

Criminal Responsibility and Psychopathy in Western Australia

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Recent empirical research on psychopathy has led many to argue that psychopaths suffer cognitive and emotional deficits that should exempt them from criminal responsibility. The author argues that, in light of the recent research, the unsoundness of mind defence in Western Australia may indeed extend to psychopaths. However, the author also argues that there are legal, moral and pragmatic considerations against exempting them from responsibility.

IN popular culture, the psychopath is synonymous with cold-hearted evil. Partly this is because the popular concept of a psychopath – think Hannibal Lecter from *The Silence of the Lambs* – is quite different from the psychiatric concept. Nevertheless, the criminal law often reflects the popular opinion;¹ that is, the dominant view within the law has been that psychopaths deserve harsh punishment for their crimes, especially if they have a prior criminal history.² Research performed in the United States, for example, shows that in 85 per cent of reported cases where evidence that an offender suffers from psychopathy is admitted, this evidence has been led by the prosecution.³ Typically, the psychopath is seen simply as the worst kind of antisocial, immoral individual.

Yet while psychopaths may coldly commit terrible acts for which they later feel no guilt or remorse, it is not clear that they should in fact be held responsible

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1. See J Ruffles, 'Diagnosing Evil in Australian Courts: Psychopathy and Antisocial Personality Disorder as Legal Synonyms of Evil' (2004) 11 *Psychiatry, Psychology & Law*, 113.
2. Consider the case of Garry David, for example, whose criminal exploits led directly to the enactment of the Community Protection Act 1990 (Vic) so that he could be detained beyond the completion of his prison sentence. For discussion, see CR Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 *Monash Law Review* 161.
3. D DeMatteo & J Edens, 'The Role and Relevance of the Psychopathy Checklist – Revised in Court: A Case Law Survey of US Courts (1991–2004)' (2006) 12 *Psychology, Public Policy & Law* 214.

for such behaviour. A wealth of evidence from psychiatry and psychology implies that psychopathy is a serious personality disorder with several features that potentially undermine criminal responsibility. Most saliently, psychopaths' capacity for reasoning about the morality of their actions is often either entirely lacking or severely impaired. This has led many moral and legal theorists in recent years – perhaps the majority who have written on the topic – to argue that in light of their deficiencies in moral reasoning it is unjust to hold psychopaths morally responsible for their actions.⁴ On this basis, some have gone on to assert that at least those with severe forms of psychopathy may deserve the special verdict of not guilty by reason of unsoundness of mind. This would rarely, if ever, lead to a psychopathic offender being unconditionally released, of course. Instead, he or she may receive an indeterminate custody order or a range of other orders including intensive supervision orders.⁵

In contrast, the courts in Western Australia appear firmly set against allowing psychopaths to make use of the unsoundness of mind defence. My goal in what follows is to reconsider the merits of this position given the recent explosion of empirical and theoretical research on psychopathy and responsibility. I will argue that as the law currently stands, and in light of the recent research, it is arguable that some psychopaths should be entitled to make use of the unsoundness of mind defence.

However, I also argue, contrary to the emerging consensus, that as a matter of justice psychopaths should not in fact be exempted from criminal responsibility. One of the most interesting features of psychopaths, from a legal perspective, is that their condition puts pressure on the common identification of moral responsibility and criminal responsibility. For, on the one hand, psychopaths seem to lack moral understanding: they are deficient in both their capacity to feel moral emotions, such as empathy and guilt, and the ability to distinguish moral right from wrong. On the other hand, psychopaths who commit crimes are typically in control of their actions and aware of their illegality and the relevant criminal sanctions. The law is ambivalent about how such cases should be dealt with. In response, I argue that the familiar justifications for imposing criminal sanctions do not imply that the ability to reason about morality and make moral judgements is a

4. A small sample of such work includes: A Duff, 'Psychopathy and Moral Understanding' (1977) 14 *American Philosophical Quarterly* 189; C Fine & J Kennett, 'Mental impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment' (2004) 27 *International Journal of Law & Psychiatry* 425, 425–6; P Arenella, 'Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability' (1992) 39 *University of California, Los Angeles Law Review* 1511; I Haji, 'The Emotional Depravity of Psychopaths and Culpability' (2003) 9 *Legal Theory* 63; N Levy, 'The Responsibility of the Psychopath Revisited' (2007) 14 *Philosophy, Psychiatry and Psychology* 129; P Litton, 'Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance' (2008) 39 *Rutgers Law Journal* 349. See also L Malatesti & J McMillan (eds), *Responsibility and Psychopathy: Interfacing Law, Psychiatry and Philosophy* (New York: OUP, 2010) pt III.

5. For details, see below pp 270–1, 284–6.

universal requirement for criminal responsibility. In particular, for both theoretical and pragmatic reasons psychopaths should be held criminally responsible for their wrongdoings even if they are not morally responsible for them.

PSYCHOPATHY

The category of the psychopathic personality has a relatively long history in medicine and can be traced back at least to James Cowles Prichard's notion of 'moral insanity'.⁶ Although we no longer speak of the morally insane, the core idea can be traced through the intervening years as it evolved into the variety of descendant concepts we find in modern psychiatry: antisocial personality disorder (ASPD), sociopathy and psychopathy.⁷ According to the DSM-IV (the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*), to be classified as suffering from ASPD a person must show a 'pervasive disregard for and violation of the rights of others' as indicated by three or more of a list of several characteristics including a failure to conform to social norms, deceitfulness, impulsivity and lack of remorse. To be diagnosed as having ASPD, a person must also be over 18 years of age — which presumably shows the influence of concerns about legal responsibility rather than any underlying medical reality.⁸

The medical usefulness of the category of ASPD is often doubted.⁹ Moreover, given that ASPD is diagnosed on the basis of past antisocial behaviour and that it is relatively widespread,¹⁰ it is often rightly argued that an ASPD diagnosis should not be able to exempt a person from criminal responsibility.¹¹ In slogan form, evil should not be its own excuse. Since ASPD is sometimes identified with psychopathy, some commentators therefore argue that psychopaths should not be exempted from criminal responsibility.¹²

However, it has become increasingly clear in recent years that it is important to distinguish carefully ASPD from psychopathy. Some psychologists and

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6. J Cowles Prichard, *On the Different Forms of Insanity in Relation to Jurisprudence, Designed for the Use of Persons Concerned in Legal Questions Regarding Unsoundness of Mind* (London: Hippolyte Bailiere, 1842). For discussion, see T Ward, 'Psychopathy and Criminal Responsibility in Historical Perspective' in Malatesti & McMillan, above n 4.
 7. Although it should be noted that many of those Prichard called morally insane would probably these days be diagnosed with bipolar disorder: Ward, *ibid* 8.
 8. DT Lykken, 'Psychopathic Personality: The Scope of the Problem' in C Patrick (ed), *Handbook of Psychopathy* (New York: Guilford Press, 2006) 4.
 9. See, eg, Lykken *ibid*; R Hare & C Neumann, 'Psychopathy: Assessment and Forensic Implications', in Malatesti & McMillan, above n 4, 93.
 10. ASPD is the most common personality disorder amongst prisoners. It is estimated that 50-80% of prisoners have ASPD: Office of the Chief Psychiatrist (WA), 'Report on Alternative Detaining Powers in Relation to Persons Diagnosed with Dangerous and Severe Personality Disorder' (2004) 9, 13-14.
 11. Eg, B McSherry, 'The Reformulated Defence of Insanity in the Australian Criminal Code Act 1995 (Cth)' (1997) 20 *International Journal of Law & Psychiatry* 183, 193.
 12. See, eg, McSherry, *ibid*; Williams, above n 2.

