as they would pose too great a danger to individuals confined with different underlying disorders and diseases. Individuals with psychopathy may present a danger to other inmates in prison, but they could pose a greater threat to exploit the more vulnerable individuals civilly confined with serious mental illness. Moreover, at present, no effective treatment exists for psychopathy. Actually, not only is there no treatment, but mental health treatment seems to *increase* recidivism rates among psychopaths exhibiting the most severe emotional dysfunction.¹⁷⁹ Similarly, individuals who satisfy only the antisocial conduct aspect of psychopathy

176. See, e.g., Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 16 (1997) (assuming that “desert based on moral fault is at least a necessary pre-condition for just punishment”).

177. See, e.g., T.M. Scanlon, *Punishment and the Rule of Law*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 257-71 (Harold Hongju Koh & Ronald Slye, eds., 1999), reprinted in T.M. SCANLON, *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 219-33 (2003) (presenting fairness as a moral limit on justified punishment without invoking the idea of retributive desert).

178. See *id.* at 225-30.

179. In summarizing one international study, Blair and colleagues report that individuals with highest scores on the emotional dysfunction scale “reoffended at higher rates if they had been treated: 86 percent as opposed to 59 percent!” BLAIR ET AL., *supra* note 61, at 16 (citing Robert D. Hare et al., *Psychopathy and the Predictive Validity of the P.C.L.-R: An International Perspective*, 18 BEHAV. SCI. & L. 623, 637 (2000)).

reoffend at lower rates after participating in educational and vocational training programs; however, psychopathic individuals with the most severe emotional impairment were reconvicted at *higher* rates after participating in such programs than similarly profiled individuals who did not participate.¹⁸⁰

On the other hand, excusing psychopaths, rendering them eligible for indefinite civil commitment, may have positive benefits for preventing crime, especially when they are young and their antisocial conduct is at its height.¹⁸¹ The rules governing their confinement could possibly accommodate the data on their recidivism rates, and also our knowledge about their decreasing anti-social behavior over time. The emotional dysfunction associated with psychopathy does not seem to dissipate, but psychopaths tend to “age out” of the antisocial-conduct aspect of the disorder.¹⁸² Nevertheless, though, there is a danger of over-diagnosis of psychopathy if that diagnosis renders some offenders eligible for indeterminate periods of civil commitment.

Moreover, public attitudes about responsibility and punishment represent a worrisome concern if we were to excuse individuals with psychopathy. At present, no reason exists to think legislators would clarify insanity statutes to excuse psychopaths. But if judges were to read current insanity statutes as authorizing an excuse for psychopathic offenders, then that could lead to renewed public antagonism or outrage towards the insanity defense, itself.¹⁸³ The unavailability of the insanity excuse represents injustice, and we must

180. *Id.*

181. If the purpose of detaining persons with psychopathy who violate the law is to prevent future crime, then there may be great benefit to using the civil commitment system rather than the criminal justice system, which supposedly targets retributive desert. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). Paul Robinson argues that one reason why it is perverse to invoke the guise of retributive justice to cloak measures that really aim to prevent future danger is that such measures do not do a good job of preventing danger. For example, “three strikes” laws really aim to prevent danger, although they are implemented within the criminal justice system; but these laws often ensnare offenders only after “the natural forces of aging . . . rein” in their antisocial conduct. *Id.* at 1451.

182. BLAIR ET AL., *supra* note 61, at 23.

183. The well-known insanity acquittal of John Hinckley, who shot President Reagan, spurred a “state legislative backlash against the insanity defense in general and control [or volitional] tests in particular.” Morse & Hoffman, *supra* note 173, at 1092. Many states eliminated volitional tests from their insanity standards, and five state legislatures abolished their insanity defenses entirely. *Id.*

consider whether excusing psychopaths would undermine support for the defense.¹⁸⁴

We must also consider the financial and other costs to the criminal justice system in excusing individuals with psychopathy. Of course, there are costs associated with making insanity an available defense for the few defendants who arguably meet present standards of insanity. However, the number of offenders who could possibly raise (although not necessarily with success) a psychopathy-excuse defense is very high. Regarding prison inmates in the United States, "estimates suggest that between 50 and 80 percent . . . reach criteria for [Antisocial Personality Disorder]."¹⁸⁵ Further studies conclude that fifteen to twenty-five percent of prison inmates meet the criteria for psychopathy under Hare's *Psychopathy Checklist-Revised*.¹⁸⁶ The fact that so many criminal defendants would be able to litigate their responsibility-status could carry more than financial cost: "The law wants to reinforce societal assumptions that most of us are morally accountable actors but [a psychopathy-excuse] would permit most criminal defendants to challenge that expectation of accountability."¹⁸⁷ Perhaps a psychopathy-excuse should be limited to serious crimes, but if so, that would represent another issue requiring consideration if the law were to provide such a defense.

