

THE RIGHTS AND WRONGS OF THE PSYCHOPATH IN CRIMINAL LAW: HOW  
MODERN SCIENCE MUST RESHAPE OLD POLICY. ©

**Jasmine Nicolson\***

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INTRODUCTION

Psychopaths have long been enshrined in both popular culture and in law as the face of evil and danger;<sup>1</sup> their classic characteristics of callousness, impulsivity, and remorselessness have helped to cement the conceptual link between psychopathy and violent crime.<sup>2</sup> Psychiatrists from the 19<sup>th</sup> century, with all the equipment they had available at the time, made sweeping generalisations about the nature of the disorder. Pinel described patients who appeared without delusions or psychosis, as mentally unimpaired but engaged in impulsive acts of 'instincte fureur'.<sup>3</sup> Prichard built upon this definition to develop the concept of 'moral insanity'. This term has evolved since its original intent - coming from the original French, 'moral' was taken to mean 'emotional' rather than ethical - and so the original 'moral insanity' was a 'madness' of emotional disposition and social ability, but without hallucinations or delusions.<sup>4</sup>

The concept has since evolved to include a lack of comprehension and appreciation of ethics and morality,<sup>5</sup> but ultimately the M'Naghten rules in 1842 forged the legal defence of insanity, which required a clear presence of delusion, rather than a mere lack of morality.<sup>6</sup> Both jurisdictions of England and Scotland have since built upon this to include an inability to

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1 Cary Federman, Dave Holmes, and Jean Daniel Jacob, "Deconstructing the Psychopath: A Critical Discursive Analysis," *Cultural Critique* 72, no. 1 (2009).

2 Eric Silver, Edward P. Mulvey, and John Monahan, "Assessing Violence Risk among Discharged Psychiatric Patients: Toward an Ecological Approach," *Law and Human Behavior* 23, no. 2 (1999).

3 Fini Schulsinger, "Psychopathy: Heredity and Environment," *International Journal of Mental Health* 1, no. 1-2 (1972).

4 S. C. Herpertz and H. Sass, "Emotional Deficiency and Psychopathy," *Behav Sci Law* 18, no. 5 (2000), <https://www.ncbi.nlm.nih.gov/pubmed/11113962>.

5 F. A. Whitlock, "A Note on Moral Insanity and Psychopathic Disorders," *The Psychiatrist* 6, no. 4 (1982).

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\*GDL Candidate at the University of Law

‘appreciate’ the nature or the wrongfulness of their act, as an excuse to diminish or exculpate criminal responsibility.<sup>7</sup>

However, English and Scottish law do not permit psychopathy as an excuse to be relieved of criminal responsibility, and has instead been used inconsistently in sentencing as both an aggravating and a mitigating factor. The Law Commission and the Scots Law Commission have expressed doubt over whether psychopaths actually do have an inability to understand the morality of their misconduct,<sup>8</sup> and both Commissions labour under the antiquated perception that it is difficult, even impossible, to distinguish psychopaths from ‘ordinary’ criminals.<sup>9</sup>

This paper will analyse the legal positions, and will attempt to disperse the misconceptions around psychopathy through analysing the empirical evidence that suggests that, contrary to the respective Law Commissions’ claims, psychopaths do in fact possess neurological deficits that remove their ability to understand morality. Further discussion around the methods of assessment will illuminate the reliable techniques and data which can accurately distinguish the psychopath from the neurotypical offender, and can provide compelling evidence to definitively assert the psychopath’s mental non-responsibility.

## THE LAW IN ENGLAND AND WALES

A successful plea of the insanity defence requires the defendant to prove, on the balance of probabilities rather than beyond all reasonable doubt, that they were suffering from a ‘defect of reason’, as a result of a ‘disease of the mind’. Thus, the defendant either did not know the nature of their

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6 Hannah Franziska Augstein, "Jc Prichard's Concept of Moral Insanity—a Medical Theory of the Corruption of Human Nature," *Medical History* 40, no. 03 (1996).

7 Criminal Procedure (Scotland) Act 1995, s51A

8 H. L. Maibom, "The Mad, the Bad, and the Psychopath," *Neuroethics* 1, no. 3 (Oct 2008), <http://dx.doi.org/10.1007/s12152-008-9013-9>.

9 *Carraher v HMA* 1946 JC 108 at 117, per Lord Normand.

act or did not comprehend that it was wrong.<sup>10</sup> These M’Naghten Rules have prevailed as the predominant checklist when assessing insanity pleas, and have subsequently been refined and developed through case law over the years.

The Homicide Act 1957 has elaborated on the requirements to qualify for diminished responsibility, including ‘mental abnormality’ and ‘substantial impairment of responsibility’ as essential conditions.<sup>11</sup> The test for ‘substantial’ impairment is a largely subjective, and requires the trier of fact to use their own judgment to determine what is ‘substantial’.<sup>12</sup> These stipulations must still be contrasted with the M’Naghten ‘defect of reason’, and would include states of mind ‘so different [from the ordinary] that the reasonable man would term it abnormal’.<sup>13</sup> In these abnormal states of mind, the power of reasoning itself must be impaired, rather than simply being a failure to utilise these powers.<sup>14</sup> This is an instrumental point: this paper will argue that the psychopath’s cognitive ability to comprehend abstract concepts is impaired, and results in a defective power of reasoning.

Reform has been recommended by the Law Commission: a new ‘recognised medical condition defence’ has been proposed to replace the insanity defence in England. However, the Commission’s advice is not to include ‘antisocial personality disorder’ – psychopathy’s ‘official’ but inaccurate title. The proposed definition uses the same language as the Scottish legislation, which contains explanatory notes clarifying the legislative intent to exclude psychopathy, and lists three capacities which a mentally disordered offender must lack in order to have a potential defence on this basis.<sup>15</sup>

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10 *M’Naghten* [1843] UKHL J16 House of Lords

11 The Homicide Act 1957 (5 & 6 Eliz.2 c.11), s.2

12 *R v Lloyd* [1967] 1 QB 175

13 *R v Byrne* (1960) 2 QB 396, per Lord Chief Justice Parker

14 *R v Clarke* [1972] 1 All ER 219

15 Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* 2013, p20.

## THE LAW IN SCOTLAND

The English interpretation of the M’Naghten Rules prevailed in Scotland until 2010, when the Criminal Justice and Licensing (Scotland) Act 2010 inserted an amendment into the Criminal Procedure (Scotland) Act 1995. The amendment created a new defence, replacing the common-law defence derived from the M’Naghten Rules, and legislated towards the criminal responsibility of offenders with a mental disorder;<sup>16</sup> however, it explicitly excludes any personality disorder which is ‘solely or principally’ characterised by abnormal aggression or seriously irresponsible conduct. Psychopathy falls under this legislative umbrella, as noted in the explanatory notes to the statute. These reforms came directly from the recommendations of the Scots Law Commission’s Report on Insanity and Diminished Responsibility.<sup>17</sup>

### MAIN LEGAL CONCERNS

There are two legal concerns that are shared by both jurisdictions’ Law Commissions, which they have attempted to legislate against.

#### CONCERN #1: PSYCHOPATHY DOES NOT INVOLVE ANY OF THE INCAPACITIES SPECIFIED IN THE DEFENCES

The English Law Commission’s proposal included three ‘incapacities’ that would be covered by the recognised medical condition defence:

- [the capacity] rationally to form a judgment about the relevant conduct or circumstances;
- [the capacity] to understand the wrongfulness of what he is charged with having done

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<sup>16</sup> Criminal Procedure (Scotland) Act 1995 c. 56, s51A(2)

<sup>17</sup> Scottish Law Commission, Report on Insanity and Diminished Responsibility, 2004

- [the capacity] to control his physical actions in relation to the relevant conduct or circumstances as a result of a qualifying medical condition<sup>18</sup>

By comparison, the Scots Law Commission proposed the mental disorder defence operate from the test of “an inability to appreciate either the nature or the wrongfulness of [criminal] conduct”.<sup>19</sup>

Both jurisdictions’ proposals emphasise the capacity to ‘appreciate’ the wrongfulness of their conduct, a definition which appears to be wider than knowledge of ‘legal’ wrongfulness.<sup>20</sup> The Scots Law Commission, in particular, highlights the need for appreciation of the morality over the legality of their actions. However, as will be examined, the English and Scots Law Commissions are labouring under the same misconception. They are ignoring the significant evidence that would suggest that psychopaths do, in fact, lack the ability to appreciate their conduct’s moral wrongfulness.

