

Dangerous Psychopaths: Criminally Responsible but *Not* Morally Responsible, Subject to Criminal Punishment *And* to Preventive Detention

KEN LEVY*

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* Associate Professor, LSU Law Center. I would like to thank Ray Diamond, Donald Dripps, Denny LeBoeuf, Captain Todd Morris (of the East Baton Rouge Sheriff's Office), Ed Richards, Walter Sinnott-Armstrong, Alec Walen, Gideon Yaffe, participants in the LSU Philosophy Colloquium, and participants in the University of San Diego School of Law's Conference on the Morality of Preventive Restriction of Liberty for their very helpful feedback. I have also learned much from discussions with, and papers written by, students in my Advanced Criminal Law seminars during 2010 and 2011. Finally, I am very grateful to the editors at the *San Diego Law Review*, especially Hana Hsiao and R.J. Pinto, for their excellent research assistance, revisions, and suggestions.

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I. INTRODUCTION

There is a long-standing debate in the religious and ethics literature about whether or not people can be evil.¹ The answer, at first, seems obvious. Of course they can—all the people who commit violent crimes! The skeptic’s response to this point, however, is that violent criminals are not evil. Instead, they split into three nonevil groups: bad-act performers who are (1) “mad”—sick, insane, mentally ill—not “bad”; (2) victimized by adverse environmental forces, usually severe neglect or abuse (physical or sexual); or (3) convinced that their bad act is *not* bad but inherently or instrumentally good.² The skeptic’s response, then, denies the existence or possibility of a fourth category: (4) bad-act performers who are *not* mad, abused, or ideologically subjugated. Such people perform bad acts *not* because they do not know any better or have not been given proper guidance, instruction, or incentives. Rather, they perform bad acts knowing full well that these acts are bad simply because they enjoy performing them.

So-called psychopaths—people who cannot feel compassion and so are fully indifferent to the harm that they cause others—would seem to be the paradigmatic example of evil. Still, those who deny the possibility of evil agency would say that psychopaths are victims—victims of a neurological disorder, of environmental forces, or of misguided beliefs.

1. *Compare* K.M. ROGERS, STAINED GLASS JESUS 72 (2010) (“The world is troubled and people can be evil.”), *with* GLENN KOHRMAN, REFLECTIONS OF A CATHOLIC PRIEST 104 (2008) (“People cannot be evil, no one can be evil.”).

2. I include this third category only because some believe that a person is evil only if that person *knows* that her bad acts are bad, in which case bad-act performers who fall into the third group would *not* be evil. While I myself believe that people who fall into this third category—for example, terrorists who murder in the name of some supposedly higher good—are evil, there does seem to be some intuitive merit to the notion that they are still less evil than *knowing* bad-act performers. As Ron Rosenbaum explains:

By characterizing Hitler’s apparently implacable hatred of Jews as merely an actor’s trick, by thus denying him the ‘virtue’ of passionate sincerity . . . [Emile] Fackenheim deflects, even derails one entire project of Hitler explanation . . . by contending that the passion was *not* white hot but pure, cold, calculated invention.

And, thus, all the more evil. Evil for evil’s sake, evil inexplicable by pathology or ideology and all the more inexcusable. “Radical evil”: a term Fackenheim uses to define a phenomenon that goes beyond the quantity of the victims, a new *category* of evil.

RON ROSENBAUM, EXPLAINING HITLER: THE SEARCH FOR THE ORIGINS OF HIS EVIL 290–91 (1998).

This debate has now reached deep into criminal law as well. On the one hand, many judges, lawyers, lawmakers, and scholars tend to think of psychopaths as ranging between bad and evil because they frequently commit crimes, lack compassion for their victims, are generally thought to be incurable, and are (therefore) likely to repeat similar or worse crimes. For these reasons, the criminal law often treats psychopathy as an *aggravating* factor, a factor that warrants increased punishment.³ On the other hand, a very strong case can be made that psychopathy is actually a *mitigating*, if not exculpatory, factor.⁴ Empirical studies increasingly confirm the proposition that psychopaths are *themselves* victims of neurological abnormalities that make them *incapable of* empathy, impulse control, and emotional or affective understanding of moral principles and the criminal law.⁵ To date, we have been unable to find a

3. See Stephen D. Hart, *Psychopathy, Culpability, and Commitment*, in MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT AND COMPETENCE 159, 169 (Robert F. Schopp et al. eds., 2009) (“[T]he law’s view of psychopathy is unambiguously negative: It causes chronic functional impairment that is serious enough to be considered a potential aggravating factor for the purposes of some commitment decisions . . .”); Christina Lee, *The Judicial Response to Psychopathic Criminals: Utilitarianism over Retribution*, 31 LAW & PSYCHOL. REV. 125, 133–35 (2007) (arguing that psychopathy should be treated as an aggravating factor rather than a mitigating factor because this approach “better responds to the inability to rehabilitate psychopaths and acknowledges the continual threat [that psychopaths pose] to society”); Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 159 (2009) (“Psychopathy nowhere provides an excuse from liability; its only legal relevance may be as an aggravating factor in sentencing. Nor are there . . . any credible efforts in the political realm in this country to grant excuse or mitigation based on psychopathy.”); O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1339 (2007) (“[T]he aggravating factor of future dangerousness [is] no friend to the capital defendant.”).

4. See Lee, *supra* note 3, at 133 (“[O]ne [c]ould argue that a mental disorder (here psychopathy in particular) effectively decreases the culpability of the criminal Notably, this argument closely parallels the rationale of the insanity defense. This approach . . . plac[es] blame not on the criminal but on the inevitable effects of psychopathy. In other words, the individual should not be judged as fully responsible as his or her actions were controlled by the inherently violent and dangerous traits of psychopathy.” (footnotes omitted)).

5. See ROBERT D. HARE, WITHOUT CONSCIENCE 126–34, 166, 168–69 (1993) (attributing psychopathy to faulty brain organization); DANIEL GOLEMAN, SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS 128–29 (2006) (“When it comes to empathy, psychopaths have none; they have special difficulty recognizing fear or sadness on people’s faces or in their voices. A brain imaging study with a group of criminal psychopaths suggests a deficit in circuitry centering on the amygdala, within a brain module essential for reading this particular range of emotions, and deficits in the prefrontal area that inhibits impulse. . . . [Psychopaths’] neural wiring deadens them to the range of emotions in the spectrum of suffering. . . . [T]hey are literally numb in the face of distress, lacking the very radar for detecting human agony.” (footnotes omitted)); Carla L. Harenski, Robert D. Hare & Kent A. Kiehl, *Neuroimaging, Genetics, and Psychopathy: Implications for the Legal System*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY 125, 139–40 (Luca Malatesti & John McMillan eds., 2010) (“[N]euroimaging studies . . . suggest that psychopathy is

successful treatment for these psychological deficits.⁶ As a result, psychopaths who are not caught and treated at a very early age are

associated with a wide range of neural deficits [N]eurology studies indicate that there exists no single region to which damage leads to the complete manifestation of psychopathy.”); *id.* at 147 (“Neuroimaging studies have identified a network of brain regions, primarily centring in limbic and paralimbic cortex, which show structural and functional deficits in psychopaths. These deficits have been associated with abnormalities in basic cognitive and affective processing These brain regions also show substantial overlap with those that have been implicated in social cognition.”); Kent A. Kiehl, *Without Morals: The Cognitive Neuroscience of Criminal Psychopaths*, in 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT 119, 149 (Walter Sinnott-Armstrong ed., 2008) (concluding from data that “the relevant functional neural architecture implicated in psychopathy is the paralimbic system”); Neil Levy, *Psychopathy, Responsibility, and the Moral/Conventional Distinction*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY, *supra*, at 213, 223 (“There is independent evidence that psychopaths show weaker rACC [rostral anterior cingulate cortex] activation when defecting in a social cooperation game.” (citation omitted) (citing James K. Rilling et al., *A Neural Basis for Social Cooperation*, 35 NEURON 395 (2002))); Luca Malatesti & John McMillan, *Defending PCL-R*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY, *supra*, at 79, 87–89 (suggesting that although there is increasing scientific evidence to suggest that psychopathy is caused by brain damage, “a widely accepted theory of the neural causes of psychopathy is not in sight”).

6. See HARE, *supra* note 5, at 94, 193–94, 195–97, 198–201, 205, 217 (suggesting that, as of 1993, no method had been found for treating psychopaths); *id.* at 174 (“No amount of social conditioning will *by itself* generate a capacity for caring about others or a powerful sense of right and wrong. . . . [P]sychopathic ‘clay’ is much less malleable than is the clay society’s potters usually have to work with.”); Lee, *supra* note 3, at 134 (“Researchers have agreed: ‘Whether or not psychopathy is a disorder, it is an enduring aspect of a person, and . . . cannot be expected to change as a result of either time in prison or treatment.’ The failure of treating psychopaths is further illustrated in that ‘no sound treatment or re-socialization programs have been demonstrated to be effective.’ In fact, treatment often brings about the undesired effect as it can result in significantly higher rates of violent recidivism.” (footnotes omitted) (quoting Grant T. Harris et al., *The Construct of Psychopathy*, in 28 CRIME AND JUSTICE 197, 239 (Michael Tonry ed., 2001); Robert F. Schopp et al., *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator After Hendricks*, 5 PSYCHOL. PUB. POL’Y & L. 120, 140 (1999))); Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 LAW & PHIL. 383, 396 (2008) (“The evidence suggests that [psychopaths], many of whom appear to comprise some of the most serious and intractable criminal offenders, are nearly insusceptible to character change. There is no known effective treatment of psychopathy and psychopaths engage in criminal conduct well past the point at which other offenders tend to desist.”); Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349, 388 (2008) (“[A]t 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.”); Stephen J. Morse, *Psychopathy and the Law: The United States Experience*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY, *supra* note 5, at 41, 53 (“At present, there is no effective

generally determined to be psychopathic for the remainder of their lives.⁷ They are typically destined to lead a life that is emotionally impoverished, lacking in enriching human relationships, and doomed to occupational failure.⁸

So how should we resolve this dilemma? How should we judge psychopaths, both morally and in the criminal justice system? This Article will argue that psychopaths are often not morally responsible for their bad acts simply because they cannot understand, and therefore be guided by, moral reasons. Scholars and lawyers who endorse the same conclusion automatically tend to infer from this premise that psychopaths should not be held *criminally punishable* for their criminal acts.⁹ These scholars and lawyers are making this assumption (that just

treatment for adult psychopaths”); James R. P. Ogloff & Melisa Wood, *The Treatment of Psychopathy: Clinical Nihilism or Steps in the Right Direction?*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY, *supra* note 5, at 155, 157 (“Regardless of the success of offender-rehabilitation programmes, a particular subgroup of offenders—those with psychopathy—have demonstrated a lack of responsiveness to a variety of treatment attempts, and continue to be considered by many to be essentially untreatable.” (citation omitted)); *id.* at 170 (“[W]e still know very little about whether, and how, psychopaths can be successfully and appropriately treated.”).

7. See HARE, *supra* note 5, at 160, 164, 200 (“If intervention is to have any chance of succeeding, it will have to occur early in childhood. . . . [Psychologist Rolf] Loeber notes that there are several well-established pathways to criminality and that it would be illogical and foolish not to do everything in our power to disrupt these pathways as early as possible. The same reasoning applies, with even greater force, to psychopathy. . . . Logically, our best chance of reducing the impact of adult psychopathy on society is to attack the problem early. . . . The situation may [improve] as we learn more about the roots of psychopathy. Further, psychologists have developed intervention programs that are quite successful in changing the attitudes and behaviors of children and adolescents who have a variety of behavioral problems. . . . If used at a very early age, it is possible that some of these programs will be useful in modifying the behavioral patterns of ‘budding psychopaths,’ perhaps by reducing aggression and impulsivity and by teaching them strategies for satisfying their needs in more prosocial ways.” (footnotes omitted)); Lee, *supra* note 3, at 129 (“Early detection provides an optimistic outlook towards treatment. While it is accepted that psychopathy in adults is generally untreatable, researchers remain optimistic that early intervention in these instances may either prevent or lessen the manifestation of psychopathy.” (footnote omitted)); David T. Lykken, *The Case for Parental Licensure*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 122, 129 (Theodore Millon et al. eds., 1998) (“[R]eally talented parents (or, more likely, a truly fortuitous combination of parents, neighborhood, peer group, and subsequent mentors) can sometimes socialize even [budding psychopaths].”).

8. See HARE, *supra* note 5, at 2 (“[A psychopath is] a self-centered, callous, and remorseless person profoundly lacking in empathy and the ability to form warm emotional relationships with others, a person who functions without the restraints of conscience. . . . [W]hat is missing in this picture are the very qualities that allow human beings to live in social harmony.”).

9. See, e.g., Charles Fischette, *Psychopathy and Responsibility*, 90 VA. L. REV. 1423, 1449–69 (2004) (offering arguments for the position that psychopaths are not criminally responsible because they are not morally responsible); Kimberly Kessler

criminal punishment requires moral responsibility) on the basis of one of two deeper assumptions: that either (1) criminal punishment directly requires moral responsibility or (2) criminal punishment requires criminal responsibility, which itself requires moral responsibility. I will argue, however, that the virtually universal assumption that just criminal punishment requires moral responsibility—whether or not through the middle term of criminal responsibility—is false; that although psychopaths are not morally responsible, they are still criminally responsible and criminally punishable.¹⁰

The reason why just criminal punishment does not require moral responsibility is because criminal law is a fail-safe, last-ditch option to use against those who, for whatever reason, are not sufficiently motivated by morality and respect for the law to comply with the law. And one reason for insufficient motivation may just be *inability* to be sufficiently motivated. But even if certain people are unable to be sufficiently motivated by morality and respect for the law, they are still criminally responsible, and therefore criminally punishable, for breaking the law as

Ferzan, Foreword, *Living on the Edge: The Margins of Legal Personhood*, 39 RUTGERS L.J. 237, 245 (2008) (“[P]rofound defects in rationality may leave the psychopath utterly outside the moral community, yielding the result that they should be *exempt* from the criminal law.”); Lippke, *supra* note 6, at 386 (“[M]oral control over their actions . . . is the basis for condemning [recidivists] through punitive confinement.”); *id.* at 389–90 (“Without such moral competence, [the individual] would not properly be subject to retributive punishment, with its distinctive censuring dimension.”).

10. Stephen Morse comes very close to asserting the same proposition when he says:

Now, suppose that the predator lacks the capacity for empathy, guilt, and remorse. . . . If these capacities are lacking, it is plausible to argue that the agent lacks moral rationality and is not responsible, even if the agent is in touch with reality otherwise and knows the moral rules in the narrowest sense. *In criminal law, of course, lack of these capacities is not an excusing condition*, although such a defect surely predisposes an agent to do wrong.

Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1072–73 (2002) (emphasis added) (citation omitted); *see also* Litton, *supra* note 6, at 384, 392 (“I have [argued that] the psychopath [] is not a fully [morally] responsible agent 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. . . . 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. . . . [T]he 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.”).

long as they knew that they were breaking the law and that breaking the law would likely mean getting punished if they were caught.

If I am correct, then contrary to many scholars but consistent with the current law, psychopaths are not in fact insane¹¹ and should therefore continue to be criminally punished for their criminal acts. One drawback of this position is that it will be slightly more difficult for the state to justify preventively detaining psychopaths who have not committed any criminal acts but have signaled in one way or another that they are inclined in this direction. Still, this drawback is hardly a reason to call psychopaths something that they are not—again, insane. Moreover, *slightly more difficult* does not mean too difficult. Even if dangerous psychopaths are not insane, the state still can, and should, preventively detain them. The reason is that the state is allowed to involuntarily commit people who are both mentally ill and dangerous to themselves or others. And although psychopathy is not currently considered to be a mental illness, no less a form of insanity, I will argue that it should be.

II. PSYCHOPATHY DEFINED

In order to understand what psychopathy is, we need to understand how the term is ordinarily understood, how it is defined by the psychological community, and how it differs from Antisocial Personality Disorder (ASPD).

A. A Working Definition of Psychopathy

A psychopath is essentially a person who is unable—lacks the psychological capacity—to feel concern or compassion for others.¹² From this simple definition, three points follow.

11. See HARE, *supra* note 5, at 5 (“*Psychopathic* killers . . . are not mad, according to accepted legal and psychiatric standards.”); *id.* at 143 (“[P]sychopaths *do* meet current legal and psychiatric standards for sanity. They understand the rules of society and the conventional meanings of right and wrong. They are capable of controlling their behavior, and they are aware of the potential consequences of their acts.”); Hart, *supra* note 3, at 166 (“[P]sychopathy is recognized in the law as a mental disorder that can impair cognitive or volitional functions. But is the nature and severity of functional impairment associated with psychopathy sufficient to mitigate culpability? Many different courts have grappled with this question over the years, and most have concluded that the answer is no.” (citations omitted)); John McMillan & Luca Malatesti, *Responsibility and Psychopathy*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY, *supra* note 5, at 185, 186 (“[T]he McNaghten rule for criminal insanity is generally interpreted so as to include psychopaths and those with personality disorders within the scope of those punishable by law, although it may be deemed a factor relevant to a defence of diminished responsibility.”).

12. A psychopath is “a person having a character disorder distinguished by amoral or antisocial behavior *without feelings of remorse.*” RANDOM HOUSE WEBSTER’S

First, contrary to some sensationalist websites and tabloids, a person can engage in violence without being psychopathic;¹³ conversely, a psychopath

COLLEGE DICTIONARY 1052 (2d ed. 1997) (emphasis added). As this definition also suggests, the psychopath's absence of remorse is not merely an accident or a sporadic phenomenon but rather a constant condition—again, a “character disorder.” *Id.*; HARE, *supra* note 5, at 6 (“[There is] a frightful and perplexing theme that runs through the case histories of all psychopaths: a deeply disturbing inability to care about the pain and suffering experienced by others—in short, a complete lack of empathy. . . .”); *id.* at 129 (“[T]he psychopath lacks an important element of experience—in this case, emotional experience—but may have learned the words that others use to describe or mimic experiences that he cannot really understand.”); *id.* at 132 (“It is the *emotionally charged* thoughts, images, and internal dialogue that give the ‘bite’ to conscience, account for its powerful control over behavior, and generate guilt and remorse for transgressions. This is something that psychopaths cannot understand. For them, conscience is little more than an intellectual awareness of rules others make up—empty words. The feelings needed to give clout to these rules are missing.”); JASON MOSS, *THE LAST VICTIM: A TRUE-LIFE JOURNEY INTO THE MIND OF THE SERIAL KILLER 8* (1999) (“I imagined what it would be like to stalk and kill. I put aside all I’d been taught about right and wrong. I tried to pretend I was someone without a conscience. I tried to get to that level of consciousness where one exults in being truly evil.”); Ferzan, *supra* note 9, at 238–39; Harenski et al., *supra* note 5, at 141 (“Psychopaths show deficits in empathy, interpreting facial expressions, and moral cognition and behaviour.” (citation omitted)); Levy, *supra* note 5, at 221 (“I think that the most plausible explanation for the psychopaths’ performance on the moral/conventional task is that they fail to grasp moral norms They are *incapable* of moralizing conventional transgressions, because they do not have the capacity to grasp core moral wrongness at all.”); *id.* at 223 (suggesting that psychopaths “are not in the morality game” and are “morally blind”); Lippke, *supra* note 6, at 402 (“[P]sychopaths [are not] responsive at all to moral considerations. . . . [T]he morally unresponsive . . . may be capable of acknowledging their violent tendencies, but they are presumably incapable of understanding and accepting the moral reasons against the conduct that results from those tendencies.”); Litton, *supra* note 6, at 372–76 (arguing that psychopaths suffer from a “diminished capacity for moral reasoning”); McMillan & Malatesti, *supra* note 11, at 190–91 (suggesting that psychopaths either cannot form moral reasons or can form them but cannot be “moved” or sufficiently motivated by them); Morse, *supra* note 6, at 51 (“Most people can use empathy, conscience, understanding of the reason underlying a criminal law’s prohibition, and prudential reasons to guided behaviour. Psychopaths . . . cannot grasp or be guided by the good reasons not to offend, which could be expressed either as a cognitive or control defect.”); Alix Spiegel, *Can A Test Really Tell Who’s a Psychopath?*, NPR (May 26, 2011), <http://www.npr.org/2011/05/26/136619689/can-a-test-really-tell-whos-a-psychopath> (referring to psychopaths as “emotionally deaf”).

13. See HARE, *supra* note 5, at 22 (“For most people, the confusion and uncertainty surrounding th[e] subject [of psychopathy] begin with the word *psychopathy* itself. Literally it means ‘mental illness’ (from *psyche*, ‘mind’; and *pathos*, ‘disease’), and this is the meaning of the term still found in some dictionaries. The confusion is compounded by the media use of the term as the equivalent of ‘insane’ or ‘crazy’: ‘The police say a “psycho” is on the loose,’ or, ‘The guy who killed her must be a “psycho.”’”); Dave Cullen, *The Depressive and the Psychopath: At Last We Know Why the Columbine Killers Did It*, SLATE (Apr. 20, 2004), <http://www.slate.com/id/2099203/> (“In popular usage, almost any crazy killer is a ‘psychopath.’”).

does not necessarily engage in violence.¹⁴ Instead, this absence of concern or compassion can be exhibited through nonviolent behavior such as theft or sudden abandonment.

Second, a person who lacks concern or compassion on a given occasion is not necessarily a psychopath. Indeed, while most people have the capacity to feel compassion, some, if not many, of these ordinarily compassionate people are also able to “turn off” their compassion in certain situations. Some of the worst kinds of wrongdoers exemplify these dual capacities: mafia hit men, drug lords, school bullies, death squad commanders, corporate executives, and terrorists. Most people who fall into these categories are capable of both great violence and great love and concern for their family and friends.¹⁵ What applies to these

14. See HARE, *supra* note 5, at 5–6 (“[T]he fact is that the majority of psychopaths manage to ply their trade without murdering people. . . . We are far more likely to lose our life savings to an oily-tongued swindler than our lives to a steely-eyed killer.”); *id.* at 45 (“[V]ery few psychopaths commit [torture]. Their callousness typically emerges in less dramatic, though still devastating, ways: parasitically bleeding other people of their possessions, savings, and dignity; aggressively doing and taking what they want; shamefully neglecting the physical and emotional welfare of their families; engaging in an unending series of casual, impersonal, and trivial sexual relationships; and so forth.”); *id.* at 174 (“[A]n individual with a mix of psychopathic personality traits who grows up in a stable family and has access to positive social and educational resources might become a con artist or a white-collar criminal, or perhaps a somewhat shady entrepreneur, politician, or professional. Another individual, with much the same personality traits but from a deprived and disturbed background, might become a drifter, mercenary, or violent criminal.”); Scott O. Lilienfeld & Hal Arkowitz, *What ‘Psychopath’ Means: It Is Not Quite What You May Think*, SCI. AM. MIND (Nov. 28, 2007), <http://www.scientificamerican.com/article.cfm?id=what-psychopath-means> (“[M]ost psychopaths are not violent, and most violent people are not psychopaths.”); Hans Toch, *Psychopathy or Antisocial Personality in Forensic Settings*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR, *supra* note 7, at 144, 151 (“[T]he typical psychopath, as I have seen him, usually does not commit murder or other offenses that promptly lead to major prison sentences.” (quoting HERVEY CLECKLEY, *THE MASK OF SANITY* 262 (5th ed. 1976)) (internal quotation marks omitted)). Still, although most psychopaths are not violent, many of the violent crimes are committed by psychopaths. See HARE, *supra* note 5, at 87 (“Psychopaths are responsible for more than 50 percent of the serious crimes committed.”); *id.* at 88 (“[Psychopaths] commit more than twice as many violent and aggressive acts, both in and out of prison, as do other criminals.”); *id.* at 93 (“Perhaps half of the repeat or serial rapists are psychopaths.”).

15. See HARE, *supra* note 5, at 175 (“[Nonpsychopaths] also learn violent behaviors . . . but because of their greater ability to empathize with others and to inhibit impulses, they do not act out as readily as do psychopaths.”); Litton, *supra* note 6, at 374 (“[I]t is not the case that psychopathic individuals . . . 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. [A psychopath], on the other hand, endorses no moral principles.”); Lykken, *supra* note 7, at 126 (“[T]he people doing [drug] violence are people who have grown up to be

wrongdoers arguably applies to the vast majority of human beings. Although they are normally capable of love and concern for others, they are also capable of deliberately hurting their fellow human beings if they are put into situations that either elevate their power to a level that is without ordinary moral constraints or cause them abnormally high stress, pressure to conform or obey, fear, anger, or exhaustion.¹⁶ Still, despite the inhumanity that such people exhibit toward their victims, none of them is necessarily psychopathic because, *ex hypothesi*, they still can feel deep concern for other people—usually family and friends.¹⁷

Third, the psychopath's inability to care for others may be either genotypical or caused by physical or sexual abuse.¹⁸ Regarding the former, some children seem to be indifferent to others from birth, no matter how decent and normal their upbringing. These are the “classic” psychopaths.¹⁹ Regarding the latter, people who characteristically lack

unsocialized, aggressive, feral, and violent. A few of them are psychopaths, but most are phenocopies of psychopathy—sociopaths.”)

16. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY passim* (1st ed. 1974) (using experimental data to show that a majority of ordinary people are easily intimidated by authority figures into acting contrary to their moral values and society's expectations); PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL*, at vii (2007) (“[P]owerful situational forces . . . that exist in many common behavioral contexts are more likely to distort our usual good nature by pushing us toward engaging in deviant, destructive, or evil behavior when the settings are new and unfamiliar. When embedded in them, our habitual ways of thinking, feeling, and acting no longer function to sustain the moral compass that has guided us reliably in the past. . . . [W]hile most people are good most of the time, they can be readily seduced into engaging in what would normally qualify as ego-alien deeds, as antisocial, as destructive of others.”); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 *GEO. L.J.* 1, 7–8, 170–79 (2004) (arguing that social psychology, or “situationism,” is generally more accurate and explanatorily powerful than personality psychology, or “dispositionism”).

17. See *supra* note 15.

18. See Harenski et al., *supra* note 5, at 142–47 (arguing that although “studies suggest a genetic contribution to psychopathy,” the “aetiological nature of neural deficits in psychopathy remains largely unknown”); Hart, *supra* note 3, at 162 (“The etiology of psychopathy is unknown. Most theoretical models have focused on the potential causal influence of biological factors, as research has failed to identify any childrearing experiences, familial dysfunctions, or other adverse life experiences that are found both frequently and specifically in people with psychopathy compared to people with other mental disorders.”).

19. See HARE, *supra* note 5, at 6 (“It is true that the childhoods of *some* psychopaths were characterized by material and emotional deprivation and physical abuse, but for every adult psychopath from a troubled background there is another whose family life apparently was warm and nurturing Furthermore, most people who had horrible childhoods do not become psychopaths or callous killers.”); *id.* at 84 (“Some criminals can be understood as largely the products of what is known as ‘the cycle of

concern for others as a result of abuse are more correctly referred to as “sociopaths” than “psychopaths.”²⁰ For better or worse, however, the two terms are often used interchangeably,²¹ if only because observers of antisocial behavior generally do not know its ultimate cause.

B. Psychological Community’s Definition

Once again, according to the ordinary understanding, the essential attribute of psychopathy—what makes the psychopath a *psychopath*—is his constitutive lack of concern for others.²² It is not clear, however, whether or not the psychological community agrees that this characteristic is *essential*.

In 1941, Hervey Cleckley published a book, *The Mask of Sanity*, in which he listed sixteen symptoms that he considered to be the defining characteristics of a psychopath.²³ In the early 1990s, Robert D. Hare, Ph.D.,

violence.’ Evidence is emerging to show that victims of early sexual, physical, or emotional abuse frequently become perpetrators of the same as adults.”); *id.* at 170 (“On balance . . . I can find no convincing evidence that psychopathy is the direct result of early social or environmental factors.”); *id.* at 172 (“While some assert that psychopathy is the *result* of attachment difficulties in infancy, I turn the argument around: In some children the very failure to bond is a *symptom* of psychopathy. It is likely that these children lack the capacity to bond readily, and that their lack of attachment is largely the result, not the cause, of psychopathy.”); *see also* HARE, *supra* note 5, at 158–59, 165–66, 170, 172–75, 177–78, 215. Hare does suggest that the particular *expression* of psychopathy—whether it is violent or nonviolent—*does* depend on the psychopath’s upbringing. *See* HARE, *supra* note 5, at 165–66, 173–75, 178.

20. *See id.* at 23–24 (“[S]ome clinicians and researchers—as well as most sociologists and criminologists—who believe that the syndrome is forged entirely by social forces and early experiences prefer the term *sociopath*, whereas those . . . who feel that psychological, biological, and genetic factors also contribute to development of the syndrome generally use the term *psychopath*.”); DAVID T. LYKKEN, *THE ANTISOCIAL PERSONALITIES*, at viii (1995) (“[A]ny persistent offender is likely someone whose innate temperament made him or her unusually difficult to socialize. These are the people I call *psychopaths*. . . . The feral products of indifferent, incompetent or overburdened parents are the people I refer to as *sociopaths*.”); *id.* at 7 (“I use the term *sociopath* to refer to persons whose unsocialized character is due primarily to parental failures rather than to inherent peculiarities of temperament. 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.”); Lykken, *supra* note 7, at 124–25 (describing psychopaths as “individuals whose innate temperaments make them intractable to socialization” and sociopaths as “the larger fraction [of criminals] who have grown up unsocialized primarily because of environmental rather than genetic reasons”). An example of a sociopath, a person whose psychopathic condition was likely caused by severe abuse, is Robert Alton Harris. *See* Miles Corwin, *Icy Killer’s Life Steeped in Violence*, L.A. TIMES, May 16, 1982, at 1.

21. *See* JON RONSON, *THE PSYCHOPATH TEST: A JOURNEY THROUGH THE MADNESS INDUSTRY* 112–13 (2011) (“Psychologists and psychiatrists around the world tend to use the terms [*psychopath* and *sociopath*] interchangeably.”).

22. *See supra* note 12.

23. CLECKLEY, *supra* note 14, at 337–38.

revised the list and gave it the name “Psychopathy Checklist-Revised” or “PCL-R.”²⁴ The symptoms listed in the PCL-R include not only specific kinds of antisocial behavior but also several other personality traits as well. Here is the complete list²⁵:

- glib and superficial charm
- grandiose self-worth
- need for stimulation or proneness to boredom
- pathological lying
- conning and manipulateness
- lack of remorse or guilt
- shallow affect
- callousness and lack of empathy
- parasitic lifestyle
- poor behavioral controls
- promiscuous sexual behavior
- early behavior problems
- lack of realistic, long-term goals
- impulsivity
- irresponsibility
- failure to accept responsibility for own actions
- many short-term marital relationships
- juvenile delinquency
- revocation of condition release
- criminal versatility²⁶

24. See HARE, *supra* note 5, at 32–70 (explaining how the PCL-R originated and describing several of the more central items in the checklist).