psychiatrists have argued that psychopathy should be seen as a sub-type of ASPD, of which sociopathy is another sub-type.¹³ Others have argued, consistently with the previous approach, that ASPD is best seen as the American Psychiatric Association's failed attempt to provide diagnostic criteria for psychopathy: an attempt which failed precisely because it does not rely on aspects of psychopathic *personality* for diagnosis and instead focuses solely on *prior antisocial behaviour*.¹⁴

In contrast, psychopathy is primarily diagnosed using Robert Hare's *Psychopathy Checklist — Revised* (PCL-R) which is a 20 item list containing items relating to both personality and antisocial behaviour. Factor analysis of the list of diagnostic items in the PCL-R has identified two factors. Factor 1 consists of a set of affective/interpersonal features including shallow affect, failure to accept responsibility, callousness and lack of empathy, grandiose sense of self-worth and glibness or superficial charm. Factor 2 relates to antisocial or impulsive behaviour, including poor behavioural controls, lack of realistic long-term goals and early behavioural problems. Apart from these cognitive and emotional deficits, discussed in more detail below, psychopaths can be clear-headed, rational and highly intelligent.

Each item on the PCL-R is assigned a score of either 0, 1 or 2 and a score of 30 or above (out of a possible 40) is typically taken as sufficient for a diagnosis of psychopathy. While there is no magic to this cut-off point, it has proven to be a useful way of classifying psychopaths. It is important to keep in mind, though, that psychopathy is a dimensional construct and so one's personality can be more or less psychopathic. Most importantly, each of the cognitive and emotional deficits associated with psychopathy also come in degrees. It is thus not possible to draw general conclusions about the moral or criminal responsibility of psychopaths: each individual must be considered in light of their particular deficits.

There is strong evidence that the PCL-R is a reliable diagnostic tool and that psychopathy (unlike ASPD) is a valid construct.¹⁵ And although it is a good predictor of future criminal behaviour, psychopaths are much less common in the prison population than those diagnosed with ASPD.¹⁶

Psychopathy has been the subject of intense study in the last 10-15 years and several important findings have emerged. First, psychopaths cannot reliably draw the distinction between conventional norms and moral norms.¹⁷ This distinction is

13. Eg, Lykken, above n 8.

14. Hare & Neumann, above n 9, 101–3.

15. For the checklist and a helpful summary of the empirical support for it, see *ibid*.

16. The Office of the Chief Psychiatrist (above n 10, 13–14) estimates the rate of psychopathy at only 3 per cent of prisoners. However studies in the US suggest a much higher proportion of 15–25 per cent: see R Hare, *Manual for the Hare Psychopathy Checklist* (North Tonawanda: MHS, 2nd edn, 2003).

17. RJR Blair, 'A Cognitive Developmental Approach to Morality: Investigating the Psychopath' (1995) 57 *Cognition* 1; RJR Blair, 'Moral Reasoning and the Child with Psychopathic Tendencies' (1997) 22 *Personality & Individual Differences* 731.

one that can be reliably drawn by normal children by about the age of five.¹⁸ For example, while children recognise that it would be permissible for a boy to wear a dress to school if their teacher allowed it, but wrong to hit another child even if the teacher allowed it, psychopaths have difficulty seeing the difference between the two cases. Thus, perhaps due in part to their lack of affect and ability to empathise, psychopaths apparently fail to reach a stage of moral development easily obtained by most young children.¹⁹ Yet while they have not come to understand moral transgressions, it is clear that psychopaths do understand societal and conventional rules.²⁰ So it seems that psychopaths can understand and reason about the law, crime and punishment, for example, but are unable to understand and reason about morality.²¹

Second, psychopaths appear to be relatively fearless and respond abnormally to the prospect of punishment. In particular, they show less skin conductance (and so less ‘arousal’) in anticipation of a negative stimulus and, in various contexts, show a poor ability to regulate their behaviour to avoid punishment.²² Children who have these features are undoubtedly difficult to socialise, which may contribute to the development of their disorder. More importantly for current purposes, this also points to the problems psychopaths typically have with practical reasoning.

Although psychopaths can display great ingenuity in achieving their ends, they have great difficulty sticking to even short to medium term goals and even when they do, their motivations can be hard to comprehend.²³ They may commit crimes in ways they know will result in punishment, indifferently shed plans they were apparently firmly committed to moments before and hold contradictory beliefs without showing normal signs of unease when this is pointed out to them.²⁴ Further, Blair argues that at the base of the reactive aggression often found in psychopaths is a childhood deficit in instrumental learning which leads to frustration and anger

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18. E Turiel, ‘Distinct Conceptual and Developmental Domains: Social Convention and Morality’ (1977) 25 *Nebraska Symposium on Motivation* 77; LP Nucci, ‘Challenging Conventional Wisdom About Morality: The Domain Approach to Values Education’ in LP Nucci (ed), *Moral Development and Character Education: A Dialogue* (Berkeley: McCutchan, 1989) 183.
 19. Levy, above n 4; N Levy, ‘Psychopathy, Responsibility, and the Moral/Conventional Distinction’ in Malatesti and McMillan, above n 4, 213.
 20. RJR Blair, L Jones, F Clark & M Smith, ‘Is the Psychopath “Morally Insane?”’ (1995) 19 *Personality & Individual Differences* 741, 751.
 21. Fine and Kennett, above n 4, and Levy, above n 19, explain the evidence for, and importance of, the psychopath’s failure to draw the moral/conventional distinction. Fine & Kennett also contains a very useful summary of more indirect evidence supporting the hypothesis that psychopaths have failed to pass through a basic stage of moral development.
 22. For a very useful summary of the empirical literature on these findings, see D Fowles & L Dindo, ‘A Dual Deficit Model of Psychopathy’ in Patrick, above n 8, 14.
 23. See generally RD Hare, *Without Conscience: The Disturbing World of Psychopaths Among Us* (New York: Guilford, 1993). As mentioned above, the associated behavioural problems constitute several items on Hare’s checklist.
 24. For fascinating anecdotal accounts of such behaviour, see HM Cleckley, *The Mask of Sanity* (St Louis. Hervey Milton, 1955) and his descriptions of Pierre, Joe and Milt in particular.

when they fail to achieve their ends and so to heightened reactive aggression.²⁵ Blair also postulates that, combined with an impaired Violence Inhibition Mechanism, the difficulties in practical reasoning often ultimately lead to psychopaths resorting to instrumental aggression — that is, using aggression to achieve their ends.²⁶ Nevertheless, it is important to keep in mind that the psychopath, though deficient in empathy, is not essentially aggressive and may in fact display great kindness. According to Lykken, even the apparently virtuous Oskar Schindler may have been a psychopath.²⁷

In summary, psychopathy is a well-established personality disorder involving deficits in affect, empathy and, apparently as a result of these problems, moral understanding. But such people also suffer deficits in behaviour control and practical reasoning that equally impair their ability to conform their behaviour to social norms.