#### CONCERN #2: DIFFICULTY IN DISTINGUISHING THE PSYCHOPATH FROM THE TYPICAL OFFENDER

The second shared concern is the apparent difficulty in distinguishing the psychopath from a neurotypical but dangerous offender.<sup>21</sup> The psychopath’s inability to empathise is a pivotal aspect of the psychopathic disorder, and is characterised in the violent offences thus committed. The psychopath can then arguably use his inability to empathise as a valid defence. By contrast, a violent but mentally-sound offender demonstrates a failure to empathise by committing their respective offences. Critics of

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18 Law Commission, Criminal Liability: Insanity and Automatism Discussion Paper 2013, p20.

19 SCOTTISH LAW COMMISSION, report on insanity and diminished responsibility, 2004, 2.51

20 Criminal Procedure (Scotland)1995 Act, s 51A, Explanatory Notes; Law Commission, Criminal Liability: Insanity and Automatism Discussion Paper 2013, p53.

21 Law Commission, Criminal Liability: Insanity and Automatism Discussion Paper 2013, p80

this argument have pointed out the potential overlap between an incapacity to empathise and a failure or neglect to employ one's ability to empathise as fundamentally similar and easily mistaken; such a similarity could then see a mentally-sound and undeserving offender successfully pleading the insanity defence under the guise of psychopathy.<sup>22</sup>

There are ways of identifying and determining the differences between the psychopath and the non-psychopath. The challenge lies in convincing the public and jurors that psychopathy and its corresponding presented evidence actually leads to a lack of capacity. Studies would suggest that lay people have assimilated the pop-psychology and media portrayals of the psychopath – à la Hannibal Lecter and Dexter Morgan – as being highly intelligent, rational, and capable of making but unwilling to make moral judgments.<sup>23</sup> As a result, the fear of non-psychopathic offenders escaping punitive justice through this loophole is greatly exaggerated and unsubstantiated.<sup>24</sup>

### AFTERTHOUGHTS

The opinions of Pinel and Pritchard, amongst other early psychologists, appear to have persisted throughout the decades. The emphasis that the psychopathic disorder is merely an abnormality of personality, and not a pathological condition or a 'disease', has seen psychopaths being sidelined and denied proper consideration in legislating a defence of mental disorder.<sup>25</sup> The psychopathic disorder manifests itself physically within the brain, this 'condition of the brain'<sup>26</sup> has a direct impact on the mind, which renders these individuals not legally responsible for their actions.<sup>27</sup> This

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22 *Carraher v HMA* 1946 JC 108 at 117, per Lord Normand.

23 Shaun Nichols, "How Psychopaths Threaten Moral Rationalism," *Moral psychology: historical and contemporary readings* (2010).

24 S. Penney, "Impulse Control and Criminal Responsibility: Lessons from Neuroscience," *Int J Law Psychiatry* 35, no. 2 (Mar-Apr 2012), <http://dx.doi.org/10.1016/j.ijlp.2011.12.004>.

25 W. John Livesley, "Conceptual and Taxonomic Issues," (2001).

26 *R v Kemp* (1957) 1 QB 399

27 P. Tyrer et al., "The Nottingham Study of Neurotic Disorder. Effect of Personality Status on Response to Drug Treatment, Cognitive Therapy and Self-Help over Two Years," *Br J*

argument has been applied to offenders with brain tumours, epilepsy,<sup>28</sup> and a range of other physical conditions; where a disease of the brain has a direct biological impact on the health of the mind. It therefore makes no sense to exclude psychopathy from this defence.

### CURRENT SCIENCE LITERATURE

The definition of psychopathy does not exist within the most recent edition of the '*Diagnostic and Statistical Manual of Mental Disorders*' (the professional handbook for psychologists and encyclopaedia of psychiatric diagnoses) and is not an official title used by major psychiatric organisations. What exists in its place is Antisocial Personality Disorder (ASPD), which boils down to a 'pervasive pattern of disregard and violation of the rights of others',<sup>29</sup> with a list of symptoms which a patient would possess. These include a lack of remorse, impulsivity, and a failure to conform to or respect lawful behaviours, amongst others. ASPD has been argued to not be synonymous with psychopathy, as the criteria for diagnosis are not identical.<sup>30</sup> The difference can be summarised as 'all psychopaths are antisocial, but not all antisocials are psychopaths';<sup>31</sup> individuals with ASPD are diagnosed from their behavioural factors of disobeying authority and rule-breaking, whereas psychopaths are diagnosed from their emotional or 'affective' traits of lacking empathy and grandiose ego.

While this may seem a largely arbitrary distinction, it has a great impact upon both offenders and the judicial system. The diagnosis of ASPD is

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*Psychiatry* 162, no. 2 (Feb 1993), <https://www.ncbi.nlm.nih.gov/pubmed/8435693>.

28 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386

29 Association American Psychiatric and Association American Psychiatric, "Dsm-Iv-Tr: Diagnostic and Statistical Manual of Mental Disorders, Text Revision," *Washington, DC: American Psychiatric Association* 75 (2000).

30 Stephen D. Hart and Robert D. Hare, "Psychopathy and Antisocial Personality Disorder," *Current Opinion in Psychiatry* 9, no. 2 (1996).

31 R. D. Hare, S. D. Hart, and T. J. Harpur, "Psychopathy and the Dsm-Iv Criteria for Antisocial Personality Disorder," *J Abnorm Psychol* 100, no. 3 (Aug 1991), <https://www.ncbi.nlm.nih.gov/pubmed/1918618>.

something that 80-85% of criminals can receive,<sup>32</sup> whereas an assessment of psychopathy occurs in up to 20% of serial offenders. Studies of British prisoners saw psychopathy prevalence rates averaging from 3%<sup>33</sup> to 13%.<sup>34</sup> The estimates' difference is likely a result of being performed in prison populations of varying security levels. Clearly, psychopathic offenders are in the minority, and these statistics come from a very specific set of assessments. The Psychopathy Checklist, recently revised (PCL-R), has been the go-to assessment developed by pioneering psychologists in this field, and serves to match a patient's personality traits to a set of typically psychopathic characteristics on a scale.<sup>35</sup> With recent brain imaging technology advancements, increasingly accurate analyses of brain scans have uncovered significant physiological differences between the average brain and the psychopathic brain, in areas that would explain the emergence of psychopathic personality traits.<sup>36</sup> In tandem, the administration of the PCL-R and brain scans can reliably weed out the true psychopaths from the offenders that are aggressively antisocial by choice, not by biology.

#### METHODS OF DIAGNOSIS AND DETECTION

As previously mentioned, psychopathy expresses itself in two distinct ways: structurally and functionally. There are variations within the psychopathic brain's physical structure which have a direct impact on behaviour and cognitive functioning. Both aspects are important to detect and analyse; the concept of 'psycho-neural pairing' is a commonly accepted idea which links the mind and the brain. As such, an offender

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32 R. Hare, *Without Conscience: The Disturbing World of Psychopaths between Us* (Londres: Warner Books, 1994). p. 25.

33 David J. Cooke, "Psychopathic Disturbance in the Scottish Prison Population: The Cross-Cultural Generalisability of the Hare Psychopathy Checklist," *Psychology, Crime and Law* 2, no. 2 (1995).