25. See *id.* at 34–56; RONSON, *supra* note 21, at 97–98. Hare also developed a list of symptoms for diagnosing twelve- to eighteen-year-old juveniles with psychopathy. This list is called the PCL-YV, where YV stands for “Youth Version.” The list is similar to the PCL-R except for some minor differences in labels and in method of scoring. See THE CAL. SCH. OF PROF’L PSYCHOLOGY, HANDBOOK OF JUVENILE FORENSIC PSYCHOLOGY 302 (Neil G. Ribner ed., 2002). For an alternative, overlapping list of psychopathic traits, see Hart, *supra* note 3, at 160.

26. Hare categorizes seven of these symptoms under the heading “Factor1: Personality ‘Aggressive narcissism’”: glibness and superficial charm, grandiose sense of self-worth, pathological lying, conning/manipulative, lack of remorse or guilt, shallow affect, callous/lack of empathy, and failure to accept personal responsibility. Hare categorizes nine of the symptoms under the heading “Factor2: Case history ‘Socially deviant lifestyle’”: need for stimulation/proneness to boredom, parasitic lifestyle, poor behavioral control, lack of realistic long-term goals, impulsivity, irresponsibility, juvenile delinquency, early behavior problems, and revocation of conditional release.

This list raises at least two important questions. First, what if a person satisfies only some or most but not all of these criteria? Is that person still considered a psychopath? Second, what if a person satisfies some or all of these criteria to a small degree? Again, is that person still considered a psychopath? Hare's response to both questions is that psychopathy is a continuum condition, a condition that admits of degrees.²⁷ Instead of suggesting that certain people either are psychopaths or are not psychopaths, Hare suggests that the extent to which different psychopaths exhibit any of the twenty symptoms above will vary. So, for the purposes of diagnosis, psychiatrists using the PCL-R rate subjects on a scale of 0–2 within each category. Zero represents no exhibition, 1 some exhibition, and 2 full exhibition of a given symptom. Subjects who receive a score of 30 or above are classified as psychopathic; subjects who receive a score of 29 or below are classified as nonpsychopathic. Within the psychopathic class—within the 30- to 40-point range—the higher the score, the more psychopathic that subject is considered to be. So a subject who receives a 38 is considered to be more psychopathic than a subject who receives a 33.²⁸

Given this approach, however, it is not clear whether or not lack of concern for others—an absence that splits into two attributes above, lack of remorse or guilt and callousness/lack of empathy—is essential to psychopathy. A person might receive 0 in both of these categories and still receive a total score of 30 or above simply by receiving enough 1s and 2s in the eighteen other categories. Yet it is difficult to see how such a person would qualify as a psychopath because, again, according to the ordinary understanding, what seems *essential* to psychopathy is an inability to feel remorse and empathy. If a person were to score 0 in the remorse and empathy categories but still highly enough in the other

Finally, Hare suggests that three factors are not correlated with either Factor1 or Factor2: promiscuous sexual behavior, many short-term marital relationships, and criminal versatility. See ROBERT D. HARE, *THE HARE PSYCHOPATHY CHECKLIST-REVISED: PCL-R* (2d ed. 2003); see also Lee, *supra* note 3, at 127 (“[T]he [psychopathy] test is comprised of two factors: ‘Factor 1 captures the affective/interpersonal dimension of psychopathy, measuring things like “egocentricity, manipulateness, callousness, and a lack of remorse,” while Factor 2 captures an unstable or antisocial lifestyle component typified by behavior like juvenile delinquency, a parasitic lifestyle, proneness to boredom, impulsivity, and irresponsibility.’ Simplified, the first factor measures narcissism and egocentrism, while the second factor correlates with substance abuse and criminal behavior.” (footnote omitted)).

27. See also Ferzan, *supra* note 9, at 239 (referring to psychopathy as “an admittedly degreed category”); Harenski et al., *supra* note 5, at 145 (suggesting that psychopathy is a “dimensional” disorder rather than a “categorical” disorder).

28. The cutoff in Europe is 25 rather than 30. See Malatesti & McMillan, *supra* note 5, at 80 n.2.

categories to receive a 30 or above, the person would qualify only technically, not intuitively or conventionally, as a psychopath.

Even the “father” of the PCL-R, Robert Hare, seems to have conflicting commitments here. On the one hand, as far as I am aware, Hare never says that a person who receives a 0 in three categories—lack of remorse or guilt, lack of empathy, and shallow affect—and still receives a total score of 30 or above on the PCL-R is *not* a psychopath. On the other hand, Hare states repeatedly that a constitutive absence of conscience is the essential attribute of a psychopath, a point that implies that receiving a 0 in the three categories just mentioned *would* automatically disqualify a person from being a psychopath.²⁹

C. Possible Problems with the PCL-R

The PCL-R is generally considered to be a reliable tool for diagnosing psychopaths.³⁰ In recent years, however, some lawyers and scholars

29. See HARE, *supra* note 5, at 1 (“[Psychopaths’] hallmark is a stunning lack of conscience”); *id.* at 40 (“Psychopaths show a stunning lack of concern for the devastating effects their actions have on others.”); *id.* at 44 (“[Psychopaths] seem unable to ‘get into the skin’ or to ‘walk in the shoes’ of others, except in a purely intellectual sense. The feelings of other people are of no concern to psychopaths.”); *id.* at 89 (“[Psychopaths’] violence is callous and instrumental . . . and the psychopath’s reactions to [another person’s suffering] are much more likely to be indifference, a sense of power, pleasure, or smug satisfaction than regret at the damage done.”).

30. See *id.* at 181 (“Not only does [the Psychopathy Checklist] provide clinicians and decision makers with a reliable and valid diagnostic procedure, it provides others—including members of the criminal justice system—with a detailed description of precisely what goes into a diagnosis of psychopathy.”); *id.* at 183–84 (“Accurate diagnoses that also have predictive validity can be extremely useful to the criminal justice system. The success of the *Psychopathy Checklist* in predicting recidivism and violence attests to this. . . . [A]ccurate assessments can be very useful in the classification of offenders The review assists [prison] staff in the difficult and nerve-racking task of trying to strike a reasonable balance between the need to reduce violence and the needs and rights of each patient to receive appropriate treatment.”); *id.* at 189–90 (“[T]here is ample evidence that a careful diagnosis of psychopathy . . . greatly reduces the risks associated with decisions in the criminal justice system. Properly used, it can help to differentiate those offenders who pose little risk to society from those who are at high risk for recidivism or violence.”); Hart, *supra* note 3, at 171 (“Psychological tests with established reliability and validity have been developed to provide a comprehensive assessment of psychopathic symptomatology. The most widely used tests for assessing psychopathy in the context of civil long-term commitment evaluations are the *PCL-R* and *PCL:SV*.”); Lee, *supra* note 3, at 135 (“[S]cientific data indicates that public safety can be better protected by basing sentencing decisions ‘on more comprehensive information about offenders, including measures of psychopathy.’” (quoting Harris et al., *supra* note 6, at 238)); Litton, *supra* note 6, at 371 (“[U]se of the PCL-R instrument produces strong inter-rater reliability.”).

have criticized the checklist. These critics have offered at least six different objections.³¹

The first objection is that most diagnoses based on the PCL-R are unreliable because they vary too much from one psychiatrist to another. Hare or a supporter of Hare's approach to psychopathy might respond that even if there is variation *in these cases*, we can still rely on psychopathy scores in all of the *other* situations, the situations in which one psychiatrist's psychopathy score *is* independently confirmed by at least one other psychiatrist.³² But this point does not help us determine

31. See generally David DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court: A Case Law Survey of U.S. Courts (1991–2004)*, 12 PSYCHOL. PUB. POL'Y & L. 214, 215, 219–21 (2006); John F. Edens, Melissa S. Magyar & Jennifer M. Cox, *Taking Psychopathy Measures "Out of the Lab" and into the Legal System: Some Practical Concerns*, in HANDBOOK ON PSYCHOPATHY AND LAW (Kent A. Kiehl & Walter Sinnott-Armstrong eds., forthcoming 2012); John F. Edens, Marcus T. Boccaccini & Darryl W. Johnson, *Inter-Rater Reliability of the PCL-R Total and Factor Scores Among Psychopathic Sex Offenders: Are Personality Features More Prone to Disagreement than Behavioral Features?*, 28 BEHAV. SCI. & L. 106, 106–09, 116–18 (2010); John F. Edens & Gina M. Vincent, *Juvenile Psychopathy: A Clinical Construct in Need of Restraint?*, 8 J. FORENSIC PSYCHOL. PRAC. 186, 194 (2008); John F. Edens, David K. Marcus, Scott O. Lilienfeld, & Norman G. Poythress Jr., *Psychopathic, Not Psychopath: Taxometric Evidence for the Dimensional Structure of Psychopathy*, 115 J. ABNORMAL PSYCHOL. 131, 131, 141 (2006); John F. Edens, *Unresolved Controversies Concerning Psychopathy: Implications for Clinical and Forensic Decision Making*, 37 PROF. PSYCHOL.: RES. & PRAC. 59, 60–63 (2006); Robert Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357, 360, 370–72 (2006). But see Malatesti & McMillan, *supra* note 5, *passim* (responding to various objections against the validity or usefulness of the PCL-R).

32. In all fairness to Hare, he recognizes this problem. See HARE, *supra* note 5, at 189 ("Even under the most ideal conditions, with access to high-quality information and using strict diagnostic criteria, psychiatric diagnosis and predictability are not error-free. . . . We must also be aware of the fact that even if perfect diagnoses were possible (and they are not), their ability to accurately predict recidivism or violence is limited."); RONSON, *supra* note 21, at 214–15 ("I do worry about the PCL-R being misused," Bob [Hare] said. . . . 'I tried to train some of the people who administer it. They were sitting around, twiddling their thumbs, rolling their eyes, doodling, cutting their fingernails—these were people who were going to use it.' . . . In the executive bar, Bob Hare continued. He told me of an alarming world of globe-trotting experts, forensic psychologists, criminal profilers, traveling the planet armed with nothing much more than a Certificate of Attendance, just like the one I had. These people might have influence inside parole hearings, death penalty hearings, serial-killer incident rooms, and on and on. I think he saw his checklist as something pure . . . but the humans who administered it as masses of weird prejudices and crazy dispositions."); see also Lee, *supra* note 3, at 131 ("While there is an increased use of the PCL-R in court, critics continue to take issue with the accuracy of the test and its occasional undue weight in capital cases. Specifically, critics warn that studies 'provide little support for the ability of the PCL-R to predict violent institutional behavior among capital murderers facing death sentences.' As such, critics contend that there is 'virtually no support for using the PCL-R to predict institutional violence in the high-stakes context of a capital case.' Consequently, many scholars are seriously concerned about the potential misuses or questionable applications of instruments such as the PCL-R in legal contexts, contending

what to do, how to label the individual, in situations where the variation among evaluators is too great. Indeed, the fact that psychiatrists can vary so much in some cases casts great doubt on their evaluations not only in those cases but also in all of the other cases as well, including the cases where they happen to agree. Their agreement in the latter cases could just be a happy coincidence of similar error, not a genuine reflection of anything about the individual whom they are evaluating.

The second objection is that the PCL-R does not actually measure what it purports to measure—the mental disorder of psychopathy. Rather, it measures nothing more than a tendency toward criminal behavior.³³ It should be noted that Hare adamantly opposes this criticism and, at one point, demanded that Skeem and Cooke eliminate this point (among others) from a draft of their article before publishing it. When Skeem and Cooke refused to comply with Hare's demand, he threatened to sue them for defamation. And this move itself spawned a flurry of literature over not only the merits of the PCL-R but also academic freedom more generally.³⁴

The next few objections concern not the PCL-R per se but rather key assumptions that underlie the PCL-R. The first of these objections—and the third objection overall—is that the term *psychopathy* does not “pick out” any real disorder in the real world.³⁵ In other words, there is no

that psychopathy may be afforded too much weight in determining sentencing.” (footnotes omitted).

33. See generally Jennifer L. Skeem & David J. Cooke, *Is Criminal Behavior a Central Component of Psychopathy? Conceptual Directions for Resolving the Debate*, 22 PSYCHOL. ASSESSMENT 433 (2010).

34. See generally David Baxter, *Psychopath Guru Blocks Critical Article: Will Case Affect Credibility of PCL-R Test in Court?*, PSYCHOPATH RESEARCH (May 30, 2010), http://www.psychopath-research.com/forum/ubbthreads.php/topics/10614/Psychopath_Checklist_Debate; Karen Franklin, *Psychopathy Brouhaha: It's a Wrap (I Hope!)*, IN THE NEWS: FORENSIC PSYCHOLOGY CRIMINOLOGY & PSYCHOLOGY-LAW (June 17, 2010), <http://forensicpsychologist.blogspot.com/2010/06/psychopathy-brouhaha-its-wrap-i-hope.html>; Norman Poythress & John P. Petrila, *PCL-R Psychopathy: Threats To Sue, Peer Review, and Potential Implications for Science and Law. A Commentary*, 9 INT'L J. FORENSIC MENTAL HEALTH 3 (2010); Charlie Smith, *UBC Psychopathy Expert Robert Hare Responds to Academic Criticism over Lawsuit Threat*, STRAIGHT (June 13, 2010), <http://www.straight.com/article-328927/vancouver/ubc-psychopathy-expert-robert-hare-responds-academic-criticism-over-lawsuit-threat>; John Travis, *Paper on Psychopaths, Delayed by Legal Threat, Finally Published*, SCIENCEINSIDER (June 10, 2010, 2:08 PM), <http://news.sciencemag.org/scienceinsider/2010/06/paper-on-psychopaths-delayed-by.html>.

35. See Malatesti & McMillan, *supra* note 5, at 82 (“[S]ome have argued that PCL-R is not valid. A notion of absolute validity requires that PCL-R cuts objective reality at ‘its joints.’ In other words, PCL-R should refer to some unitary and

distinct disorder corresponding to the word *psychopathy* in the same way that there is a distinct disorder corresponding to the words *anorexia nervosa*. Instead, what we call *psychopathy* “picks out” an arbitrary collection of attributes that do not constitute a disorder any more than having a cold, dark hair, and a bad temper at the same time constitutes a disorder. Indeed, the twenty different attributes that are supposed to constitute psychopathy no more naturally belong together as attributes of a real psychological entity than do happiness, curiosity, a tendency to oversleep, and an inclination toward romantic movies. We could *call* the phenomenon of weighing over 100 pounds, wearing blue jeans, and carrying at least two books a *disorder*, but calling this random group of attributes a disorder would not make it so. It would not make it a disorder not only because there is nothing wrong with this combination but because this combination is arbitrary and therefore does not refer to a distinct entity in the real world to which *disorder* or a more specific term refers or should refer.³⁶

The fourth objection is that many psychiatrists are not at all dispassionate or objective when they evaluate individuals for psychopathy.³⁷ On the contrary, they tend to diagnose individuals as psychopaths on either subjective grounds (usually fear or dislike³⁸) or utilitarian grounds

independent reality. . . . [I]t has been argued that specific different neural underpinnings might accompany the different dimensions of the construct of psychopathy, thereby showing that PCL-R is a heterogeneous collection of disparate neurological bases that should be abandoned.” (citations omitted)).

36. Hare responds to this objection as follows:

[F]ailing to recognize that a child has many or most of the personality traits that define psychopathy may doom the parents to unending consultations with school principals, psychiatrists, psychologists, and counselors in a vain attempt to discover what is wrong with their child *and with themselves*. It may also lead to a succession of inappropriate treatments and interventions—all at great financial and emotional cost.

If you are uncomfortable applying a formal diagnostic label to youngsters, then avoid doing so. However, do not lose sight of the problem: a distinct syndrome of personality traits and behaviors that spells long-term trouble, no matter how one refers to it.

HARE, *supra* note 5, at 161.

37. See Toch, *supra* note 14, at 151–53 (providing evidence of biases and subjectivity in clinicians’ diagnoses of inmates with ASPD).

38. See *id.* at 152 (“[T]he experience ‘I sense an effort to manipulate me, and I resent it’ can translate into a patient’s adjudged trait of ‘manipulativeness,’ and ‘I feel frustrated because you won’t confess your culpability when I cross-examine you’ can become ‘lack of remorse’; similarly, ‘I can’t get you to discuss your feelings with me when I invade your privacy’ translates into ‘You can’t have any feelings since you won’t discuss them with me,’ *ergo*, ‘callousness.’ Other inferences can be drawn from personal reactions to the offense, or from perceptions of uncongeniality or uncooperativeness with authorities.”).

(for example, to prevent them from gaining admission to their facilities).³⁹ As a result, the label is too often misapplied and misused. People who are not really psychopathic are still labeled this way and then treated accordingly.⁴⁰

The fifth objection is that, like the label *witch* in seventeenth-century America, the label *psychopath* is dangerous. It is supposed to be objective and scientific—indeed, a clinical diagnosis such as what a patient with a bad cough receives from a lung doctor—but is in fact thoroughly tinged with negative moral judgment and pessimism.⁴¹ For most people, including psychologists, the term *psychopath* signifies a person who is both morally reprehensible—ranging from very bad to evil—and untreatable. These two inferences are dangerous for four reasons.

The first reason: the label *psychopath* is dehumanizing and confining. Because it is generally interpreted to mean “a very dangerous guy who cannot be controlled,” it reduces psychopaths to the status of wild animals. Indeed, psychopaths are often compared, if not identified, with

39. See *id.* (“Because psychopathy is generally equated with untreatability, offenders that clinicians do not want to deal with can be turned away by adjudging them psychopathic, and hence unamenable to treatment. In other words, psychopathy is featured in . . . the ‘diagnostic game’—the use of diagnoses to shuttle clients from one’s own turf to other jurisdictions. Psychopathy (or antisocial personality disorder) unsurprisingly becomes a salient diagnosis in the discharge summaries of hospitals who send patients back to prison after cursory review.” (footnote omitted) (citation omitted)).

40. See HARE, *supra* note 5, at 181 (“[I]mproper use of the label [*psychopath*] has powerful destructive potential for the misdiagnosed individual.”); *id.* at 191 (“Diagnoses yield sticky labels; faulty predictions based on inaccurate diagnoses can result in confusion and disaster.”); John Gunn, *Psychopathy: An Elusive Concept with Moral Overtones*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR, *supra* note 7, at 32, 35 (“The term ‘psychopathic disorder’ . . . is a trigger for rejection. Patients labeled in this way are excluded from all sorts of arrangements and are often dealt with via punitive rather than therapeutic responses.”).

41. See Gunn, *supra* note 40, at 34 (“‘Psychopathic’ is almost synonymous with ‘bad’—a powerful subjective concept that is unhelpful in medical science. Patients may be harder to treat if they are called ‘psychopaths’ or any other name that is synonymous with ‘badness’ and that invites rejection. ‘Oh he’s just a psychopath!’ means ‘I don’t like him; I regard him as a bad guy.’ . . . In medicine, the morality of a patient’s symptoms or behavior ought to be irrelevant.”); *id.* at 35 (“The term ‘psychopathic disorder’ [is] a largely moral term.”); *id.* at 36 (“From both the scientific and the therapeutic perspective . . . it would be more helpful if we could describe unpleasant patients in more neutral terms. The value-laden language makes the treatment task even more difficult than it is to begin with.”).

sharks, snakes, wolves, and other dangerous predators.⁴² And because the assumption of incurability is built into this label, the person so labeled cannot *escape* this cavalierly designated subhuman status. The label *psychopath* dooms that person to be perceived—and therefore treated indefinitely—as a frightening creature who needs to be caged and isolated from society rather than a human being in need of psychological assistance.⁴³

The second reason: jurors will be overly prejudiced by this term. Once they learn that a psychologist has diagnosed a given defendant to be a psychopath, they will infer that the defendant is evil and will be that much more likely to find him guilty.⁴⁴ This result seems unfair; jurors should judge a defendant solely on the basis of the evidence regarding the alleged crime, not on the basis of any prejudicial labels that designated experts attach to the defendant. Notice, this unfairness is

42. See Ferzan, *supra* note 9, at 239–40 (“At a recent conference I attended . . . one theorist [compared] the psychopath to a tiger and argu[ed] that we should treat the psychopath just as we would treat a tiger—we should put him in a cage. I demur. Does anyone doubt that we would unapologetically *shoot* an animal that was as dangerous as some psychopaths?”); Lee, *supra* note 3, at 126 (“[Psychopaths] have even been characterized as ‘cold-blooded “intraspecies predators” that are hardwired to violate others, even those to whom they are closest, without guilt or conscience.” (quoting Lisa Ells, Note, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 COLUM. L. REV. 158, 158 (2005))).

43. See Toch, *supra* note 14, at 151 (“Psychopathy is a wildly pejorative designation because individuals described with this designation are presumptively sleazy, unsavory, repugnant, and dangerous.”). Hare responds to this criticism by defending his use of the term *psychopath*:

[The label *psychopath*] is a *convenience* If we talk of someone with high blood pressure we talk of them as hypertensives. It’s a *term*. . . . Saying ‘psychopathic’ is like saying ‘hypertensive.’ I could say, ‘Someone who scores at or above a certain point on the PCL-R Checklist.’ That’s tiresome. So I refer to them as psychopaths. And this is what I mean by psychopathy: I mean a score in the upper range of the PCL-R. . . .

. . . . [T]he people who [claim that *psychopath* is a problematic label] . . . are very left-wing, left-leaning academics. Who don’t like labels. Who don’t like talking about differences between people. People say I define psychopathy in pejorative terms. How else can I do it? Talk about the *good* things? I could say he’s a good talker. He’s a good kisser. He dances very well. He has good table manners. But at the same time, he screws around and kills people. So what am I going to *emphasize*?

RONSON, *supra* note 21, at 268–69.

44. See HARE, *supra* note 5, at 186–88 (giving an example of the “destructive potential of diagnostic labels in court”); Lee, *supra* note 3, at 132 (“[T]he APA [American Psychiatric Association] asserts that ‘mental health expert testimony on the issue of future dangerousness impermissibly distorts the fact-finding process and causes serious prejudice to the defendant, as the “expert” testimony is likely to receive undue weight.” (quoting Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 LAW & PSYCHOL. REV. 63, 83 (2005))).

only compounded if a psychologist's diagnosis is incorrect. In these situations, jurors may be assuming that the defendant is a psychopath and judging him that much more harshly when this assumption is simply incorrect.

The third reason: the fact of the matter is that different kinds of psychopaths may just be treatable—by medication, different forms of therapy, or both.⁴⁵ So to assume that they are categorically untreatable is to give up on them unnecessarily early. It is to deprive them, and ourselves, of what is likely a more humane and productive policy approach.⁴⁶

The fourth reason: the label *psychopath* might be particularly pernicious because it may turn people who are not otherwise psychopathic *into* psychopaths. That is, the label may become a self-fulfilling prophecy.⁴⁷

45. See HARE, *supra* note 5, at 202–05 (describing broad outlines of a potentially successful treatment program for psychopaths); STANTON E. SAMENOW, *INSIDE THE CRIMINAL MIND* 208–42 (Crown Publishers rev. ed. 2004) (1984) (arguing that even the most hardened criminals can be converted into law-abiding citizens if they are taught how to take responsibility for their behavior); J. REID MELOY, *THE PSYCHOPATHIC MIND: ORIGINS, DYNAMICS, AND TREATMENT* 309–40 (1988) (delineating several different categories of psychopaths and arguing that most of these categories can be helped to one extent or another by appropriate psychotherapeutic techniques); Gunn, *supra* note 40, at 38 (“The treatment of patients with antisocial problems can be a very rewarding activity. The patients are fascinating, vary enormously, and respond to a wide variety of treatment strategies. They have very little in common with one another, other than the negative feelings they engender in other people. If such patients are to be helped, they require an individual functional analysis based on an understanding of their pathology, as well as an individualized treatment program.”); Lee, *supra* note 3, at 130 (“[M]ost remain hopeful for prevention in that ‘research may eventually allow for effective, early legal and psychological intervention with youth who might otherwise proceed inexorably to adult psychopathy.’” (citation omitted)); Lilienfeld & Arkowitz, *supra* note 14 (“Although psychopaths are often unmotivated to seek treatment, research by psychologist Jennifer Skeem of the University of California, Irvine, and her colleagues suggests that psychopaths may benefit as much as nonpsychopaths from psychological treatment. Even if the core personality traits of psychopaths are exceedingly difficult to change, their criminal behaviors may prove more amenable to treatment.”); Ogloff & Wood, *supra* note 6, at 178 (“Perhaps the question of whether psychopathy can be treated ought to be reformulated as whether we can manage psychopaths and their behavior. . . . More success has been realized in trying to reduce their problematic behaviours—including offending.”).

46. See Gunn, *supra* note 40, at 37 (“A negative halo leads directly to a global label, which in turn leads to negative ideas about treatment and often to frank rejection. Once the pejorative label is dropped, once the term ‘psychopathic’ is out of the way, the notion of ‘untreatability’ can also be tempered or dropped.”).

47. See HARE, *supra* note 5, at 161 (“[I]t is no light matter to apply psychological labels to children—or to adults. Perhaps the issue with the most pressing consequences for children is the ‘self-fulfilling prophecy,’ whereby a child who has been labeled a troublemaker may indeed grow to fit the mold, while others—teacher, parents, friends—

People who are *not* psychopathic but who have been erroneously “slapped” with this label by an authority may actually *become* entirely indifferent toward others because the label forces them along this path. Initially, after the label has been attached, they may try to prove that the label is inapplicable. But after several failed attempts, attempts that fail precisely because they are wrongly interpreted through the lens of this label, they may give up or actually come to believe that the label is indeed correct after all. At that point, their self-conception and resulting behavior actually follow the label rather than deviate from it.

The sixth objection is that labeling certain individuals as psychopaths is misleading because it denies individual variation among psychopaths.⁴⁸ It falsely implies that all of the individuals to whom this label is attached exhibit the same symptoms and that these symptoms are caused by the same kind of neurological disorder. This implication is false because the PCL-R contains twenty different attributes, each of which can range from 0–2. So there is an extraordinarily large number of different combinations of attributes and degrees that can result in a score of 30 or higher, which means that any two people who have been diagnosed as psychopaths might have very different personalities and exhibit very different behavior. Yet by labeling them both as psychopaths, we render these differences invisible.

These differences should not be overlooked for two reasons. First, they may be morally relevant. One psychopath’s behavior might be less morally reprehensible than another psychopath’s. Second, they may be relevant to treatment. Different treatments are appropriate for different symptoms.

As an analogy, consider the label *sick*. This label equally applies to the person suffering from a bad cold and the person suffering from malaria, but its equal application to both would do a great disservice to both, especially to the latter. By obscuring the very real differences between them—the differences in the symptoms, the gravity of these symptoms, and the causes of these symptoms—it misleadingly implies that people in this general category should be regarded, and treated, as the same. If, then, doctors were to act on this label alone, many people

reinforce the process by subtly conveying their negative expectations.”); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 30 (“[W]hen the government chooses to label a miscreant a ‘predator’ or ‘dangerous person’ in lieu of punishing him as a ‘criminal offender,’ as sexual predator statutes do, it very powerfully announces that the individual either cannot or will not control his behavior. Research on motivation suggests that this type of labeling might become a self-fulfilling prophecy. The individual shunted into the ‘predator’ system will come to believe that, unlike those who are punished as volitional actors, he is incapable of acting differently. That belief in turn could well make him more dangerous.”).

48. See Litton, *supra* note 6, at 367–68 (making a similar point about ASPD).

suffering from malaria would be both mistreated and undertreated and many people suffering from a bad cold would be both mistreated and overtreated. The same, then, applies to the diagnosis of psychopathy. By obliterating the very real differences between different people in this category, it tends to lead psychologists and the criminal justice system to treat them all the same when, in fact, these differences call for different attitudes and responses.

D. Differences Between Psychopathy and Antisocial Personality Disorder

Historically, psychopathy and ASPD were not distinguished.⁴⁹ And to this day, people often use the terms interchangeably.⁵⁰ Indeed, passages from the “diagnostic bible”⁵¹ of psychological disorders, the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)*, make it seem as though ASPD and psychopathy are identical⁵²:

Individuals with Antisocial Personality Disorder also tend to be consistently and extremely irresponsible Irresponsible work behavior may be indicated by significant periods of unemployment despite available job opportunities, or by abandonment of several jobs without a realistic plan for getting another job. There may also be a pattern of repeated absences from work that are not explained by illness either in themselves or in their family. Financial irresponsibility is indicated by acts such as defaulting on debts, failing to provide child support, or failing to support other dependents on a regular basis. Individuals with Antisocial Personality Disorder show little remorse for the consequences of their acts They may be indifferent to, or provide a superficial rationalization for, having hurt, mistreated, or stolen from someone (e.g., “life’s unfair,” “losers deserve to lose,” or “he had it coming anyway”). These individuals may blame the victims for being foolish, helpless, or deserving their fate; they may minimize the harmful consequences of their

49. HARE, *supra* note 5, at 24 (“A term that was *supposed* to have much the same meaning as ‘psychopath’ or ‘sociopath’ is *antisocial personality disorder*”); *id.* at 25 (“[There] has been confusion during the past decade, with many clinicians mistakenly assuming that antisocial personality disorder and psychopathy are synonymous terms.”).

50. *See, e.g.*, Hart, *supra* note 3, at 159 (“Psychopathy or psychopathic personality disorder is referred to as antisocial personality disorder in the fourth edition of the DSM-IV” (citations omitted)). *But see* HARE, *supra* note 5, at 159 (comparing psychopathy with Disruptive Behavior Disorder rather than with ASPD).

51. This is Hare’s term. *See* HARE, *supra* note 5, at 24.

52. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-TEXT REVISION 701–02 (4th ed. 2000) [hereinafter DSM-IV-TR]. The DSM-IV-TR authors recognize as much when they state that ASPD “has also been referred to as psychopathy, sociopathy, or dyssocial personality disorder. . . . [D]eceive and manipulation are central features of Antisocial Personality Disorder.” *Id.* at 702.

actions; or they may simply indicate complete indifference. They generally fail to compensate or make amends for their behavior. They may believe that everyone is out to “help number one” and that one should stop at nothing to avoid being pushed around.

....