The social costs of excusing individuals with psychopathy may strongly speak in favor of maintaining current practices of exposing them to punishment. Again, though, consequentialist considerations would arguably be irrelevant if it is unjust to treat psychopaths as fully responsible agents. They would have a right not to be punished, or so the argument goes.

However, even if we accept a non-consequentialist limitation to whom we may punish, the aforementioned pragmatic considerations may nevertheless prevail. One plausible view, related to the conclusion that the psychopath is not morally responsible for his conduct, is that the psychopath does not possess the same array of rights that persons with a sense of justice must be afforded. In a well-known article, Jeffrie Murphy argues that

184. Some commentators do not believe the insanity defense is required by justice. *See id.* at 1115-32 (discussing arguments against the insanity defense and presenting a persuasive response).

185. BLAIR ET AL., *supra* note 61, at 19 (citing S.D. Hart & R.D. Hare, *Psychopathy and Antisocial Personality Disorder*, 9 CURRENT OP. IN PSYCHIATRY 129 (1996)).

186. Robert D. Hare, *Psychopathy: A Clinical Construct Whose Time Has Come*, 23 CRIM. J. & BEHAV. 25, 26 (1996) (cited in BLAIR ET AL., *supra* note 61, at 19).

187. Arenella, *supra* note 121, at 1599 (speaking through a judge engaged in colloquy with a hypothetical psychopath).

psychopaths do not have rights at all because they lack the human capacity—and, apparently, the potential to have that same human capacity—that is necessary for the existence of institutionally-recognized rights; namely, the capacity to defer gratification of one's desires to treat others respectfully, on grounds of fair reciprocity.¹⁸⁸ An individual who lacks all capacity to respect the rights of others “is in no position to claim rights for himself.”¹⁸⁹ That conclusion, if correct, does not imply that we may treat psychopaths in any manner desired; we can still act cruelly, wrongly toward them. But that conclusion implies that we would not violate anyone's rights if, for pragmatic reasons, we choose to continue treating psychopaths as criminally responsible for violating the law.

In addition, individuals with psychopathy, themselves, may not, from their own perspective, have good reason to object to being treated as criminally responsible. As noted, being excused would not mean going free; it could mean indefinite civil confinement, possibly worse than being sent to prison for a defined period. Furthermore, though criminal punishment may carry a communal expression of moral blame, differentiating it from civil confinement, moral blame does not affect the interests of the psychopath. The psychopath does not take responsibility for his actions and does not care (except perhaps for instrumental reasons) whether any rift exists between him and others who find him blameworthy. The rift exists: he neither has meaningful interpersonal relationships nor is capable of participating in one, and he does not understand our moral experience; as such, he does not grasp the interpersonal significance of being morally blamed by others. Civil commitment and prison represent the same harm to him: confinement.

On the whole, then, it may be that both individuals *with and without* psychopathy have more reason to endorse a system of legal rules under which the former are held criminally responsible for their criminal conduct. Here I have merely tried to sketch some relevant considerations.

VII. CONCLUSION

This Article has addressed a debate within the moral responsibility literature regarding the characteristics of agents whom we may fairly hold morally responsible, a debate that primarily implicates the responsibility status of individuals with psychopathy. Some responsibility theorists argue that morally accountable agents have the capacity for rational self-

188. Murphy, *supra* note 2, at 290-91.

189. *Id.* at 291.

governance or, rather, the capacity for practical reasoning; other theorists argue that, in addition to that capacity, *morally* responsible agents must have the distinct capacity to grasp and be guided by *moral* reasons. The psychopath seemingly falls within the area of disagreement between these camps of responsibility theorists because he is normally described as an agent capable of reasoning practically, but without the capacity to engage with moral reasons. Essentially, I have questioned this description of the psychopath. I have argued that there is not significant disagreement between these two camps of theorists because the psychopath's incapacity for moral reasoning is symptomatic of a more general, weakened capacity for rational self-governance.

On either account of the criteria for moral responsibility, the psychopath is not morally responsible or, at least, not *fully* morally responsible for his wrongdoing and criminal conduct. Nevertheless, there may be stronger reasons, from the perspective of both persons with and without psychopathy, to maintain the status quo in which individuals with psychopathy are held criminally responsible for their criminal wrongdoing. The issue of their criminal responsibility requires further analysis, which will be more informed in years to come as we learn more about the disorder.