With this understanding of psychopathy in place, I now turn to consider whether psychopaths may be able to make use of the unsoundness of mind defence in Western Australia.

ARE PSYCHOPATHS UNSOUND OF MIND IN WESTERN AUSTRALIAN LAW?

1. The unsoundness of mind defence

Section 27(1) of the Criminal Code 1913 (WA) provides a defence against conviction for any crime on the grounds of unsoundness of mind. It states that:

A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

Section 1 defines ‘mental impairment’ to mean ‘intellectual disability, mental illness, brain damage or senility’ and ‘mental illness’ to require ‘an underlying pathological infirmity of the mind, whether of short or long duration and whether

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25. RJ Blair, D Mitchell & K Blair, *The Psychopath: Emotion and the Brain* (Oxford: Blackwell, 2005).
26. Blair, above n 17. Psychopaths often commit murder for instrumental reasons. According to a 2002 study in the US the frequencies are as follows: murder for retribution 30.3%; for money 22%; non-consensual sex related murders 19.3%; conflicts over female 11.1%; for drugs or alcohol 2.8%; ‘other’ 6.4%. M Woodworth & S Porter, ‘In Cold Blood: Characteristics of Criminal Homicides as a Function of Psychopathy’ (2002) 111 *Journal of Abnormal Psychology* 436.
27. Lykken, above n 8, 11–12. According to Lykken, Schindler’s bravery was not motivated by empathy, but solely by the desire to conquer the impossible challenge of saving hundreds of Jews from the Nazis.

permanent or temporary'.²⁸ Thus, for a psychopath to successfully employ the unsoundness of mind defence he or she must show that psychopathy is a mental impairment which deprived him or her of one of the listed capacities at the time of the offence.

Section 27(1) is derived from the M'Naghten Rules, laid down in *M'Naghten's Case*.²⁹ There are important differences, however. First, section 27(1) explicitly allows those who were unable to control their actions to be acquitted, whereas the *M'Naghten* Rules only exempt those who do not know the nature of their actions or that those actions are wrong. Second, section 27(1) speaks of an accused being deprived of certain *capacities*, whereas the *M'Naghten* Rules speak of a lack of actual knowledge. It is also noteworthy that the structure of section 27 was thought by its original drafter, Sir Samuel Griffiths, to bring the defence into line with several other defences relieving an accused of criminal responsibility. In other words, Griffiths saw the three listed capacities in section 27(1) as paralleling, respectively, the defences of mistake of fact (section 24), act independent of will (section 23A) and the exemption of children from criminal responsibility (on the grounds that they lack an understanding of their moral duty) (section 29).³⁰

The unsoundness of mind defence is successfully appealed to in only a small number of cases. When it is, however, the special verdict of not guilty by reason of unsoundness of mind is delivered. If the offence is a 'schedule 1' offence, the Criminal Law (Mentally Impaired Accused) Act 1996 (WA), section 21(a) requires that a custody order be made. Assuming the offender is over 18, this means that they will face indeterminate detention, subject to review by the Mentally Impaired Accused Review Board, in an authorised hospital if their condition is treatable (and certain other conditions are met) or a declared place or prison otherwise (section 24). If the offence is not a schedule 1 offence, the offender is still liable to be given a custody order (sections 21(b), 22(1)(c)) but may instead be given either a community based order, a conditional release order, or an intensive supervision order (section 22(1)(b)). In some, uncommon, cases the offender may be released unconditionally (section 22(1)(a)). In light of these arrangements, a verdict of not guilty because of unsoundness of mind is often more attractive to the prosecution than the defence, and indeed the prosecution may itself raise the insanity issue for this reason. Regardless of who raises the defence, however, it is important to determine whether psychopaths may come under it. (For further discussion of the disposition of psychopaths see section 4.2.)

28. This definition is derived from King CJ in *Radford v The Queen* (1985) 42 SASR 266, 274.

29. *M'Naghten's Case* [1843] 10 Cl & Fm 200.

30. E Edwards, 'Insanity Under the Queensland and Western Australian Codes' (1967) 8 *University of Western Australia Law Review* 196.

2. Personality disorders and ‘mental impairment’

Although personality disorders, like psychopathy, are not listed explicitly within the definition of ‘mental impairment’, the Code also does not explicitly exclude them.

Whether or not a particular mental condition is a ‘mental impairment’ is a matter of law, although medical opinion is relevant to determining the issue.³¹ In *Hodges*, the Court of Criminal Appeal held that a diagnosis of ASPD was not sufficient to qualify a person as suffering from a ‘mental disease or natural mental infirmity’ as section 27 then required.³² This accords with the view of some psychiatrists, at least when ‘mental illness’ is understood as a medical term.³³ In contrast, in the earlier case of *Willgoss*, the High Court seemed to accept that a diagnosis of ASPD, which was referred to as ‘psychopathy’, did count as a ‘mental illness’ – the relevant concept in Victoria, from where the appeal came.³⁴

Mirroring this ambivalence from the courts, over the last two decades there has been vigorous debate in the wider legal community over whether personality disorders should be recognised as a type of mental illness or impairment that can potentially relieve a person of criminal responsibility. As a result, the Criminal Code (Cth), section 7.3(1), and the Criminal Code (ACT), section 27(1), now include ‘severe personality disorder’ within their definitions of mental impairment. In contrast, after careful consideration, the South Australian legislature decided against including personality disorders within the definition of mental impairment in its Criminal Code. In their 2007 report *Review of the Law of Homicide*, the Law Reform Commission of Western Australia considered the issue and concluded that severe personality disorder ‘should not (like intellectual disability, senility and brain damage) automatically qualify as a mental impairment for the purposes of the insanity defence. But this does not mean that personality disorder should be specifically excluded from the defence of insanity.’³⁵ Instead, the Commission was satisfied that the Code definition in section 1 allowed the courts sufficient flexibility to decide whether any particular condition should qualify as a mental impairment for the purposes of section 27.

31. *R v Falconer* (1990) 171 CLR 30.

32. *Hodges v The Queen* (1985) 19 A Crim R 129.

33. See Office of the Chief Psychiatrist (WA) ‘Report on Alternative Detaining Powers in Relation to Persons Diagnosed with Dangerous and Severe Personality Disorder’ (2004) 9 and the references there. The American Law Institute’s Model Penal Code (1981) § 4.01(2) contains an explicit caveat to its definition of mental illness which rules out any ‘abnormality manifested only by repeated criminal or otherwise antisocial conduct’.