Individuals with Antisocial Personality Disorder frequently lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others. They may have an inflated and arrogant self-appraisal (e.g., feel that ordinary work is beneath them or lack a realistic concern about their current problems or their future) and may be excessively opinionated, self-assured, or cocky. They may display a glib, superficial charm and can be quite voluble and verbally facile (e.g., using technical terms or jargon that might impress someone who is unfamiliar with the topic). Lack of empathy, inflated self-appraisal, and superficial charm are features that have been commonly included in traditional conceptions of psychopathy that may be particularly distinguishing of the disorder and more predictive of recidivism in prison or forensic settings where criminal, delinquent, or aggressive acts are likely to be nonspecific. These individuals may also be irresponsible and exploitative in their sexual relationships. They may have a history of many sexual partners and may never have sustained a monogamous relationship. They may be irresponsible as parents, as evidenced by malnutrition of a child, an illness in the child resulting from a lack of minimal hygiene, a child’s dependence on neighbors or nonresident relatives for food or shelter, a failure to arrange for a caretaker for a young child when the individual is away from home, or repeated squandering of money required for household necessities. These individuals may receive dishonorable discharges from the armed services, may fail to be self-supporting, may become impoverished or even homeless, or may spend many years in penal institutions. Individuals with Antisocial Personality Disorder are more likely than people in the general population to die prematurely by violent means (e.g., suicide, accidents, and homicides).⁵³

Still, ASPD and psychopathy are thought to be different in at least two respects. First, lack of empathy is not essential to ASPD.⁵⁴ Second, more generally, although the diagnostic criteria of ASPD are primarily behavioral, the diagnostic criteria of psychopathy are both behavioral and psychological (or “internal” or “affective”).⁵⁵ As the *DSM-IV-TR* indicates, ASPD is an antisocial pattern of *behavior*:

53. *Id.* at 702–03.

54. *See* Morse, *supra* note 6, at 41 (“All but one of the criteria for ASPD are repetitive antisocial behaviours, and the one psychological criterion, lack of remorse, is not necessary to make the diagnosis.”); Morse, *supra* note 10, at 1072 (“Th[e] lack of capacity [for empathy, guilt, and remorse] is a necessary feature of psychopathy but not of A[S]PD.”).

55. *See* HARE, *supra* note 5, at 25 (“‘Psychopathy’ . . . is defined by a cluster of both personality traits and socially deviant behaviors.”); Malatesti & McMillan, *supra* note 5, at 80–81 (noting that the *DSM*’s emphasis of behavior over internal causes results from its requirement “that psychiatric disorders [be] classified without any emphasis on underlying traits or aetiological hypotheses.”); Morse, *supra* note 6, at 50–51 (“According to the strict language of [MPC § 4.01(2)] . . . psychopaths . . . are [not] excluded [from the insanity defense] because [psychopathy] is [not] manifested *only* by repeated criminal or otherwise antisocial conduct. Psychopathy, as clinically described and as measured by the [PCL-R], includes many psychological criteria and is not

The essential feature of Antisocial Personality Disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.

....

For this diagnosis to be given, the individual must be at least age 18 years . . . and must have had a history of some symptoms of Conduct Disorder before age 15 years Conduct Disorder 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. The specific behaviors characteristic of Conduct Disorder fall into one of four categories: aggression to people and animals, destruction of property, deceitfulness or theft, or serious violation of rules. . . .

The pattern of antisocial behavior continues into adulthood. Individuals with Antisocial Personality Disorder fail to conform to social norms with respect to lawful behavior They may repeatedly perform acts that are grounds for arrest (whether they are arrested or not), such as destroying property, harassing others, stealing, or pursuing illegal occupations. Persons with this disorder disregard the wishes, rights, or feelings of others. They are frequently deceitful and manipulative in order to gain personal profit or pleasure (e.g., to obtain money, sex, or power) They may repeatedly lie, use an alias, con others, or malingering. A pattern of impulsivity may be manifested by a failure to plan ahead Decisions are made on the spur of the moment, without forethought, and without consideration for the consequences to self or others; this may lead to sudden changes of jobs, residences, or relationships. Individuals with Antisocial Personality Disorder tend to be irritable and aggressive and may repeatedly get into physical fights or commit acts of physical assault (including spouse beating or child beating) Aggressive acts that are required to defend oneself or someone else are not considered to be evidence for this item. These individuals also display a reckless disregard for the safety of themselves or others This may be evidenced in their driving behavior (recurrent speeding, driving while intoxicated, multiple accidents). They may engage in sexual behavior or substance use that has a high risk for harmful consequences. They may neglect or fail to care for a child in a way that puts the child in danger.⁵⁶

Contrast this behavioral focus with several criteria from the PCL-R:

- grandiose self-worth
- need for stimulation or proneness to boredom

manifested solely by repetitive criminal or antisocial behaviour.” (footnotes omitted); Ogloff & Wood, *supra* note 6, at 172 (“While the DSM-IV-TR indicates that [ASPD] is also known as Psychopathy or Dissocial Personality Disorder, the fact is that the criteria for each of these disorders are sufficiently different such that they are all quite distinct constructs. With respect to ASPD in particular, it is largely a disorder characterized by antisocial behaviour and criminality rather than fundamental personality deficits. . . . In point of fact, the prevalence of ASPD is much higher in the population than the prevalence of psychopathy.” (citation omitted)); *see also* RONSON, *supra* note 21, at 239–40 (offering a brief account of Hare’s failed attempt to persuade the authors of the *DSM* to include psychopathy).

56. DSM-IV-TR, *supra* note 52, at 701–02.

- lack of remorse or guilt
- shallow affect
- callousness and lack of empathy
- lack of realistic, long-term goals
- impulsivity
- irresponsibility
- failure to accept responsibility for own actions⁵⁷

In this way, ASPD might be regarded as “psychopathy *light*”—psychopathic behavior without necessarily a psychopathic personality behind it.

The difference between ASPD and psychopathy is not merely theoretical. Many people who suffer from ASPD are *not* psychopaths. Indeed, although up to 90% of the current prison population have ASPD,⁵⁸ only up to 25% of this same population are psychopathic.⁵⁹ What this means is that although up to 90% of prisoners repeatedly engage in antisocial behavior, up to 75% of them do not exhibit the list of psychological problems above to a significant enough degree.⁶⁰ The causes of their antisocial behavior, then, are not psychopathy but other psychological factors such as peer pressure, temptation, greed, or poor anger management; situational factors such as “hanging with the wrong crowd”; and poverty in conjunction with the opportunity for a “quick buck.” Still, for the approximately 20% of prisoners who suffer from both conditions, their psychopathic nature is most likely what causes or motivates their ASPD.

III. THREE CONSEQUENTIALIST REASONS FOR CRIMINALLY PUNISHING PSYCHOPATHS

Suppose that a person has committed a violent crime and has been diagnosed by independent psychiatrists as psychopathic. Should that person be criminally punished? At first, it seems that the answer is

57. See HARE, *supra* note 5, at 34; see also *supra* notes 24–26 and accompanying text.

58. See Jennifer L. Skeem et al., *Psychopathy, Treatment Involvement, and Subsequent Violence Among Civil Psychiatric Patients*, 26 LAW & HUM. BEHAV. 577, 578 (2002). For other estimates of the rate of ASPD among prison inmates, see Ells, *supra* note 42, at 182 n.154 (75%–90%); Grant T. Harris et al., *supra* note 6, at 218 (50%–75%); Litton, *supra* note 6, at 390 (50%–80%); Morse, *supra* note 6, at 41 (40%–60%); Ralph C. Serin, *The Clinical Application of the Psychopathy Checklist-Revised (PCL-R) in a Prison Population*, 48 J. CLINICAL PSYCHOL. 637, 637 (1992) (50%–80%).

59. See HARE, *supra* note 5, at 87. For different estimates, see RONSON, *supra* note 21, at 60 (citing Essi Viding’s estimate that 25% of inmates are psychopathic); Harenski et al., *supra* note 5, at 145 (15%–25%); Lee, *supra* note 3, at 127 (15%–25%); Morse, *supra* note 6, at 41 (25%).

60. See HARE, *supra* note 5, at 83–85 (listing some causes other than psychopathy for criminal activity).

obviously yes. There are three reasons—all consequentialist—that make this conclusion seem obvious.

The first consequentialist reason for finding psychopaths criminally responsible for their behavior is that it will help to gratify victims' and society's vengeful impulses. The fact that a diagnosed psychopath has inflicted serious harm on the victim and is indifferent to the victim's suffering will lead the victim, his family, and most others who hear about the incident to become angry and vengeful toward the perpetrator. If, then, a court were to rule that the perpetrator was psychopathic and therefore not guilty (by reason of insanity), this decision would meet with great resistance. The court's refusal to quench society's thirst for righteous vengeance would provoke mass outrage. Society would insist that the defendant knew what he was doing, that he was either amused by or indifferent to the victim's suffering, and therefore that the defendant should have been (severely) punished.⁶¹

The second consequentialist reason for finding psychopaths criminally responsible for their behavior is that it will help to promote at least general deterrence and possibly specific deterrence. By convicting psychopaths along with nonpsychopaths, the courts will be sending the message that psychopathy is not an excuse; that even if you are, or consider yourself, psychopathic, you will still be convicted and punished if you commit this kind of crime and get caught. This message will likely discourage many people, whether or not psychopathic, from committing this kind of crime in the first place. It might also help to deter people who have committed this kind of crime and been punished for it from committing the same kind of crime again.

The third consequentialist reason for finding psychopaths criminally responsible for their behavior is that it will tend to make society feel more secure. If psychopaths are deemed criminally responsible, then they will be convicted rather than acquitted. Conviction, at least for violent crimes and serious white collar crimes, is usually followed by incarceration.

61. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 98–99 (1997) (suggesting that our outrage at stories about clear underpunishment is "intuitive" and "what we believe on instinct").

And one of the central purposes of incarceration is to protect society from convicted criminals, from people who have been proved to be dangerous to one degree or another. Naturally, the longer their prison sentence, the longer society will be protected from them.

Now, one might very well argue that society is *also—equally—*protected from defendants who are found not guilty by reason of insanity. Rather than being locked up *in prisons*, they are instead locked up *in psychiatric hospitals*. So the third consequentialist reason does not necessarily support finding psychopaths to be *criminally responsible* for their behavior. Instead, it is equally consistent with finding psychopaths to be nonresponsible and then *civilly committing* them. Indeed, defendants found not guilty by reason of insanity often end up being committed for a *longer time* in psychiatric hospitals than they would have been incarcerated had they been found criminally responsible.⁶²

Still, the general public, rightly or wrongly, worries that civil commitment suffers from the following flaws in comparison with incarceration: it is easier for patients to escape from psychiatric hospitals than it is for inmates to escape from prisons; many patients in psychiatric hospitals will be released back into society earlier than they would have been had they been incarcerated; patients will *fool* the hospital officials into thinking that they are no longer dangerous when they really are; and patients *will* actually be less dangerous upon release but sooner or later resume their old, antisocial ways.⁶³ I will return to the issue of civil commitment in Part X.

IV. MORAL RESPONSIBILITY AND THE EXAMPLE OF JOHN WAYNE GACY

The three consequentialist considerations just provided for criminally punishing psychopaths who break the law may be very strong, but they

62. See John Matthew Fabian, *Rethinking “Rational” in the Dusky Standard: Assessing a High-Profile Delusional Killer’s Functional Abilities in the Courtroom and in the Context of a Capital Murder Trial*, 25 QUINNIPIAC L. REV. 363, 367 (2006) (“While there may be a substantial number of incompetent defendants charged with serious violent offenses, there is empirical support indicating that such incompetent defendants will spend longer periods of time in the psychiatric hospital for competency restoration than their competent counterparts.”); Litton, *supra* note 6, at 391 (“[I]ndividuals with psychopathy, themselves, may not, from their own perspective, have good reason to object to being treated as criminally responsible. . . . [B]eing excused would not mean going free; it could mean indefinite civil confinement, possibly worse than being sent to prison for a defined period.”).

63. According to one study, although 70% of patients diagnosed with schizophrenia and 70% to 80% diagnosed with mood disorders improve with the use of medication, only 36% of inmates continue taking medication after release. See Jennifer L. Morris, Comment, *Criminal Defendants Deemed Incapable To Proceed to Trial: An Evaluation of North Carolina’s Statutory Scheme*, 26 CAMPBELL L. REV. 41, 49–50 (2004).

are not necessarily dispositive. Indeed, there are some cogent consequentialist reasons for punishing the *insane*, children, and even innocent people. But these reasons are generally thought to be outweighed by moral considerations. Perhaps the most significant of these moral considerations is *injustice*. It is a foundational axiom of criminal law that the state should not prosecute and punish people whom it knows to be innocent. To knowingly punish an innocent person is the very definition of injustice. Innocent people, by definition, did not commit a crime and therefore do not *deserve* criminal punishment. A similar, but not identical, argument may be made against punishing children or the insane. Even if they have caused serious harm, most believe that they should still not be criminally punished. Again, the reason is that (1) they are not considered morally responsible for their behavior and (2) criminal punishment requires moral responsibility.

Consequentialist considerations aside, should psychopaths be held responsible and therefore criminally punishable for their criminal wrongdoing? Do they *deserve* this treatment? Consider, for example, John Wayne Gacy, who tortured and killed thirty-three teenage boys and young men and never felt or expressed any remorse for these horrific acts.⁶⁴ Clearly, once society learned of Gacy's brutal murders, it needed to take immediate steps to protect itself from further harm by locking him up *somewhere*—either in a prison or a psychiatric hospital. But this need to remove Gacy from society does not answer the question whether or not Gacy deserved to be *criminally punished* for his brutal murders. At first, the answer seems to be an obvious yes. He tortured and killed all of these boys for his own pleasure. Still, the question remains: was he *morally responsible* for these acts? If not, it is generally thought that he was an eligible candidate *not* for criminal punishment but only for involuntary commitment to a psychiatric hospital.⁶⁵

Our answer to this question depends on two things: (1) what we mean by *morally responsible* and (2) whether or not criminal responsibility requires moral responsibility. Regarding (2), the distinction between criminal responsibility and moral responsibility is rarely recognized. Most assume that either (1) moral responsibility is necessary for criminal punishment without ever considering the notion of criminal responsibility or

64. See generally CLIFFORD L. LINEDECKER, *THE MAN WHO KILLED BOYS* (1980); MOSS, *supra* note 12.

65. See Lippke, *supra* note 6, at 391 n.16 (“I take it to be fairly well established that psychopaths are not appropriate subjects of retributive legal punishment.”).

(2) moral responsibility and criminal responsibility are one and the same thing. I will argue in Part IX, however, that neither is the case; that there is an important distinction between moral responsibility and criminal responsibility; and that, as it turns out, criminal responsibility—and therefore criminal punishment—does *not* require moral responsibility. If this (radical!) position is correct, then it is possible to hold both that Gacy was not morally responsible for his criminal acts *and* that he was still criminally responsible, and therefore criminally punishable, for them.

Regarding (1), what is this moral responsibility that most adults at most times are presumed to have?⁶⁶ And why might one think that Gacy lacked this attribute?⁶⁷ Perhaps the least controversial way to characterize moral responsibility is this: the set of conditions an agent bears that make it genuinely fair to blame or praise and possibly punish or reward that agent for a given act. If an act has no moral implications—brushing one’s teeth or reading one’s mail—then it is not quite right to say that one is *morally* responsible for these acts. This elocution would be correct only if these acts could be construed as injuring or supporting another person’s rights or interests.

Because I am not concerned in this Article with praiseworthy acts, only (ultimately) with psychopathy and its implications for the insanity defense, I will consider only the conditions necessary and sufficient for judging a given act—call it *A*—to be *blameworthy*.⁶⁸ There are four of them:

66. Some theories of moral responsibility suggest that moral responsibility is simply impossible and therefore that not only Gacy but *all of us* are not morally responsible for any of our behavior. According to one—perhaps the most popular—such skeptical theory, moral responsibility is metaphysically impossible because there are only two logically possible alternatives, determinism and indeterminism; and both alternatives are equally incompatible with what is required for moral responsibility: ultimate *self*-determinism. *See generally* RICHARD DOUBLE, *THE NON-REALITY OF FREE WILL* (1991); DERK PEREBOOM, *LIVING WITHOUT FREE WILL* (2001) (arguing for hard incompatibilism); BRUCE N. WALLER, *FREEDOM WITHOUT RESPONSIBILITY* (1990); Galen Strawson, *The Impossibility of Moral Responsibility*, 75 *PHIL. STUD.* 5 (1994). Whatever one concludes about this skeptical argument, it cannot decide whether or not we should find *Gacy* morally responsible because we are asking this question against the background of a semipragmatic, semimetaphysical assumption that most adults are morally responsible for most of their behavior, an assumption that itself rests on a second deeper assumption: that moral responsibility is indeed metaphysically possible.

67. *See* McMillan & Malatesti, *supra* note 11, at 190 (“[E]ven if it is the case that [skeptics about the metaphysical possibility of moral responsibility] are right, there still remains an interesting question about whether the control that psychopaths have over their actions is different from the rest of us. Even if none of us is morally responsible we should still be interested in that question.”).

68. Notice, *A* need not be a positive action; it can also be an omission. As I have argued in a previous article, the distinction between a positive action and an omission is this:

MR1: knowledge, or a threshold capacity to know, that A is morally wrong;⁶⁹

MR2: a threshold capacity to refrain from A-ing;

MR3: control over A-ing;⁷⁰ and

MR4: an absence of circumstances that excuse this performance.

It is a person's satisfaction of these four conditions that makes that person blameworthy and, if the wrongfulness or harm caused by the act is serious enough, punishable.⁷¹

Regarding the first condition (MR1), the threshold capacity to know the moral status of A naturally requires the capacity to know (1) that one is A-ing, (2) A's "nature," (3) the difference between right and wrong, and (4) that A falls on the "wrong" side of this divide. For this reason, a person who is delusional because of a mental disorder and consequently has false beliefs about his action (either that it has a different nature or that it is morally right when it is, in fact, criminal) does not satisfy MR1 and is therefore not blameworthy for his otherwise wrongful action.⁷²

The second condition (MR2) amounts to "reasons-sensitivity," which itself contains three subconditions: (1) a threshold capacity to entertain reasons against performing A, (2) a capacity to then act on these reasons,

An omission is either (a) a deliberate failure to perform a certain positive action or (b) a failure, whether deliberate or not, to fulfill a moral or legal duty or reasonable expectation. . . .

. . . A positive action is any agent-caused event that does not essentially involve a failure or not-doing in its description.

Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 632–33 (2010) (footnotes omitted).

69. See Antony Duff, *Psychopathy and Answerability*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY, *supra* note 5, at 199, 201–08 (arguing that responsibility requires the ability to grasp and be guided by reason—that is, by reasons that are minimally coherent and connected with reality); Litton, *supra* note 6, at 354–55, 359–60 (arguing that moral responsibility requires a capacity to grasp and be guided by moral reasons qua moral); McMillan & Malatesti, *supra* note 11, at 188 (calling MR1 the "epistemic precondition" of moral responsibility).

70. See McMillan & Malatesti, *supra* note 11, at 188 (calling MR3 the "'control' precondition" of moral responsibility).

71. Cf. Duff, *supra* note 69, at 199–200 ("[A] responsible agent is one who can be called to answer for her actions; to say that A is responsible for an action or an outcome is to say that A can properly be called to answer . . . for that action or outcome." (footnote omitted)).

72. See *supra* note 69 and accompanying text.

and (3) an opportunity to act on these reasons.⁷³ To have this opportunity itself requires that there be no internal or external force or compulsion, nothing independent of the agent's own reasons *making* or *necessitating* that the agent *A* instead of refrain from *A*-ing.

The third condition (MR3) will be discussed in greater detail in Parts V.C–D and IX.B. But, for starters, control is agency or self-determination. I have control over a given state of affairs *S* when I determine whether or not *S* is the case. So I have control over my arm when I determine whether or not (and how) it moves. Likewise, I have *self*-control when I control myself, when I determine whether or not (and how) I act. Conversely, I do not have control over the flowers across the room because my attempts to make them move to the right or to the left simply do not work. Likewise, I do not have control over a twitch or spasm because, although it is my body moving, this movement does not originate with *me*, with my agency, but rather with some physical cause within my body.⁷⁴ An intermediate case might be my control over the trajectory of a rock that I drop off the side of a cliff. I certainly control whether or not it falls and approximately where given the motion with which I release it, my knowledge of the surrounding conditions, and the law of gravity. But once I let go, my attempts to make it move this way or that do not have any effect.

It might be thought that MR3 *entails* MR2,⁷⁵ in which case MR2 is redundant. But this assumption is false. So-called Frankfurt-style situations show that these two conditions are compatible: (1) the agent willingly *As* without being compelled to *A*; and (2) the agent could not have done otherwise. In Frankfurt-style situations, the agent cannot do otherwise—cannot refrain from *A*-ing. But the agent is still not forced or compelled to *A* because, given the very peculiar hypothetical circumstances (involving a “counterfactual intervener”), the agent's inability to refrain from *A*-ing is not causally relevant to her *A*-ing. She *As* not because

73. See generally JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* 28–91 (1998); John Martin Fischer, *Recent Work on Moral Responsibility*, 110 *ETHICS* 93, 127–28 (1999).

74. See McMillan & Malatesti, *supra* note 11, at 189 (“When . . . agent[s] ha[ve] no control over what they are doing, their actions and behaviour do not originate in the causality of the agent.”); Slobogin, *supra* note 47, at 36 (“Truly ‘involuntary’ acts are rare. Illustrated by epileptic seizures and perhaps some dissociative states, they require a disjunction between mind and body that seldom occurs even in people with severe mental illness, much less in sexual predators and like offenders.” (footnote omitted)).

75. See, e.g., Litton, *supra* note 6, at 352 (“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. 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.” (footnote omitted)).

she has to but because she wants to. So she still has control over her action even though she could not have refrained from performing it. In this way, control does not entail the power to do otherwise.⁷⁶

Of course, one might respond that, given that control does not entail the power to do otherwise, only control (MR3), not the power to do otherwise (MR2), is necessary for moral responsibility. This point may have merit, but—to be on the safe (or traditional) side—I will simply continue to assume that MR2 is also necessary for moral responsibility. Should this assumption turn out to be false, the various positions that I take in this Article would remain mostly, if not entirely, unaffected.

The fourth condition (MR4), an absence of circumstances that excuse an agent's *A*-ing, means an absence of circumstances, internal or external to the agent, that make it reasonable for us (society in general) to expect the agent to have refrained from *A*-ing. In the criminal law, these circumstances, the circumstances that make it *unreasonable* to expect the agent to have refrained from *A*-ing, include insanity, duress, infancy, hypnotism, involuntary intoxication, automatism, necessity, mistake (of fact or of law), and entrapment.⁷⁷ There are other excuses as well, other circumstances that are recognized not as excuses in the criminal law but as excuses in everyday life. Whether or not a given condition excuses depends on the specific circumstances and the moral norms of the relevant community. For example, the fact that one's car breaks down on the highway might excuse her for being late to a business meeting later that day but does not excuse her for being late to a business meeting the following day. We can generally understand or accept the former but not the latter. Likewise, contracting the flu may excuse one from occupational duties but not from continuing to take care of a dependent child. Once again, we can generally understand or accept the former but not the latter.

76. See Ken Levy, *Why It Is Sometimes Fair To Blame Agents for Unavoidable Actions and Omissions*, 42 AM. PHIL. Q. 93, 93 (2005) (making the same point in terms of responsibility rather than control).

77. Duff suggests that excuses split into two kinds—those that the agent can answer for and those that the agent cannot answer for (exemptions). An example of the former is duress; the agent can answer for her wrongful action by pointing to situational factors, specific circumstances that render her blameless for the action. An example of the latter—an exemption—is insanity; the agent is exempt from answering for the wrongful action in the first place because *answering for* presupposes a minimal level of rationality, something that the insane person lacks (by definition). See Duff, *supra* note 69, at 201.

V. THREE ARGUMENTS THAT PSYCHOPATHS ARE NOT MORALLY RESPONSIBLE FOR THEIR CRIMINAL BEHAVIOR

Given the four conditions of moral responsibility in Part IV above—again, MR1 (knowledge, or a threshold capacity to know, that A is morally wrong), MR2 (a threshold capacity to refrain from A-ing), MR3 (control over A-ing), and MR4 (an absence of circumstances that excuse this performance)—at least three arguments may be made that psychopaths like John Wayne Gacy are not morally responsible and therefore blameworthy for the crimes that they commit. I believe that these arguments are compelling.⁷⁸ Still, I will argue in Part IX that even if these arguments are correct—even if Gacy was not morally responsible for his crimes—he was still *criminally* responsible, and therefore criminally punishable, for his crimes. Controversial as this point may sound, criminal responsibility does not require moral responsibility. Again, I will defend this very controversial point in Part IX.

A. First Argument that Psychopaths Are Not Morally Responsible for Their Criminal Behavior: Inability To Grasp Moral Reasons

The first argument splits into two parts. First, Gacy did *not* know that it was wrong to torture and murder. Second, a capacity for this kind of knowledge is necessary for moral responsibility (MR1).⁷⁹

78. In contrast, some scholars argue that psychopaths are indeed *morally* responsible for their behavior. See HARE, *supra* note 5, at 5 (“*Psychopathic* killers . . . are not mad Their acts result not from a deranged mind but from a cold, calculating rationality combined with a chilling inability to treat others as thinking, feeling human beings.”); *id.* at 22 (“Unlike psychotic individuals, psychopaths are rational and aware of what they are doing and why. Their behavior is the result of *choice*, freely exercised.”); SAMENOW, *supra* note 45, at 187 (“Clinical descriptions of the psychopath are incomplete and in some important ways erroneous. For example, to call him impulsive is to assert that he lacks self-control, whereas he actually has a rational, calculating mind that enables him to delay gratification if he deems it in his best interest. The criminal has moral values, but he shuts off considerations of conscience long enough to do what he wants.” (footnote omitted)); *id.* at 251–52 (“Decisions are not made for the criminal. . . . [T]he specific decision is up to the individual. . . . Eventually, he chooses his life’s work and advances as far as his talents and effort allow. . . . Within the limits of responsibility lie countless opportunities and variations in life style. . . . [T]he change process calls for criminals to acquire moral values The objective is to teach them to live without injuring others.”); LINEDECKER, *supra* note 64, at 244 (“[I]t seems possible that some people are so vicious and devoid of feeling for others that they become thieves, murderers, and rapists merely because they choose to.”). Hare, however, seems a bit conflicted when he states, in implicit opposition to his quotation above, that psychopathy is a “life-threatening *disease*.” HARE, *supra* note 5, at 163 (emphasis added). *This* passing reference implies that psychopaths are *victims* and their behavior an inevitable, and therefore *unchosen*, symptom of the condition that victimizes them.

79. See Levy, *supra* note 5, at 219 (“I [previously] argued that for psychopaths all offences were merely conventional, and that they therefore were not due the full blame

Regarding the first part, one might argue that Gacy *did* know that it was wrong to torture and murder because he knew that the criminal law prohibits torturing and killing. He also knew that society has criminalized these acts because it wants to minimize their occurrence. He might even have understood that society wants to protect citizens from these acts ultimately because they cause physical harm, emotional harm, and death.

What he did *not* understand, however, is *why* society would care about these things.⁸⁰ To psychopaths like Gacy, laws against the torture and murder of human beings are like laws against the torture and murder of weeds. A law punishing the torture of plants is perfectly clear; it says that if one is caught torturing weeds (perhaps by randomly twisting and cutting its leaves and branches), one will face arrest, prosecution, and—if convicted—prison time. But few of us would understand *why* this law was passed. Most people would say that there is nothing wrong with torturing, no less killing, weeds; that they probably cannot feel pain, and that even if they can, their pain is simply too unimportant to worry about, no less to merit criminal punishment. And because this law is nonsensical, a person should not be criminally punished for breaking it.

Gacy regarded laws punishing the torture and murder of human beings the same way we would regard a law punishing the torture and murder of weeds. He understood that these activities were unlawful and that, if caught, he would face serious punishment. But he did not understand the ultimate moral basis of these laws. To Gacy, the boys he tortured and killed were no more important than weeds are to most of us.⁸¹ He

that attaches to moral transgressions (or, indeed, any significant amount of blame); since psychopaths do not grasp the fact that it is *moral* norms they transgress, they cannot be properly *morally* responsible.”); Litton, *supra* note 6, at 351, 360–65 (arguing that moral responsibility requires the “capacity for practical reasoning or rational self-governance” and that the latter condition “entails the capacity to comprehend and act on moral considerations”); Morse, *supra* note 6, at 52–53 (arguing that the capacity for emotional knowledge is necessary for rationality, which is itself necessary for moral responsibility); Tony Ward, *Psychopathy and Criminal Responsibility in Historical Perspective*, in *RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY*, *supra* note 5, at 7, 18 (agreeing with Hervey Cleckley’s and Jerome Hall’s notion that “the emotions ma[k]e an important contribution to moral responsibility”). *But see* Lippke, *supra* note 6, at 403 (arguing that rationality does not “compel[] the acceptance of morality” and noting “the history of failed attempts to establish a necessary link between rationality and the acceptance of moral standards”).

80. *See supra* note 12 and accompanying text.

81. *See* LINEDECKER, *supra* note 64, at 168 (noting Gacy’s justification for killing over thirty people was that “[t]hey were blackmailing me They were baaaa people” (internal quotation marks omitted)); MOSS, *supra* note 12, at 213–14, 225–

understood that they could experience pain, that they had their whole lives ahead of them, that they had families that loved them, and that their families would suffer serious emotional pain over losing them. But he did not understand why he should care—and, indeed, why the rest of us do care—about any of this. After all, it was not *his* death or *his* pain. And except for the families involved, it was not *their* deaths or pain. And even for the families involved, losing a family member does not cause *that* much pain. Families all over the world lose family members. That is just the way life goes. Like weeds. Gacy, then, simply did not *get it*. A boy's being tortured was no more cause for concern than a weed's being tortured; and the boy's death was no more cause for concern than a weed's death.

The reason that Gacy did not get it is because he *could* not get it. Gacy lacked the capacity to care about any particular victim as a boy, as a human being, as something much more—and other—than a mere object for his pleasure. And because Gacy lacked the capacity to care deeply about others, he just could not understand what it means, and how it feels, *for others* to lose their son or grandson or brother. Even if he understood that they might exhibit all of the behavior that goes along with grieving, he simply could not relate to the inner experience that goes along with this behavior.⁸²

The same cannot be said of most mafia hit men, drug lords, school bullies, death squad commanders, corporate executives, or even terrorists.⁸³ Even though people in all of these categories deliberately harm others, they are not generally considered psychopathic because they still have the *capacity* for empathy and therefore the capacity to know or understand why their harmful behavior is morally wrong.