34 R. D. Hare et al., "Psychopathy and the Predictive Validity of the Pcl-R: An International Perspective," *Behav Sci Law* 18, no. 5 (2000), <https://www.ncbi.nlm.nih.gov/pubmed/11113965>.

35 Robert D. Hare, "Manual for the Revised Psychopathy Checklist," (2003).

36 Antonio R. Damasio, "Descartes' Error: Emotion, Rationality and the Human Brain," (1994).



truly lacking in empathy would flag up markers both in diagnostic interviews and brain scans revealing abnormal structures or activity.<sup>37</sup> We must examine the psychopath's pathology to understand their psychology.

### STRUCTURAL EXPRESSION: BRAIN-IMAGING

Research is swiftly accumulating that would suggest that psychopathy develops from childhood with significant genetic influences, and manifests within the paralimbic system: a network of brain regions that are closely involved in emotion processing, behaviour and inhibition control, and abstract conception.<sup>38</sup> The brain scans are obtained through magnetic resonance imaging (MRI) and functional magnetic resonance imaging (fMRI). MRIs will provide an image of the brain's structure, and will highlight any physical abnormalities. fMRIs measure blood flow to the brain regions while the participant is engaged with tasks designed to activate these specific regions, and will highlight areas of the brain that are activating abnormally when provided with stimuli.

### PREFRONTAL CORTEX

The prefrontal cortex is widely agreed to have a dominant influence over a person's personality,<sup>39</sup> and has been connected with planning, decision-making, personality expression, and moderating social behaviour.<sup>40</sup> The majority of activity in this region is commonly termed 'executive function', which is geared towards outcome prediction, the ability to control urges that would result in socially unacceptable actions, and filtering conflicting thoughts – good and bad, for example.<sup>41</sup> The prefrontal cortex is

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37 Ted X. Honderich, *A Theory of Determinism: The Mind, Neuroscience, and Life-Hopes* (JSTOR, 1988).

38 Kent Kiehl, *The Psychopath Whisperer* (Oneworld Publications, 2014).

39 C. G. DeYoung et al., "Testing Predictions from Personality Neuroscience. Brain Structure and the Big Five," *Psychological Science* 21, no. 6 (Jun 2010), <http://dx.doi.org/10.1177/0956797610370159>.

40 Yaling Yang and Adrian Raine, "Prefrontal Structural and Functional Brain Imaging Findings in Antisocial, Violent, and Psychopathic Individuals: A Meta-Analysis," *Psychiatry research* 174, no. 2 (10/14 2009), <http://dx.doi.org/10.1016/j.psychresns.2009.03.012>.

subdivided into various regions, each interconnected but functionally discrete.

### DORSOLATERAL AND VENTROLATERAL PREFRONTAL CORTEX

The dorsolateral prefrontal cortex (DL-PFC) and the ventrolateral prefrontal cortex (VL-PFC) are two subdivisions of the prefrontal cortex with distinct functions. The DL-PFC's primary functions are the executive functions: it is where working memory, abstract reasoning and conceptualisation,<sup>42</sup> planning, and cognitive flexibility<sup>43</sup> are executed. While it should be noted that it is not solely responsible for these functions, it is deeply interconnected to the other brain regions involved in these processes.<sup>44</sup> The VL-PFC's function is involved with motor control, and the ability to control motor responses, such as whether to stop or override a motor response.<sup>45</sup>

These are the regions ultimately responsible for making decisions, particularly in situations where the outcome may either be a punishment or a reward.<sup>46</sup> As such, a deficiency here would indicate an impaired ability to make adequate decisions on par with the kind of choices a neurotypical person would make; it would manifest as a difficulty in planning a course

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41 E. K. Miller, D. J. Freedman, and J. D. Wallis, "The Prefrontal Cortex: Categories, Concepts and Cognition," *Philos Trans R Soc Lond B Biol Sci* 357, no. 1424 (Aug 29 2002), <http://dx.doi.org/10.1098/rstb.2002.1099>.

42 Bruce L. Miller and Jeffrey L. Cummings, *The Human Frontal Lobes: Functions and Disorders* (Guilford press, 2007).

43 J. T. Kaplan, S. I. Gimbel, and S. Harris, "Neural Correlates of Maintaining One's Political Beliefs in the Face of Counterevidence," *Scientific Reports* 6 (Dec 23 2016), <http://dx.doi.org/10.1038/srep39589>.

44 James B. Hale and Catherine A. Fiorello, *School Neuropsychology: A Practitioner's Handbook* (Guilford Publications, 2004).

45 A. R. Aron, T. W. Robbins, and R. A. Poldrack, "Inhibition and the Right Inferior Frontal Cortex," *Trends Cogn Sci* 8, no. 4 (Apr 2004), <http://dx.doi.org/10.1016/j.tics.2004.02.010>.

46 D. Shohamy et al., "Cortico-Striatal Contributions to Feedback-Based Learning: Converging Data from Neuroimaging and Neuropsychology," *Brain* 127, no. Pt 4 (Apr 2004), <http://dx.doi.org/10.1093/brain/awh100>.

of action, a lack of organisation, and difficulty in predicting or conceptualising future consequences of these actions.<sup>47</sup>

Accordingly, there is evidence of reduced grey cell matter in these prefrontal cortex regions in patients with high PCL-R scores,<sup>48</sup> and these findings are replicated in children with conduct issues: specifically, a 14% reduction in volume of prefrontal matter.<sup>49</sup> With such a literal physical deficit, it is not at all implausible to conclude that a psychopath's impulsive and irresponsible behaviours are directly related to, essentially, their defective decision-making centre.

### ORBITOFRONTAL AND VENTROMEDIAL PREFRONTAL CORTEX

The orbitofrontal prefrontal cortex (OF-PFC) and the ventromedial prefrontal cortex (VM-PFC) are densely connected with the previously discussed regions, and also with the basal ganglia and amygdala, which will be discussed later. Their particular location and strong connectivity mean they are highly involved with emotional or 'affective' content, and using that content to assist the DL-PFC and VL-PFC in making the ultimate decisions; this is accomplished by assessing and processing the potential reward or punishment, and subsequently 'tagging' this emotional information with reward or punishment values, which results in a positive 'gut feeling' when making a good decision.<sup>50</sup> An example would be making a donation to a bald campaigner on the street: if they were campaigning for an alopecia research fund, the reward value attached to this information would result in donation making you feel positive. If,

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47 W. M. Dinn and C. L. Harris, "Neurocognitive Function in Antisocial Personality Disorder," *Psychiatry Research* 97, no. 2-3 (Dec 27 2000), <https://www.ncbi.nlm.nih.gov/pubmed/11166089>.

48 Y. Yang et al., "Volume Reduction in Prefrontal Gray Matter in Unsuccessful Criminal Psychopaths," *Biol Psychiatry* 57, no. 10 (May 15 2005), <http://dx.doi.org/10.1016/j.biopsych.2005.01.021>.

49 M. J. Kruesi et al., "Reduced Temporal Lobe Volume in Early Onset Conduct Disorder," *Psychiatry Research* 132, no. 1 (Nov 15 2004), <http://dx.doi.org/10.1016/j.psychres.2004.07.002>.

50 D. C. Krawczyk, "Contributions of the Prefrontal Cortex to the Neural Basis of Human Decision Making," *Neuroscience & Biobehavioral Reviews* 26, no. 6 (Oct 2002), <https://www.ncbi.nlm.nih.gov/pubmed/12479840>.

conversely, this same bald campaigner was fundraising for a white power movement, the punishment value attached to this information would make you feel otherwise.

This has a direct impact on a person's morality: with little to no emotional connection with cognitive thought, the ability to weigh up differences of morality and ethics depreciates. Patients with this deficit from childhood fail to assimilate knowledge and conceptualise understanding between acceptable and unacceptable morality, which has significant repercussions on social behaviour and moral reasoning.<sup>51</sup> There has been some indication that such a deficit leads to an increase in a patient's utilitarian moral reasoning, regardless of the aversive or fraught situation constructed;<sup>52</sup> while it is a valid philosophical theory, it is not a socially-constructive or altruistic outlook to promote in society.