34. *Willgoss v The Queen* (1960) 105 CLR 295. For other cases that seem to have accepted personality disorders as mental illnesses or impairments, see *Stapleton v The Queen* (1952) 86 CLR 358, 360–7; *Jeffrey v The Queen* (1982) 7 A Crim R 55; *Attorney-General (SA) v Brown* [1960] AC 432;

35. Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 97, Final Report (2007) 230.

Thus, in Western Australia, a psychopath would need to successfully argue that their relevant ‘mental impairment’ is a mental illness, and so that they suffer from an ‘underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary’ (section 1). In *Hodges*, Burt CJ and Smith J (agreeing), held that the medical evidence showed that Hodges had ASPD but that this amounted to him merely being an ‘impulsive man lacking self-control’.³⁶ It did not amount to a mental disease or natural mental infirmity, as then required. However, I have already mentioned the importance of distinguishing psychopathy from ASPD. Further, there is now significant evidence that psychopaths do suffer from underlying ‘pathological infirmities’ of the mind in the form of a variety of neural deficits revealed by neuroimaging techniques. These results are ‘consistent with neuropsychological studies that have reported psychopathic-like behaviour in individuals suffering damage’ to the relevant brain regions.³⁷ The emerging picture, then, is one in which significant neural dysfunction, which can be detected by neuroimaging techniques, underlie the cognitive and affective deficits and which in turn lead to the anti-social behaviour displayed by psychopaths.

Against treating personality disorders as a ‘mental impairment’ it is sometimes argued that including them would excuse a large proportion of criminal behaviour.³⁸ But this is not true. Section 27 further requires that the mental impairment deprived the defendant of one of three named capacities. The vast majority of those suffering from personality disorders are not deprived of any of those capacities. In the case of psychopathy, unlike ASPD, there are also relatively few sufferers of the disorder to begin with.

It is arguable, therefore, that a severe personality disorder such as psychopathy could serve as the basis for an unsoundness of mind defence in Western Australia, provided it could also be shown that the accused lacked one of the listed capacities.

3. Knowledge of the nature of one’s act and control of one’s actions

Whatever the other cognitive deficits from which psychopaths suffer, it is clear that they know both what they are doing and the consequences of their actions. They do not suffer from delusions or hallucinations and can be highly intelligent. Thus, psychopaths are unable to argue that they lack the capacity to know the nature of their actions.

As mentioned above, however, psychopaths do suffer from impulsivity and have various problems with prudential reasoning. Focusing on these deficits, it may be

36 *Hodges*, above n 32, 131.

37. C Harenski, R Hare & K Kiehl, ‘Neuroimaging, Genetics and Psychopathy: Implications for the Legal System’ in Malatesti & McMillan, above n 4, 139.

38. See, eg, McSherry, above n 11, 193; S Yeo, ‘Commonwealth and International Perspectives on the Insanity Defence’ (2008) 32 *Criminal Law Journal* 7, 10.

possible to argue that psychopaths lack the second capacity listed in section 27, namely the capacity to control their actions. Indeed, it is sometimes argued that psychopaths should not be considered moral agents because of their inability to regulate their behaviour appropriately.

The Code itself does not provide any guidance for understanding what it means to lack a capacity to control one's actions. There are two interpretations in the case law. The first, more expansive interpretation, has been applied in two important WA decisions, *R v Moore* and *R v Wray*.³⁹ In those cases, it was held that section 27 'accepts the medical theory of uncontrollable impulse, and treats people who are insane to the extent that they have not the capacity to control their actions ... as being persons who are irresponsible'.⁴⁰ On this reading, those who act on an uncontrollable or irresistible impulse caused by mental impairment will fall within section 27. This may include, for example, those who suffer from a pathological gambling disorder⁴¹ or other personality or impulse-control disorders.

An alternative, narrower interpretation of the lack of control test was more recently applied in *Falconer*, a High Court appeal arising from a conviction for murder before the Supreme Court of Western Australia.⁴² In that case, Mason CJ, Brennan and McHugh JJ confined a lack of control to involuntary behaviour occurring independently of the exercise of the will.

The interpretation in *Falconer* apparently holds sway in Western Australia. In light of this, the courts are very unlikely to conclude that psychopaths lack the relevant control over their actions. Unlike an automaton, psychopaths know what they are doing. Moreover, they do not act automatically or mechanically, but act intelligently to achieve their ends. Further, even if the courts returned to the more expansive interpretation of what it is to lack control of one's actions, this interpretation is still unlikely to be wide enough to exempt psychopaths since they do not behave antisocially because of some internal compulsion. For example, here is how Harvey Cleckley describes an act of forgery by one of his patients – a crime for which he was bound to be caught.

There was no specific breath-taking and unbearable drive to do this irrational act, and no vivid fulfilment in its accomplishment. He had done it as a lazy man might swat a fly.⁴³

Unlike someone suffering from obsessive-compulsive disorder or a gambling disorder, then, psychopaths face no internal battle over whether to perform the

39. *R v Moore* (1908) 10 WALR 64; *R v Wray* (1930) 33 WALR 67.

40. *Moore*, *ibid* 66.

41. See, eg, *R v Telford* (2004) 89 SASR 352.

42. *Falconer*, above n 31.

43. Cleckley, above n 24, 109.

act or not, and certainly do not have a resolute intention to do one thing which is overridden by an irresistible desire to do something else.

4. Psychopathy and knowing that one ought not

In order to be relieved of criminal responsibility, therefore, psychopaths must show they lack the capacity to know that they ought not perform the relevant actions. Indeed, it is precisely the idea that psychopaths are generally rational and yet lack moral understanding which has excited so much interest amongst philosophers and legal theorists. On the one hand, the psychopath is fundamentally different from those we normally exempt from responsibility on the basis of being unsound of mind, in that she is fully aware both of her surroundings and the relevant social conventions. Yet, on the other hand, she seems to lack the basic moral understanding required for moral responsibility.

So, what conditions must be met for an accused to be held not to have the capacity to know that ‘he ought not to do the act’? In *R v Porter*, Dixon J (as he then was) interpreted ‘wrong’ in the *M’Naghten* Rules as meaning that the accused needs to know not just that the act was legally wrong, but also morally wrong.⁴⁴ Dixon J expressed this view by saying that the crucial question is whether the accused was

disabled from knowing that it was a wrong act to commit in the sense that ordinary reasonable men understand right and wrong and that he was disabled from considering with some degree of composure and reason what he was doing and its wrongness.⁴⁵

Dixon J’s interpretation was subsequently approved in *Stapleton*. In that case, Dixon CJ and Webb and Kitto JJ made clear the reasons for this interpretation.