The second part of the first argument (that psychopaths are not morally responsible for their bad acts) suggests that the capacity to grasp moral reasons is necessary for moral responsibility. I will now defend this second assumption.

Suppose four-year-old Dolly hits three-year-old Jeffy. If Dolly's parents witness this aggressive act, they will likely scold Dolly. They will say something like, "No hitting! How would you like it if Jeffy hit

29 (summarizing conversations in which Gacy admitted that he killed over thirty people and asserted that his victims deserved their fate); *see also* HARE, *supra* note 5, at 88–93 (using several examples to illustrate psychopaths' complete lack of compassion for their victims).

82. *See supra* note 12 and accompanying text.

83. *See* Lippke, *supra* note 6, at 396–97 ("We might hold out more hope for terrorists [than for psychopaths, sexual predators, pedophiles, or hardened professional criminals]. They may have highly developed moral sensitivities of narrow or distorted kinds that the right combination of maturation, education, and reflection will be able to draw upon to generate sincere repentance and efforts at moral rebirth.").

you??!!” The parents are trying to teach Dolly not merely an arbitrary social convention, such as a rule of etiquette (for example, “no belching” or “no licking your plate”), but a moral principle. And precisely because this principle is not arbitrary or conventional, they do not merely instruct Dolly to blindly obey it but instead try to give her the reason why she should obey it. This reason—“How would you like it if Jeffy hit you??!!”—really contains both an argument and an appeal. The argument is that the no-hitting rule is designed to protect all of us, including Dolly, from being hit. The appeal is to Dolly’s compassion or concern for others. By giving Dolly the reason for the no-hitting rule, and not just the no-hitting rule itself, Dolly’s parents are trying to inculcate in her a concern for others that will, in the course of development, motivate her to comply with the no-hitting rule above and beyond the fear of punishment for noncompliance. Dolly’s parents are, in essence, asking her to project the kind of suffering that she feels when *she* is hit on to Jeffy in the hopes that she will vicariously *feel* Jeffy’s pain and thereby develop an inhibition toward hitting others that parallels her own desire to avoid being hit. On this view, our development of empathy ultimately begins with self-concern. And, once again, the vehicle through which we are initially able to develop concern for persons other than ourselves is projection.

Suppose, however, that because of a neurological problem, Dolly cannot project her own suffering on to Jeffy. All Dolly will learn from her parents is the no-hitting rule, not the reasons for the no-hitting rule. She will not be able to understand their point that she should not hit Jeffy for the same reason that she does not like to be hit. Although she will agree that *she* does not like to be hit, she will not see why this fact—the suffering that *she* feels when *she* is hit—should prevent her from hitting *Jeffy*. After all, *she* is not *him*; so *why* should *she* care about *his* pain? Her inability to project her own suffering on to Jeffy and thereby empathize with Jeffy will prevent her from understanding the moral basis of the no-hitting rule. The most that she will learn is that if she hits others and gets caught, she will be punished. So fear of punishment is the only reason that she has—and that she believes she has—to comply with the rule. Because she cannot feel empathy, she cannot understand this reason for compliance. Because she cannot understand this reason for compliance, it cannot motivate her to comply. And because it cannot motivate her to comply, she cannot be held morally responsible for failing to comply on this basis.

More generally, nonpsychopaths' ability to care about others gives them reasons for refraining from intentionally harming others. Although these reasons do not always prevail, they usually do. And even when they do not, they are still present, just too weak to overcome other, stronger (weightier, not necessarily morally better) reasons. If, however, psychopaths lack the capacity to care, then they also lack the capacity to form reasons that will counterbalance their reasons for inflicting harm—whether they be anger, sadism, or callous indifference. If one cannot form these counterbalancing reasons, then one cannot act on these reasons. And if one cannot act on these reasons, then we cannot blame the agent for failing to act on these reasons. It follows, then, that we cannot hold Gacy morally responsible for failing to treat others with concern if he was incapable of feeling and therefore understanding such concern.⁸⁴

B. Second Argument that Psychopaths Are Not Morally Responsible for Their Criminal Behavior: Inability To Do Otherwise

The second argument for the conclusion that Gacy was not morally responsible for his criminal behavior is that he simply could not have done otherwise. On the one hand, because he could not care about his victims, he had no moral reasons against torturing and killing. On the other hand, Gacy was the kind of person who derived sadistic pleasure from torturing and killing. Given both (1) this reason for torturing and killing and (2) the absence of countervailing reasons, Gacy could not have wanted otherwise. His desire for pleasure had to prevail because it faced no competing desires. And because he could not have wanted otherwise, he could not have done otherwise. In other words, because he could not care for others, he could not form or possess a reason strong enough to outweigh his desire to harm others.

84. See Duff, *supra* note 69, at 210 (“Someone who is . . . an outsider to our moral practices . . . is not a morally . . . responsible agent. We cannot expect him to be guided by the moral reasons that bear on the situations in which he acts, since he cannot understand those reasons as reasons We cannot call him to answer for the wrongs he commits [S]ince he cannot grasp those reasons, he cannot explain how he acted against them.” (footnote omitted)); Levy, *supra* note 5, at 213 (“[I]t is reasonable to conclude that psychopaths are blind to central moral considerations. It follows . . . that they cannot be held responsible for failing to respond to these moral considerations.”); *id.* at 224 (“Psychopaths lack [affective] capacities. For them it is not easy to grasp core moral norms; it is, I suspect, *impossible*. Since they cannot understand the moral significance of guiding their behaviour by these norms, and they are not responsible for that fact, they are excused [from] moral responsibility for violations of those norms.”); Morse, *supra* note 10, at 1072–73 (“For most citizens, conscience and empathy are the most powerful prophylaxes against wrong conduct and are much more powerful than fear of the criminal sanction. If these capacities are lacking, it is plausible to argue that the agent lacks moral rationality and is not responsible, even if the agent is in touch with reality otherwise and knows the moral rules in the narrowest sense.”).

There is empirical support for this conclusion as well. First, once again, we still have not found an effective treatment for psychopaths, at least not psychopaths who score very highly on the PCL-R.⁸⁵ Second, as a result, this same group recidivates at an abnormally high rate.⁸⁶ Third, psychologists have concluded from various studies of psychopaths that they suffer from impaired practical reasoning, moral reasoning, or both.⁸⁷

85. See *supra* note 6.

86. See HARE, *supra* note 5, at 96 (“The recidivism rate of psychopaths is about *double* that of other offenders. The *violent* recidivism rate of psychopaths is about *triple* that of other offenders.”); RONSON, *supra* note 21, at 85 (“In regular circumstances, 60 percent of criminal psychopaths released into the outside world go on to re-offend.”); Lee, *supra* note 3, at 127–28 (“The notorious difficulty in dealing with psychopathic criminals has brought this mental disorder to the forefront of crime: ‘Psychopathic offenders are responsible for a disproportionate amount of crime . . . [t]hey are more difficult to manage in correctional and institutional settings . . . [t]hey re-offend and violate conditions of release faster and more often and are at higher risk to re-offend violently than other offenders.’ While psychopathy serves as an overwhelming obstacle for justice, it also doubles as a helpful indicator of likely offenders. In fact, ‘the score on the Psychopathy Checklist-Revised . . . was the single best predictor of violent recidivism.’ Having established that psychopathy is highly-related to violence, this mental disorder serves as a ‘robust predictor of recidivism and violence among criminal, forensic, and psychiatric populations.’” (alterations in original) (footnotes omitted) (quoting Harris et al., *supra* note 6, at 198–99)); Lippke, *supra* note 6, at 396 (“The evidence suggests that [psychopaths], many of whom appear to comprise some of the most serious and intractable criminal offenders, are nearly insusceptible to character change. There is no known effective treatment of psychopathy and psychopaths engage in criminal conduct well past the point at which other offenders tend to desist.”); Litton, *supra* note 6, at 382 (“The inability to resist temptation is perhaps one reason 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.’” (quoting JAMES BLAIR ET AL., THE PSYCHOPATH: EMOTION AND THE BRAIN 16 (2005))); Morse, *supra* note 6, at 41 (“[P]sychopathy . . . is a substantial risk factor for crime.”); *id.* at 54 (“[Psychopathy] is . . . an undoubted risk factor for future dangerousness.”); Ogloff & Wood, *supra* note 6, at 157 (“[P]sychopathy is a risk factor given the strong and consistent relationship shown between psychopathy and reoffence risk Psychopathy has been found to be associated with . . . poor treatment outcome, in terms of reoffending.” (citations omitted)). See generally James F. Hemphill & Robert D. Hare, *Some Misconceptions About the Hare PCL-R and Risk Assessment: A Reply to Gendreau, Goggin, and Smith*, 31 CRIM. JUST. & BEHAV. 203 (2004).

87. See *supra* notes 12 and 79 and accompanying text.

C. *Third Argument that Psychopaths Are Not Morally Responsible for Their Criminal Behavior: No Self-Control*

The third argument for the conclusion that Gacy was not morally responsible for his criminal behavior is similar to the second. Once again, Gacy could not do otherwise. But the third argument offers a different reason. While the second argument suggested that Gacy could not have done otherwise because of the relative strengths of his desires, the third argument suggests that Gacy could not have done otherwise not merely because one desire outweighed the other but because it *significantly* outweighed the other. One desire was so much stronger than its only competitor that he simply could not bring himself to act on the weaker desire; he just *had* to act on the much stronger one. In this way, Gacy really did not have any self-control. Instead, his strongest desire controlled him.

One might argue that psychopaths—and everybody else—must have control over their behavior because otherwise it would not be *behavior*—or conduct or action—in the first place. Instead, it would be nothing more than involuntary bodily movements like spasms, twitches, and convulsions, which are not behavior at all. To be an action, a given event must be caused or chosen by an agent, a self.⁸⁸ But to say that a given event is caused or chosen by an agent is just to say that the agent had control over this event. It follows, then, that there cannot be involuntary actions, behavior over which a person does not have control. The mere fact that a given event constitutes an action is sufficient to show that the person who performed this action had control over it.

This argument is actually quite compelling. Still, even if it is correct, it leaves open a “loophole.” One might concede this argument and still maintain that it does not decide the issue; that even if, by definition, an agent has control over every action that she performs, the agent may still have varying degrees of control over different actions. And moral responsibility for a given action requires a higher level of control than that which is definitionally entailed by the event’s *being* an action. It requires a *threshold* level of control, a level of control above the minimal degree that every action satisfies and without which it would be not an action but a nonaction, an involuntary bodily motion like a twitch, spasm, or convulsion.⁸⁹

88. See *supra* Part IV.

89. See McMillan & Malatesti, *supra* note 11, at 188 (distinguishing between voluntary and nonvoluntary actions, which correspond to my distinction between actions above the control threshold and actions below the control threshold); Morse, *supra* note 10, at 1055 (“If an agent’s body is literally forced to move, say, by operation of a

What kinds of actions might not reach this threshold? I concede that it is very difficult to answer this question.⁹⁰ And this difficulty can be demonstrated apart from psychopaths; psychopathy just further complicates an already complicated issue. Still, I contend that we can make some progress here once we recognize that control actually splits into three levels. The highest level or threshold must be attained in order to be morally responsible; the middle level or threshold must be attained in order to be *criminally* responsible; and the level between the middle threshold and no control at all is the minimal level of control that every action qua action satisfies and without which it would be a nonaction like a twitch or convulsion. What is controversial about this tri-level schema is the implication that one can be criminally responsible without being morally responsible; that one can achieve a level of control sufficient for criminal responsibility but not sufficient for moral responsibility.⁹¹

genuine reflex, then the agent, for legal purposes, has not acted at all, because the law's concept of action requires intentional bodily movement.”)

90. See Morse, *supra* note 6, at 49 (“A fraught question for the law is how to understand claims that the defendant could not help or control himself in situations in which no one is threatening the defendant. . . . Difficulties conceptualizing and assessing such problems are central reasons why ‘control’ tests for excuse in these one-party cases are less common than tests for lack of rational capacity.”); *id.* at 59 (“There are . . . difficult obstacles to conceptualizing and measuring ‘serious difficulties’ controlling oneself.”); Slobogin, *supra* note 47, at 35 (arguing that the Supreme Court’s “inability-to-control standard [in *Kansas v. Hendricks*, 521 U.S. 346 (1997)] is vacuous to the extent it suggests the state must show some type of ‘involuntary’ behavior or criminal impulse caused by overwhelming urges”); *id.* at 38 (“[G]auging the strength of criminal desires, or the weakness of the will to resist them, is a scientific impossibility at this point. Despite repeated attempts to develop instruments that measure impulsivity, there is no generally accepted, or even partially accepted, formulation of the construct. . . . [I]nstruments for assessing volitional impairment are in a very primitive state.” (footnotes omitted)).

91. Although it is unlikely that Lippke would agree with my point here or its implications, he does offer a similar “levels” account of responsibility:

[T]here may be some individuals who have exceedingly strong, if not irresistible, predilections toward violence in certain kinds of circumstances. They may be dimly aware of the moral considerations weighing against their acting on these predilections but largely unable to make their conduct conform to them. It may be that we are unsure how to conceptualize such weakly morally responsible agents for the purposes of punishment theory. They do not seem as blameworthy (and so subject to punitive confinement) as those with more normal or even robust moral personalities. Yet it is hard to convince ourselves that such individuals are so out of touch with reality that the alternative of involuntarily civilly confining and treating them is in order.

Lippke, *supra* note 6, at 405–06.

Still, I will argue in Part IX that this is precisely the psychopath's situation.

In the remainder of this section, I will try to describe what is going on at this middle level. Once again, actions at this middle level involve agency sufficient for criminal responsibility but not sufficient for moral responsibility.

Suppose that Charlie loves chocolate cake but is on a diet, is at a party where chocolate cake is being served, and is feeling very conflicted between resisting the chocolate cake and giving in to his temptation. If Charlie gives in, did he lose control—*threshold* control? This question is hard enough to answer.⁹² It is just as hard—if not harder—when we consider addiction. Does Helen, a heroin addict who has been through a rehabilitation program and successfully resisted heroin for several months, *lose* threshold control if she takes advantage of the next opportunity that arises? Or would it be more correct to say that Helen *chose* to do heroin again and that she had full or significant control over this choice?⁹³

Finally, these questions are just as difficult, if not more so, when we add a moral dimension. This additional moral dimension makes the

92. Regarding weakness of will, most philosophers hold that Charlie is still fully responsible for his failure to hold out. The assumption underlying this position is that Charlie could have tried harder—indeed, sufficiently hard—to resist temptation. See, e.g., FISCHER & RAVIZZA, *supra* note 73, at 41–46, 69–73 (arguing that an agent is fully responsible for weak-willed action because the agent could have acted on a stronger reason for refraining had it been presented); JOHN MARTIN FISCHER, 14 THE METAPHYSICS OF FREE WILL: AN ESSAY ON CONTROL 168 (1994) (“[C]ertain kinds of *hypothetical* irrationality are compatible with moral responsibility; a tendency toward weakness of the will need not point to any defect in the actual mechanism leading to action. Moral responsibility requires *some* connection between reason and action, but the fit can be quite loose.”); Litton, *supra* note 6, at 354 (“[W]e sometimes are weak-willed yet remain responsible for such moments of weakness 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 [one] 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.”); François Schroeter, *Endorsement and Autonomous Agency*, 69 PHIL. & PHENOMENOLOGICAL RES. 633, 654 (2004) (“[I]n the case of minor weakness of will . . . the agent’s intention-forming capacities are not subjected to any . . . constraints that would limit the agent’s responsibility over his action. Unlike irresistible addictions, minor weakness of will does not absolve an agent from responsibility over his actions. [And even if weakness of will means no autonomous control,] the fit between autonomy and responsibility does not need to be perfect. One may well be responsible for some actions even if one does not have autonomous control over them.” (footnote omitted)). But see Gary Watson, *Reasons and Responsibility*, 111 ETHICS 374, 380–82 (2001) (critiquing Fischer and Ravizza’s “reasons-responsiveness” account of why agents are fully responsible for their weak-willed actions).

93. Regarding addiction, philosophers will split into three general camps. Some will still hold Helen fully responsible, some less responsible, and some not responsible at all.

presence or absence of threshold control all the more important because the possibility of blame and punishment now enters the picture. If a person does not have threshold control over her actions, then she is not morally responsible for them. Suppose, then, that Gacy felt just as tempted to torture and murder as Charlie felt before giving in to the chocolate cake and Helen felt before giving in to the heroin. If we think that Charlie and Helen lack threshold control over their actions, then we seem committed to the same conclusion if Gacy gave in to his temptation, in which case we would be committed to the conclusion that Gacy should have escaped blame and criminal punishment for torturing and murdering.

So where does this leave us? Once again, as I stated in Part V.A–B, Gacy could not form or possess a moral reason for refraining from violent behavior. Still, he not only could—but did—possess a *prudential* or *self-interested* desire to avoid getting caught and punished. But this desire, while supplying him with a reason for refraining from violent behavior, was not nearly strong enough. It was *far* outweighed by the strength of his desire to engage in violent behavior, which itself was motivated by the pleasure that he anticipated from exercising cruel power over his helpless prey.⁹⁴ Gacy’s inclination to torture and kill was so much stronger than his only counterbalancing reason, knowledge that he might get caught and be punished, that the latter did not stand a chance. The former simply *steamrolled* the latter—much as an addict’s desire for the next “fix” can be said to overpower the desire to “go clean.”⁹⁵

94. See HARE, *supra* note 5, at 100 (describing a psychopath, “Earl,” as someone who is obsessed “with absolute power” and who “values people only insofar as they bend to his will or can be coerced or manipulated into doing what he wants” (internal quotation marks omitted)); LINEDECKER, *supra* note 64, at 218 (“After the horror [of Gacy’s many murders] was discovered . . . Dr. Marvin Ziporyn, an authority on mass murder . . . said . . . ‘[Gacy] had the love of power that we all have and he almost has gone berserk, gone wild, gone out of control . . . because he has killed and tasted flesh.’ Ziporyn continued that, having killed once, a murderer might be surprised at how easy the act is, and be pleased with his ability and power to make life-and-death decisions.” (footnote omitted)); MOSS, *supra* note 12, at 158 (“The power [of killing an innocent woman with my bare hands] is indescribable. . . . [Y]ou can feel the draining of their energy, the total ecstasy. Get your mind into it. Savor it.” (quoting passage from personal letter from serial killer Richard Ramirez) (internal quotation marks omitted)).

95. See LINEDECKER, *supra* note 64, at 213–15 (describing the uncontrollable-impulse defense that Gacy’s attorneys used during his trial). Hare presents conflicting accounts of the psychopaths’ inner experience when engaging in antisocial behavior. On the one hand, he quotes two psychopaths who compare the thrill that they get from committing crimes to the “fix” or “high” one gets from taking drugs. See HARE, *supra*

(Incidentally, the reader will notice that I have characterized an overpowered will as a will that is overpowered by reasons or desires. In this sense, I may be accused of reducing the volitional to the cognitive, diminished self-control to diminished ability to reason well. I recognize that this is a controversial approach, but at least I am in good company. For example, Stephen Morse argues that the notion of losing control is best explained in terms of irrationality or defective practical reasoning.⁹⁶)

Yet another example might help drive the point home. Consider “Smoker.” Smoker wants to quit smoking but just cannot resist the urge when it comes upon—and over—her. After satisfying the urge on a given occasion, Smoker exercises various measures such as drugs, cigarette substitutes, a nicotine patch, psychotherapy, or just sheer effort of will to help prevent herself from succumbing again. But as the urge reapproaches, Smoker still finds herself changing her mind, radically discounting all the reasons motivating her desire to quit. Just before smoking another cigarette, she says things to herself like, “It’s just one cigarette. . . . I’ll stop smoking *after* that. . . . Maybe smoking isn’t such a bad thing after all. . . . It really calms me down, and I’m under too much stress to quit now. . . . Anyway, there’s always tomorrow. . . .”⁹⁷ Based on these thoughts alone, one might conclude that Smoker is fully in control of her choice to smoke again. But that would be the wrong inference to

note 5, at 40, 61. On the other hand, Hare states, “In most instances it is egocentricity, whim, and the promise of instant gratification for more commonplace needs, not the drooling satisfaction of bizarre power trips and sexual hungers, that motivate the psychopath to break the law.” *Id.* at 74. In support of the latter point, see Slobogin, *supra* note 47, at 37, arguing that recidivism rates do not correlate with, and are not therefore caused by, compulsive desires.

96. See Morse, *supra* note 10, at 1064 (“Lack of capacity for rationality is almost always the most straightforward explanation of why we colloquially say that some people cannot control themselves when they experience intense desires.”); *id.* at 1075 (“[L]ack of capacity for rationality is . . . the best explanation of what we really mean when we say that an agent cannot control himself. Control standards should be understood in terms of rationality defects.”); Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1625–28 (1994) (arguing that a supposedly “internally coerced” act is performed not because the agent’s psychological state leaves the agent no other alternative but because his defective practical reasoning makes this act seem preferable to other, more rational acts); see also Slobogin, *supra* note 47, at 39–40 (“[M]any cases of volitional impairment can be re-characterized as deficits in cognition. For instance, the kleptomaniac who steals for no apparent reason (because he merely hides what he steals without attempting to make money from it) could be said to have an irrational thought process, as could the person with mania who carelessly spends money in grandiose schemes because of inaccurate beliefs about himself and the world.” (footnote omitted)).

97. See Morse, *supra* note 10, at 1070 (suggesting that desires that are “so powerful and insistent” may compromise or negate rationality by (1) making it difficult or impossible for the agent to think “straight” or “clearly” and (2) causing “further distracting and often unpleasant feeling states, such as anxiety, irritation, excitement, tension, and the like”).

draw. Smoker is clearly trying to rationalize the inevitable, trying to justify to herself her failure to exert self-restraint. She knows at a deeper level that she is powerless to resist her craving. And rather than make this damaging admission, she deludes herself into thinking that the next cigarette will be the product of her autonomous choice.

Just as Smoker discounts her reasons for quitting when the urge to smoke comes upon her, psychopaths like Gacy tend to discount or disregard the prospects of apprehension and punishment to a greater extent than do people who are *not* psychopathic.⁹⁸ They continue to do the wrong thing even with the knowledge that the likely long-term cost—punishment—will outweigh the short-term benefit—momentary pleasure. And this kind of unrealistic attitude and self-destructive behavior is either constitutive, or evidence, of diminished or absent control.⁹⁹

98. For a clear account of discounting in the context of self-control, see HOWARD RACHLIN, *THE SCIENCE OF SELF-CONTROL* 27–56, 150–55 (2000).

99. See, e.g., HARE, *supra* note 5, at 77–78 (“Concrete rewards are pitted against vague future consequences—with the rewards clearly the stronger contender. The mental image of the consequences *for the victim* [is] particularly fuzzy.”); *id.* at 143 (“[Psychopaths’] problem is that th[eir] knowledge [of the potential consequences of their acts] frequently fails to deter them from antisocial behavior.”); Hart, *supra* note 3, at 165 (“There is also considerable evidence indicating that psychopathy is associated with impairment of volitional functioning. The findings from experimental research here indicate that psychopathic offenders have problems evaluating the potential consequences of their actions, inhibiting impulses, implementing plans, and learning from punishment. . . . The corpus of relevant research is even older and larger than that supporting cognitive impairment, comprising hundreds of studies over almost 50 years.” (citations omitted)); Lippke, *supra* note 6, at 405 (rejecting the proposition “that most dangerous offenders have control over their conduct in the sense that they are able to refrain from violence where the risk of arrest and prosecution is especially high” and stating “such nonmoral control does not suffice for the retributive punishment of crimes with its distinctive blaming function”); Litton, *supra* note 6, at 381 (“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.”); Malatesti & McMillan, *supra* note 5, at 85 (“There are [research] results that appear to show that psychopaths are impaired in certain forms of learning that are taken to be correlated or enabled by certain emotional responses. . . . [P]sychopaths appear to have deficits in a type of instrumental learning that involves learning both to respond to stimuli that give rise to reward and to avoid responding to stimuli that give rise to punishment. . . . All of these impairments suggest that the practical reason of psychopaths might be damaged. . . . Psychopathy associates with reduced emotional responses.”); Morse, *supra* note 6, at 53 (“They say that they have goals, but act in ways inconsistent with understanding what having and achieving a goal entails. They do not consistently follow life plans and are impulsive. . . . Much of their conduct appears unintelligible because we cannot imagine what good reason would

Whether or not Gacy, for example, deliberated about what to do or attempted to resist his perverse desires (for whatever reason—fear of getting caught or some glimmering sense of conscience), the result was inevitable: when an opportunity presented itself, Gacy’s desires were so far apart that he was simply powerless to act on his weaker desire (to avoid punishment) and stop himself from taking advantage of this opportunity. The same is true if Gacy *created* the opportunity; he was not only powerless to stop himself from taking advantage of this opportunity but also, given the great gap between his desires, powerless to stop himself from creating this opportunity in the first place.¹⁰⁰ In sum, then, precisely because of his psychopathy, Gacy was unable to resist his temptation to commit brutal crimes. And because of this inability, he lacked moral responsibility for these crimes.

VI. THE INSANITY DEFENSE

Once again, I generally accept the arguments in the last Part for the conclusion that psychopaths are not morally responsible for their criminal acts. Yet I still contend that psychopaths should be held criminally responsible for these acts. In the remainder of this Article, I will explain why I believe that the latter conclusion is consistent with the former conclusion. I will further argue that the latter conclusion is *not* inconsistent with involuntarily committing dangerous psychopaths *before* they commit crimes.

motivate it. In brief, psychopaths have a generally diminished capacity for rational self-governance that is not limited to the sphere of morality. They cannot even reason prudentially.” (footnote omitted); Ward, *supra* note 79, at 13 (“[Criminals who habitually commit unprofitable crimes suffer from] a form of criminality that is itself insane The quality that distinguishes their criminality and marks it as insane is the conspicuous want of prudence and wisdom. . . . [T]he whole criminality is unnecessary and supererogatory.” (quoting CHARLES ARTHUR MERCIER, A TEXT-BOOK OF INSANITY 134–35 (2d ed. 1914)) (internal quotation marks omitted)).

100. See Morse, *supra* note 10, at 1073–74 (“In some cases . . . we may plausibly infer that sexual predators may have a general, rather than an intermittent, time-limited defect in the capacity for rationality that might genuinely undermine responsibility for sexually predatory behavior. . . . Even in the absence of psychotic cognition, in some cases continued predation simply may not make rational sense either to the predator or to anyone else. The predator may have no reasonable explanation for why he did not tie himself to the mast, did not take the preventive measures necessary to avoid hated imprisonment. The agent simply cannot think straight about what to do, even when not aroused, and continues to put himself in harm’s way without, apparently, the rational capacity to deliberate about how to avoid such situations.”).

A. Assumptions Underlying the Insanity Defense

The insanity defense is designed primarily to prevent persons deemed legally insane from being criminally punished. The three assumptions motivating the insanity defense are: (1) people who are insane are not morally responsible for their actions, (2) moral responsibility is a necessary condition of criminal responsibility, and (3) criminal responsibility is necessary for just criminal punishment. Therefore, by transitivity, people who are insane may not be justly criminally punished.

Each of these assumptions—(1), (2), and (3)—requires a brief explanation. We have already seen why (1) is the case in Part IV. Once again, people who are insane lack at least one of the first three conditions of moral responsibility—usually MR1 (knowledge, or a threshold capacity to know, that *A* is morally wrong) and less frequently some variation of MR2 (a threshold capacity to refrain from *A*-ing) or MR3 (control over *A*-ing).

Assumption (3) is also easy enough to explain. Very simply, there are two reasons why criminal responsibility is necessary for criminal punishment: justice and deterrence. To punish a person who is not criminally responsible for his actions would be unjust and would fail to deter that person from recidivating and similarly situated (that is, nonresponsible) persons from performing the same or similar crimes.¹⁰¹

Assumption (2) is also easy enough to explain, but I will argue here and in Part IX that it is false. There are two reasons why most, if not all, scholars and participants in the criminal justice system (attorneys and judges) subscribe to (2). First, moral responsibility is thought to be necessary for criminal responsibility because criminal responsibility is just a subset of moral responsibility—namely, moral responsibility for a given criminal act. Second, suppose that a person is not morally responsible for a given act. This means that MR1, MR2, MR3, or MR4 is not the case. And it seems unfair to blame, stigmatize, and punish an individual under this circumstance.¹⁰²

Still, there are two problems with this conclusion. First, contrary to the second reason above (with specific regard to MR1), there are two

101. See MODEL PENAL CODE § 4.01 cmt. at 166 (Official Draft and Revised Comments 1985) (“Those who are irresponsible under the [*M’Naghten*] test are plainly beyond the reach of the restraining influence of the law, and their condemnation would be both futile and unjust.”).

102. See *supra* note 9 and accompanying text.

ways in which people may be guilty of committing a crime even if they did not know that their act was criminal: (1) the jurisdiction requires only knowledge of the act or likely consequences, not knowledge of the criminal nature of the act or consequences; or (2) the *mens rea* for the crime was less culpable than knowledge: recklessness, criminal negligence, or strict liability.

Second, for both consequentialist and retributivist (desert) reasons, the criminal justice system should leave open the possibility that some people are criminally responsible even though they are *not* morally responsible. It is easy to see why some might wish to maintain this position with respect to psychopaths. Even if they are persuaded by the arguments in Part V above that psychopaths are not morally responsible for their behavior, they might still feel that they are responsible *enough*—that the gravity of the psychopath’s crimes in conjunction with the psychopath’s sadism and remorselessness merits punishment for the purposes of both exacting retribution and maximizing deterrence of others who would commit crimes of similar gravity.

B. Different Versions of the Insanity Defense

The first version of the insanity defense was the *M’Naghten* rule, which was issued by a British court in 1843.¹⁰³ According to the *M’Naghten* rule, a person is legally insane and therefore not guilty of the crime with which he is accused if, at the time of the crime, he was “labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know that what he was doing was wrong.” So under the *M’Naghten* rule, a person is considered insane and therefore not criminally responsible if, at the time of the alleged crime, (1) the person had a mental disorder (or “disease of the mind”), (2) the person’s mental disorder caused him to suffer from severe ignorance (to “labour[] under such a defect of reason”), and (3) this ignorance took one of two forms—either ignorance of what the person was doing or ignorance of the fact that what he was doing was wrong.¹⁰⁴ Thirty jurisdictions in the

103. *M’Naghten’s Case*, [1843] 8 Eng. Rep. 718 (H.L.) 722.