As such, this is very important area. With little or no emotional information being processed and 'tagged' before being shuttled to the decision-making centre, it is accepted that deficits to this region lead to an increase in impulsivity, irresponsibility, general indifference to ethical conventions, and unstable behavioural inhibitions.<sup>53</sup> Studies performed on individuals with psychopathy and antisocial personality disorder reflect the expected reduction in grey matter volume in these areas.<sup>54</sup> It is particularly interesting to note that these symptoms are not unique to pathological psychopaths. Previously healthy patients who experience damage to this area have experienced the emergence of pseudo-psychopathic behaviour, or 'acquired sociopathic syndrome' – the famous

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51 S. W. Anderson et al., "Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex," *Nature Neuroscience* 2, no. 11 (Nov 1999), <http://dx.doi.org/10.1038/14833>.

52 M. Koenigs et al., "Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgements," *Nature* 446, no. 7138 (Apr 19 2007), <http://dx.doi.org/10.1038/nature05631>.

53 N. R. Horn et al., "Response Inhibition and Impulsivity: An Fmri Study," *Neuropsychologia* 41, no. 14 (2003), <https://www.ncbi.nlm.nih.gov/pubmed/14572528>.

54 M. P. Laakso et al., "Prefrontal Volumes in Habitually Violent Subjects with Antisocial Personality Disorder and Type 2 Alcoholism," *Psychiatry Research* 114, no. 2 (Jun 15 2002), <https://www.ncbi.nlm.nih.gov/pubmed/12036509>.

story of Phineas Gage is the best example of this. Being on the receiving end of a ballistic iron rod through the skull, the damage to Phineas' brain was extensive but not lethal, and resulted in dramatic change of personality as a result of the specific areas that were impaled. The symptoms of 'acquired sociopathic syndrome' include decreased empathy, poor impulse control, impaired ability to predict the future consequences of their actions, and elements of social disinhibition.<sup>55</sup>

### TEMPORAL CORTEX

The temporal lobe is largely responsible for the processing of language and memory, and has great impact upon understanding and visualising emotional and empathetic information.<sup>56</sup> This has a direct impact upon their personality and corresponding actions: to be unable or less able to pick up on social and emotional cues, and to be less able to adequately control or respond to their own emotional responses, patients with a deficit within the temporal cortex are more likely to be antisocial, whether by intent or accident.

### SUPERIOR TEMPORAL CORTEX

The superior temporal cortex (STC) is responsible for accurately processing auditory and sound-based information. Impairment in this area leads to difficulty in processing 'affective' or emotionally-relevant information. A study of this area involved patients viewing a series of images of faces, whereupon separate pieces of information were provided about them. A 'neutral' piece of information could be that the person's favourite colour was green, and an 'affective' piece of information could be that they are a Clinton or a Trump supporter. The result of a well-

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55 A. Bechara, H. Damasio, and A. R. Damasio, "Emotion, Decision Making and the Orbitofrontal Cortex," *Cerebral Cortex* 10, no. 3 (Mar 2000), <https://www.ncbi.nlm.nih.gov/pubmed/10731224>.

56 EE Smith and SM Kosslyn, *Cognitive Psychology: Mind and Brain*. 2007 (Pearson Prentice Hall, Upper Saddle River, NJ, 2007). pp. 21, 194-199, 349.

functioning STC would be that the 'affective' piece of information be recalled swifter in the patients' memories than the 'neutral' information.<sup>57</sup>

The psychopath and other violent offenders display a reduced volume and structural abnormality in this area;<sup>58</sup> the resultant impact of these deficits is a difficult understanding and distinguishing 'affective' information from 'neutral' information.<sup>59</sup> This contributes significantly to difficulties in 'mentalising' complex and abstract concepts such as empathy, and the fact that other people have individual thoughts and feelings discrete from others',<sup>60</sup> something which is learned by children at a young age.<sup>61</sup> Correspondingly, this has strong connections to psychopathic traits such as a lack of empathy and shallow, superficial charm.

#### MEDIAL TEMPORAL STRUCTURES: THE AMYGDALA AND THE HIPPOCAMPUS

The amygdala is largely responsible for responding to negative emotions and stimuli, such as fear, anxiety, and threat;<sup>62</sup> the hippocampus processes moral cognition - that is, moral thinking, in the light of social norms and concepts of morality<sup>63</sup> - and the conscious retrieval of memories to aid future decision-making.<sup>64</sup>

57 Marianne Ball, "Learning Faces: The Effects of Neutral and Sensational Information on Later Recognition" (University of Cape Town, 2007), [http://www.psychology.uct.ac.za/sites/default/files/image\\_tool/images/117/Marianne.Ball\\_.pdf](http://www.psychology.uct.ac.za/sites/default/files/image_tool/images/117/Marianne.Ball_.pdf).

58 M. Dolan and I. Park, "The Neuropsychology of Antisocial Personality Disorder," *Psychol Med* 32, no. 3 (Apr 2002), <https://www.ncbi.nlm.nih.gov/pubmed/11989987>.

59 S. Williamson, T. J. Harpur, and R. D. Hare, "Abnormal Processing of Affective Words by Psychopaths," *Psychophysiology* 28, no. 3 (May 1991), <https://www.ncbi.nlm.nih.gov/pubmed/1946892>.

60 Janet Wilde Astington and Margaret J Edward, "The Development of Theory of Mind in Early Childhood," *Social Cognition in Infancy* 5 (2010).

61 Alice P. Jones and Essi Viding, "Psychopathic Traits in Young Children," *Netherlands journal of psychology* 63, no. 4 (2007), <http://dx.doi.org/10.1007/bf03061073>.

62 R. J. Davidson and W. Irwin, "The Functional Neuroanatomy of Emotion and Affective Style," *Trends Cogn Sci* 3, no. 1 (Jan 1999), <https://www.ncbi.nlm.nih.gov/pubmed/10234222>.

63 J. Moll, R. de Oliveira-Souza, and P. J. Eslinger, "Morals and the Human Brain: A Working Model," *Neuroreport* 14, no. 3 (Mar 03 2003), <http://dx.doi.org/10.1097/01.wnr.0000057866.05120.28>.

64 William D Casebeer and Patricia S Churchland, "The Neural Mechanisms of Moral Cognition: A Multiple-Aspect Approach to Moral Judgment and Decision-Making," *Biology and philosophy* 18, no. 1 (2003).

Again, the psychopathic brain possesses a distinct deficit in these areas: a reduction in amygdala volume,<sup>65</sup> reductions in hippocampus volume,<sup>66</sup> and a structural imbalance within the hippocampus<sup>67</sup> are strongly associated with increased psychopathy scores. By having such a distinct structural deficit, the psychopathic brain does not activate as expected when exposed to negative stimuli, and does not respond to such an experience. As such, their emotional response to negative stimuli such as fear or threat are significantly muted, and they fail to learn from bad experiences and their repercussions for future actions.

### SUMMATION

It is clear from brain-imaging analysis that the psychopath possesses a brain with distinct abnormalities in, at least, the structure of the prefrontal and temporal cortex. These abnormalities would cause the brain's function to operate aberrantly, particularly regarding a psychopath's impulsivity, judgment, and ability to process and respond to fear or threat. It is additionally very plausible that these structural and, consequently, functional deficits account for the classic psychopathic traits of superficial charm, the lack of empathy and remorse, and an inability to conceptualise morality.<sup>68</sup> A practical result of these findings is the ability to use this data and samples of these brain scans to compare and contrast with future brain scans of individuals. Now that researchers are aware of the appearance of the neurophysiological deficits, and their locations, it will be easier to diagnose on a case-by-case basis.