The truth perhaps is that, from a practical point of view, it cannot often matter a great deal whether the capacity of the accused person is measured by his ability to understand the difference between right or wrong according to reasonable standards, or to understand what is punishable by law, because in serious things the two ideas are not easily separable. But in certain cases, where the insane motives of the accused arise from complete incapacity to reason as to what is right or wrong (his insane judgment even treating the act as one of inexorable obligation or inescapable necessity) he may yet have at the back of his mind an awareness that the act he proposes to do is punishable by law.⁴⁶

44. The opposite conclusion was reached in England in *R v Windle* [1952] 2 QB 826. RD Mackay & G Kearns, ‘More Facts About the Insanity Defence’ [1999] *Criminal Law Review* 714 suggest that this decision is not followed strictly in practice. In the US, the leading case is *People v Schmidt* 110 NE 945 (1915) in which it was held that in ‘command from God’ cases the appropriate test is moral wrongness not legal wrongness. This is reflected in the American Law Institute’s Model Penal Code (1981) §4.01.

45. *R v Porter* (1933) 55 CLR 182, 190.

46. *Stapleton*, above n 34, 375.

In other words, a person who is unsound of mind may fully understand and remember that an act is against the law, but nevertheless be driven to perform it because of the belief that it is morally right or even morally obligatory to do so. This may often be the case for those who commit crimes in the grip of a delusion. For example, in *Hone* the accused was enduring a florid schizophrenic delusion which led him to believe it was necessary to punch his mother to prove to certain powerful forces that he was ‘the chosen one’.⁴⁷ (In fact, he subsequently killed both his mother and sister.) Nevertheless, Hone was able to know what he was doing, control his actions and knew that what he was doing was illegal. Likewise, in *AJ*, according to the report of one of the psychiatrists, Dr Allnutt, the accused also retained these capacities and yet because of a psychotic delusion ‘he felt morally right and delusionally justified in [killing the deceased] because he saw himself as acting [as] a father protecting his daughter from a sexual predator’.⁴⁸

In cases such as these, where, because of a mental illness, a person believes they are morally compelled to perform an illegal act and have lost the capacity to reason about such matters, the law deems it unfair to hold them responsible for breaking the law. Why does the law exempt such people? Presumably the rationale resembles that for the defence of emergency (section 25). In the case of emergency, the law recognises that in some extreme situations it may seem to a reasonable person, and even be true, that it is morally right to commit a crime.⁴⁹ The law accepts, in other words, that morality can, and sometimes should, ‘trump’ legality. Likewise, if someone is mentally disordered and their disorder leads them to believe that they are morally compelled to break the law, they should be exempted from responsibility.

Reading the requirement that one lacks the ‘capacity to know that he ought not’ in section 27 in terms of moral wrongness also provides a consistent interpretation of those words in Chapter V of the Code. The same words appear in section 29 as a condition on exempting children between 10 and 14 of criminal responsibility. In that context, the condition is also read in terms of moral wrongness.⁵⁰

Given the prevailing reading of section 27, a case could be made for exempting psychopaths from criminal responsibility. As mentioned above, there is good evidence to suggest that psychopaths lack moral understanding altogether — they simply do not understand the difference between right and wrong.

Nevertheless, this argument faces a serious obstacle in the form of another judgment of the Dixon court, namely *Willgoss v R*.⁵¹ In that case special leave to

47. *Hone v State of Western Australia* (2007) 179 A Crim R 138.

48. *State of Western Australia v AJ* [2008] WASC 215, [82].

49. This rationale has its limits. The law does not allow those who commit acts of civil disobedience to be exempted from responsibility.

50. *R v M* (1977) 16 SASR 589; *R v F*; *ex parte Attorney-General* [1999] 2 Qd R 157, 160.

51. *Willgoss*, above n 34.

appeal was denied to a psychopath who had been convicted of murder. The ratio was expressed succinctly:

The complaint however on behalf of the prisoner is that his Honour did not direct the jury that a mere intellectual apprehension on the prisoner's part of the wrongness of the act would not or might not amount to knowledge unless it was accompanied by some sufficient appreciation of, or feeling about, the effect of his act upon other people; perhaps some moral appreciation. The law provides no foundation for such a complaint. It is enough to say that it is an attempt to refine upon what amounts to knowledge of the wrongness of the act which is not countenanced by the law.⁵²

This reasoning makes clear that the court conceptualised the decision that needed to be made as one between whether unsoundness of mind requires the offender to lack the capacity to 'intellectually apprehend' that the act was wrong, or whether it requires a full cognitive and *emotional* appreciation of the effects of the act on other people. When conceptualised in those terms, the High Court's decision seems both in accord with the common law at that time and intuitively just. The absence of a moral emotion such as disgust or repugnance at the time of performing an immoral act should not in itself relieve a person of responsibility.⁵³ Instead, it merely suggests a moral failing.

However, although the way the issue was conceptualised by the court may have been necessitated by the medical and legal arguments on behalf of the appellant (and be partly due to the understanding of psychopathy at the time), I suggest that a different approach is more appropriate. As argued above, psychopaths not only have low affect, there is now strong evidence that they suffer from deep deficits in moral understanding. In other words, it is not merely that they lack the appropriate 'feeling' when they contemplate performing an immoral act. It is that, because of their low affect, they have failed to reach a basic stage of moral development that most children have reached by the age of five. More specifically, they lack the capacity to distinguish moral norms from mere social convention. And this implies, given the fundamental nature of the distinction to an understanding of morality, that they have failed even to grasp the moral concepts of right and wrong.⁵⁴ In such a case, the offender is no more able to know that an act is wrong (or right) than a person who lacks the concept of a nation can know that Australia is a nation. Thus, a full-fledged psychopath could be argued to lack any knowledge of the wrongness of any act, including the 'intellectual apprehension' required in *Willgoss*.⁵⁵

52. Ibid 301.

53. McSherry, above n 11, 187.

54. There are difficult philosophical questions about what it takes to possess moral concepts that I am ignoring here for reasons of space. For the sake of argument I assume that the failure to distinguish moral norms from conventional norms suffices to show that one lacks moral concepts.

55. Even if this was denied, it might be argued that a 'capacity to know that one ought not' includes an 'emotional' understanding of the wrongness of the act and so *Willgoss* does not block psychopaths from appealing to s 27. See NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (2010) [3.61]. This seems to me a strategy of last resort, however.

So far I have focused on the distinction made by Dixon J in *Porter* and affirmed in *Stapleton* between moral and legal wrongness. But the same conclusion results if we apply Dixon J's test more carefully and speak of a capacity to know the act was wrong 'having regard to the ordinary standards of reasonable people'.⁵⁶ Without the concept of wrongness, a person can no more form the belief that ordinary people would hold an act to be wrong than a person who lacks the concept of a nation can believe that reasonable people think that Australia is a nation. Thus, although in *Hodges and Willgoss* the courts appear to have set themselves against allowing psychopaths to appeal to the unsoundness of mind defence, it could be argued that, given our improved understanding of that condition, the legal tests for unsoundness of mind are wide enough to include psychopaths on the grounds that they lack the understanding of right and wrong which was held in *Stapleton* to be necessary for criminal responsibility.