104. *Id.*; see Ward, *supra* note 79, at 9 (“What was needed to create legal obligation . . . was that the putative legal subject knew what he was doing and was able to understand that he had an obligation not to do it, so that whether or not he knew the law, he knew his action was wrong. Those two tests were the core of what came to be known as the McNaghten rules.”).

United States still employ this version, in whole or in part, of the insanity defense.¹⁰⁵

Five of these jurisdictions¹⁰⁶ have supplemented their versions of the insanity defense with what is typically known as the “irresistible impulse rule” (IIR). According to IIR, defendants are legally insane and therefore not criminally responsible or punishable for their otherwise criminal conduct if a mental defect or disorder made it impossible for them to control their behavior and avoid committing the criminal act for which they are being prosecuted.¹⁰⁷ The reasoning behind this volitional supplement is simple: if the insanity defense is designed to excuse defendants who are not morally responsible for their behavior because of a mental disorder, then it should excuse defendants whose mental disorder renders them not only unable to *know* the nature or wrongfulness of their behavior but also unable to *control* their behavior. The latter (volitionally impaired) are just as nonresponsible by virtue of their mental condition

105. ALA. CODE § 13A-3-1 (LexisNexis 2005); ALASKA STAT. § 12.47.010 (2008) (in part); ARIZ. REV. STAT. ANN. § 13-502 (2010); ARK. CODE ANN. § 5-2-301(5)(A) (2006) (in part); CAL. PENAL CODE § 25 (West 2011); COLO. REV. STAT. § 16-18-101.5 (2010) (in part); FLA. STAT. ANN. § 775.027 (West 2010); GA. CODE ANN. § 16-3-2 (2007) (in part); HAW. REV. STAT. § 704-400 (1993); IND. CODE ANN. § 35-36-2-2 (LexisNexis 1998) (in part); IOWA CODE ANN. § 701.4 (West 2003); LA. REV. STAT. ANN. § 14:14 (2007); MINN. STAT. ANN. § 611.026 (West 2009); MISS. CODE ANN. § 99-13-3 (West 2006); MO. ANN. STAT. § 552.030 (West 2002) (in part); NEB. REV. STAT. § 29-2203 (1995); NEV. REV. STAT. § 194.010 (2009); N.J. STAT. ANN. § 2C:4-1 (West 2005); N.Y. PENAL LAW § 40.15 (McKinney 2009) (in part); OHIO REV. CODE ANN. § 2901.01 (LexisNexis 2010); OKLA. STAT. ANN. tit. 21, § 152 (West 2002) (in part); 18 PA. CONS. STAT. ANN. § 315 (West 1998); S.D. CODIFIED LAWS § 22-1-2 (1988); TENN. CODE ANN. § 39-11-501 (2006) (in part); TEX. PENAL CODE ANN. § 8.01 (West 2011) (in part); WASH. REV. CODE ANN. § 9A.12.010 (West 2009); WIS. STAT. ANN. § 971.15 (West 2007) (in part); *see also* State v. Hartley, 565 P.2d 658, 660 (N.M. 1977); State v. Bonney, 405 S.E.2d 145, 155 (N.C. 1991); Morgan v. Commonwealth, 646 S.E.2d 899, 902 (Va. Ct. App. 2007).

106. *See, e.g.*, Lipscomb v. State, 609 S.W.2d 15, 17–18 (Ark. 1980); Hartley, 565 P.2d at 660; Graham v. State, 547 S.W.2d 531, 540–41 (Tenn. 1977); Morgan, 646 S.E.2d at 902. Although Indiana rejects IIR as a form of insanity, it still regards IIR as a possible means of demonstrating insanity. *See* Benefiel v. State, 578 N.E.2d 338, 350 (Ind. 1991) (“The legislature . . . amended the statute in 1984 to confine the definition of insanity to the inability to differentiate right from wrong. This, of course, does not exclude the showing of irresistible impulse to show such inability, but it excludes irresistible impulse as a separate independent excuse for the commission of a criminal act.”).

107. ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 67 (1967) (“[IIR] tells jurors to acquit by reason of insanity if they find the defendant had a mental disease which kept him from controlling his conduct.”).

as the former (cognitively impaired) and therefore should be just as eligible for acquittal.

In 1962, the American Law Institute (ALI) proposed an alternative version of the insanity defense in its Model Penal Code (MPC): “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”¹⁰⁸ Fifteen jurisdictions now implement this MPC version or a similar variation.¹⁰⁹ The MPC version of the insanity defense differs from the *M’Naghten* rule in three main respects. First, it changes inability to know (or unavoidable ignorance) to a lack of “substantial capacity . . . to appreciate.” The latter phrase suggests that a broader range of people might be found insane—not only those who simply *cannot* know but also those who *have significant difficulty* knowing; and not only those who cannot *know* but also those who have significant difficulty *doing something less* than knowing—namely, appreciating (or understanding).¹¹⁰ Second, it eliminates the nature of one’s act from the object of this inability. While the *M’Naghten* rule suggests that people are insane if they cannot know the nature or wrongfulness of their behavior, the MPC suggests that people are insane if they cannot know or appreciate (only) “the criminality [wrongfulness]” of their behavior. Third, it incorporates a

108. MODEL PENAL CODE § 4.01(1) (Official Draft and Revised Comments 1985) (alteration in original).

109. See CONN. GEN. STAT. ANN. § 53a-13 (West 2007); DEL. CODE ANN. tit. 11, § 401 (2007); HAW. REV. STAT. § 704-400; 720 ILL. COMP. STAT. ANN. 5/6-2 (West 2002); KY. REV. STAT. ANN. § 504.020 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 17-A, § 39 (2006); MD. CODE ANN., CRIM. PROC. § 3-109 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 768.21a (West 2000); N.D. CENT. CODE § 12.1-04.1-01(1) (1997); OR. REV. STAT. § 161.295(1) (2009); S.C. CODE ANN. § 17-24-10(A) (2003); VT. STAT. ANN. tit. 13, § 4801(a)(1) (2009); WYO. STAT. ANN. § 7-11-304(a) (2009); *State v. Johnson*, 399 A.2d 469, 476 (R.I. 1979); *State v. Massey*, 359 S.E.2d 865, 871 (W. Va. 1987). Several jurisdictions have adopted hybrid versions of the *M’Naghten* rule and the MPC version of the insanity defense. See, e.g., ALASKA STAT. § 12.47.010(a); ARK. CODE ANN. § 5-2-312(a)(1) (2006); GA. CODE ANN. § 16-3-2; IND. CODE ANN. § 35-41-3-6 (LexisNexis 2009); MO. ANN. STAT. § 552.030(1); N.Y. PENAL LAW § 40.15; TENN. CODE ANN. § 39-11-501; WIS. STAT. ANN. § 971.15(1). Four of these hybrid jurisdictions have adopted IIR. See, e.g., GA. CODE ANN. § 16-3-3 (2007); *Hamilton v. United States*, 475 F.2d 512, 515 (6th Cir. 1973); *Smith v. State*, 397 N.E.2d 959, 962 (Ind. 1979); *Kwosek v. State*, 100 N.W.2d 339, 345–46 (Wis. 1960). Several MPC jurisdictions have also adopted IIR. See, e.g., *People v. Lowhone*, 126 N.E. 620, 626 (Ill. 1920); *People v. Russell*, 173 N.W.2d 816, 824 (Mich. Ct. App. 1969); *Hartley*, 565 P.2d at 661; *State v. Goyet*, 132 A.2d 623, 651 (Vt. 1957).

110. See MODEL PENAL CODE § 4.01 cmt. at 180 (Official Draft and Revised Comments 1985) (“[I]t is doubtful if any other single term [than *substantial*] that does not implicitly require an unrealistic total lack of capacity can better catch the notion of very considerable incapacity.”).

relaxed version of IIR. While IIR requires a complete inability to control one's behavior, the MPC version of volitional insanity requires merely a "lack [of] substantial capacity . . . to conform [one's] conduct to the requirements of the law." Again, just as an inability to know is a more rigorous, harder-to-satisfy standard than a lack of "substantial capacity . . . to appreciate," so too an inability to control one's behavior is a more rigorous, harder-to-satisfy standard than a lack of "substantial capacity . . . to conform one's conduct to the requirements of the law."¹¹¹

Finally, there is the third and virtually extinct version of the insanity defense, what is known as the "*Durham*" or "Product" rule. Only one jurisdiction—New Hampshire—still subscribes to it.¹¹² As stated in the *Durham* case itself, "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."¹¹³ This version of the insanity defense is generally rejected because it conflicts with the widely held view that mental illness is consistent with

111. See *id.* § 4.01 cmt. at 171–72 ("A test requiring an utter incapacity for self-control imposes a comparably unrealistic restriction on the scope of the relevant inquiry. To meet these difficulties, it was thought that the criterion should ask if the defendant, as a result of mental disease or defect, was deprived of 'substantial capacity' to appreciate the criminality (or wrongfulness) of his conduct or to conform his conduct to the requirements of law, meaning by 'substantial' a capacity of some appreciable magnitude when measured by the standard of humanity in general, as opposed to the reduction of capacity to the vagrant and trivial dimensions characteristic of the most severe afflictions of the mind." (footnote omitted)).

112. See *State v. Fichera*, 903 A.2d 1030, 1034 (N.H. 2006) ("A defendant asserting an insanity defense must prove two elements: first, that at the time he acted, he was suffering from a mental disease or defect; and, second, that a mental disease or defect caused his actions." (citing *State v. Abbott*, 503 A.2d 791, 794 (N.H. 1985))). The District of Columbia subscribed to the *Durham* test until *United States v. Brawner*, 471 F.2d 969, 983 (D.C. Cir. 1972) (en banc), where the court noted, "The more we have pondered the problem the more convinced we have become that the sound solution lies not in further shaping of the *Durham* 'product' approach in more refined molds, but in adopting the ALI's [MPC] formulation as the linchpin of our jurisprudence." Likewise, Maine subscribed to the *Durham* test until 1981, when it adopted half of the MPC test. See ME. REV. STAT. ANN. tit. 17-A, § 39(1) ("A defendant is not criminally responsible by reason of insanity if, at the time of the criminal conduct, as a result of mental disease or defect, the defendant lacked substantial capacity to appreciate the wrongfulness of the criminal conduct.").

113. *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (citing *State v. Jones*, 50 N.H. 369, 398 (1871)). There was precedent for this proposition in *State v. Pike*, 49 N.H. 399, 402 (1870), *overruled by Hardy v. Merrill*, 56 N.H. 227 (1875). See also ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT, 1953, [Cmd.] 8932, ¶ 333 (U.K.) (rejecting the *M'Naghten* rule).

moral responsibility and therefore with criminal responsibility.¹¹⁴ The *Durham* rule suggests that anybody suffering from mental illness is not morally responsible for behavior resulting from this mental illness.¹¹⁵ But we generally reject this proposition because mental illness and moral responsibility are both considered to be continuum concepts. As we move along the mental illness continuum from lesser to more severe, a person increasingly loses moral responsibility. At some point, then, a person is considered to be so severely mentally ill that the person is no longer morally responsible for his behavior. This dividing line between responsibility and nonresponsibility occurs somewhere toward the far end of the mental-illness continuum. What this means is that individuals who fall along the continuum *prior* to this dividing line *are* morally responsible for their behavior at least to some significant degree. Again, the *Durham* rule is not at all consistent with this view; it regards *anybody* along the mental-illness continuum as entirely *non*responsible.

VII. FOUR ARGUMENTS THAT PSYCHOPATHS ARE INSANE

I do not believe that any American court has ever found a psychopath to be insane strictly on the grounds that he was psychopathic. If I am correct, part of the reason for this universal omission may be that many psychopaths do not invoke the insanity defense in the first place. They would be well advised not to because, if they were actually to succeed and persuade a court that they are insane, they would likely be committed for a longer period of time than they would be imprisoned if they were found guilty.¹¹⁶ Still, for the sake of showing the complete picture and the cogency of both sides in this debate, I will offer in this Part four arguments for the conclusion that psychopaths are insane and therefore should be eligible for the insanity defense. The reader should be aware that this is not my final conclusion. On the contrary, I will argue in Part IX that psychopaths are, in fact, *not* insane but rather criminally responsible for their behavior and therefore should be *ineligible* for the insanity defense.

114. See Ken Levy, Moral Responsibility, Excuses, and Situationism (unpublished manuscript) (on file with author).

115. See MODEL PENAL CODE § 4.01 cmt. at 173 (Official Draft and Revised Comments 1985) (“Under the *Durham* rule . . . ‘an accused is not criminally responsible if his unlawful conduct was the product of mental disease or defect.’” (quoting *Durham*, 214 F.2d at 874–75)).

116. See Morse, *supra* note 6, at 53 (arguing that “virtually no psychopath would . . . raise the insanity defence” because, given the absence of any effective treatment for psychopathy, “any psychopath acquitted by reason of insanity would be facing a lifelong commitment to an essentially prison-like facility” as compared with the potential for a shorter time in prison if found guilty).

A. First Argument that Psychopaths Are Insane

The fact that the drafters of MPC § 4.01 put *wrongfulness* in brackets after *criminality* highlights a difficulty that many courts and jurisdictions have been forced to confront. The difficulty is determining what kind of wrongfulness people must appreciate in order to be criminally responsible for their behavior. Ten jurisdictions hold that criminal responsibility requires only an appreciation of criminality or criminal wrongfulness, not necessarily an appreciation of moral wrongfulness.¹¹⁷ Call these “Appreciation-of-Criminality” jurisdictions. Twenty jurisdictions hold that criminal responsibility requires an appreciation not only of criminality but also of moral wrongfulness.¹¹⁸ Call these “Appreciation-of-Moral-Wrongfulness” jurisdictions. The remaining jurisdictions have not made it clear which standard they adopt.

There are two reasons why the Appreciation-of-Criminality jurisdictions believe that substantial appreciation of the moral wrongfulness of one’s act is *not* necessary for criminal responsibility. First, not all violations of the criminal law are morally wrong. Violations of *malum prohibitum*, as opposed to *malum in se*, laws are arguably no more morally wrong than violations of traffic rules. So requiring knowledge of the moral wrongfulness of *malum prohibitum* laws would preclude criminal responsibility for violating these laws, a result that many would regard

117. See ARK. CODE ANN. § 5-2-312(a)(1) (2006); MD. CODE ANN., CRIM. PROC. § 3-109 (LexisNexis 2008); NEV. REV. STAT. § 194.010 (2009); OR. REV. STAT. § 161.295 (2009); S.C. CODE ANN. § 17-24-10 (2003); TEX. PENAL CODE ANN. § 8.01 (2011); VT. STAT. ANN. tit. 13, § 4801 (2009); Ivery v. State, 686 So. 2d 495, 501 (Ala. Crim. App. 1996); State v. Hamann, 285 N.W.2d 180, 183 (Iowa 1979); State v. Crenshaw, 659 P.2d 488, 491 (Wash. 1983).

118. See DEL. CODE ANN. tit. 11, § 401 (2007); GA. CODE ANN. § 16-3-2 (2007); OHIO REV. CODE ANN. § 2901.01 (2010); S.D. CODIFIED LAWS § 22-1-2 (1988); WIS. STAT. ANN. § 971.15 (West 2007); State v. Skaggs, 586 P.2d 1279, 1284 (Ariz. 1978) (citing State v. Malumphy, 461 P.2d 677, 689 (Ariz. 1969) (McFarland, J., concurring)); People v. Skinner, 704 P.2d 752, 764 (Cal. 1985); People v. Serravo, 823 P.2d 128, 137 (Colo. 1992); State v. Wilson, 700 A.2d 633, 643 (Conn. 1997); Dacey v. People, 6 N.E. 165, 182 (Ill. 1886); Hill v. State, 251 N.E.2d 429, 437 (Ind. 1969) (citing United States v. Freeman, 357 F.2d 606, 622 n.52 (2d Cir. 1966)); State v. Brogdon, 426 So. 2d 158, 168 (La. 1983); State v. Rawland, 199 N.W.2d 774, 788 (Minn. 1972); State v. Long, 139 N.W.2d 813, 821 (Neb. 1966) (citing Bothwell v. State, 99 N.W. 669, 670–71 (Neb. 1904)); State v. Worlock, 569 A.2d 1314, 1321 (N.J. 1990); People v. Wood, 187 N.E.2d 116, 121 (N.Y. 1962); State v. Staten, 616 S.E.2d 650, 658 (N.C. Ct. App. 2005); State v. Thompson, 402 S.E.2d 386, 390 (N.C. 1991); State v. Johnson, 399 A.2d 469, 477 (R.I. 1979); Graham v. State, 547 S.W.2d 531, 543 (Tenn. 1977); White v. Commonwealth, 616 S.E.2d 49, 58 (Va. Ct. App. 2005) (Elder, J., dissenting), *aff’d*, 636 S.E.2d 353 (Va. 2006); Flanders v. State, 156 P. 39, 44 (Wyo. 1916).

as nonsensical. Second, appreciation of the moral significance of the criminal law is simply not necessary. If a person substantially appreciates that she is violating a criminal law, whether it is *malum in se* or *malum prohibitum*, then she is *not* insane. She is *not* “out of touch” with reality, at least the reality that matters for criminal responsibility. On the contrary, the fact that she performed the criminal act even though she knew that she is not allowed to behave this way, that society has erected prohibitions against this kind of behavior, is precisely the kind of defiance that criminal punishment is directed against.¹¹⁹

In contrast to the Appreciation-of-Criminality jurisdictions, the Appreciation-of-Moral-Wrongfulness jurisdictions maintain that mere appreciation of the criminality of one’s act is not sufficient for criminal responsibility, that one must also appreciate that one’s act is morally wrong as well.¹²⁰ They tend to limit this “extra” appreciation or knowledge to *malum in se* crimes for precisely the reason given above: requiring knowledge of moral wrongfulness for criminal responsibility would lead to the absurd result that nobody could be criminally responsible for committing a *malum prohibitum* crime. But with respect to *malum in se* crimes, why do Appreciation-of-Moral-Wrongfulness jurisdictions require not only knowledge of criminality but also knowledge of moral wrongfulness? The assumptions motivating this position are that (1) criminal responsibility requires *moral responsibility* and (2) moral responsibility for a criminal act requires not merely knowledge that one is violating the criminal law but also knowledge that one is violating the *moral* law, the *moral* basis upon which the criminal law itself is predicated.¹²¹

119. I will defend this point further in Part IX. Of course, if individuals claim that they knew that their behavior violated the law but “could not help it”—felt powerless to bring their actions into conformity with their knowledge—then they might still have a successful insanity defense if that jurisdiction recognizes IIR or the MPC’s volitional-incapacity prong. *See supra* Part VI.

120. By *as well*, I mean that the Appreciation-of-Moral-Wrongfulness jurisdictions require, for criminal responsibility, *both* appreciation of the criminality *and* appreciation of the moral wrongfulness of one’s act. Still, an Appreciation-of-Moral-Wrongfulness jurisdiction could in principle require *only* appreciation of the moral wrongfulness of one’s act for criminal responsibility. This kind of jurisdiction would hold that one’s knowledge of moral wrongfulness and therefore criminal responsibility is *consistent with* ignorance of the fact that one’s morally wrongful action is criminally prohibited.

121. MODEL PENAL CODE § 4.01 cmt. at 166 (Official Draft and Revised Comments 1985) (“One shortcoming of [the knowledge criterion of the *M’Naghten* rule] is that it authorizes a finding of responsibility in a case in which the actor is not seriously deluded concerning his conduct or its consequences, but in which the actor’s appreciation of the wrongfulness of his conduct is largely detached or abstract awareness that does not penetrate to the affective level. Insofar as a formulation centering on ‘knowledge’ does not readily lend itself to application to emotional abnormalities, the *M’Naghten* test

The implication of this position is that a person who knows that a given crime is *malum in se* but does not know or believe that this act is morally wrongful is insane and therefore not criminally responsible for her act. Suppose, for example, that Debbie knows that firing a loaded rifle “for kicks” at another person is against the law but does not know that this action is morally wrongful. Of course, it is difficult even to imagine this situation. It seems that if Debbie does not have the moral knowledge, she will not have the legal knowledge as well. Conversely, if Debbie has the legal knowledge, then she should have at least some sense—some appreciation—of the moral implications. But if we put this consistency concern aside and accept the hypothetical, it stands to reason that Debbie is so out of touch with moral reality, so out of touch with the most basic and obvious moral norms of our society, that she cannot be considered morally responsible if she then acts on the basis of this moral ignorance and fires away. Her moral knowledge is no more advanced than a young child’s, in which case she is no more culpable than a young child is for its morally reprehensible acts.

As it turns out, the empirical evidence shows that dangerous psychopaths are generally in Debbie’s situation. On the one hand, they know that certain *malum in se* acts such as killing, raping, kidnapping, and stealing are against the law. On the other hand, they do not have an “emotional” or “affective” understanding of the moral wrongfulness of these acts. To the extent that they consider them to be morally wrong at all, they consider them to be morally wrong only in the sense that they are against the law. For them, there is no *malum in se*. All moral wrongfulness reduces to *malum prohibitum*, all criminal prohibitions to regulatory restrictions.¹²²

appears less than optimal as a standard of responsibility in cases involving affective disorder.”).

122. See *supra* note 12 and accompanying text; see also MOSS, *supra* note 12, at 158 (citing a passage in a personal letter from serial killer Richard Ramirez, stating that “[m]orals, scruples and all that other shit are just words to make people feel better about themselves”); Ferzan, *supra* note 9, at 238–39 (“[U]nder the traditional understanding, the psychopath is an individual who fails to understand moral norms because he lacks the capacity to form emotional attachments to others. Viewed this way, one might imagine the psychopath to be akin to Data from Star Trek. Data, an android, does not form any emotional attachments. He can only act logically and rationally. Applied to the psychopath, all criminal laws appear to the psychopath as *malum prohibitum* laws appear to us—the only reason we have to follow these laws is because we will otherwise be punished. The laws do not forbid anything morally wrong in and of themselves.” (footnote omitted)); Levy, *supra* note 5, at 219 (“Normal children make the moral/conventional distinction; so do autistic children. However, psychopaths apparently cannot reliably draw the distinction.” (citations omitted)).

If a given *malum in se* act—kidnapping—happened not to be against the law, they would simply not understand what we meant when we said that it is still *wrong*. For them, it would be like saying that it is still wrong to drive through an intersection without stopping even though there is no stop sign or red light. *Legally permissible* means morally permissible and vice versa.

The root cause of psychopaths' moral ignorance is an innate inability to empathize with the victim, an inability to see the victim's situation from the victim's own perspective. As I argued in Part V.A, for nonpsychopaths who have undergone normal socialization and moral development, we may appeal to their compassion, their concern for others, when we wish to influence their behavior toward other sentient beings. We ask them how *they* would feel if *they* were on the receiving end of the kind of negative behavior that they are exhibiting. Asking them to imaginatively displace themselves into the heads of their potential victims is often, if not usually, sufficient to curb or reverse their negative behavior. But the same is not true of psychopaths. Because they are incapable of imaginatively displacing themselves into the heads of others—because they are incapable of feeling empathy—they are incapable of feeling sympathy. They simply cannot *care* about their victims' feelings. And this inability to care about others renders all moral terms meaningless. Without a conscience to make them feel guilty about treating others badly, they simply cannot understand what we mean when we insist that this negative treatment is simply *wrong*.

Given the psychopath's inability to understand moral wrongfulness, one might very well argue that psychopaths should qualify as insane in an Appreciation-of-Moral-Wrongfulness jurisdiction.¹²³ Although they

123. See Litton, *supra* note 6, at 385–86 (“[O]ne could argue that [psychopaths] 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 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; one must also be able to ‘internalize the enormity of [his] criminal act’ and appreciate emotionally its moral wrongfulness. The case for excusing the psychopath along this rationale is stronger under law that follows the Model Penal Code 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 If a law requires substantial capacity to appreciate moral wrongfulness, the psychopath has a strong argument for excuse.” (footnotes omitted)); Morse, *supra* note 6, at 51 (“Despite the United States law’s exclusion of psychopathy as the basis for an insanity defence, the language of the various tests permits a reasonable case for inclusion. In brief, the argument for excusing psychopaths, or anyway some of them, is that they lack the strongest reasons for complying with the

may have known that their acts were against the law, they did not understand the moral basis of this prohibition. And, again, Appreciation-of-Moral-Wrongfulness jurisdictions require this moral understanding for criminal responsibility. This is the first argument for the conclusion that psychopathy is a form of insanity.

B. Second Argument that Psychopaths Are Insane

There are three more arguments for the conclusion that psychopaths are insane. Unlike the last argument, which applies only in Appreciation-of-Wrongfulness jurisdictions, all three of them apply universally.

The first of these universally applicable arguments suggests simply that no person “in his right mind” could do the things that Gacy did—torture and kill—under his particular circumstances.¹²⁴ This last part about Gacy’s particular circumstances has to be included to avoid the implication that people who torture and kill in other situations are insane, an implication that is false. Many people who torture and kill under different kinds of circumstances are *not* insane. Examples include people who torture and kill because they have been indoctrinated, trained, terrorized, or severely abused. Whether or not these conditions—indoctrination, training, terror, or abuse—mitigate their responsibility, most of these agents have lost “only” their compassion—perhaps only on certain occasions and only for certain human beings—not their sanity. People can lose compassion for others and still know the nature of their actions, know the moral and legal status of their actions, and retain control over their actions.

The same, however, cannot be said of people like Gacy, who never could feel compassion for others. Somebody with this permanent deficit is arguably just as “crazy”—just as “out of touch”—as a person who is

law, such as understanding that what they are doing is wrong and empathic understanding of their victim’s plight.”).

124. See HARE, *supra* note 5, at 22 (“[A] common response to reports of brutal crimes, particularly serial torture and killing, is: ‘Anyone would *have* to be crazy to do that.’”); Morse, *supra* note 6, at 53 (“[S]evere psychopaths are out of touch with ordinary social reality.”); Ward, *supra* note 79, at 17 (advocating Hervey Cleckley’s point that “the reason the psychopath present[s] such a medico-legal conundrum was that the surface appearance of rationality—the ‘mask of sanity’—concealed an inner life from which some essential element of rationality was absent”). *But see* Litton, *supra* note 6, at 371 (“The fact of psychopaths’ repeated immoralities . . . cannot show that they are incapable of moral reasoning or that they should not be held morally responsible for their conduct. Evil should not represent its own excuse.”).

unable to distinguish between fantasy and reality.¹²⁵ Some scholars put this argument in terms of *rationality*. They argue that rationality requires “moral competence,” a capacity for moral understanding, which itself requires a capacity to value others as more than means to one’s own end.¹²⁶ That is, rationality cannot survive on reason and self-interest alone; people cannot be minimally rational if they cannot be motivated by reasons that concern others’ interests and rights, reasons that are informed by other-concerning values, desires, and emotions.¹²⁷ It follows, then, that psychopaths are fundamentally irrational. And because fundamental irrationality is, or causes, insanity, it follows that psychopaths, who lack minimal moral competence, are insane.

C. Third Argument that Psychopaths Are Insane

According to the second universally applicable argument (and the third argument overall), Gacy’s inability to understand the moral wrongfulness of torturing and killing arguably satisfies the *M’Naghten* rule, according to which a person was insane at the time of the crime if that person was “labouring under such a defect of reason, from disease of the mind . . . that he did not know that what he was doing was wrong.”¹²⁸

I say *arguably* because this conclusion requires three points to be established: that (1) Gacy suffered from a “defect of reason” or “disease of the mind”; (2) *know* refers not merely to cognitive knowledge but also to emotional or affective knowledge;¹²⁹ and (3) *wrong* means not merely *legal* wrong (illegality) but also *moral* wrong (immorality).¹³⁰ In Part IX below, I will argue that both (2) and (3) are false. But for the purposes of

125. See *supra* notes 69 and 124 and accompanying text.

126. See *supra* note 79 and accompanying text.

127. The claim here is that rationality requires a minimal moral capacity. This claim should not be confused with David Hume’s superficially similar claim that rationality—or “reason alone”—cannot motivate one to act; that action requires psychological states other than reason—namely, “passions” or “emotions.” DAVID HUME, A TREATISE OF HUMAN NATURE 413–18 (L.A. Selby-Bigge & P.H. Nidditch eds., 2d ed. 1978) (1739–1740); cf. Jana Schaich Borg, *Impaired Moral Reasoning in Psychopaths? Response to Kent Kiehl*, in 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT, *supra* note 5, at 159, 159–63 (arguing that studies “cast[] doubt on the view that emotion is unnecessary for successful moral reasoning”).

128. But see Ward, *supra* note 79, at 10 (“Those who today might be called psychopaths were the very last people the judges who formulated [the *M’Naghten* test and IIR] would have expected to benefit from them.”).

129. (2) is discussed more fully in Part V.A below and in Ken Levy & Walter Sinnott-Armstrong, *Insanity Defenses*, in OXFORD HANDBOOK ON THE PHILOSOPHY OF THE CRIMINAL LAW 299, 315–16 (John Deigh & David Dolinko eds., 2011).

130. (3) is discussed more fully in Part VII.A below and in Levy & Sinnott-Armstrong, *supra* note 129, at 302–06, 312–13.

this argument, we may now assume that (2) and (3) are both true. And that is enough to sanction the third argument because (1) is also true.

To demonstrate that (1) is true, it would have to be shown that Gacy was a psychopath and psychopathy is a “defect of reason” or “disease of the mind.” The literature clearly establishes that Gacy was a psychopath.¹³¹ And the notion that psychopathy is a “defect of reason” or a “disease of the mind”—a mental illness—was implicitly established in Parts II and V (and will be further defended in Part X.E). Given the fact that psychopathy tends to deprive the individual of key abilities—including the ability to care for others, to control one’s impulses, and to engage in long-range planning—psychopathy seems to fit right in with the family of other conditions that deprive individuals of equally central abilities and thereby qualify as mental illnesses.¹³² Still, the reader should recognize that this point is controversial.¹³³ Most courts, psychologists, and scholars do not accept the proposition that psychopathy is a mental illness.¹³⁴

131. See generally LINEDECKER, *supra* note 64; MOSS, *supra* note 12.

132. See HARE, *supra* note 5, at 142 (“[John Wayne] Gacy’s ‘loose associations’ and his contradictory statements and lies may reflect little more than mental carelessness, lack of interest in keeping things straight for the listener, or part of a strategy intended to confuse the listener. However . . . they also may stem from a condition in which continuity among mental events and the self-monitoring of speech are defective, perhaps even disordered: mental Scrabble without an overall script.”). Examples of other abilities-depriving mental illnesses include decompensation, dementia, developmental disability, mental retardation, pedophilia, and various other disorders: Autism, Bipolar Disorder, Borderline Personality Disorder, Dissociative Disorders, Substance Abuse Disorder, Eating Disorders, Major Depression, Obsessive-Compulsive Disorder, Narcissism, Panic Disorder, Post-Traumatic Stress Disorder, Schizophrenia, Schizoaffective Disorder, Seasonal Affective Disorder, and Tourette’s Syndrome. 53 AM. JUR. 2D *Mentally Impaired Persons* § 1 (2006); *Mental Illnesses: By Illness*, NAT’L ALLIANCE ON MENTAL ILLNESS (NAMI), http://www.nami.org/Template.cfm?Section=By_Illness (last visited Nov. 24, 2011).