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65 M. Boccardi et al., "Cortex and Amygdala Morphology in Psychopathy," *Psychiatry Research* 193, no. 2 (Aug 30 2011), <http://dx.doi.org/10.1016/j.psychres.2010.12.013>.

66 M. P. Laakso et al., "Psychopathy and the Posterior Hippocampus," *Behavioural Brain Research* 118, no. 2 (Jan 29 2001), [http://dx.doi.org/10.1016/s0166-4328\(00\)00324-7](http://dx.doi.org/10.1016/s0166-4328(00)00324-7).

67 A. Raine et al., "Hippocampal Structural Asymmetry in Unsuccessful Psychopaths," *Biol Psychiatry* 55, no. 2 (Jan 15 2004), <https://www.ncbi.nlm.nih.gov/pubmed/14732599>.

68 Yaling Yang and Adrian Raine, "Functional and Structural Brain Imaging Research on Psychopathy," in *The International Handbook of Psychopathic Disorders and the Law* (John Wiley & Sons, Ltd, 2010).

Perhaps also relevant is a recent study which analyses the average intelligence of the psychopathic population. Pop-psychology has led the general public to assume psychopaths to be calculatingly intelligent, but this can be mistakenly assumed from their manipulative charm in interpersonal relations<sup>69</sup> – instead, a large meta-analysis has discovered that there is a small, but nevertheless significant negative impact of psychopathy on intelligence.<sup>70</sup> It may be relevant to note both this tendency for lower intelligence, in conjunction with their difficulty or inability to learn empathy, as important factors for re-categorising the psychopath under the Mental Health Act 2007: for do these literal neurological deficits not constitute an ‘incomplete development of the mind’ associated with ‘abnormally aggressive or seriously irresponsible conduct’, including ‘significant impairment of intelligence’ and ‘social functioning’?<sup>71</sup>

#### FUNCTIONAL EXPRESSION: PSYCHOPATHY CHECKLIST

For brevity, this author shall omit the details of the creation and origins of the PCL-R. It was developed by Robert Hare in the 1970s for use in psychology experiments on offenders and forensic inmates, and as a means of assessing the presence of psychopathic traits in individuals by a 20-item checklist of observed behaviours and presented personality traits.<sup>72</sup> There is large body of empirical evidence to suggest that the checklist is the gold standard for testing ‘...both clinically and in research use’<sup>73</sup>, and has seen a significant rise in its substantive use in the courts.<sup>74</sup>

69 R. J. Blair, "The Emergence of Psychopathy: Implications for the Neuropsychological Approach to Developmental Disorders," *Cognition* 101, no. 2 (Sep 2006), <http://dx.doi.org/10.1016/j.cognition.2006.04.005>.

70 Olga Sanchez de Ribera, Nicholas Kavish, and Brian Boutwell, "On the Relationship between Psychopathy and General Intelligence: A Meta-Analytic Review," *bioRxiv* (2017).

71 Mental Health Act 1983, c.20 s.1(2A)

72 N. C. Venables, J. R. Hall, and C. J. Patrick, "Differentiating Psychopathy from Antisocial Personality Disorder: A Triarchic Model Perspective," *Psychol Med* 44, no. 5 (Apr 2014), <http://dx.doi.org/10.1017/S003329171300161X>.

73 Solomon M Fulero, "Review of the Hare Psychopathy Checklist-Revised," *Twelfth mental measurements yearbook* (1995).

74 Tiffany Walsh and Zach Walsh, "The Evidentiary Introduction of Psychopathy Checklist-Revised Assessed Psychopathy in Us Courts: Extent and Appropriateness," *Law and*



There are derivatives of the test, from which children and adolescents have been measured against (the Antisocial Process Screening Device,<sup>75</sup> and the PCL-Youth Version<sup>76</sup>), and a screening version for use in correctional facilities to facilitate likelihood of violence (PCL-SV). The PCL-R has consistently proved to be the greatest determinate of the violence risk factor in study populations.<sup>77</sup>

#### ADMINISTRATION AND CONTENT

PCL-R is conducted in the form of a semi-structured interview, sometimes spread over several sessions to capture a representative sample of personality and interaction style; it will consist largely of a review of available file and personal background information<sup>78</sup>, which would include education, employment, family and relationship background, and antisocial behaviours from adolescence and older. The historical information is necessary for scoring PCL-R items, and the structure and spread of the interview is designed to gauge consistency and deception within the interview and in relation to proven facts in the provided file. The answers given in the interview, as well as analysis of the patient's persona presented throughout, are compared against the mentioned checklist, which determines a particular score for the strength of each trait's presence. In a sense, the test does not define what psychopathy is, but is a diagnostic tool to determine who can be deemed a psychopath.<sup>79</sup>

It is most effectively deployed in a criminal or penal setting, as collateral information is an important aspect for assessing reliability of the information given in the interview and, consequently, scoring accurately

*Human Behavior* 30, no. 4 (2006).

75 PJ Frick and RD Hare, "The Psychopathy Screening Device," *Toronto: Multi-Health Systems* (2001).

76 Adelle E Forth and D Kosson, "The Hare Pcl: Youth Version," *Toronto, ON: Multi-Health Systems* (2003).

77 H. J. Steadman et al., "A Classification Tree Approach to the Development of Actuarial Violence Risk Assessment Tools," *Law and Human Behavior* 24, no. 1 (Feb 2000), <https://www.ncbi.nlm.nih.gov/pubmed/10693320>.

78 Robert D Hare, *The Psychopathy Checklist-Revised* (Toronto: ON, 2003).

79 Jennifer L Skeem and John Monahan, "Current Directions in Violence Risk Assessment," *Current Directions in Psychological Science* 20, no. 1 (2011).

on the PCL-R scale. The checklist covers 20 factors that can be subdivided into four categories of traits: interpersonal, affective, lifestyle, and history of antisocialism. Each factor is scored out of two points – the higher the score, the higher the severity of psychopathic traits. Every participant will fall on the PCL-R's scale somewhere; Scottish prisoners were determined to have a mean PCL-R score of 13.8,<sup>80</sup> and British prisoners overall have a mean of 16.5.<sup>81</sup> Scores for PCL-R items should not be calculated unless there is adequate collateral information, and information must come from the widest range of sources possible.

All participants who score over 30 points are classified as a psychopath, but there is room for flexibility in this cut-off score. Psychiatric practitioners and other investigators typically adhere to the recommended cut-off scores, but these do vary by jurisdiction: North America follow the score of 30 and upwards as being definitively psychopathic, whereas Britain and Europe reduce their cut-off to 25.<sup>82</sup> While a lower baseline would imply that there is a greater prevalence of psychopathic offenders than in North America,<sup>83</sup> British and European offenders who attain a score of 25 appear to express a very similar level of psychopathy as their North American peers with a score of 30.<sup>84</sup> Perhaps representative of a metric-imperial conversion rate? Nevertheless, multiple analyses of large data sets, and additional meta-analytic reviews have indicated that these baseline cut-off scores represent the same level of psychopathy across

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80 Cooke.

81 Hare et al.

82 David J Cooke, "Psychopathy across Cultures," in *Psychopathy: Theory, Research and Implications for Society* (Springer, 1998).

83 David J Cooke et al., "Assessing Psychopathy in the UK: Concerns About Cross-Cultural Generalisability," *The British Journal of Psychiatry* 186, no. 4 (2005).