5. Should *Stapleton* Be Applied to Psychopaths?

Yet while the decision in *Stapleton* could be used to exempt psychopaths, it is not clear that the courts should in fact apply *Stapleton* in this way. It is important to remember that the interpretation of 'wrong' in *Stapleton* was there applied to a case where the accused acted in a way he knew was legally prohibited but, because of his mental disorder, believed was morally required. This is also the situation in which *Stapleton* is usually applied. For the reasons given above, the High Court's reasoning seems entirely appropriate in such cases. However, the High Court made clear in *Stapleton* that in most cases the capacity to know that an act is wrong can equally be read as the capacity to know the act was legally wrong. It is only in these special cases that we must be careful to focus on moral wrongness.⁵⁷

The situation is profoundly different in the case of the psychopath. The psychopath does not have the concepts of right and wrong and so does not choose to act illegally on the mistaken conviction that his acts are morally required. There is no question of the psychopath deserving to be exempted from responsibility on the grounds that, due to their disordered mind, they had formed mistaken beliefs about moral right and wrong. Instead, the psychopath chooses to disobey the law, risking whatever punishment is due to her if she is caught, in the hope of receiving whatever immediate gain is on offer.

56. *Porter*, above n 45, 190. See also *Sodeman v The King* (1936) 55 CLR 192, 215. A similar test is employed in the Criminal Code Act 1995 (Cth) which requires a lack of capacity to reason about 'whether the conduct, as perceived by reasonable people, was wrong': s 7.3(1)(b) (emphasis added).

57. A similar point was made, for example, by the Washington Supreme Court in *State v Crenshaw* 98 Wash 2d 789, 659 P.2d 488 (1983), where it was held that the basic test for the knowledge of wrongness of an act was legal wrongness, but that an exception should be made for those acting under a 'command from God'. For discussion, see R Slovenko, *Psychiatry in Law/Law in Psychiatry* (London: Routledge, 2nd edn, 2009) 192.

In short, there will be an important distinction between the factual scenario of *Stapleton* and any case in which a psychopath has committed a crime. This could justify distinguishing *Stapleton* from a case involving a psychopath. If the courts followed this route, it would allow them to recognise that psychopaths lack moral understanding while relying on the psychopath's prudential rationality, such as it is, together with their capacity to know their acts are legally wrong, to ground their criminal responsibility. That psychopaths are rational – that is, possess sufficient practical or prudential rationality – is, after all, the most common reason given to justify holding them criminally responsible.

The problem with distinguishing *Stapleton* from cases involving psychopaths, however, is that doing so would be to acknowledge that criminal responsibility does not require moral responsibility. The apparent consensus among moral and legal theorists who have written on psychopathy is that psychopaths should not be held morally responsible for their actions because they lack moral understanding. If we accept that psychopaths lack moral understanding, such arguments are very persuasive. Those who lack moral understanding should no more be held to account, morally, than those who are colour blind should be blamed for failing to distinguish a ripe tomato from an unripe one by looks alone. But if psychopaths are not morally accountable for their actions, are they therefore to be exempted from criminally responsibility?

It is often assumed in discussion of psychopathy that it is fundamental to the purpose and function of the criminal law that criminal convictions and punishments should only be meted out to those who are morally responsible for their crimes.⁵⁸ There is some support for this assumption when taken as a description of the current state of the law. In particular, Griffiths's description of the intended operation of the provisions of the Code relating to criminal responsibility make it clear that he saw their role to be the exemption of those not morally responsible for their acts and, in particular, those who did not understand the notion of duty. In this Griffiths was clearly following the approach to criminal responsibility developed in English and Australian common law in the 18th and 19th centuries. According to that approach the basic notion that a person must be 'blameworthy' to be convicted of a crime was read in moral terms: this was particularly so when the concept was related to the requirement that the offender must have had a 'guilty mind'. For example, as already mentioned, children were traditionally exempted from responsibility on the grounds that they had not yet learnt to distinguish good from evil.⁵⁹ It is also true that when Australian courts have been called on to interpret knowledge of the 'wrongness' of an action in the context of criminal responsibility they have done so in terms of moral wrongness. This suggests that it is moral responsibility that is at issue in determining criminal responsibility.

58. Eg, Fine & Kennett, above n 4; Arenella, above n 4; Duff, above n 4. See also RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007); CT Sistare, *Responsibility and Criminal Liability* (Boston: Kluwer Academic, 1989) 16, 28.

59. See, eg, M Hale, *The History of the Pleas of the Crown* (London: Professional Books, reprint 1971), 16–37.

But while all this is true, there are also strands within the law that imply moral responsibility is not always required for criminal responsibility. I offer four examples. First, and most obviously, there are now many crimes of strict and absolute liability which do not require proof of a subjective fault element. Second, the law has shown an unmistakable tendency to move away from talk of ‘guilty minds’ and *mens rea*. Third, the doctrine that ignorance of the law is no excuse leaves room for the morally blameless to be held criminally responsible. There are many ways in which one could be non-culpably ignorant of the law – and the moral principles behind it – and yet for many offences this ignorance will not relieve an offender of criminal responsibility. Finally, though perhaps controversially, certain crimes committed as acts of civil disobedience involve no moral vice or blameworthiness – indeed, they may display great moral virtue – and yet the law shows no signs of allowing a defence of civil disobedience.⁶⁰

Thus, it seems that the law is ambivalent about whether criminal responsibility requires moral responsibility.⁶¹ On the one hand, there is a tradition of requiring moral blameworthiness for conviction; on the other, policy considerations often intervene to allow criminal responsibility where moral blame is not justified. Given this ambivalence, it is worthwhile considering whether wider considerations of justice and pragmatism imply that psychopaths *should* be held criminally responsible and so whether the law should deny that moral responsibility is always a prerequisite for criminal responsibility.

SHOULD PSYCHOPATHS BE HELD CRIMINALLY RESPONSIBLE?

It is trite to observe that the true connection between morality and the law is obscure and controversial. Fortunately, I do not need to enter that debate here. Instead, my goal is to argue that it is just to hold some people criminally responsible for their crimes even though they are not morally responsible for them. In doing so, as in the previous sub-section, I focus solely on the psychopath’s deficits in moral understanding, on the assumption that their deficits in practical reasoning are not sufficient to justify, at law, their exemption from criminal responsibility. I argue that to the extent psychopaths have the capacity for prudential rationality, that capacity is sufficient to justify holding them criminally responsible. In arguing this way, I do not take myself to be criticising the decision in *Stapleton*. Instead, I argue only that where an offender altogether lacks a grasp of morality, but is otherwise practically rational, that case should be distinguished from *Stapleton* and the offender held criminally responsible.

60. Although I cannot argue it here, I agree with Arenella, above n 4, that if the law does require moral agency for criminal responsibility, then it is operating with an impoverished conception of moral agency. I take this to be a further reason for thinking that moral agency is not really a requirement for criminal responsibility.

61. Arenella reaches the same conclusion about the law in the United States: above n 4, 1619ff.

1. The justifications for criminal sanctions

The basic argument in favour of holding psychopaths criminally responsible is that the justifications for holding a person criminally responsible for their behaviour require only that they have the capacity to know the criminal law, not the capacity to know the moral law.