133. See HARE, *supra* note 5, at 21 (“[The question whether a psychopath is mad or bad is] a question that has long troubled not just psychologists and psychiatrists but philosophers and theologians.”); *id.* at 25 (“[There has been] an argument that spanned generations and seesawed between the view that psychopaths were ‘mad’ and that they were ‘bad’ or even diabolical.”).

134. *Id.* at 22 (“Most clinicians and researchers don’t use the term [*psychopathy*] to mean ‘insane’ or ‘crazy’; they know that psychopathy cannot be understood in terms of traditional views of mental illness. Psychopaths are not disoriented or out of touch with reality, nor do they experience the delusions, hallucinations, or intense subjective distress that characterize most other mental disorders. Unlike psychotic individuals, psychopaths are rational and aware of what they are doing and why.”).

D. Fourth Argument that Psychopaths Are Insane

The fourth overall argument for the conclusion that psychopaths like Gacy are insane: for reasons given above, Gacy satisfied (1) both prongs, the cognitive and volitional, of the MPC test; and (2) the insanity test in jurisdictions that have added IIR.¹³⁵

First, the cognitive prong of the MPC test. Again, the MPC's cognitive prong says that a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct." As I argued in Part VII.A, Gacy's psychopathy deprived him of a substantial capacity to appreciate—to have an emotional understanding of—what is morally wrongful about torturing and killing and therefore would easily satisfy the cognitive prong of the MPC test in Appreciation-of-Moral-Wrongfulness jurisdictions.

Second, the volitional prong of the MPC test. Again, the MPC's volitional prong says that a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to conform his conduct to the requirements of the law." As I argued above in Part V.C–D, Gacy satisfied this prong because he could not have done otherwise; given his psychopathy and his sadistic desires, he felt overwhelmingly powerful reasons to torture and kill and much weaker reasons to resist these desires. So when the opportunities arose—or when he impulsively created such opportunities—he simply *had* to take advantage of them. He could not have resisted. One set of reasons easily and unavoidably overpowered the other set of reasons.¹³⁶

For the very same reasons, Gacy satisfied the IIR prong of the *M'Naghten* test in several jurisdictions. Again, according to IIR, defendants are legally insane and therefore not criminally responsible or criminally punishable for their otherwise criminal conduct if a mental defect or disorder made it impossible for them to control their behavior. The paragraph above demonstrates that Gacy satisfied this condition.

135. See *supra* Part VI.B.

136. One danger of this argument is that it may discourage psychopaths from trying to improve their behavior. See Ward, *supra* note 79, at 13 (noting that Havelock Ellis, a criminological positivist in the late nineteenth and early twentieth centuries, "regarded the whole enterprise of distinguishing between 'responsible' and 'non-responsible' criminals as futile and counterproductive, since telling some criminals that they were incapable of self-control was likely to be a self-fulfilling prophecy"); see also *supra* note 47.

VIII. WHY THE CRIMINAL JUSTICE SYSTEM REGARDS PSYCHOPATHS
AS CRIMINALLY RESPONSIBLE

Despite all of the reasons in the last Part for judging psychopaths like John Wayne Gacy to be insane and therefore nonresponsible for criminal acts that result from their psychopathy, no jurisdiction currently regards psychopathy as a form of insanity and therefore as a basis for acquittal.¹³⁷ On the contrary, psychopathy is almost always regarded as an *aggravating* factor.¹³⁸ Why, then, is the criminal justice system reluctant to follow through on the perfectly plausible proposition that psychopaths are insane? In this Part, I will offer several reasons. In Part IX, I will argue that whether or not these reasons are correct, their conclusion is. That is, the criminal justice system is *correct* to reject psychopathy as a form of insanity and therefore as a basis of acquittal.

Once again, there are several reasons why the criminal justice system does not regard psychopaths as insane. The first is consequentialist. As I argued in Part III above, society would simply not tolerate acquitting a defendant like Gacy. It would not understand—nor wish to hear—why a man who tortured and killed over thirty young males did not receive severe punishment—either life imprisonment or death.¹³⁹ Its outrage would be fueled primarily by a thirst for retribution and secondarily by the goal of maximizing deterrence of Gacy “copycats.” It might also prefer punishment to acquittal if it believed either that acquittal would not be followed by commitment to a psychiatric hospital or that commitment is less secure than imprisonment. Still, as I argued above in Part III, it is important to realize that both of these beliefs are false and therefore that *this* reason to prefer punishment to acquittal is misguided.

Second, psychopaths’ characteristic lack of compassion for their victims makes them especially unsympathetic and unlikeable defendants.¹⁴⁰ The

137. See *supra* note 11 and accompanying text.

138. See *supra* note 3.

139. See Litton, *supra* note 6, at 389 (“[I]f 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.”).

140. See MOSS, *supra* note 12, at 102 (“Because part of me knew that [Gacy] was trying very hard to manipulate me, I felt less guilty manipulating him. I suppose I shouldn’t have felt guilty at all. One could make the argument that Gacy, as someone who’d brutally killed thirty-three men and boys, wasn’t entitled to honesty or fair play.”); RONSON, *supra* note 21, at 110 (“Why should we feel sorry for [psychopaths]? They don’t give a shit about us.” (quoting a fellow conference attendee) (internal quotation marks omitted)).

fact that they callously harmed their victims in the first place and then never felt (or showed) genuine remorse afterward indicates that they regard their victims not as fellow human beings deserving of respect but rather as means or obstacles—either means for their own use or pleasure or obstacles whom they need to remove in order to fulfill their own selfish impulses. We generally react to this cold, unfeeling attitude toward others' suffering with horror and disgust. So, far from being inclined to excuse psychopathic defendants, we are inclined to do just the opposite: treat their psychopathy as an aggravating factor. They are not mad; they are *bad*. Indeed, they are as bad as one can get. They knowingly and willingly harmed their victims. This is the very embodiment of *evil*, not of insanity.

Third, people like Gacy *seem* sane. Yes, Gacy was a person whose psychology we have a great deal of trouble understanding. Most of us simply cannot imagine how a person could even *want* to torture and kill others, no less carry through on this bizarre desire. To be sure, we understand *that* he had these desires and acted on them—much as Gacy understood *that* we are morally opposed to these desires and acts. What we do *not* understand is *how* he wanted and did these things—perhaps as much as Gacy did not understand *how* we do *not* share *his* desires. But foreign as he is to us, difficult as it is to put ourselves inside his head and experience the world as he did, it is still reasonable to perceive him as sufficiently rational. He was cognitively and socially intelligent, able to communicate as a normal human being, did not suffer from any illusions (like many schizophrenics), and was quite adept—indeed, too adept—at practical reason (that is, at finding the means to satisfy his ends). In short, he walked on two legs and came across as a *normal* human in most respects.¹⁴¹ And in the few respects that he did

141. See HARE, *supra* note 5, at 142 (“[W]hy are psychopaths so believable, so capable of deceiving and manipulating us? Why do we fail to pick up the inconsistencies in what they say? The short answer is, it is difficult to penetrate their mask of normalcy . . . [because] they put on a good show. We are sucked in not by what they say but by how they say it and by the emotional buttons they push while saying it.”); MOSS, *supra* note 12, at 16 (“John Wayne Gacy . . . seemed to be the embodiment of all evil . . . Unlike some of the [other serial killers], he was totally invisible when he was operating. There was no way you could tell what he was up to. He wasn’t a crazed lunatic like Manson or a loner like Dahmer; rather, he projected the appearance of a normal guy whom most anyone would like.”); Borg, *supra* note 127, at 159 (“[C]ognitive neuroscience data have shown that psychopaths have deficits in emotional processing, yet they are still able to maintain a ‘mask of sanity’ and rationalize what is morally right or appropriate”); Hart, *supra* note 3, at 162, 167–68; Lee, *supra* note 3, at 126 (“[It is] disturbing . . . that psychopaths usually appear well adjusted and exhibit average or better intelligence. Thus, psychopaths not only possess dangerous traits prone to violence, they are capable of masking those characteristics under a façade of superficial normalcy for unsuspecting victims.” (footnote omitted)); Litton, *supra* note 6, at 385 (“Psychopaths are in touch with physical reality: they do not suffer from

not come across as normal, he was not mad. Rather, again, he was bad—indeed, pure evil.¹⁴²

Fourth, we saw above in Part II.D that psychopathy and ASPD overlap significantly. Once again, the only real differences between them are that (1) lack of empathy is not an essential criterion of ASPD and (2) while the diagnostic criteria of ASPD are primarily behavioral, the diagnostic criteria of psychopathy are both behavioral and psychological. We also saw in Part II.D that up to 90% of the prison population are thought to suffer from ASPD. If, then, the courts were suddenly to shift course and stipulate that ASPD is a form of insanity, it follows that most criminal cases would lead to insanity verdicts rather than criminal convictions. But this is a shift that society is not at all inclined to take—for obvious reasons (consequentialist, retributivist, expressivist, and commonsensical). Given this reluctance and the fact that psychopathy and ASPD are so similar, it follows that society is nearly, if not equally, reluctant to regard *psychopathy* as a form of insanity.¹⁴³

Fifth, the courts are not generally aware of the scientific evidence regarding psychopaths' moral ignorance and *incapacity* for moral knowledge. Moreover, researchers differ in their interpretations of this data. So the courts that are presented with this data are not confident enough to conclude from it that a given defendant who has been diagnosed with psychopathy either (1) genuinely lacked knowledge or substantial appreciation that the act was morally wrong or (2) genuinely lacked the *capacity* to know or substantially appreciate that the act was morally wrong. Indeed, even if the courts ventured far enough to accept (1)—to accept that the defendant did not know that the act was morally

psychosis, as do persons with schizophrenia. 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.” (footnote omitted)).

142. See MOSS, *supra* note 12, at 256–57 (“I began wondering if Gacy had a soul. I wondered if someone who was that evil, who’d destroyed so many lives, who was so willing to be deceptive and manipulative, could possibly have anything resembling a spiritual side to him.”).

143. See Litton, *supra* note 6, at 390 (“We must also consider the financial and other costs to the criminal justice system in excusing individuals with psychopathy. . . . [T]he number of offenders who could possibly raise (although not necessarily with success) a psychopathy-excuse defense is very high. . . . 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.’” (footnotes omitted)).

wrongful—they would still likely find criminal responsibility because they would not be confident enough in the expert testimony to accept (2) as well. All else being equal, it seems safer to presume that the psychopathic defendant either was not ignorant in the first place or, if he was, was more willfully than helplessly ignorant.

IX. WHY PSYCHOPATHS ARE CRIMINALLY RESPONSIBLE EVEN THOUGH THEY ARE NOT MORALLY RESPONSIBLE

In this Part, I will argue that the criminal justice system is right not to regard psychopathy as a form of insanity and therefore as a basis for invoking the insanity defense.

As we saw in Part V, there are two main reasons for the conclusion that psychopaths are not morally responsible for their criminal acts: inability to know right from wrong and inability to avoid doing the wrong thing. Scholars typically infer from this conclusion that psychopaths are not *criminally* responsible for their crimes and therefore may not be justly punished. I will argue, however, that this inference is false; that even if psychopaths are not morally responsible for their criminal acts, they are still criminally responsible—and therefore criminally punishable—for them. In a nutshell, I will argue that Appreciation-of-Criminality jurisdictions get it right. Even if psychopaths are unable to have a moral, emotional, or affective understanding—an understanding of the concern for others that underlies most—of the criminal law, they still have a cognitive understanding of the criminal law; an understanding that if they violate the criminal law, they will likely be caught and punished.¹⁴⁴ And although the latter understanding is not sufficient for moral responsibility, it *is* sufficient for criminal responsibility, in which case it is perfectly legitimate to hold psychopaths criminally responsible and punish them rather than acquitting and then committing them.

A. *Why Criminal Responsibility Does Not Require Moral Responsibility*

Once again, criminal responsibility is generally thought to require moral responsibility. If people are not morally responsible for their behavior, then it seems unjust to criminally punish them for it. It is easy to see why most would subscribe to this proposition. Responsibility is

144. See H.J. Eysenck, *Personality and Crime*, in *PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR*, *supra* note 7, at 40, 45 (“Research has shown that criminals know what is right and wrong as well as anybody—they just prefer the wrong to the right.”).

responsibility. If I am not responsible for a given act, then it is not fair to blame me for it. And if it is not fair to blame me for it, then it is equally unfair to punish me for it.

But what this syllogism fails to take into account is a critical—and almost entirely overlooked—distinction between two different kinds of responsibility: moral and criminal. Although the two clearly overlap, the latter simply does not *require* the former. One can be criminally responsible for a criminal act even if one is not morally responsible for it. The explanation is that our reasons for holding people morally responsible are different from our reasons for holding people criminally responsible. On the one hand, we hold people morally responsible (blameworthy) when they fail to comply with moral norms *and* knew or should have known these moral norms. On the other hand, we hold people criminally responsible—and therefore criminally punishable—when they fail to comply with the *criminal law* and knew or should have known that these laws were in effect.

To be sure, criminal laws often follow moral norms. All *malum in se* laws—laws against murder, rape, theft, and kidnapping—are laws that derive directly from moral prohibitions. Still, when we find a defendant guilty of committing a *malum in se* crime, we are blaming and punishing the defendant *not* for violating the moral norm per se but for violating the criminal law.

Criminal blame—the practice of holding a defendant criminally responsible—assumes that the defendant satisfies four conditions:

CR1: knowledge, or a threshold capacity to know, the (relevant) criminal law (*C*);

CR2: a threshold capacity to refrain from violating *C*;

CR3: control over violating *C*;¹⁴⁵

CR4: an absence of circumstances that excuse this violation, including reasonable (or reasonably understandable) ignorance of the possible/likely consequences of violating *C*.

Naturally, these four conditions parallel the conditions of moral responsibility, presented above in Part IV:

145. Cf. Vincent Chiao, *Action and Agency in the Criminal Law*, 15 LEGAL THEORY 1, 16–22 (2009) (arguing that the voluntary-act requirement should be understood as a “practical-agency condition” rather than a control condition).

- MR1: knowledge, or a threshold capacity to know, that *A* is morally wrong;
- MR2: a threshold capacity to refrain from *A*-ing;
- MR3: control over *A*-ing; and
- MR4: an absence of circumstances that excuse this performance.

Still, these two lists are only superficially similar. In fact, the differences between them help to explain how a person might be criminally responsible for *A*-ing without being morally responsible for *A*-ing. Suppose that the defendant is, because of a psychological or neurological disorder, *incapable* of grasping or understanding moral norms. Then we cannot (justly) hold the defendant morally responsible for *A*-ing because MR1—one of the four conditions required for holding him morally responsible—is simply not satisfied. Importantly, however, we might *still* be able to hold the defendant *criminally* responsible for *A*-ing. Even though the defendant could not understand the moral basis of the criminal law and therefore cannot be blamed for failing to comply with the criminal law qua moral norm, the defendant might still have been able to understand the possible or likely consequences of violating the criminal law (arrest, conviction, punishment, and stigma) and therefore still had *plenty* of good reasons for complying with the criminal law qua criminal law.¹⁴⁶

146. See HARE, *supra* note 5, at 78 (“[P]sychopaths are not *completely* unresponsive to the myriad rules and taboos that hold society together. After all, they are not automatons, blindly responding to momentary needs, urges, and opportunities. It is just that they are much freer than the rest of us to pick and choose the rules and restrictions they will adhere to. . . . [T]he psychopath carries out his evaluation of a situation—what he will get out of it and at what cost—without the usual anxieties, doubts, and concerns about being humiliated, causing pain, sabotaging future plans, in short, the infinite possibilities that people of conscience consider when deliberating possible actions.”); *id.* at 143 (“In my opinion, psychopaths certainly know enough about what they are doing to be held accountable for their actions.”); Eysenck, *supra* note 144, at 40, 45 (“Research has shown that criminals know what is right and wrong as well as anybody—they just prefer the wrong to the right.”); Fischette, *supra* note 9, at 1482 (“[T]he limits on behavior come not from any emotional connection to the moral import of the law but rather from the clear fear of being punished—a purely self-interested motivation. If that can be generalized, there may be a class of laws where emotional capacities are unnecessary to the fairness of attributions of responsibility.”); Hart, *supra* note 3, at 169 (“According to the law, people with psychopathy may have problems fully appreciating the emotional meaning or consequences of their actions and using their emotions to make choices and plans, but they ought to know better than to commit serious crime and violence.”); Lippke, *supra* note 6, at 394 (“Granted, the criminal law does not set very high liability requirements with regard to legal punishment. In particular, it does not require that those liable to punishment be capable in any very substantial way of regulating their conduct by reference to moral considerations. It is enough for the criminal law if individuals are capable of restraining their violent proclivities based merely on considerations of self-interest.”); Morse, *supra* note 10, at 1068–69 (“Most sexually violent agents are firmly in touch with reality, instrumentally rational, and fully aware of the applicable moral and legal rules. . . . Furthermore, although predators’

Consider a violent crime such as murder. Most people refrain from committing murder for four reasons.¹⁴⁷ First, they just do not want to. Angry as they may get at other people, they simply do *not* want to kill—no less think of killing—the latter. Second, a subset of this majority may *think* of killing. But they refrain for one of three reasons. The first reason (among this inclined subset) and the second overall reason that they refrain from murder is that they morally oppose it; their conscience would not tolerate it. Although they may entertain, however briefly, the thought of murdering the person whom they hate, they quickly decide against it because they believe that it is just wrong, morally intolerable.¹⁴⁸ The second reason (among the inclined subset) and the third overall reason that they refrain from murder is that they respect the criminal law. They believe that the criminal law, at least the law prohibiting murder, represents the moral ideals of the community; and they have too much respect for this shared moral code to defy it. The third reason (among the inclined subset) and the fourth overall reason that they refrain from murder is that they fear the criminal law. They fear violating it, getting caught, and being criminally punished. Importantly, fear need not have the affect of fright or dread; it could consist solely in the fright-free knowledge that unpreferred consequences—especially arrest and punishment—will likely follow a given criminal act.¹⁴⁹

sexual desires and behavior may be statistically abnormal and morally objectionable, predators are instrumentally rational when they satisfy those desires. . . . [I]t appears that most mentally abnormal sexual predators are fully responsible for their sexually predatory conduct, even if they suffer from a serious, recognized disorder, and, thus, they may fairly be criminally convicted for their sexual crimes.” (footnotes omitted); *id.* at 1072 (“[U]nless they have a co-occurring psychotic disorder, people with psychopathy are entirely in touch with reality, instrumentally rational, and know the applicable moral and legal rules. They simply do not ‘get’ the point of morality and cannot be guided by it. They are guided only by the fear of sanctions.”).

147. See HARE, *supra* note 5, at 75 (offering a similar list).

148. See Eysenck, *supra* note 144, at 45 (“I suggest[] that we behave[] well because our consciences would trouble us if we did not; this is not an original notion, because it agrees with common-sense and religious teaching.”).

149. See HARE, *supra* note 5, at 54 (“Laboratory experiments using biomedical recorders have shown that psychopaths lack the physiological responses normally associated with fear.”); *id.* at 56 (“For [psychopaths], fear—like most other emotions—is incomplete, shallow, largely cognitive in nature, and without the physiological turmoil or ‘coloring’ that most of us find distinctly unpleasant and wish to avoid or reduce.”); *id.* at 76 (“[I]n psychopaths, the links between prohibited acts and anxiety are weak, and the threat of punishment fails to deter them.”); *id.* at 194 (“Psychopaths are always getting into trouble, in large part because their behavior is *not* motivated by anxiety or guided by cues that warn of danger. . . . [T]hey miss much of what goes on around them.”); Lee,

For most people, the first three reasons above are sufficient to prevent them from even attempting to murder. For a smaller group of people, the first three reasons are not sufficient, but the fourth is. For a tiny minority of people, however, none of these four reasons is sufficient; in spite of all of them, they still murder. These people are responsible for murder as long as they knew that they were killing without justification/excuse and that killing without justification/excuse is against the law. One might think of it as a sort of contract or “deal” with the state: if I commit this act, which I know is criminal, then I expose myself to arrest, stigma, and criminal punishment if I should be caught and found guilty.¹⁵⁰ If, for example, I enjoy harming others because of the sense of control and power it gives me,¹⁵¹ then the “price” that I must pay for this enjoyment is possible apprehension, conviction, incarceration, and stigma.¹⁵² Importantly, all of this is the case only so long as I can be reasonably expected to know the consequences of breaking the law—*whether or not I fear* these consequences.¹⁵³

Assume, for example, that Killer murders Victim and that Killer is lawfully caught, arrested, indicted, and tried. On what grounds should Killer be found guilty and criminally punished? It is generally held that (1) Killer should be found guilty only if he is criminally responsible for murdering Victim, and (2) Killer should be found criminally responsible only if he is morally responsible for murdering Victim. Ground (1) is correct. But, despite its nearly universal acceptance, (2) is false. Suppose Killer wanted to kill Victim because he hated her; that he simply could not grasp or understand any moral reasons not to act on his hatred and murder Victim; that he did not respect the criminal law; and that he understood that murder was against the law and therefore that if he was caught, he was likely to be found guilty and punished. It does not look

supra note 3, at 126 (“From a judicial perspective, the key psychopathic trait is fearlessness, making the psychopath more difficult to socialize using standard threats of punishment. Specifically, psychopaths lack a normal fear or anxiety response. Instead, psychopaths tend to act impulsively, which indicates deficient inhibitory control.” (footnotes omitted)).

150. Cf. Ken Levy, *Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action that Causes It*, 24 *LAW & PHIL.* 263, 285–88 (2005) (arguing that by voluntarily engaging in criminal conduct, a person is making a deal with “the gods” or “the casino of morality” that the moral status of that person’s action will be determined, in large part, by the degree of harm that the action causes).

151. See *supra* note 94.

152. Indeed, on this contractual view, the criminal’s preferences are largely irrelevant. Even if the criminal were masochistic and *wished* to be caught and punished, the deal would remain the same: by committing the criminal act, the criminal would still be exposed to all of the predictable consequences, consequences that most of us regard as highly undesirable.

153. See *supra* note 149.

like Killer is *morally responsible* for murdering Victim; once again, he could not even understand that, or why, murdering her was morally wrong. Yet he still seems *criminally responsible*—guilty of the crime—simply because, in spite of his understanding that murder was against the law and the likely consequences of breaking this law (arrest and punishment), he still went ahead, assumed the risk of suffering these consequences, and murdered her.¹⁵⁴

Indeed, it is mainly because of people like Killer that we have a criminal justice system in the first place. If there were no such people—if everybody were sufficiently deterred from breaking the law by morality, respect for the law, or fear of the law—then there would be no need for criminal punishment at all. There would be a need only for criminal statutes and the *threat* of criminal punishment should these statutes be violated. Unfortunately, however, there are such people, people who, like Killer, are not sufficiently motivated, for whatever reason, by morality, respect for the law, or fear of the law to comply with the law. It is precisely for this segment of the population, tiny as it usually is, that we need to maintain and continue implementing the practice of criminal punishment. Indeed, it would be nonsensical to hold otherwise. If we could not punish people for whom morality was not sufficiently motivating, then we could not punish virtually *anybody*. By definition, a criminal is a person who did the criminally wrong thing and therefore—with the arguable exception of some *malum prohibitum* laws and a tiny number of arguably unjust criminal laws—the morally wrong thing.

It therefore remains a great puzzle why scholars seem to be unanimous in holding the opposite belief, in assuming that a person cannot be punished unless morality could have sufficiently motivated that person to comply. Ability to be moral has nothing to do with it. When it comes to determining criminal responsibility, it is only the ability to be *noncriminal*—the ability to comply with the criminal law—that matters.¹⁵⁵

*B. Why Moral or Emotional Understanding of the Law Is
Not Necessary for Criminal Responsibility*

One might argue that Appreciation-of-Moral-Wrongfulness jurisdictions get it right; that the reason Killer can be justly punished for

154. See *supra* notes 78 and 146 and accompanying text.

155. See *supra* note 146 and accompanying text.

murder is *not* merely because he could have refrained from murdering but because he had a moral (or emotional or affective) understanding of the law against murder. He understood *why* murder is against the law. And this moral understanding—an understanding not merely *that* murder is against the law but also the moral basis for this legal prohibition—is what entitles us to hold him responsible and punish him. If Killer *lacked* this moral understanding, then it would *not* be just to hold him responsible and punish him. And because this is the situation that psychopaths are in—because they understand only what is against the law, not the deeper moral basis for any given legal prohibition—we may *not* justly hold them responsible, and punish them, for their crimes.

This objection, however, is flawed. There are situations in which *nonpsychopaths*, people just like you and me, do not have a moral (or emotional or affective) understanding of prohibitions against certain behavior. And, despite their temptation to violate these prohibitions, they still refrain from this behavior for no other reason than that it is prohibited. It is not clear, then, why we cannot reasonably expect the same (often self-interested) self-restraint from the psychopath.

Consider, for example, cocaine use. Many people who believe that there is nothing morally wrong with snorting cocaine still refrain from this activity for at least one of the first four reasons above: absence of desire, conscience, respect for the law, or fear of the law. It is not at all clear, then, why we cannot expect the same of everybody else, even if they happen to lack a moral understanding of this law and are therefore not deterred by the first two reasons (absence of desire or conscience).

Suppose that a person—Connie—has a strong desire to snort cocaine; Connie strongly believes that snorting cocaine is not morally wrong; Connie does not respect the laws prohibiting cocaine use and possession; and Connie purchases and then snorts cocaine. The police somehow get word of this and, after a lawful search and seizure, arrest Connie for these criminal acts. At trial, Connie might claim that she did not really know about the laws prohibiting purchase, possession, and use of cocaine because she lacked any moral or emotional understanding of these laws. But very few—including even most opponents of cocaine laws—would agree that this defense is viable. Connie knew that cocaine purchase, possession, and use were against the law and therefore that she was assuming the risk of being caught and punished when she violated these laws. The fact that she *disagreed* with, and therefore lacked a moral or emotional understanding of, these laws does not excuse her.

So much the worse, then, for psychopaths. Like Connie, they lack a moral/emotional understanding of laws prohibiting the crimes that they commit. For this reason, they might even disagree with these laws. But, for the same reason that this lack of a moral or emotional understanding

does not excuse Connie, it does not excuse psychopaths. Whether or not they agree with, or morally/emotionally understand, the law is irrelevant. Just as one does not need a moral/emotional understanding of why purchasing, possessing, or using cocaine is against the law to be criminally responsible for committing these crimes, so too one does not need a moral/emotional understanding of why violating any other law is morally wrong in order to be criminally responsible for violating that law.¹⁵⁶

Again, all one *does* need to be criminally responsible for breaking the law is *knowledge* of the law (and sufficient self-control, which will be discussed in Part IX.C). And the fact of the matter is that psychopaths generally know the criminal law. They know what the criminal law prohibits and what the consequences are if they still violate the law and get caught. At least there is nothing about their psychopathy that conflicts with, or removes, this knowledge. So unless a given psychopathic defendant can show that there are *other* reasons why he did not know

156. See *supra* notes 78 and 146 and accompanying text; see also HARE, *supra* note 5, at 143 (“[Psychopaths] are capable of controlling their behavior, and they are aware of the potential consequences of their acts. . . . They understand the intellectual rules of the game but the emotional rules are lost to them. This modern version of the old concept of ‘moral insanity’ may make some theoretical sense, but it is not relevant to practical decisions about criminal responsibility. In my opinion, psychopaths certainly know enough about what they are doing to be held accountable for their actions.”); Hart, *supra* note 3, at 166 (“[Psychopaths’] understanding of the physical consequences of their actions is intact; they can use this ability to compensate for or overcome their impairment (at least to some extent), and the law expects them to do so. . . . The law typically holds that people with psychopathy are capable of and can reasonably be expected to use their intact cognitive skills and abilities to overcome their impairments when making decisions with potentially serious consequences. Similarly, the law expects that people with serious color blindness should be aware of and compensate for their handicap—knowing they may have difficulty discriminating between red and green traffic lights, they should either avoid driving or develop strategies to ensure they can drive safely.”); Lippke, *supra* note 6, at 402 (“[G]iven the unattractiveness of the options other than preventive detention available to [psychopaths], the nonmoral reasons to which such individuals are responsive will likely counsel them to take their chances on remaining free . . . and attempt to avoid arrest and prosecution.”); Morse, *supra* note 6, at 51–52 (“[P]sychopathy does not prevent agents from acting as the law defines action, nor does it prevent psychopaths from forming prohibited mental states. . . . Further, psychopaths are not excused because they do possess many rational capacities. They usually know the facts and are generally in touch with reality, they understand that there are rules and consequences for violating them . . . and they feel pleasure and pain, the anticipation of which can potentially guide their conduct. . . . Finally, psychopaths do not suffer from lack of self-control as it is traditionally understood. They do not act in response to desires or impulses that are subjectively experienced as overwhelming, uncontrollable, or irresistible.”).

that an otherwise criminal action was against the law, the defendant's argument that he did not know—or understand—the law will, and should, fail.¹⁵⁷

C. *Psychopaths Have Sufficient Control over Their Behavior*

In this section, I will argue that contrary to the arguments in Part V.B–C, psychopaths *do* have sufficient control over their criminal acts to be criminally responsible, and therefore criminally punishable, for them. Even if they cannot “help” obtaining pleasure from hurting others, they still *can* help whether or not they try to obtain this pleasure to a degree that is sufficient for criminal responsibility even if it is not sufficient for moral responsibility.

First, if the arguments in Part V.B–C worked, they would lead to the highly undesirable result that we would be committed to acquitting defendants who proved to the required standard that they were just too tempted to engage in criminal activity. But these are precisely the people we should be punishing, not acquitting, if only for consequentialist reasons—specific deterrence, general deterrence, and incapacitation.