84 D. M. Bolt, R. D. Hare, and C. S. Neumann, "Score Metric Equivalence of the Psychopathy Checklist-Revised (Pcl-R) across Criminal Offenders in North America and the United Kingdom: A Critique of Cooke, Michie, Hart, and Clark (2005) and New Analyses," *Assessment* 14, no. 1 (Mar 2007), <http://dx.doi.org/10.1177/1073191106293505>.

gender,<sup>85</sup> culture, and racially diverse offenders and patients.<sup>86</sup>

The psychiatric interviews are particularly useful in assessing an offender's understanding of morality and the moral wrongness of their criminal conduct. In line with the brain scan evidence, they visibly struggle to conceptualise morality to scale; when asked, hypothetically, about the most serious moral wrongs a person could commit, the psychopath would list oddly specific and largely trivial acts – 'pulling gates off their posts' is one such example<sup>87</sup> – or will equate jaywalking with armed robbery.<sup>88</sup>

When asked to justify their answers, the psychopath would provide basic and conventional moral arguments, but would tend to be unable to discuss or criticise his own arguments. In essence, the psychopath would have a purely aesthetic appreciation of morality.<sup>89</sup> The psychopath would be able to repeat the principles they have learned, but lack the abstract cognition to extend these shallowly-understood moral principles over new hypothetical situations, and would also be unable to recognise or defend contradictions within his 'moral' principles.<sup>90</sup> Perhaps a slightly more naïve concern is that the psychopath may also lack awareness and insight as to what their condition actually entails; an individual who has never experienced 'guilt' or 'empathy' may be confused about what these emotions actually are, and may unintentionally mislabel different feelings as 'guilt' or 'empathy' when being interviewed.<sup>91</sup>

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85 J. E. Rogstad and R. Rogers, "Gender Differences in Contributions of Emotion to Psychopathy and Antisocial Personality Disorder," *Clin Psychol Rev* 28, no. 8 (Dec 2008), <http://dx.doi.org/10.1016/j.cpr.2008.09.004>.

86 Jennifer L Skeem et al., *Are There Ethnic Differences in Levels of Psychopathy? A Meta-Analysis* (Springer, 2004).

87 Jonathan Glover, "Responsibility," (1970)., citing G Stevenson, *The Development of Conscience* (Humanities Press, New York 1966)

88 Bruce Maxwell and Leonie Le Sage, "Are Psychopaths Morally Sensitive?," *Journal of Moral Education* 38, no. 1 (2009).

89 Antony Duff, "Psychopathy and Moral Understanding," *American Philosophical Quarterly* 14, no. 3 (1977). 197-198.

90 Hervey M Cleckley, *The Mask of Sanity: An Attempt to Clarify Some Issues About the So-Called Psychopathic Personality 3rd Edition* (Pickle Partners Publishing, 2016).

91 Scott O Lilienfeld, Katherine A Fowler, and C Patrick, "The Self-Report Assessment of Psychopathy," *Handbook of psychopathy* (2006).

Sceptics of psychopathy as a legitimate disorder would highlight the ability of a non-delusional offender to simply lie when interviewed. In fairness, it does appear paradoxical to expect honest answers to diagnose a disorder of which dishonesty and deception are fundamental characteristics. However, feigning mental illness in an attempt to evade criminal responsibility, termed 'malingering'<sup>92</sup>, is neither a novel nor an unexpected problem in such situations. Malingering has been widely studied in other medico-legal cases,<sup>93</sup> and tests have been designed to defeat it.<sup>94</sup> This is a largely hypothetical fear at present; there is no real incentive to fake psychopathy in most jurisdictions as it does not constitute an excuse for culpability, and would even be an aggravating factor in sentencing. Nonetheless, if the law were to be changed, this may become a realistic concern. Although, there is research that would suggest that there is no statistically significant data that psychopaths malingere other mental disorders.<sup>95</sup>

Further concerns include the idea that the psychopath acts aberrantly due to their misplaced and antisocial values instead of an inability to distinguish otherwise. It must be stressed that the risk of misinterpreting personal values as mental illness is not unique to psychopathic disorders: this has been a difficulty since the advent of psychiatry, such as trying to distinguish between deeply religious beliefs about visions and schizophrenic delusions.<sup>96</sup> This is not an unassailable obstacle to accurate diagnosis, and the solution would simply be to ensure that the practising psychiatrists are aware and mindful of the challenges.

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92 American Psychiatric and American Psychiatric.

93 D. Bourget and L. Whitehurst, "Amnesia and Crime," *Journal of the American Academy of Psychiatry and the Law* 35, no. 4 (2007), <https://www.ncbi.nlm.nih.gov/pubmed/18086739>.

94 Jaspreet Singh, Ajit Avasthi, and Sandeep Grover, "Malingering of Psychiatric Disorders: A Review," *German Journal of Psychiatry* 10, no. 4 (2007).

95 L. T. Kucharski et al., "Psychopathy and Malingering of Psychiatric Disorder in Criminal Defendants," *Behav Sci Law* 24, no. 5 (2006), <http://dx.doi.org/10.1002/bsl.661>.

96 Thomas S Szasz, "The Myth of Mental Illness," *American Psychologist* 15, no. 2 (1960).

The largest criticism of this method is the lack of standardisation and the potential for unreliability that this would create.<sup>97</sup> There is definitely scope for disagreement between practitioners, if retained by opposing parties in court proceedings;<sup>98</sup> defence experts would predictably give PCL-R scores supporting their defence's case, and vice versa, sometimes diverging by a remarkably large amount.<sup>99</sup> This does not, however, depreciate the validity of the PCL-R itself, and would point more to the shortcomings of evaluators with ulterior motives.<sup>100</sup>

### WHAT DOES THIS ALL MEAN?

Ultimately, the evidence appears to show that the psychopath does indeed have a large quantity of cognitive deficits. These must be viewed in context, as an interesting feature of the psychopathic personality disorder is that individuals are able to appear as completely cognitively intact, displaying a high level of interpersonal intelligence and executive function.<sup>101</sup> This, however, all operates on a superficial level; their psychopathic traits and behaviour directly stem from a dysfunction in the brain circuitry and abnormality in the brain structure.<sup>102</sup> These physiological issues in these specific areas predictably manifest in difficulties around emotion processing, self-control, and some cognitive

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97 Robert D Hare and Craig S Neumann, "The Pcl-R Assessment of Psychopathy," *Handbook of psychopathy* (2006).

98 Terence W Campbell, "The Validity of the Psychopathy Checklist-Revised in Adversarial Proceedings," *Journal of Forensic Psychology Practice* 6, no. 4 (2006).

99 The Canadian case of R v KS (2004) OJ no. 3826. One practitioner gave the offender a PCL-R score of 19/40 and the opposing practitioner gave the offender a score of 33/40.

100 John F Edens, Marcus T Boccaccini, and 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?," *Behavioral Sciences and the Law* 28, no. 1 (2010).

101 Hare.

102 D. J. Cooke et al., "Reconstructing Psychopathy: Clarifying the Significance of Antisocial and Socially Deviant Behavior in the Diagnosis of Psychopathic Personality Disorder," *J Pers Disord* 18, no. 4 (Aug 2004), <http://dx.doi.org/10.1521/pedi.18.4.337.40347>.

deficits.<sup>103</sup> Essentially, the absence of adequate emotional processing results in the psychopath lacking the ability to behave morally; their perceived intelligence is largely superficial and socially rhetorical, which has little impact or influence on their behaviour.<sup>104</sup> While some of these traits can occur as the result of extreme brain trauma, current evidence suggests they generally arise as a result of genetic or heritable factors, and are not acquired through upbringing or environment.<sup>105</sup> Since psychopathy has definitive 'coordinates' in the brain, detectable through expert interview and brain imaging scans, it is not unforeseeable that defendants and lawyers would use these data results to justify its presence and influence on capacity.<sup>106</sup> There is arguably very little ground on which legislation could exclude psychopathy from mental health defences.

Having now determined that there is a legitimate scientific and psychiatric case for arguing that the psychopath lacks the emotional capacity for empathy and the cognitive capacity for morality, how should we proceed?

## INCARCERATION

Psychopathy is largely regarded by laypeople and many experts as a non-treatable condition, and its unique characteristics make it an extremely large risk factor for recidivism and violence. It is not the only risk factor, but it is too important to dismiss and is particularly pervasive. There is, however, ongoing discussion around psychopathy's treatability among

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103 K. A. Kiehl, "A Cognitive Neuroscience Perspective on Psychopathy: Evidence for Paralimbic System Dysfunction," *Psychiatry Research* 142, no. 2-3 (Jun 15 2006), <http://dx.doi.org/10.1016/j.psychres.2005.09.013>.