The crucial feature of the criminal law is that it is a coercive system of social control.⁶² Such a system should aim to maximise individual liberty consistent with achieving the appropriate kinds and degrees of social control. Thus John Rawls's first principle of justice: 'Each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system for all'.⁶³ For such a system to be fairly applied, individuals subject to the criminal law, and so to its sanctions, should be capable of recognising how it operates so that they can regulate their behaviour to avoid infringements of their liberty that the state is entitled to impose. This places constraints on how a liberal political system should operate, including the public accessibility of the laws. But it also places constraints on the sort of person that can count as criminally responsible for their behaviour. Most importantly, it requires that a person be capable of recognising the law and bringing their behaviour into conformity with it. In other words, it is unfair to hold a person responsible for violating norms of which they are ignorant and have not had the opportunity to ascertain, or who is unable to bring their behaviour into conformity with the law. Such conditions on responsibility are basic to our conception of it.

These considerations also show, in broad outline, why the unsoundness of mind defence is justified.⁶⁴ The unsound of mind whom the law exempts from responsibility — such as the delusional, the mentally disabled or the insane automaton — either lack the capacity to ascertain the law or to bring their behaviour into conformity with it. Holding them responsible for violating such norms is, therefore, unjustified.⁶⁵

But while a capacity to know the criminal law is necessary for criminal responsibility, the capacity to know the moral law is not. If some crimes are not

62. The argument in this paragraph is indebted to Robert Schopp and Andrew Slain 'Psychopathy, Criminal Responsibility, and Civil Commitment as a Sexual Predator' (2000) 18 *Behavioral Sciences & the Law* 247, 267.

63. J Rawls, *A Theory of Justice* (Cambridge: Harvard UP, 1999) 220.

64. Although the proper justification for the unsoundness of mind defence is controversial, I cannot discuss it further here. It is worth pointing out, though, that even if the justification is traced to the idea that the insane lack the requisite 'guilty mind', it is arguable that the knowledge requirement for a guilty mind is only knowledge of the criminality of the act. See A Kenny, *Freewill and Responsibility* (London: Routledge, 1978) 81–5.

65. Indeed, this is the test for the insanity defence in the American Law Institute's Model Penal Code (1981) § 4.01, which exempts a person who, by reason of mental disease or defect, does not possess 'substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.' A classic defence is HLA Hart, *Punishment and Responsibility: Essays in the Philosophy* (Oxford: Clarendon Press, 1968) ch IX.

moral wrongs, then one can be criminally responsible without having the capacity to know that one's act is morally wrong (since it is impossible to know an act is morally wrong if it isn't). Suppose, however, that in an ideal system all criminal acts are moral wrongs and that their criminality is justified by their immorality.⁶⁶ Even in such an ideal system, the reasons given above for holding a capacity to know the criminal law necessary for criminal responsibility do not also imply that one must have the capacity to know the moral law too. This is because it is not unfair to hold a person responsible for violating norms of which they were aware (including the associated punishment) but whose ultimate grounds or justification they did not know or could not understand. Moreover, although by lacking moral understanding a psychopath may lack the *best* reasons the rest of us have for obeying the law, namely understanding that crimes are morally wrong, they still have access to reasons *sufficient* to deter them from criminal behaviour, namely the threat of punishment. Thus, while it is unreasonable to hold a person criminally responsible who is unable to know their act is a crime, it is not unreasonable to find a person criminally responsible who has that capacity but lacks a further capacity to recognise their actions are morally wrong.

Punishing people who are criminally but not morally responsible for their actions is also largely consistent with standard justifications for punishment. Doing so is clearly consistent with utilitarian or consequentialist justifications based on rehabilitation and community protection.⁶⁷ Since holding psychopaths responsible does not, of course, imply it is legitimate to punish those who have actually committed no crime, punishing them is also consistent with standard consequentialist prohibitions on punishing the innocent.

Denying that moral responsibility is necessary for criminal responsibility is also consistent with a robust form of an expressivist or communicative theory of punishment.⁶⁸ According to such theories, the crucial feature of recording a criminal conviction against an offender and punishing them is the communicative function that such actions serve; communication that takes place not just with the offender, but also with the members of the criminal justice system — including the police — and with the general community. In the case of the psychopath, these communicative functions can be retained. The communications would have something like the following content. To the offender the state would enter into a dialogue concerning their behaviour, its legal wrongness and its effect on others. Upon conviction, the state asserts that the offender's conduct is unacceptable to the wider community and that the offender voluntarily and knowingly engaged in that

66. It is implausible to pretend that all crimes must be *mala in se* or wrong in themselves. But it is arguable that even some *mala prohibita* (wrong because prohibited) are public wrongs prior to criminalisation. See Duff, above n 4, 89–93.

67. For classic statements, see Hart, above n 65; H Gross, *A Theory of Criminal Justice* (New York: OUP, 1979).

68. See Arenella, above n 4, 1619–20. Expressivist theories are defended by RA Duff, *Punishment, Communication and Community* (New York: OUP, 2003); V Tadros, *Criminal Responsibility* (New York: OUP, 2005).

behaviour. This notifies the wider justice system that the offender has engaged in such conduct, and it sends the message to the wider community that such conduct is inappropriate and will be punished.

Of course, what is missing from the above description is the retributivist slant commonly combined with expressivist theories of punishment.⁶⁹ Since psychopaths are not morally responsible agents, it would be disingenuous to pretend to be morally condemning them when we held them criminally responsible. It would also be pointless to attempt to enter into a moral conversation with them, as Duff suggests the criminal justice system should converse with those it convicts. Yet for the reasons given above, moral condemnation and dialogue are not essential features of the criminal justice system. Its essential function is social control, limited so that it infringes the liberty of its citizens to the minimum extent possible. There is no requirement that such a system must pass moral judgment or attempt to persuade criminals of the moral wrongness of their actions. It is enough if such a system publicly prohibits the relevant behaviours and publicly declares the penalties for violating the prohibition. Moreover, the desire for moral condemnation that fuels the retributivist approach to punishment can be at least partially captured by morally condemning the criminal conduct, rather than the criminal herself.

Likewise, although by punishing psychopaths we are rejecting the central retributivist notion that we must only punish moral agents who have committed a moral wrong, that is not to say that we have given up the retributivist requirement that we must only punish those who deserve punishment. It makes good sense to say that a person who wilfully violates criminal laws, where such laws are those necessary for social control, deserves punishment. Retribution can thus be seen as giving a person what they legally or criminally deserve, rather than what they morally deserve.

Another feature of the retributivist model that can be retained is that only those who have committed *moral* wrongs deserve punishment. This idea can be upheld as long as we aim for a system in which we do not criminalise an act unless it is morally wrong. In such an ideal system, only those who commit moral wrongs can face criminal sanctions. But this does not let in by the backdoor the requirement that those we punish must be morally responsible for their actions. For even if all crimes are moral wrongs, it is possible to understand the criminal law without understanding the moral justifications for it. For example, imagine a foreigner who travels to a community with the ideal criminal justice system and who comes to learn the criminal laws before coming to understand that they are all moral wrongs and why they are. In a more extreme way, this is the situation in which a psychopath permanently finds himself.