Second, the arguments in Part V.B–C in favor of acquitting Gacy on the basis of lack of control just seem wrong—*morally* wrong. If defendants committed a criminal act because they were simply too tempted to engage in this kind of activity, then they are *more* blameworthy, not less, than they would be if they engaged in the activity for any other reason. They victimized another human being *not* accidentally or because they were acting in self-defense but because they *wanted to*, because they derived *pleasure* from it—as much (or more) pleasure as Charlie derives from chocolate cake and Helen from heroin!¹⁵⁸ Indeed, if—contrary to fact—drug addicts directly victimized others merely by possessing or using drugs, we would most likely hold *them* criminally responsible for inflicting this harm *in spite of the fact* that they were addicts. The same, then, applies to psychopaths. The fact that a given person—call him Bill—did not resist committing, say, a violent act—*V-ing*—against another person because it brought him such pleasure is the epitome of *evil*, not of sickness. It is why we regard dictators such as Hitler and Stalin as among the greatest *criminals* of the twentieth century; they caused millions to die

157. See Ward, *supra* note 79, at 20 (“The notion that people who know they are making themselves liable to punishment but break the rules anyway should therefore not be punished is not one that many lawyers find persuasive.”).

158. See HARE, *supra* note 5, at 40, 61–62 (quoting two psychopaths who compared the joy that they received from engaging in antisocial behavior to the “fix” or “high” that one gets from taking drugs).

for their own selfish ends.¹⁵⁹ Whatever psychological problems they had, and psychopathy was *clearly* one of them,¹⁶⁰ we regard them as fully culpable. If they had been tried for their crimes (crimes against humanity and war crimes), they would have been found guilty and punished to the maximum degree allowable.¹⁶¹ Regarding Bill, then, we should treat him accordingly—not by holding him nonresponsible and committing him to a psychiatric hospital but rather by holding him fully responsible and punishing him in proportion to the harm that he enthusiastically inflicted on another human being.

Third, Bill has a very good reason for refraining from violating the law: the prospect of getting caught and punished. He knows that this is one very possible, if not likely, negative consequence of his illegal behavior.¹⁶² If Bill still goes ahead and Vs, he does so with one of two beliefs: that he is not likely to get caught or punished or that apprehension

159. See ROSENBAUM, *supra* note 2, at 367 (expressing the preference for a “contingent vision, which makes individual schemers, flesh-and-blood immoral agents—Hitler himself—responsible for Hitler’s crimes, rather than impersonal, inexorable forces of history”). See generally TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN (2010) (offering ample evidence that Hitler and Stalin both deliberately ordered, with complete indifference, millions of human beings to be killed for strategic, political, and ideological reasons); Christian Ingraio, *General Chronology of Nazi Violence*, ONLINE ENCYCLOPEDIA MASS VIOLENCE (Mar. 14, 2008), http://www.massviolence.org/IMG/article_PDF/General-Chronology-of-Nazi-Violence.pdf (documenting in great detail Hitler’s genocides, crimes against humanity, and war crimes); Nicolas Werth, *Mass Crimes Under Stalin (1930–1953)*, ONLINE ENCYCLOPEDIA MASS VIOLENCE (Mar. 14, 2008), http://www.massviolence.org/IMG/article_PDF/Mass-crimes-under-Stalin-1930-1953.pdf (describing in great detail Stalin’s genocides, crimes against humanity, and war crimes).

160. Indeed, one book about Hitler is titled *The Psychopathic God*. See RALPH G.L. WAITE, THE PSYCHOPATHIC GOD: ADOLF HITLER (Da Capo Press 1993) (1977).

161. See, e.g., Prosecutor v. Jelusic, Case No. IT-95-10-A, Appeal Judgment, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001), available at <http://www.unhcr.org/refworld/pdfid/4147fcad4.pdf> (“[T]here is no *per se* inconsistency between a diagnosis of the kind of immature, narcissistic, disturbed personality on which the Trial Chamber relied and the ability to form an intent to destroy a particular protected group. Indeed . . . it is the borderline unbalanced personality who is more likely to be drawn to extreme racial and ethnical hatred than the more balanced modulated individual without personality defects.”); see also United States v. Goering (IMT Judgment), in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, at v (1947) (omitting to acquit any of the twenty Nazi high officials on the grounds of insanity).

162. See *supra* note 156. And if this is *not* the case—if Bill does *not* know that he risks criminal punishment by performing a certain criminal act—then he *may* be a good candidate for the insanity defense on the basis of the *M’Naghten* rule or the appreciation prong of MPC § 4.01(1) rather than on the basis of IIR or the volitional prong of MPC § 4.01(1).

and punishment are not so bad in the first place.¹⁶³ Whichever belief is at work, Bill is voluntarily assuming the risk of apprehension and punishment when he *Vs.*¹⁶⁴ And it is this voluntary assumption of risk that precludes excusing Bill and justifies punishing him instead.

Fourth, the arguments in Part V.B–C that the psychopath is like the addict insofar as both are powerless to resist their overwhelming urges confuses difficulty with inability. To be sure, Smoker’s addiction to nicotine makes it difficult for her to resist the temptation to smoke and, as the temptation increases, proportionally causes her to discount all of the reasons that she wants to quit smoking.

But even given her addiction, Smoker is the one who is doing this sudden discounting of her values and desire to quit. Yes, her addiction is motivating this discounting. But, difficult as it may be, it is still entirely up to Smoker to resist this discounting and reassert her long-term reasons for quitting over her short-term reasons for giving in.¹⁶⁵

163. See Lippke, *supra* note 6, at 402 (“[G]iven the unattractiveness of the options other than preventive detention available to [psychopaths], the nonmoral reasons to which such individuals are responsive will likely counsel them to take their chances on remaining free . . . and attempt to avoid arrest and prosecution.”).

164. See Levy, *supra* note 150, at 281–93 (explaining why voluntary assumption of risk justifies greater punishment for greater harm, all else being equal).

165. See GENE M. HEYMAN, ADDICTION: A DISORDER OF CHOICE 116 (2009) (“Addiction depends on general principles of choice, the unique behavioral effects of addictive drugs, and individual and environmental factors that affect decision making. . . . For humans, virtually all environments support more than one activity, so that in effect most behavior is choice behavior. Indeed, most of what all mammals do most of the time is voluntary.”). There is a second argument that leads to the same conclusion, in other words, that Smoker is responsible for whether or not she decides to smoke: Smoker is the one who started smoking way back when. Presumably nobody forced her to. Even peer pressure does not count as force and is perfectly consistent with culpable, autonomous choice. Peter de Marneffe, *Against Drug Legalization*, in THE LEGALIZATION OF DRUGS: FOR & AGAINST 108, 154 (2005) (“It is an error based on science fiction to think that heroin addiction turns a person into a zombie who is completely unable to guide his actions by his own deliberative judgment. Heroin use may be *difficult* for some people to control . . . but this does not mean that it is entirely *outside* their control. This is because a person always has the mental capacity to *decide* to stop using heroin or to form the intention to do so. Because heroin is addictive . . . this intention may not be entirely effective. . . . But a person also has the mental capacity to decide what she needs to do in order to succeed in acting in accordance with her original intention—to form the intention to get whatever help she needs to stay clean that day, for example.”); Slobogin, *supra* note 47, at 36–37 (“Even conduct that the actor perceives to be the product of strong urges is ‘willed,’ in the sense that the actor decides to engage in it. The addict who steals to feed a habit, the sexual predator who molests a child, and the psychotic individual who kills all intend, and often plan, their actions. Further, they all probably could have avoided those actions, in the sense that they knew of and were able to choose other options. Finally, for many of these individuals the criminal act is pleasurable, rather than a method of avoiding psychological pain, or is at least a combination of the two. For all of these reasons, identifying precisely how such actions are ‘compelled’ is difficult. While such people may seem to have overwhelming urges, they still choose to act on those urges and they do not seem to be compelled in the

This argument, incidentally, leads to the conclusion that Smoker is responsible for whichever way she decides this inner conflict.¹⁶⁶

In case one still doubts this point, consider the following scenario. It is the very first day of Smoker's attempt to quit smoking "cold turkey." At 10:00 a.m., the urge to smoke first makes an "appearance." Smoker resists it and occupies herself with another activity. At 10:10 a.m. the urge to smoke increases in intensity. Smoker tries harder to distract herself. By 10:20 a.m., Smoker decides that she just cannot go on any longer and runs to her desk for a cigarette and lighter. From these facts alone, one might argue that Smoker lost control over her decision whether or not to smoke. Although she tried to resist her ever-increasing desire to smoke, this desire ultimately overcame Smoker and compelled her to smoke.

same way a person acting with a gun pointing at his head is compelled." (footnotes omitted)).

166. See SAMENOW, *supra* note 45, at 40–41 (“[W]e choose which peer group or groups to belong to. . . . No criminal I have evaluated or counseled was forced into crime. He chose to associate with risk-taking youngsters who were doing what was forbidden. . . . Sometimes alone, but more often with youngsters like himself, he commits more and more crimes, bolstering his self-image in the process and finding that no one can do anything for very long to bring a halt to his spiraling criminality.”); *id.* at 41 (“The view that a youngster is *led or driven* into crime to gain status ignores the role of personal choice. . . . From the time he was little, the delinquent has chosen the company he keeps and has determined what kind of status he wants.”). So Smoker brought this addiction upon herself when she could have chosen to avoid it, which means that even if she cannot do otherwise *now*, she is still responsible for her addictive behavior because she *could* have avoided becoming an addict in the first place. See Lippke, *supra* note 6, at 395 (distinguishing between “primary moral control,” which is control over behavior at the time of performance, and “secondary moral control,” which is indirect control over later behavior, control over the current action only by means of control over previous causally relevant actions); Morse, *supra* note 10, at 1071 (“If an agent knows from experience that the urges are recurrent and that on previous occasions the agent has acted on those urges in a state of diminished rationality, the agent also knows during more rational moments that he is at risk for acting in such a state in the future. It is a citizen’s duty in such circumstances to take all reasonable steps to prevent oneself from acting wrongly in an irrational state in the future, including drastically limiting one’s life activities if such an intrusive step is necessary to prevent serious harm. If the agent does not take such steps, the agent may indeed be responsible, even if at the moment of acting he suffers from substantially compromised capacity for rationality. The situation would be analogous to the case of a person who suffered from a physical disorder that recurrently produced irrational mental states or blackouts during which the person caused harm, but who did not take sufficient steps to prevent such harm in the future. We would surely not excuse such an agent.”). *But see* Douglas N. Husak, *Addiction and Criminal Liability*, 18 LAW & PHIL. 655, 668–71 (1999) (arguing that culpability for causing oneself to become an addict does not necessarily mean that addiction should not be a recognized excuse in criminal law).

But this conclusion would be hasty. The fact pattern above does not say that Smoker actually ended up smoking. Instead, as it turns out, when she got to her desk, all the cigarettes and lighters were gone. Smoker's husband had thrown them all out in order to help her successfully quit. Of course, Smoker is not happy about this state of affairs. For the next few hours, she undergoes a roller coaster of feelings and emotions—anger, frustration, panic, and despair, alternating with brief surges of renewed resolve and optimism. During this same period, she develops the same symptoms that she would have if she contracted the flu—nausea, sweating, headaches, and fatigue. After a few more episodes like this over the next forty-eight hours, Smoker actually succeeds in quitting. She did *not*, then, *have* to smoke at 10:20, no less afterward. She survived perfectly well without it. And if this had been the counterfactual scenario, not the actual one, the same conclusion would follow. However she might have felt and whatever she might have thought had she ended up smoking at 10:20, the fact that she could have gone through this alternative nonsmoking scenario proves that she could have resisted smoking.¹⁶⁷

Indeed, most young children are socialized by being denied what they strongly desire—for example, candy and expensive toys. They are obviously disappointed—often angry—when their parents fail to satisfy their requests or demands. But they recover quickly and survive just fine, which proves that they do not *have* to eat the candy or acquire any given toy. The same, then, applies to adults. If children can undergo nonsatisfaction of their strongest desires, no matter how dissatisfying and unpleasant, then certainly adults can as well.

167. See Husak, *supra* note 166, at 681 (“The desire to avoid the pain of withdrawal provides a woefully inadequate explanation of why patterns of consumption among users of many drugs . . . tend to be so compulsive. Many users would continue to report a craving, and succumb to drug use, even if no physical withdrawal symptoms occurred. Accounts that emphasize the desire to avoid withdrawal distort the phenomenology of addiction from the perspective of most addicts. In particular, the hypothesis that persons consume drugs in order to prevent withdrawal cannot begin to explain why current addicts find it hard to quit, or why former addicts find it easy to relapse.” (footnotes omitted)); de Marneffe, *supra* note 165, at 153–54 (“Some may believe . . . that heroin prohibition is justified by its benefits to mature adults because once a person uses heroin, whatever his age, he is ‘hooked,’ because he cannot stop using it without agony, and because habitual heroin use turns a person into a zombie with no capacity for genuine self-direction. This picture, however, has little basis in reality. For one thing, although heroin is certainly addictive . . . a large proportion of those who use the drug do not develop a self-destructive habit. For another thing, those who develop a habit may nonetheless stop without great suffering. (The discomfort involved in kicking a habit is commonly likened to having the flu for a few days.) Finally, although habitual heroin use can be bad for a person in depressing his motivation, it does not turn a person into a zombie whose capacities for self-direction are no longer functioning at all.” (footnote omitted)).

Likewise with Bill. Whichever way Bill decides depends on what relative weights he assigns to his desire to *V* and his desire to remain free from criminal punishment. And even given his psychopathy, it is up to him, and therefore a matter of criminally responsible choice, what relative weights he assigns here—*just as it is* when he is *not* performing criminal acts, which in fact is *most of the time*.¹⁶⁸ Bill has the capacity to bring other considerations to bear against his desire to *V* and to act on these other considerations. Although Bill's psychopathy may make it more difficult for him to give greater weight to his long-term desire to remain free from criminal punishment over the short-term satisfaction of *V*-ing, *more difficult* hardly means *too* difficult, no less impossible.¹⁶⁹

X. SHOULD WE PREVENTIVELY COMMIT DANGEROUS PSYCHOPATHS?

If I am correct in Part IX that psychopaths are criminally responsible for their behavior, then it follows that they should be criminally punished for their criminal acts like most other adults rather than acquitted and civilly committed like defendants found to be insane. But does this position that psychopaths are criminally responsible and punishable mean that we cannot *commit* dangerous psychopaths *before* they do any harm? If so, isn't this an undesirable situation? In this Part, I will argue that society should be allowed to preventively commit

168. See HARE, *supra* note 5, at 60 (“Although psychopaths have a ‘hair trigger’ and readily initiate aggressive displays, their ensuing behavior is not out of control. On the contrary, when psychopaths ‘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.”).

169. See Lilienfeld & Arkowitz, *supra* note 14 (“Even if the core personality traits of psychopaths are exceedingly difficult to change, their criminal behaviors may prove more amenable to treatment.”); Hart, *supra* note 3, at 166 (“People with psychopathy have fundamental difficulties maintaining attention or interest and exerting effort with respect to goal-directed activity. . . . [A]lthough there is little doubt that volitional impairment of this sort influences behavior on a day-to-day basis, it is possible for people with psychopathy to perceive alternative courses of action, make choices, and compensate for or overcome their volitional impairment (at least to some extent) using other skills or abilities [A]lthough they may want to engage in antisocial activity more often than do others, people with psychopathy are capable of exercising true agency with respect to this decision and the law expects them to do so.”); Morse, *supra* note 6, at 52 (“[P]sychopaths do not suffer from lack of self-control as it is traditionally understood. They do not act in response to desires or impulses that are subjectively experienced as overwhelming, uncontrollable, or irresistible.”).

people whom it knows to be dangerous and psychopathic even if (1) they have not yet committed a crime and (2) they *would* be criminally responsible for crimes if they *did* commit them.¹⁷⁰

A. *Why Defendants Eligible for Criminal Punishment (Post-Crime) Are Generally Not Eligible for Preventive Commitment (Pre-Crime) and Vice Versa*

The questions above arise from a general assumption that is deeply rooted in our criminal justice system: generally speaking, all else being equal, one and the same person cannot be both eligible for involuntary civil commitment before committing a crime (what I will refer to as “preventive commitment”) and eligible for criminal punishment after committing a crime. All else being equal (once again), a person must be one or the other—either (1) eligible for criminal punishment (after committing a crime) and not eligible for preventive commitment (before committing a crime) or (2) eligible for preventive commitment (pre-crime) and ineligible for criminal punishment (post-crime).¹⁷¹ The reason

170. See John McMillan & Luca Malatesti, *Introduction: Interfacing Law, Philosophy, and Psychiatry*, RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY, *supra* note 5, at 1, 1 (noting that “the United Kingdom . . . and other countries have aimed at making it easier to preventively detain those with ASPD who are judged to be a risk to the public”); Slobogin, *supra* note 47, at 40 (arguing that “people who are sane” should “be subject to long-term preventive detention” when they “signal[] a desire to ignore society’s most significant norms regardless of the circumstances”). *But see* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) (“[T]he trend of the last decade—the shifting of the criminal justice system toward the detention of dangerous offenders—is a move in the wrong direction. The difficulty lies not in the laudable attempt to prevent future crime but rather in the use of the criminal justice system as the vehicle to achieve that goal. The approach perverts the justice process and undercuts the criminal justice system’s long-term effectiveness in controlling crime. At the same time, the basic features of the criminal justice system make it a costly yet ineffective preventive detention system.”).

171. See Morse, *supra* note 10, at 1069–70 (“[I]t appears that most mentally abnormal sexual predators are fully responsible for their sexually predatory conduct, even if they suffer from a serious, recognized disorder, and, thus, they may fairly be criminally convicted for their sexual crimes. But, for the same reason, most such predators do not meet the necessary non-responsibility standard that might justify involuntary civil confinement. Therefore, I am claiming that, holding the agent’s capacity for rationality constant, the eligibility for punishment and the eligibility for involuntary civil confinement are mutually exclusive.” (footnote omitted)); *id.* at 1073 (“[I]f an agent is sufficiently rational to deserve criminal conviction and punishment, the most intrusive, afflictive actions the state can impose on a citizen, the agent is surely rational enough to be left at liberty until the agent commits a crime or becomes genuinely non-responsible. Civil commitment should be justified only in cases in which the agent’s rationality is sufficiently impaired also to avoid criminal responsibility.”). *But see* Lippke, *supra* note 6, at 387 (challenging this dichotomy between criminal

for this dichotomy is that if a person is eligible for criminal punishment, then that person is not insane. But if a person is not insane, then she may not be preventively committed. Preventive commitment—again, involuntary civil commitment—requires people to be both dangerous (to themselves or others) and insane.¹⁷²

The same point can be formulated in terms of degrees rather than dichotomies. There is an inverse correlation between the degree to which agents are morally responsible for their behavior and the ease with which society may preventively detain them if they are suspected of being dangerous to themselves or others. The stronger the former, the weaker the latter; and, conversely, the stronger the latter, the weaker the former.

Of course, this inverse correlation is no accident. All else being equal, we prefer maximizing the liberty of morally responsible agents despite the risks that some of these agents may pose to themselves or others than

punishment and preventive commitment by arguing that there is little material or symbolic difference between them).

172. See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’”); *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) (citing precedent for the proposition that a “committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous,” and “the acquittee may be held as long as he is both mentally ill and dangerous, but no longer. . . . [because] ‘the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society’” (quoting *Jones v. United States*, 463 U.S. 354, 368, 370 (1983)) (internal quotation marks omitted)); Hart, *supra* note 3, at 167 (“Two types of commitment are permitted under the civil law of various Anglo-American jurisdictions. The first is traditional civil commitment under mental health statutes. It typically . . . requires they pose an imminent risk for violence due to acute mental disorder. . . . The second, newer form of civil commitment is under specialized statutes, such as sexually violent predator or (proposed) dangerous and severe personality disorder statutes, that target offenders nearing release from a custodial sentence for a violent offense. It typically requires that people have committed serious violence or sexual violence in the past, and they also pose a persistent risk for future (sexual) violence due to chronic mental disorder.” (citations omitted)); Morse, *supra* note 6, at 45 (“The agent must be dangerous because he or she is suffering from a disease (especially a mental disorder)”); *id.* at 57 (“Every jurisdiction in the United States provides for involuntary civil commitment of people who suffer from mental disorder and are dangerous to themselves or others as a result.”). For a detailed summary of earlier Supreme Court jurisprudence establishing the constitutional contours of preventive commitment, see Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 352–84 (1989).

minimizing these risks by confining whomever we suspect is dangerous. We accept this position because it is mandated by the Constitution. Specifically, the Fourth, Fifth, Eighth, and Fourteenth Amendments protect “the people” against, among other things, unreasonable searches and seizures, cruel and unusual punishment, and deprivation of life, liberty, or property without due process of law.¹⁷³ All of these constitutional principles would be violated if the state detained or imprisoned morally responsible people without having sufficient grounds to arrest them or to imprison them.

The Constitution grants this general right against groundless detainment and imprisonment for several reasons. First, it is grossly unjust to confine somebody who does not deserve to be confined. And individuals who are sufficiently responsible for their actions do not deserve to be confined if they have not been convicted of a crime (after receiving full due process) and there is no probable cause for arresting them.¹⁷⁴

Second, if people did not have this right against groundless detainment and imprisonment, we would be living in a police state. The police would have the power to detain and imprison whomever they—or their political superiors—wanted and for whatever reasons. History has repeatedly taught us that when the police have this power—or, conversely, when the people lack an enforceable right against this power—then their supremely valued interests (life, liberty, property, physical well-being, and emotional well-being) will be seriously impaired for very bad reasons—usually baseless prejudice, paranoia, or vengeance.¹⁷⁵

Third, the more responsible individuals are for their behavior, the more they can control it; and the more they can control their behavior, the more susceptible or “sensitive” they may be to warnings and threats of punishment. Therefore, the more responsible individuals are for their behavior, the less need there is for the state to step in and actively prevent them from hurting themselves or others.

173. U.S. CONST. amends. IV, V, VIII, XIV.

174. See Lippke, *supra* note 6, at 403–05 (suggesting that “dangerous offenders who are somewhat responsive to moral considerations” should not be confined unless and until they commit crimes).

175. See, e.g., Paul H. Haagen, *A Hamburg Childhood: The Early Life of Herbert Bernstein*, 13 DUKE J. COMP. & INT’L L. 7, 13 (2003) (“Hitler persuaded President Hindenburg to sign an emergency decree on February 28, 1933 that suspended most of the guarantees of personal freedom contained in the German Constitution in order to permit the government to defend itself against ‘communist acts of violence endangering the state.’” (quoting *Verordnung des Reichspräsident zum Schutz von Volk und Staat* [Decree of the Reich’s President on the Protection of the People and the State], Feb. 28, 1933, REICHSGESETZBLATT [RGL.] at 83 (Ger.), available at <http://www.documentarchiv.de/ns.html>)).

Given this last point, and given the premium we place on individual liberty, it is generally thought that we must err on the side of (1) hoping that the threat of punishment will deter the average person rather than on the side of (2) detaining her indefinitely. Position (2) would reduce the risk of danger far more than (1) would. But (1) still trumps (2) because, all else being equal, we prefer maximizing liberty to minimizing danger. Indeed, this is the risky tradeoff that a free society generally makes.¹⁷⁶ I will discuss this tradeoff further in Part X.D.

It matters very much, then, whether or not society—or at least a given jurisdiction—regards psychopathy as insanity. If it does, then it would seem that psychopaths are eligible for preventive commitment (pre-crime) but not criminal punishment (post-crime). If it does not, then it would seem that psychopaths are eligible for criminal punishment. I have argued above that psychopaths are not insane, do not therefore qualify for the insanity defense, and are therefore eligible for criminal punishment. It would seem to follow, then, that (pre-crime) they are not eligible for preventive commitment—no matter how dangerous they may be.

B. The Middle-Ground Approach: Psychopathy as Mental Illness

But is this the right conclusion? Or should we opt for the opposite: psychopaths are insane and therefore not criminally punishable but may (therefore) be preventively committed if (pre-crime) they are found to be dangerous to themselves or others?

It seems that there is at least one way in which we can have our cake and eat it too—one way in which we can *both* preventively commit psychopaths whom we find to be dangerous (pre-crime) *and* criminally punish them if they are found guilty of crimes. The key is to recognize that psychopathy may very well be regarded as a *mental illness* and therefore a condition that makes psychopaths eligible for preventive commitment (as long as they are also dangerous) but is not severe enough to be regarded as insanity (that is, is not severe enough to be considered an inability to know/appreciate right and wrong or to act in conformity with this knowledge/appreciation). In other words, the story can be made a bit more complicated than Part X.A would suggest. And this additional complication makes room for a category of people

176. See *Foucha*, 504 U.S. at 83 (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)) (internal quotation marks omitted)).

who might, all else being equal, be simultaneously eligible both for preventive commitment (pre-crime) and for criminal punishment (post-crime). The people who fall into this category would satisfy two conditions: (1) the psychiatric hospital conducting the preventive commitment evaluation would find them to be mentally ill and (2) the trial court would find them to be either not mentally ill at all or mentally ill but not insane. This “middle” category—the category between sanity and insanity—is captured by the increasingly common “guilty but mentally ill” verdict.¹⁷⁷

The question, then, is *not* whether or not psychopathy is a form of insanity. The question is whether or not psychopathy is a form of mental illness. If it is, then psychopaths qualify for involuntary civil commitment if they are deemed to be dangerous as well.¹⁷⁸ If not, then psychopaths, no matter how dangerous, may not be involuntarily committed.

Psychologists and (therefore) the courts generally do not consider psychopathy to be a mental illness for two reasons—one historical/intuitive, the other formal/technical. The first—historical/intuitive—reason is that mental illness has historically been associated with false beliefs about reality—delusions—and psychopathy does not typically involve delusional beliefs. Even though this association between mental illness and delusional beliefs is flimsy—that is, even though there are mental illnesses that do *not* involve delusional beliefs such as mood disorders, anxiety disorders, and depression¹⁷⁹—many are still prejudiced by it.

177. See Debra T. Landis, Annotation, “*Guilty but Mentally Ill*” *Statutes: Validity and Construction*, 71 A.L.R.4TH 702 (2011); 21 AM. JUR. 2D *Criminal Law* § 38 (2008); 22 C.J.S. *Criminal Law* § 130 (2006). Another way to dissolve the initial tension between preventively committable (pre-crime) and punishable (post-crime) is to show that there are other categories of people who might, all else being equal, be simultaneously *ineligible* for both preventive commitment (pre-crime) and criminal punishment (post-crime). Once again, preventive commitment is involuntary civil commitment. And involuntary civil commitment requires the defendant to be both dangerous and mentally ill. It follows that a person who is either not dangerous or not mentally ill may be ineligible for preventive commitment. But the same nondangerous or nonmentally ill person might still be deemed insane by a court after she is found guilty of committing a crime. These two descriptions (nondangerous or nonmentally ill (pre-crime) and insane (post-crime)) are compatible—attributable to the same person, all else being equal—if (1) the person was insane all along and went from being nondangerous to dangerous; (2) the person *became* severely mentally ill or (insane) before committing the crime; or (3) the hospital conducting the preventive commitment evaluation and the court conducting the psychological evaluation disagree about the person’s mental status—with the hospital concluding that the person was not sufficiently mentally ill for the purposes of involuntary commitment and the court concluding that the person was insane.

178. See *supra* note 172 and accompanying text.

179. DSM-IV-TR, *supra* note 52, at 345.

The second—formal/technical—reason that psychopathy is not generally regarded as a mental illness is because, as we have seen, it is not included in the *DSM-IV-TR*. We saw one reason for this omission in Part II.D; again, while the *DSM-IV-TR*'s construct of ASPD focuses on the behavioral, psychopathy is largely about the internal. Another reason is that the psychological community does not (yet) believe that psychopathy meets the *DSM-IV-TR*'s conception of mental disorder:

[E]ach of the mental disorders [in the *DSM-IV-TR*] is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual. *Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual.*¹⁸⁰

Apparently, then, although the psychological community recognizes that psychopaths are deviant and antisocial, it does not regard psychopaths as sufficiently distressed, disabled, dysfunctional, or vulnerable to qualify as suffering from a mental disorder; although psychopaths may be highly disposed toward antisocial behavior, they can still generally function well enough to be considered normal.¹⁸¹ I will argue in this section, however, that this conclusion is false; that although courts do not generally recognize psychopathy as a mental illness, they *should* not only (1) because it *is* (for all the reasons given in Parts II, V, and VII.C) but also (2) because it will enable society to preventively commit the people in this group that are thought to be dangerous and thereby prevent them from engaging in criminal activity.

180. *Id.* at xxxi (emphasis added).

181. *See supra* note 141 and accompanying text; *see also* Hart, *supra* note 3, at 162 (“A few theoretical models reject the notion that psychopathy is a mental abnormality at all. First, some interpersonal and behavioral genetic theories view psychopathy as an extreme variant of the same personality traits found in all people. According to these theories . . . any differences between people with versus without the disorder are quantitative rather than qualitative in nature—that is, a matter of degree rather than kind. Second, some sociobiological and evolutionary theories view psychopathy as a specific adaptation to environmental conditions. . . . [T]he genetic disposition confers an advantage in terms of enhanced reproductive success for affected individuals.” (citations omitted)).

C. *Dangerous but Not Mentally Ill*

It might seem at first as though we may *easily* preventively commit dangerous psychopaths simply because they are *dangerous*. Indeed, society has little problem quarantining individuals carrying rare and deadly viruses simply because they present a danger of infecting others.¹⁸² Still, people who are dangerous in a different way—dangerous in the sense of being inclined toward antisocial behavior—may not be as easily “quarantined” or preventively committed. If a person is dangerous in this latter sense—not by carrying a disease but simply by inclining toward antisocial behavior—then we cannot preventively commit that person unless she is also mentally ill.¹⁸³ And this conclusion itself leads to a counterintuitive result: we cannot preventively commit nonmentally ill people who *clearly express* their intention to harm or kill others!¹⁸⁴

Suppose, for example, that a twenty-five-year-old law associate, Angry, says to a fellow law associate, Confidant, that if Angry’s boss, Meanie, yells at Angry one more time, Angry will kill him.¹⁸⁵ Suppose also that Confidant, like everybody else who has interacted with Angry, believes that Angry is a sane, rational individual. Confidant may conclude one of two things: either that Angry means what he says or that Angry is simply exaggerating, blowing off steam, and would never actually dare to kill, no less hurt, Meanie. If Confidant believes the latter, she will likely do little more than try to calm Angry down. In this case, Confidant should make sure that her belief is correct; if she is wrong, the consequences of her failure to do anything more could be drastic. If, however, Confidant believes the former, she has at least a moral obligation and possibly a legal obligation (in jurisdictions that recognize the crime of misprision of felony or of bad-Samaritanism¹⁸⁶) to take steps to ensure that Angry is prevented from carrying out his threat.