104 Andrea L. Glenn, Adrian Raine, and William S. Laufer, "Is It Wrong to Criminalize and Punish Psychopaths?," *Emotion Review* 3, no. 3 (2011).

105 E. Viding et al., "Evidence for Substantial Genetic Risk for Psychopathy in 7-Year-Olds," *J Child Psychol Psychiatry* 46, no. 6 (Jun 2005), <http://dx.doi.org/10.1111/j.1469-7610.2004.00393.x>.

106 R. Sitaram et al., "Fmri Brain-Computer Interface: A Tool for Neuroscientific Research and Treatment," *Computational Intelligence and Neuroscience* 2007 (2007), <http://dx.doi.org/10.1155/2007/25487>.

some psychiatrists. This will be explored later in this paper as a viable option for the future.<sup>107</sup>

As psychopathy is not currently a valid excuse for criminal responsibility, the protocol for handling the psychopathic offender is to sentence them to incarceration for an appropriate amount of time. In the English jurisdiction, a form of indeterminate sentence – the Imprisonment for Public Protection (IPP)<sup>108</sup> – was introduced for the express purpose of keeping dangerous criminals like the offending psychopath from being released. The philosophical thought behind this movement was particularly utilitarian, and was defensible only if one valued the rights of the public over the rights of offenders. Predictably, the High Court found the continued incarceration of prisoners unlawful in 2007 and, following a paper that denounced the policy's impact on public mental health,<sup>109</sup> was finally abolished in 2012.<sup>110</sup> Perhaps the most important factor that pushed this legislation into irrelevance was a joint report by the chief inspectors of prisons and probate, which concluded that the IPP sentences were contributing unsustainably to the problem of prison overcrowding.<sup>111</sup>

Although 'continued' detention rightly perished as being a violation of human rights, the debate around preventative detention is still alive and well. Now that there is an accurate method of detection, it has been argued that it would benefit society if suspected psychopaths who have not yet offended be tested, and sequestered indefinitely. This, again, is another terrible and misguided idea, and would create a blanket piece of legislation that would further violate human rights<sup>112</sup> and discriminate against people with a legitimate mental disorder.<sup>113</sup> It would also be

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107 James RP Ogloff and Melisa Wood, "The Treatment of Psychopathy: Clinical Nihilism or Steps in the Right Direction," *Responsibility and psychopathy: Interfacing law, psychiatry, and philosophy* (2010).

108 Criminal Justice Act 2003 c.44, s.225

109 Jill Peay, *In the dark: The mental health implications of Imprisonment for Public Protection*, 2008

110 Legal Aid, *Sentencing and Punishment of Offenders Act 2012* c.10

111 HM Inspectorate of Probation, *Independent inspection of adult & youth offending work*, 2010

112 European Convention of Human Rights, article 8

113 European Convention of Human Rights, article 14

ignorant of the science: simply possessing the physiological and behavioural traits does not ensure that the individual would become a violent offender. A distinction has been made between the 'successful' and the 'unsuccessful' psychopath,<sup>114</sup> where the former is able to function in society as a disagreeable but law-abiding citizen, and the latter is the criminal who got caught. More practically, attempting to preventatively detain individuals with suspect brain and personality flags would eventually run into the same problems that the IPP sentences did: massive overcrowding, and public spending towards maintaining a sector of society that would never be allowed to enter society.

The current and previous system of indiscriminate incarceration is failing the population with a valid mental disorder. It is time to look to the recommendations of the scientific and psychiatric community for guidance as to how to proceed.

## TREATMENT

The claim of untreatability is largely derived from older scientific studies, which viewed the psychopath's lack of remorse as the insurmountable stumbling block to reform; statistically, offenders would benefit from treatment, but psychopaths would be non-responsive to treatment and go on to violate their parole.<sup>115</sup> The study from which this claim originated has been roundly debunked as being a 'good lesson on what *not* to do' when treating institutionalised psychopaths,<sup>116</sup> due to the lack of professional supervision or correct implementation.<sup>117</sup> Another study lambasted therapy for the psychopath, citing the sexual re-offense rate as being five

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114 Y. Gao and A. Raine, "Successful and Unsuccessful Psychopaths: A Neurobiological Model," *Behav Sci Law* 28, no. 2 (Mar-Apr 2010), <http://dx.doi.org/10.1002/bsl.924>.

115 Marnie E Rice, Grant T Harris, and Catherine A Cormier, "An Evaluation of a Maximum Security Therapeutic Community for Psychopaths and Other Mentally Disordered Offenders," *Law and Human Behavior* 16, no. 4 (1992).

116 Stephen Wong, "Psychopathic Offenders," *Violence, crime and mentally disordered offenders: Concepts and methods for effective treatment and prevention* (2000).

117 Friedrich Lösel, "Treatment and Management of Psychopaths," in *Psychopathy: Theory, Research and Implications for Society* (Springer, 1998).



times higher for psychopaths that were apparently making positive progress on their treatment.<sup>118</sup> Several years later however, the results of this study were reanalysed by the same team, included data from a longer follow-up period; with more data, the correlation between recidivism and treatment disappeared.<sup>119</sup> As such, the actual empirical evidence that psychopaths do not respond to any treatment or respond negatively is lacking.

This does not have to mean that the behaviours and attitudes of psychopathic offenders are immutable<sup>120</sup> – merely that the current, traditional programmes need to be redesigned. These traditional programmes are emotion- and insight-oriented, and while they are effective in reshaping neurotypical offenders' outlook and resulting behaviour, when considering the discoveries outlined previously in this paper, it is obvious why the current therapy is less effective for psychopaths with only a superficial grasp of emotion and abstract insight. Only within the past decade were innovative procedures and therapy techniques developed that were specifically designed for psychopaths.<sup>121</sup>

Therapists should be less concerned with developing a psychopath's sense of empathy or conscience, or forcing personality changes. Instead, emphasis should be placed upon showing participants that there are more prosocial ways of using their interpersonal strengths and abilities to satisfy their need for stimulation and other wants. The cognitive-behavioural correctional programmes must be blended with relapse-prevention techniques to be effective,<sup>122</sup> and must be sufficiently of high-

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118 Michael C Seto and Howard E Barbaree, "Psychopathy, Treatment Behavior, and Sex Offender Recidivism," *Journal of Interpersonal Violence* 14, no. 12 (1999).

119 H. E. Barbaree, "Psychopathy, Treatment Behavior, and Recidivism: An Extended Follow-up of Seto and Barbaree," *J Interpers Violence* 20, no. 9 (Sep 2005), <http://dx.doi.org/10.1177/0886260505278262>.

120 Stephen CP Wong and Grant Burt, "The Heterogeneity of Incarcerated Psychopaths: Differences in Risk, Need, Recidivism, and Management Approaches," *Psychopath: Theory, research, and practice* (2007).

121 D Thornton and L Blud, "The Influence of Psychopathic Traits on Response to Treatment," *The psychopath: Theory, research, and practice* (2007).