Thus, our most plausible justifications for applying criminal sanctions to ordinary citizens also apply to the psychopath.

69. As in Duff, above n 4.

2. Pragmatic considerations: disposition

As well as the considerations mentioned above, the unsoundness of mind defence is often justified on the grounds that it allows for the just disposition of mentally disordered offenders.⁷⁰ What, then, is the just disposition for the psychopath?

Section 21(a) of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) requires that a custody order be made if an offender is found not guilty of a 'schedule 1' offence by reason of unsoundness of mind. Under section 24, an untreatably mentally disordered offender must be sent either to a prison or a 'declared place'. Although there may be some grounds for optimism concerning future treatments, at present there is little evidence for the effectiveness of any existing treatment programmes for psychopathy.⁷¹ As there are still no declared places in Western Australia, this means that psychopaths excused of criminal responsibility would be sentenced to prison for an indefinite time. This jail term is likely to be a long one. Psychopaths may have committed violent crimes against strangers,⁷² are unlikely to have improved in prison, will not respond to treatment and are more likely to re-offend than other prisoners.⁷³ They are also likely to be difficult prisoners and are incapable of expressing genuine remorse. Further, although conditions can be placed on their release, their impulsiveness and general deficits in practical reasoning mean they are unlikely to abide by such conditions. These considerations must be taken into account by the Mentally Impaired Accused Review Board, which advises for or against release.⁷⁴ Moreover, there is evidence to suggest that those acquitted on grounds of insanity are typically confined for longer periods than others, partly because of a desire to see them punished.⁷⁵

In contrast, if a psychopath is found criminally liable for an offence, the sentence will be for a definite period taking into account the prescribed maximum. It is also possible for him or her to plead mental impairment as a mitigating factor. A psychopath is unable to appeal to many of the typical culpability-reducing factors, such as a lack of relevant intention or uncharacteristic behaviour, but they can appeal to their inability to appreciate the wrongfulness of the action. Perhaps most importantly, the deficits psychopaths face in both practical reasoning and their ability to regulate their behaviour to avoid punishment mitigate their responsibility for their actions. If these deficits are severe, their culpability may

70. See, eg, A Grounds, 'The Mentally Disordered Offender in the Criminal Process: Some Research and Policy Questions' in K Herbst & J Gunn (eds), *The Mentally Disordered Offender* (Oxford: Butterworth Heinemann, 1991) 37, 42.

71. Hare & Neumann, above n 9, 108–9; The Office of the Chief Psychiatrist, above n 10, 12. For cautious optimism, see J Ogloff & M Wood, 'The Treatment of Psychopathy: Clinical Nihilism or Steps in the Right Direction?' in Malatesti & McMillan, above n 4.

72. I Zinger & A Forth, 'Psychopathy and Canadian Criminal Proceedings. The Potential for Human Rights Abuses' (1998) 40 *Canadian Journal of Criminology* 237, 240.

73. Fine & Kennett, above n 4, 438–40.

74. Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s 33(5).

75. E Silver, 'Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants' (1995) 19 *Law and Human Behavior* 375.

well be substantially diminished.⁷⁶ Taken together, these factors could, and in some circumstances should, result in a substantial reduction of their sentence. In practice, however, due at least in part to less than ideal expert testimony, psychopaths usually receive harsher sentences than other offenders.⁷⁷

In light of this situation, it is unlikely that a psychopath would himself or herself attempt to make use of the unsoundness of mind defence and risk life-long confinement except when an equally long prison sentence is otherwise likely to be handed down. Nevertheless, the issue remains a live one for two reasons. First, with the introduction of a 'declared place' or the discovery of effective treatments for psychopathy, the cost-benefit analysis of being exempted from responsibility could change at any moment. Second, it is possible for the prosecution to raise the issue of unsoundness of mind in at least some situations.⁷⁸ In circumstances where a psychopathic offender has committed a violent crime and is likely to reoffend, considerations of public protection may imply that it is best to 'excuse' psychopaths, since doing so allows for indefinite detention. The fact that Garry David, for example, was not exempted from criminal responsibility and so was eligible for release from prison led the Victorian government to take the unprecedented step of enacting legislation to ensure he could be detained.⁷⁹

On the other hand, schedule 1 offences include offences, such as criminal damage, which can be comparatively minor wrongdoings. Yet for the reasons given above, a psychopath exempted from criminal responsibility is likely to be detained for a very long time even for such relatively minor offences. While their confinement would not be conceived as punishment, since they would have been exempted from responsibility, by being confined in prison they are treated as we treat those we *are* punishing.⁸⁰ Only a very extreme risk of violent recidivism could justify such treatment. In many cases, therefore, it would be more just to find psychopaths criminally responsible for their actions.

The result is that we need to balance the injustice done to many psychopaths by indefinitely imprisoning them against the importance of protecting the community from dangerous psychopaths. In performing this balancing act it should be remembered that psychopathy is a continuum or dimensional concept that allows of degrees. Those who are more psychopathic are more likely to commit violent

76. As argued by W Glannon, 'Psychopathy and Responsibility' (1997) 14 *Journal of Applied Philosophy* 263.

77. Zinger & Forth, above n 72. See also Ruffles, above n 1.

78. *Falconer*, above n 31.

79. Williams, above n 2.

80. Cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 634 (Kirby J). For a helpful discussion of whether preventative detention is punitive, see M Edgely, 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia' (2007) 33 *University of Western Australia Law Review* 351, 379–82.

crimes and have a higher rate of recidivism.⁸¹ These more dangerous psychopaths will already be likely to face long prison terms because they are more likely to have committed serious offences. Their increased risk of violent recidivism can also be raised by the prosecution at sentencing. Therefore, the majority of dangerous psychopaths coming before the courts will likely face a long prison sentence even if they are not exempted from responsibility. This should significantly alleviate worries about the community not being protected from dangerous psychopaths. On balance, then, even when we consider the likely disposition of psychopaths, holding them criminally responsible seems to be the appropriate outcome.

CONCLUSION

As the law now stands, and given the current psychiatric understanding of psychopathy, it appears possible for severely psychopathic offenders to be declared unsound of mind and exempted from criminal responsibility. However, although the argument that psychopaths are not morally responsible for their actions because they lack moral understanding is very plausible, their lack of moral understanding does not justify exempting them from criminal responsibility. This conclusion is reinforced when we consider the likely alternative dispositions of psychopaths depending on whether or not they are exempted from responsibility. In closing, I should reiterate that, for reasons of space, I have been unable to consider whether it is appropriate for the law to deny that the deficits in practical reasoning suffered by psychopaths should serve as a different ground from which they could successfully launch an unsoundness of mind defence.⁸²

81. For discussion, see Hare & Neumann, above n 9, 105

82. Litton, above n 4, argues that the psychopath's deficits in forming evaluative standards implies that they are not rational and so not morally responsible or, at least, not fully morally responsible for their actions. However, Litton also cites several reasons for doubting that this should relieve psychopaths of criminal responsibility.