182. See 22 U.S.C. §§ 264, 266 (2006) (codifying federal authority to detain persons who may have been exposed to communicable diseases).

183. See *supra* note 172 and accompanying text; see also Edward P. Richards, *Dangerous People, Unsafe Conditions: The Constitutional Basis for Public Health Surveillance*, 30 J. LEGAL MED. 27, 28, 31–32 (2009) (showing how the laws governing preventive commitment of people who exhibit dangerous behavior developed from the laws governing quarantine (people who present the danger of viral infection) and therefore why the former may be considered to fall under public health law).

184. See Lippke, *supra* note 6, at 383 (“One of the more vexing problems faced by authorities in the criminal justice system is the existence of individuals who have served their sentences for their previous crimes but seem very likely to commit further, quite serious offenses involving violence against their fellow citizens if they are released from prison.”).

185. For a similar example, see Morse, *supra* note 6, at 46.

186. See Levy, *supra* note 68, at 616–21, 620 n.27 (noting that four states currently criminalize bad-Samaritanism, five states criminalize failure to report ongoing crimes, and several jurisdictions still recognize misprision of felony in one form or another).

There are a number of different ways in which Confidant may attempt to prevent Angry from trying to hurt or kill Meanie. Some are direct—physically incapacitating Angry by handcuffing him or taking all of his knives and other weapons away from him. For obvious reasons, however, both of these approaches are impractical. Regarding the latter approach, if Confidant openly tries to remove Angry’s weapons, she will probably meet with Angry’s resistance, if not retaliation, and may also be guilty of theft or attempted theft. Regarding the former approach, even if Confidant somehow manages to handcuff Angry, she may be guilty of false imprisonment, and the handcuffs will have to be removed sooner or later, at which point Angry will still pose a threat to Meanie. Instead, the more effective and more clearly legal approach is indirect: Confidant should alert the authorities—most likely, the police—to Angry’s threat and then leave the prevention up to them.

Suppose, then, that Confidant calls the police, tells them that Angry has expressed his intention to kill Meanie, and asks them to investigate the situation. It might at first seem that the police should lock Angry up until he renounces his desire to kill Meanie. But this would be an *overreaction*. Angry might just have been “talking a good game”—fantasizing about killing Meanie or blowing off steam. Or he might have meant it at the time but, like many hotheads, needed only to calm down. Or he might have meant it but, as time went on, would have given up on his plan for whatever reasons—fear, laziness, change of attitude toward Meanie, or advice from others.

Suppose further that the police approach Angry and ask him what is going on. If Angry denies that he expressed a genuine intention to kill, they may still have the right to search Angry’s person and possibly his office or home for weapons. Should they find any, they might have probable cause to arrest Angry for illegal gun possession or even attempted murder. But suppose that they do not find any further evidence of criminal activity or corroborating evidence of Angry’s intent to kill Meanie. Because the police have no further grounds to doubt Angry’s denials, they must then terminate the questioning and release Angry from this “custodial” detention. With the exception of a minority of jurisdictions, there is no law, criminal or otherwise, prohibiting people from expressing violent fantasies or intentions in private communications to third

parties—that is, to people who are not the fantasized or intended victims.¹⁸⁷

Still, there are three situations in which the police might detain Angry for a longer period of time in order to investigate the situation further and to minimize the danger, if only temporarily, that Angry poses to Meanie. The first situation: Angry has a history of violence or dangerousness, as evidenced either by a criminal record or complaints filed against him by family, friends, or acquaintances. The second situation: the police legally obtain corroborating evidence—for example, pictures underneath Angry’s desk depicting Meanie with crosshairs drawn over his face and quotations such as “I will kill you!” and “Die! Die! Die!” scrawled across. The third situation: Angry actually admits to the police that he meant what he said, that he *does* intend to kill Meanie if Meanie yells at him again.

Suppose that the third of these situations occurs. Suppose, that is, that Angry admits to the police that he will kill Meanie if Meanie yells at him again. The police may certainly detain Angry to ask him more questions and possibly, again, search his person and his property for weapons or other evidence of the commission of a crime. But what form may this detention take? Merely keeping him in his office? Taking him down to the station? Imprisoning him? Involuntarily committing him to a psychiatric hospital? The answers to these questions will vary across jurisdictions and depend on the totality of the circumstances. As a general rule, however, the more likely it seems to the police that Angry will attempt to hurt or kill Meanie, the more justified they are in detaining Angry for a longer period of time. Still, in the end, the maximum amount of time that they may temporarily imprison Angry is generally two to three days.

Some might argue that the police should be able to detain Angry beyond a few days—indeed, for as long as it takes to protect Meanie

187. There are a few courts that recognize these third-party statements as criminal threats. Some of these courts require the threatmaker to issue the threat with the intention or expectation that the third party will then communicate this threat to the intended target. *See, e.g.*, *United States v. Parr*, 545 F.3d 491, 498, 500 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1984 (2009); *United States v. Patillo*, 431 F.2d 293, 297–98 (4th Cir. 1970). One court, however, has suggested that this intention or expectation is *not* necessary for the third-party statement to be criminal. *See Beard v. United States*, 535 A.2d 1373, 1378 (D.C. 1988) (“The crime was complete as soon as the threat was communicated to a third party, regardless of whether the intended victim ever knew of the plot. . . . Even granting that a threat must be uttered, transmitted, and communicated, it does not necessarily follow that the communication must be to the intended victim rather than to a third party.” (citations omitted)); *see also* Alec Walen, *Criminalizing Statements of Terrorist Intent: How To Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 834–46 (2011) (arguing for criminalizing mere statements of criminal intent).

from him. But this is not the law. The law across all jurisdictions is that the state may detain Angry—and thereby protect Meanie—beyond a few days only if they either arrest Angry or preventively commit him in a mental hospital. And in order to arrest Angry, they must have probable cause to believe that he committed, or is committing, a crime. *Ex hypothesi*, in this hypothetical, they do not have this probable cause. Again, expressing violent intentions to a third party is generally not a crime.¹⁸⁸ So arrest is out.

Suppose further that there is no evidence that Angry is mentally ill. He has no history of mental illness, and when the police ask Angry why he is making such a self-destructive admission, he responds with two seemingly “rational” points: (1) he has always believed that honesty is the best policy, *especially* during police investigations; and (2) Meanie is an “evil bastard” whom he will kill if Meanie once again unjustly abuses Angry. In the absence of any other evidence of mental illness, both (1) and (2) seem rational enough, even if most people would not harbor the same thoughts and intentions under similar circumstances. Most people, that is, either would not plan to kill Meanie or, if they did, would lie and tell the police that they did not intend to kill Meanie to “stay out of trouble” and make their goal, killing Meanie, that much easier to attain. The fact that Angry is more honest and more willing to sacrifice his freedom, either before or after killing Meanie, hardly indicates that he is *mentally ill*. At best, it indicates that he is either more honest or more self-sacrificing than most other prospective killers. And neither honesty nor self-sacrifice is necessarily a sign of mental illness.

This is an unfortunate situation for the police to be in. They know that Angry poses a genuine, fatal threat to Meanie. Yet they cannot, merely on the basis of this knowledge, hold Angry until he abandons his plan to kill Meanie.¹⁸⁹ They must release him—again, within no more than a few days.

188. With the exceptions noted *supra* note 187.

189. See Morse, *supra* note 6, at 46 (“For example, imagine a young male prisoner about to be released from his third incarceration for armed robbery who boasts that he will immediately do it again upon release and will kill any victim who might potentially identify him. There is nothing at present the law can do to prevent [t]his. We can only hope that the armed robber has some sort of conversion experience.”).

*D. Society's Interest in Safety vs. the Dangerous Individual's
Interest in Liberty*

The reason why the authorities may not detain Angry for a longer period of time is because Meanie's interest in safety yields to Angry's liberty interest. More generally, there are significant rights and interests on each side of every decision to commit or not to commit. The task is to get the balance just right—to commit only those who would have gone on to commit serious crimes. But much easier said than done.

On the one hand, the price for allowing Angry—and people like Angry—to remain free is significant. First, the public's knowledge that people like Angry are roaming free itself causes a widespread sense of diminished security. Second, people like Angry too often injure or kill others. So if we err on the side of allowing a dangerous psychopath to remain free and he then injures or kills another, we have unjustly allowed an innocent person whom we could have otherwise protected to be victimized.¹⁹⁰

On the other hand, there are two reasons to think that Angry should remain free. And these happen to be the reasons that generally prevail in our society. First, the police's suspicion at this point about the threat that Angry presents to Meanie is uncertain and defeasible.¹⁹¹ There is

190. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 165–66 (2001) (“[S]uppose we are faced with an offender who has persistently engaged in serious criminal attacks on others, who has been unresponsive to his previous punishments, and of whom we can plausibly predict that he will commit further such attacks if he gets the chance to do so. . . . [W]e can predict that once released . . . he will commit further such crimes. What then can we say to his next victim or to the family of a victim he now kills? Can we honestly say to those whose lives have been destroyed that this new crime is a price that we (and especially they) must pay for the sake of maintaining a liberal polity? Might they not reasonably reply that this is to denigrate *their* rights to protection against this kind of predictable attack?”); Morse, *supra* note 6, at 44 (“[A]chieving the safety that makes freedom possible inevitably requires substantial infringement on the liberty of dangerous agents.”).

191. See HARE, *supra* note 5, at 189 (“We must . . . be aware of the fact that even if perfect diagnoses were possible (and they are not), their ability to accurately predict recidivism or violence is limited, simply because the variables that constitute a diagnosis represent only a fraction of the individual, social, and environmental factors that determine antisocial behavior.”); Paul Gendreau, Claire Goggin & Paula Smith, *Is the PCL-R Really the ‘Unparalleled’ Measure of Offender Risk? A Lesson in Knowledge Cumulation*, 29 CRIM. JUST. & BEHAV. 397 (2002) (arguing that the PCL-R should not be used to predict recidivism); Lee, *supra* note 3, at 132 (“[Some] (including the U.S. Supreme Court in some instances) continue to cast doubt upon the reliability of mental diagnoses when predicting dangerousness in criminals. According to the American Psychiatric Association (APA), ‘[t]he large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.’” (footnote omitted)); Malatesti & McMillan, *supra* note 5, at 82–83 (“[A] central issue for PCL-R is whether it predicts criminal recidivism. . . . Without wishing to adjudicate on this debate, it is worth

still a very good chance—too good a chance—that, if left free, Angry will never attempt to harm Meanie. Given this very good chance, our remaining concern about Angry is simply too weak a basis on which to commit Angry and thereby infringe on his presumptive right to liberty and freedom from undue state interference. Of course, the police may implement some other protective measures such as informing Meanie of Angry’s intention, issuing a restraining order against Angry on Meanie’s behalf, and warning Angry of the punishment that faces him if he should even *try* to harm Meanie. But legally—doctrinally—there is little else that they can do. Despite their worries for Meanie’s safety, they cannot, at this point, infringe upon Angry’s presumptive liberty interest.¹⁹²

Second, it may sound encouraging at first to say that we are going to round up and commit all dangerous psychopaths. We will all feel safer—at least those of us who do not find ourselves on the wrong side of this witch hunt. But that is just the point: too many people *might* just end up on the wrong side of this witch hunt for the wrong reason: either (1) the state misjudged them as dangerous or (2) the state abused this new power, rounded up people it did not like for whatever reasons, and then labeled them dangerous to justify their commitment.¹⁹³ Tyrannical states

mentioning that some are less convinced about this correlation [between psychopathy and recidivism.]”); Ogloff & Wood, *supra* note 6, at 174–75 (suggesting that the PCL-R should not be used to the exclusion of other “validated instruments” to “predict recidivism, identify criminogenic needs for treatment, and measure treatment response”); Robinson, *supra* note 170, at 1444 (“Requiring the criminal justice system to distribute punishment according to predictions of future dangerousness rather than blameworthiness for past crimes can only undercut the system’s moral credibility.”); *id.* at 1452 (“It is difficult enough to determine a person’s present dangerousness—whether he would commit an offense if released today. It is much more difficult to predict an offender’s future dangerousness—whether he would commit an offense if released at the end of the deserved punishment term in the future. It is still more difficult, if not impossible, to predict today precisely how long the future preventive detention will need to last.”). For criticisms of this argument, see ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 104–46 (1987); Lippke, *supra* note 6, at 383–85; Slobogin, *supra* note 47, at 6–11.

192. See Morse, *supra* note 6, at 46 (“In the interest of liberty, we leave potential dangerous people free to pursue their projects until they actually offend, even if their future wrongdoing is quite certain. Indeed, we are willing to take great risks in the name of liberty. . . . Do we really believe that responsible, dangerous agents have a right to be at liberty when their potential harmdoing is serious and quite certain? In theory we do.”).

193. See *Allen v. Illinois*, 478 U.S. 364, 380 (1986) (Stevens, J., dissenting) (“The sexually-dangerous-person proceeding . . . may not escape a characterization as ‘criminal’ simply because a goal is ‘treatment.’ If this were not the case . . . nothing would prevent a State from creating an entire corpus of ‘dangerous person’ statutes to shadow its

are notorious for labeling people who are suspected of disagreeing with, or resisting, the regime as “enemies of the state” and “disappearing” them. There is no reason to think that the same injustices would not take place here if we granted the state the power to preventively commit dangerous psychopaths without rigorous criteria, qualified experts, and other due process safeguards.¹⁹⁴

*E. A Consequentialist Argument for Classifying
Psychopathy as a Mental Illness*

Meanie, then, seems to be in a very vulnerable position, and there does not seem to be anything that the state can do to protect Meanie from Angry for more than a few days. But suppose now that Angry admits to the police that he will kill Meanie if Meanie once again mistreats him

criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and ‘criminal propensities,’ and constitutional protections for criminal defendants would be simply inapplicable. The goal would be ‘treatment’; the result would be evisceration of criminal law and its accompanying protections.’); Hart, *supra* note 3, at 167–68 (“It is not entirely clear why psychopathy generally is considered insufficient as a basis for short-term civil commitment. . . . There are at least two possible explanations. The first is that courts may view short-term civil commitment as requiring a very high level of cognitive or volitional impairment . . . to avoid excessive use of police powers by the state”); Slobogin, *supra* note 47, at 17–18 (“The legality objection to preventive detention is that the meaning of dangerousness cannot be satisfactorily cabined, thus allowing the state too much power.”); *id.* at 26 (“[T]he legality principle is meant to control government discretion. If the triggering act for preventive detention is not an immediate precursor to the predicted harm (as with emergency commitment and investigative stops), it must be linked to a statutorily defined crime, or the potential for government abuse becomes enormous. . . . [T]he government’s (over)reaction to the events of 9/11, including preventive detention of American citizens who remain uncharged, provides a potent counter-reason for applying the same legality constraints on preventive detention that apply to inchoate crimes.” (footnote omitted)).

194. See Morse, *supra* note 6, at 58 (“Assuming that [indefinitely committing psychopaths in specially secure hospital wings] was not a ruse, it would theoretically satisfy constitutional constraints on commitment, but no American legislature seems at present inclined to adopt such a scheme, which would of course be subject to abuse.”); Robinson, *supra* note 170, at 1444–45 (“The intense controversy surrounding the preventive detention legislation of the 1960s may help to explain this reluctance. Critics denounced the legislation as ‘Clockwork Orange’ and “‘Alice in Wonderland’ justice’ in which the punishment precedes the offense and as introducing a ‘police state’ and ‘fostering tyranny.’ Opponents described it as ‘intellectually dishonest,’ characterized it as ‘one of the most tragic mistakes we as a society could make,’ and feared that it ‘would change the complexion of American justice.’ Preventive detention was ‘simply not the American way.’” (footnotes omitted) (quoting a number of critics)); *id.* at 1455 (“[T]here are understandable concerns about creating a broader system of explicit preventive detention: the *Gulag Archipelago* potential for governmental abuse is real.” (footnote omitted)); Slobogin, *supra* note 47, at 17–18 (“The legality objection to preventive detention is that the meaning of dangerousness cannot be satisfactorily cabined, thus allowing the state too much power.”).

and the police have good reason to believe that Angry is a clinically diagnosed psychopath. Perhaps the police legally obtained Angry's psychological records, which indicate that Angry is a psychopath, or a licensed psychiatrist whom they consulted evaluates Angry and issues this diagnosis. Do they *now* have sufficient grounds for preventively committing Angry for more than a few days?

If Angry were a *sexual* psychopath, the answer in an increasing number of jurisdictions would be yes. Sexual psychopath—or sexually dangerous person—statutes generally allow the jurisdictions that have passed them to preventively commit sexual offenders, individuals who have been either convicted of designated sexual offenses or diagnosed by licensed psychiatrists as (likely) sexual offenders, if they have good reason to believe that these individuals are also dangerous to themselves or others.¹⁹⁵

Ex hypothesi, Angry is *not* a *sexual* psychopath. He is a *nonsexual* psychopath, a “generic” psychopath who wishes “only” to kill Meanie, not to commit any sexual offense against him. It is difficult to see, however, why this difference should matter, why we should permit the preventive detention only of known sexual psychopaths, not of dangerous *nonsexual* psychopaths. After all, all else being equal, being killed is worse than being sexually victimized. So just as the danger presented by sexual psychopaths is sufficient to preventively commit them, the danger presented by *homicidal* psychopaths should be sufficient to preventively commit *them*.

One way, perhaps the most direct way, to achieve this reform is to classify psychopathy as a mental illness.¹⁹⁶ There are two reasons, one

195. See Sexual Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901–16962 (2006); Tracy Bateman Farrell, Annotation, *Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA)*, 42 U.S.C.A. §§ 16901 *Et Seq.*, Its Enforcement Provision, 18 U.S.C.A. § 2250, and Associated Regulations, 30 A.L.R. FED. 2D 213 (2008); Marjorie A. Shields, Annotation, *Validity, Construction, and Application of Overt Act Requirement of State Statutes Providing for Commitment of Sexually Dangerous Persons*, 56 A.L.R.6TH 657 (2010) (“A number of states have enacted statutes relating to sexually dangerous persons, or persons with psychopathic personality disorders. . . . Statutes relating to sexually dangerous persons usually provide for the commitment of such persons.”); Morse, *supra* note 6, at 58–59 (summarizing the main criteria of laws prescribing the commitment of sexually violent predators).

196. Some already regard psychopathy as a mental illness. See, e.g., HARE, *supra* note 5, at 184 (noting that Australian authorities declared a certain psychopath “and others like him [as] mentally ill”); LINEDECKER, *supra* note 64, at 213, 215 (noting that John Wayne Gacy’s defense attorney described Gacy’s condition as a debilitating mental disease); Hart, *supra* note 3, at 164 (“[P]sychopathy meets the legal criteria for mental

formal, the other substantive. The formal reason is that the Supreme Court stated in *Foucha v. Louisiana* that a person may not be preventively committed unless that person is mentally ill.¹⁹⁷ So even if certain diagnosed psychopaths are dangerous, they may not be preventively committed unless their psychopathy is considered to be a mental illness. Given this point together with both the very real danger that Angry presents to Meanie and the protection that would be afforded to Meanie by preventively committing Angry, psychopathy should be considered a mental illness.¹⁹⁸ Moreover, given the very broad conception of mental illness supported by the Supreme Court, this proposal is hardly farfetched.¹⁹⁹

The substantive reason explains this formal rule. If Angry admitted to the police that he would kill Meanie if Meanie mistreated him again and Angry was clearly *not* mentally ill, the police would arguably not have good reason to think that, when push came to shove, Angry would carry through on this threat. Most “normal”—nonmentally ill—people get angry, and some of these people are honest—or stupid—enough to admit the full extent of their anger to the police. But it is safe to say that most nonmentally ill people, no matter how angry they get, do not kill or attempt to kill the people who anger them. It is only when they *are* mentally ill that we have better reason to think that they *will* act on their anger. The probabilities go significantly higher. Mental illness not only often motivates the anger but also impairs judgment and self-restraint.²⁰⁰ It tends to make the person irrationally or excessively angry and to act on this anger when a nonmentally ill person would have exerted self-control and either “let it go” or channeled the anger in a healthier, nonviolent direction. In this way, mental illness and dangerousness are not just two separate and independent conditions. It is mental illness

disorder. It is an abnormality of personality functions recognized in official nosological systems. It is persistent. It reflects something more than simply social deviance or bad choices.”); Lee, *supra* note 3, at 133 (referring to psychopathy as a “mental disorder”).

197. See *supra* note 172 and accompanying text; cf. Slobogin, *supra* note 47, at 35 (proposing that dangerousness and *undeterrability* be the two necessary and sufficient criteria for preventive detention).

198. See Lee, *supra* note 3, at 134–35 (making the similar point that treating psychopathy as an aggravating factor will make it easier to incarcerate psychopaths longer and thereby protect society for longer periods of time).

199. See Slobogin, *supra* note 47, at 2–3 (“In *Kansas v. Hendricks*, involving the constitutionality of a so-called ‘sexual predator’ statute, the Court permitted indeterminate confinement of dangerous individuals who have completed their sentences and have committed no new crime even when they are *not* seriously mentally disordered—as long as they have a personality disorder that renders them unable to adequately control their anti-social conduct. The Court recently affirmed its willingness to uphold the institutionalization of non-psychotic people who meet this ‘inability-to-control’ threshold in *Kansas v. Crane*.” (footnotes omitted)).

200. See *supra* note 180 and accompanying text.

that usually *makes* dangerous people *truly* dangerous, not just angry, in the first place. This is the reason why not merely apparent dangerousness but also mental illness is required for preventive commitment.²⁰¹

The same holds true of psychopathy. If Angry were not psychopathic, the probability that he is genuinely dangerous would be significantly smaller. There would be much less chance that he would actually attempt to kill Meanie. Conversely, if Angry is psychopathic, the probability is much greater that he presents a genuine danger to Meanie. Because the very same can be said of mental illness generally—because mental illness, especially in conjunction with anger, also significantly raises the probability of antisocial behavior by persons afflicted with it—it follows that psychopathy is, or at least should be regarded as, a form of mental illness.

It is very important to point out that I have in mind here not *all* psychopaths but only the *subset* of psychopaths who are dangerous. This point itself assumes that not all psychopaths are dangerous, that there are indeed people in our society who (would) score between 30 and 40 on the PCL-R in Part II above but who do *not* harm others, at least not criminally.²⁰² So I am *not* suggesting that we preventively commit whoever

201. See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’ These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. . . . The precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.” (citations omitted)); Hart, *supra* note 3, at 163 (“[H]ow does the law determine when a person’s cognitive or volitional abilities are sufficiently impaired by mental disorder to trigger the need for special care or control? . . . [The third requirement is that] the impairment of cognitive or volitional functions must be due *at least in part* to the mental disorder—or, put differently, there must exist a discernible causal nexus between the mental disorder and the impairment of cognitive or volitional functions.” (citations omitted)); *id.* at 167 (“Although statutes differ in terms of the specific type and quantum of risk that must be posed to justify commitment, a common element is that all require the state to demonstrate that the violence risk is due (at least in part) to mental disorder. Before the state can commit, it must prove that the person has a mental disorder that impairs cognitive or volitional functions in a way that increases violence risk . . .”).

202. See Hart, *supra* note 3, at 168 (“Perhaps courts . . . do not accept that [psychopathy] is associated with an imminent risk of harm.”); Ogloff & Wood, *supra* note 6, at 171 (“One might believe that working with psychopaths can be physically dangerous—and it might be—although only very rarely.”).

has been diagnosed as a psychopath. Once again, I am suggesting that we preventively commit only people who have been diagnosed with this mental illness *and* have given us good reason to believe that they will, in the near future, injure themselves or others. (Incidentally, by *others*, I include animals, but that is a different topic for a different paper.²⁰³)

*F. Psychopaths Are Still Criminally Responsible for
Their Behavior*

This last point brings us back to criminal responsibility. One might argue that if we cannot trust dangerous psychopaths to avoid committing crimes, then we cannot regard them as criminally responsible for their actions. Likewise, we generally do not regard dangerous and *mentally ill* people who are involuntarily committed to be criminally responsible for their behavior. If we did, then we likely would not commit them in the first place. Instead, we would reiterate the threat of criminal punishment against them and hope, with good reason, that issuing this threat—rather than locking them up—would suffice to deter them from committing a crime.

So I understand that there is a tension between my two positions—that psychopaths are criminally responsible for their criminal acts *and* that (pre-crime) dangerous psychopaths may be preventively committed. But *tension* does not mean *contradiction*. My two positions are still consistent. I do not contradict myself when I say that a given person may be dangerous and mentally ill enough to be preventively committed *and* still *not* mentally ill enough to qualify as insane and therefore beyond criminal punishment. The fact that individuals are mentally ill does not at all mean that they are not criminally responsible for their criminal behavior.²⁰⁴ It means only that they have more difficulty abiding by the moral and legal norms of their society. And their difficulty abiding by norms is not necessarily substantial, in which case the MPC version of the insanity defense is not necessarily satisfied and the *M’Naghten* version of the insanity defense is certainly not satisfied.²⁰⁵

203. See Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247, *passim* (2008) (arguing that, on balance, animals should be given the same legal standing as human beings).

204. Contrary to the *Durham* rule. See *supra* Part VI.B.

205. See *supra* Part IX.C.

XI. CONCLUSION

By definition and on the basis of empirical evidence, psychopaths are incapable of feeling compassion and therefore understanding how concern for others, not just fear of punishment, generally motivates the “rest of us” to refrain from engaging in activities that would otherwise maximize our self-interest. Despite this psychological deficit, I have argued that the threat or fear of punishment alone gives nonpsychopaths good enough reason to refrain from violating the criminal law. So even if psychopaths (1) cannot act for moral reasons, therefore (2) cannot be morally responsible for their behavior, and (3) do not understand why we have criminal laws or why the “rest of us” highly value the considerations that motivate these laws (especially other people’s interests), they are still criminally responsible for violating these laws—just as the “rest of us” are criminally responsible for violating drug-possession laws even though we may not morally or emotionally understand the basis, if any, of these laws.

Because psychopaths are criminally responsible for their behavior, they should be criminally punished just like the “rest of us” when they are found guilty. This conclusion will probably satisfy most retributivists, at least retributivists who believe that psychopaths are indeed criminally responsible for their criminal behavior. It may, however, disappoint two other groups: (1) retributivists who believe that psychopaths are *not* criminally responsible for their behavior; and (2) anybody who believes that individuals’ being criminally responsible for their behavior makes them ineligible, prior to committing any crime, for preventive commitment. Regarding (2), however, I have argued that the mere fact that psychopaths are criminally responsible for their behavior does not, and should not, prevent us from preventively committing them prior to their committing any crime when we have evidence that they present a real danger to themselves or others.

This last point is perfectly consistent with my central conclusion that psychopaths are not insane. People need not be insane in order to be subject to preventive commitment. Instead, they need be only dangerous and *mentally ill*. And although the *DSM-IV-TR* does not currently recognize psychopathy as a form of mental illness, it *should*. Psychopathy is a severe personality disorder. Once again, a person who suffers from this condition is unlike the “rest of us” insofar as it renders him unable to feel

genuine concern for others and thereby develop deep, rich, fulfilling relationships with other people. This deprivation should make us feel bad for psychopaths—at least until they victimize us or give signs that they are about to victimize us. Then we need to punish them or protect ourselves (respectively).

One might argue that we should still feel bad for psychopaths who are criminally punished.²⁰⁶ But it is difficult to see why. First, they presumably committed criminal acts and therefore deserve criminal punishment for these acts. Second, psychopaths do not suffer as easily or as intensely as the rest of “us” nonpsychopaths. Therefore, criminal punishment is likely to cause them much less suffering than it would, all else being equal, cause nonpsychopaths.²⁰⁷ As Robert Hare tells us:

Psychopaths often give the impression that it is *they* who are suffering and that it is the victims who are to blame for their misery. But they are suffering a lot less than you are Don't waste your sympathy on them; their problems are not in the same league as yours. Theirs stem primarily from not getting what they want, whereas yours result from a physical, emotional, or financial pounding.²⁰⁸

206. See MOSS, *supra* note 12, at 257 (“The day of [Gacy’s] execution . . . I kept thinking about Gacy. I felt really sad. I thought about how alone and scared he was probably feeling.”); RONSON, *supra* note 21, at 110 (“You have to feel sorry for psychopaths, right? If it’s all because of their amygdalae? If it’s not their fault?” (internal quotation marks omitted)); Lee, *supra* note 3, at 133 (“[O]ne [c]ould argue that a mental disorder (here psychopathy in particular) effectively decreases the culpability of the criminal who should therefore be treated with mercy and empathy. . . . This approach sympathizes with the individual, placing blame not on the criminal but on the inevitable effects of psychopathy.” (footnotes omitted)).

207. See HARE, *supra* note 5, at 195 (“*Psychopaths don’t feel they have psychological or emotional problems, and they see no reason to change their behavior to conform to societal standards with which they do not agree. . . . [P]sychopaths are generally well satisfied with themselves and their inner landscape, bleak as it may seem to outside observers. They see nothing wrong with themselves, experience little personal distress, and find their behavior rational, rewarding, and satisfying; they never look back with regret or forward with concern. They perceive themselves as superior beings Psychopaths are not “fragile” individuals. What they think and do are extensions of a rock-solid personality structure that is extremely resistant to outside influence.*”); *id.* at 203 (“[A]s far as we can determine, psychopaths are perfectly happy with themselves, and they see no need for treatment.”); *id.* at 204 (“From society’s perspective, psychopaths have never been on track; they dance to their own tune.”); LINEDECKER, *supra* note 64, at 220 (“[W]ho deserves the pity? The individual who has proven he is unfit to walk freely in society because he is dangerous to others, or potential victims who have caused injury to no one?”).

208. HARE, *supra* note 5, at 215–16. *But see* Willem H.J. Martens, *The Hidden Suffering of the Psychopath*, PSYCHIATRIC TIMES (Dec. 31, 2001), <http://www.psychiatristimes.com/print/article/10168/55051> (“[Psychopaths] have difficulty loving and trusting the rest of the world. . . . [and] do suffer emotionally as a consequence of separation, divorce, death of a beloved person or dissatisfaction with their own deviant behavior. . . . [They] can be genuinely saddened by their inability to control [their behavior toward others]. . . . Despite their outward arrogance, inside psychopaths feel inferior to others and know they are stigmatized by their own behavior. . . . They see the

love and friendship others share and feel dejected knowing they will never take part in it.” (citations omitted)).