122 Don A Andrews, James Bonta, and J Stephen Wormith, "The Recent Past and near Future of Risk and/or Need Assessment," *Crime & Delinquency* 52, no. 1 (2006).

frequency and long-duration, as programmes that run for less than six months have shown significantly less success.<sup>123</sup>

There would understandably be some pushback against creating a specialised treatment for a remorseless offender, as its conception and management are understandably expensive, labour-intensive, and time-consuming. Although, with the removal of the IPP, it is absolutely necessary to create a system based on the most current research on psychopathy and effective therapy philosophies to prepare the psychopathic offender for release into society.<sup>124</sup> At present, the psychopaths that complete treatment still reoffend post-release. However, this is not a symbol of failure: the treatments are designed to help reduce the harm caused by psychopaths in society,<sup>125</sup> and the psychopaths' offences post-treatment are significantly less violent and antisocial compared to the offenders that dropped out of treatment.<sup>126</sup>

Correctional programmes are at perpetual risk of erosion, due largely to unstable political pressures, societal concerns, and ever-changing correctional institution priorities. But some precedence must be given to these therapies, particularly following the recent studies proving that completion of the carefully-designed programmes dramatically reduced the psychopath's harm to the public.<sup>127</sup> When public policy explicitly legislates for the interests of society – as was the original but misguided intent of the IPP and concepts of preventative detention – we should

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123 R. T. Salekin, "Psychopathy and Therapeutic Pessimism. Clinical Lore or Clinical Reality?," *Clin Psychol Rev* 22, no. 1 (Feb 2002), <https://www.ncbi.nlm.nih.gov/pubmed/11793579>.

124 Randall T Salekin, Courtney Worley, and Ross D Grimes, "Treatment of Psychopathy: A Review and Brief Introduction to the Mental Model Approach for Psychopathy," *Behavioral Sciences and the Law* 28, no. 2 (2010).

125 Grant T Harris and Marnie E Rice, "Treatment of Psychopathy," *Handbook of psychopathy* (2006).

126 Heather M Gretton et al., "Psychopathy and Recidivism in Adolescent Sex Offenders," *Criminal Justice and Behavior* 28, no. 4 (2001).

127 Mark E Olver and Stephen CP Wong, "Psychopathy, Sexual Deviance, and Recidivism among Sex Offenders," *Sexual Abuse: A Journal of Research and Treatment* 18, no. 1 (2006).

legislate to protect and maintain the integrity of these programmes through stringent safeguards.

### ENFORCE MONITORING OF YOUTH FOR FUTURE PREVENTION

This paper has already advocated for the enforcement and promotion of treatment for offending psychopaths, but what about the psychopaths who have not, but are at risk of offending? There is scope and reason to consider creating preventive and proactive legislation rather than the kind of punitive and reactionary legislation.

Psychologists have discovered that psychopathy can develop at a considerably young age, and that youths with psychopathic traits can be detected very early in childhood.<sup>128</sup> Aggressive behavioural problems<sup>129</sup> and callous-emotional traits<sup>130</sup> can be picked up even by educators, and are the most stable traits to predict the development of psychopathy or antisocial personality disorder. These 'fledgling' psychopaths are of particular interest to researchers and, by extension, legislators, because the brains of children and adolescents are particularly malleable and 'plastic' during their formative years.

Taking into account the impressionability of the adolescent mind, a landmark study took a large sample size of young offenders who attained high scores on the youth variant of the PCL-R and put them through a specialised talk-therapy treatment programme. The results achieved with psychopathic youth far eclipses the successes of the treatment administered to adult offenders mentioned previously: the youths that had successfully completed the programme were far more likely to not offend

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128 Viding et al.

129 M Krischer et al., "Family Upbringing: Family Factors as Predictors for the Development of Antisocial Behavior and Psychopathy Dimensions," *International handbook on psychopathic disorders and the law* 1 (2007).

130 A. P. Jones et al., "Feeling, Caring, Knowing: Different Types of Empathy Deficit in Boys with Psychopathic Tendencies and Autism Spectrum Disorder," *J Child Psychol Psychiatry* 51, no. 11 (Nov 2010), <http://dx.doi.org/10.1111/j.1469-7610.2010.02280.x>.

again post-parole than the youths in the control group.<sup>131</sup> This would strongly suggest that psychopathy, while not necessarily treatable, is remediable if caught young enough.

When there exists data that suggest potentially dangerous psychopathy can be remedied or diminished before it becomes a criminal issue, it seems counterproductive to not create positive legislation to encourage its detection and treatment when this can prevent violent and socially deleterious crime in the future.

### WHY SHOULD WE DO ANYTHING?

Psychopathy raises fundamental issues about justice, both legal justice and social justice. The law is created with the understanding and assumption that whomever appears sane, is then culpable for their actions; those that are obviously labouring under an alienation of reason would then be understandably excused from social expectations – to an extent.

The psychopath is unique, in that they present themselves and are represented in popular media as being capable and calculatingly dangerous. It would be irresponsible to deny that their particular characteristics lend themselves to particularly offensive actions and significant harm to the fabric of society. Their very personality traits prevent them from feeling the remorse that our system of punitive incarceration attempts to instil in the hopes of reform. So why, then, should any attempt be made to do anything to help or change the individual, who could never appreciate or reciprocate that kind of altruism or positivity into society, and could decide to reoffend without any hesitation?

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<sup>131</sup> *Treatment Response of Adolescent Offenders With Psychopathy Features*, Caldwell, 2006

Counter-intuitive as it may seem, a viable option may be to view the psychopath as a victim of their own pathology. The neurotypical citizen would never wish schizophrenia upon themselves, but the schizophrenic has no choice in suffering with their mental disorder. They, however, have the somewhat dubious benefit of experiencing a mental illness with symptoms that sound terrifying to the average individual, which lends a greater amount of sympathy towards sufferers of the disorder. It is easier to view the psychopath as being relentlessly evil than a victim of a socially-debilitating disorder.

By creating legislation that accept and support psychopathy as a disorder that affect the normal functioning of a sufferer, we can push societal change and legitimise positive research in this area. The more this area is researched, the more possibilities for treatment open up. Eventually, it is not inconceivable that, like schizophrenia, there may even be a pharmacological solution that could help psychopathic sufferers and eliminate the problem.

There is need for a warning, however. Where there are inadequate checks and safeguards to ensure effective implementation, any legislation created with the best intentions would simply become a jurisprudential eyesore. The Mental Health Act 2007 is one such example; a big step was made in consolidating the definition of 'mental disorder' to not exclude psychopathic personalities, which opens detention in a secure psychiatric facility as an alternative to incarceration when considering appropriate sentencing of psychopathic offenders in England and Wales, which was remarkably progressive.<sup>132</sup> In practice, it collapses: in the spirit of inclusivity, the legislation fails to acknowledge that psychopaths will need a distinct facility and treatment programme, as they are characteristically difficult to treat, and will cause disruption to other detainees. As a result,

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<sup>132</sup> Mental Health Act 2007 c. 12, s.1

this option is rarely used,<sup>133</sup> and what was a promising piece of legislation now looks to be a desultory concession.<sup>134</sup>

### FINAL CONCLUSION

This paper has carefully analysed the various techniques which can be used to comprehensively determine whether an individual has psychopathy, and whether psychopathy as a mental disorder truly undermines the psychopath's ability to comprehend morality and experience empathy. Scotland's defence of mental disorder and England's proposed defence of 'recognised mental condition' both allow individuals to be exculpated of criminal responsibility provided they are able to prove they cannot 'appreciate' the wrongfulness of their criminal conduct. In summation, these techniques and their findings (that a psychopath's brain structure actively inhibits him from ever truly 'appreciating' his wrongdoings beyond a superficial comprehension) are sufficient to warrant a change of legislation, and would be evidentially sound enough to present in a court of law. The need for positive, constructive, and progressive legislation around offenders with psychopathic personality disorder, rather than punitive, obstructive, and regressive legislation is essential. If treatment options exist, then incarceration is both unfair and would comparatively be a waste of public money. Instead, introducing a legal clause enforcing treatment of offending and at-risk psychopaths would limit the harm caused to society, and would prevent potential future harm. Legislation encourages change in societal thought and action, and would legitimise research around this area that would create more opportunities to develop pharmacological and more psychological advancements to potentially resolve this problem for good.

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133 P. Harrison, J. Geddes, and M. U. Sharpe, *Lecture Notes Psychiatry* (Wiley, 2005).

134 Lindsay D. G. Thomson, "Personality Disorder and Mental Health Legislation in the UK," *Advances in psychiatric treatment* 16 (2010), <http://dx.doi.org/10.1192/apt.bp.109.007849>.