

NEGLIGENCE AND PSYCHOPATHY: AN UNATTENDED TORT DILEMMA

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The Yorubas, an indigenous Nigerian tribe, use the word *aranakan* to describe “a person who always goes his own way regardless of others, who is uncooperative, full of malice, and bullheaded.”¹ The Inuits use the word *kunlangeta* to describe “someone whose ‘mind knows what to do but he does not do it’ . . . repeatedly lies, steals, cheats, and rapes.”² These words are concepts that are paralleled in modern clinical psychology by a disorder called *psychopathy*. “The construct of psychopathy is understood generically as a type of personality disorder characterized . . . by the presence of behaviors that conflict with the social, moral, or legal norms of society.”³

Psychopaths are members of society as much as anyone else and therefore are subject to legal rights and duties in their everyday lives. A discussion involving legal rights and duties necessarily involves *moral agency*, or “the adoption of standards of conduct against which people monitor and evaluate their own conduct.”⁴ A psychopath has a complicated status as a moral agent while engaging with the rest of society because psychopathy impairs not only the capacity to engage in moral reasoning but also the capacity to act morally even if external standards of right and wrong conduct are clearly understood in advance.⁵ Simply stated, not only do psychopaths struggle with understanding right and wrong, *but they are utterly incapable of caring*.

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1. Kent A. Kiehl & Morris B. Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics*, 51 JURIMETRICS 355, 360–61 (2011).
2. *Id.*
3. Sanz-Garcia et al., *Prevalence of Psychopathy in the General Adult Population: A Systematic Review and Meta-Analysis*, FRONTIERS IN PSYCH., Aug. 5, 2021, at 1.
4. Adam R. Fox et al., *Psychopathy and Culpability: How Responsible is the Psychopath for Criminal Wrongdoing?*, L. & SOC. INQUIRY, Winter 2013, at 1, 12.
5. *See id.* at 14.



Law and policy face a unique obstacle when accounting for the psychopath. Approximately 30% of the general population has some psychopathic trait,⁶ but society should primarily be concerned with the 1.2% that register on the PCL-R, which is currently considered the “gold-standard” for the assessment and definition of psychopathy.⁷ 1.2% is a relatively small number (and a supermajority of that 1.2% are already tied up in the criminal justice system⁸), but what makes psychopathy a cardinal issue is the static nature of the disorder. Psychopaths are born, not formed,⁹ and there is currently no known treatment

6. *Facts & Figures*, PSYCHOPATHY IS, <https://psychopathyis.org/stats/> (last visited Oct. 7, 2022).

7. Sanz-Garcia et al., *supra*, note 3.

8. *Id.* at 10.

9. *Psychopathy vs Sociopathy*, MENTAL HEALTH AM. OF E. MISS., <https://www.mha-em.org/im-looking-for/mental-health-knowledge-base/conditions/127-psychopathy-vs-sociopathy>

or rehabilitation method.¹⁰ If law and policy do not account for the psychopath, there will always be disharmony at the margins. An ignorance of society's exceptional members might make for easier law and policy but it cannot be considered optimal.

Currently, criminal law does not provide for any affirmative excuse to mitigate a psychopath's culpability. Psychopathy has been described as "insanity without delirium."¹¹ If insanity *with* delirium affects criminal culpability, and so does delirium alone (e.g., heat of passion for manslaughter), the mens rea element of a crime could feasibly be affected by insanity without delirium. Psychopathy may never fit neatly with criminal culpability, but the role it plays can always be wrestled with and adapted to changing times and emerging research.

Tort law, however, specifically the common law doctrine of ordinary negligence, does not even have a platform where psychopathy, with its unique complications regarding moral agency, can be scrutinized for distinct treatment.¹² Ordinary negligence is not a tort that only covers forgetfulness and accidents—rights and duties are owed between moral actors. "The most striking feature of private law is that it directly connects two particular parties through the phenomenon of liability."¹³ Human behavior is all too interpersonal, and this necessarily creates friction and collision between persons' interests even if they are not particularly adverse to each other. Negligence covers some of that inevitable realm of human collision and "holds the defendant liable for the harm that materializes from the creation of an unreasonable risk."¹⁴ While there can never be intentional negligence, negligence still does arise from behaviors and calculated acts that are themselves intentional. Thus, the elements of a prima facie negligence suit "treat the progression from the defendant's action to the plaintiff's injury as a single *moral sequence*,"¹⁵ rather than some mere phenomenological capture of accidental carelessness. Presupposed in holding someone liable for a moral sequence of actions is that the person is a moral actor. However, "[b]ecause [psychopaths] never learn to associate harming

(last visited Oct. 7, 2022) ("Psychology researchers generally believe that psychopaths tends to be born — it's likely a genetic predisposition — while sociopaths tend to be made by their environment.").

10. *Can Psychopaths Be Cured?*, YALE UNIV MECHANISMS OF DISINHIBITION LAB'Y, <https://modlab.yale.edu/news/can-psychopaths-be-cured> (last visited Oct. 7, 2022) ("To the best of our knowledge, there is no cure for psychopathy.").

11. ROBERT D. HARE, PH.D, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* 25 (1993).

12. JOHN C.P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* 175 (4th ed. 2016) ("[T]here is no equivalent to the insanity defense [(i.e. mental incompetence)] in tort law. Indeed, the black letter rule states that a defendant's insanity does not even defeat the attribution of intent to her in a suit for torts such as battery.").

13. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1 (2012).

14. *Id.* at 145; *but see* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 186 (2020) (describing negligence as "a *qualified* duty of noninjury—a duty not to injure others through a certain kind of conduct.").

15. WEINRIB, *supra* note 13, at 145 (emphasis added).

others with negatively valenced emotions . . . they feel no inclination not to harm others when doing so can bring about some end that they are interested in obtaining.”¹⁶ Psychopaths do not understand why creating unreasonable risk of harm for others is a bad thing. They are *amoral*, not immoral. The moral sequence that relies on ordinary prudence necessarily requires that moral actors consider others in deciding how to act. Nowhere in that picture does the psychopath naturally fit in and that is through no fault of their own.

In ordinary negligence, the objectively reasonable person is the standard for the duty of care¹⁷ and there are only a handful of exceptions to this rule, none which psychopathy categorically falls under. Because the reasonable person is an objective standard and not co-extensive with the judgment of any individual,¹⁸ the only existing exceptions to the standard are certain physical disabilities such as deafness or blindness, professionals held to a standard of heightened competence, temporary insanity without forewarning, and children.¹⁹

The exception for children addresses a similar complication of moral agency as that of the psychopath. In *Appelhans v. McFall*, the Massachusetts Rule was advocated for.²⁰ As expressed in the Restatement (Second) of Torts § 283A, the Massachusetts Rule states that “[i]f the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person *of like age, intelligence, and experience under like circumstances*.”²¹ The Massachusetts Rule is one of the few instances where an actor, because of shortcomings in moral agency, accesses a tailored standard of liability for ordinary negligence. This new standard (i.e., the reasonable child) is still objective but it takes into consideration both perspectives and circumstances unique to the actor. In some jurisdictions, the alternative to the Massachusetts Rule is the Tender Years Doctrine, or the rule that “a child under the age of seven is incapable of recognizing and appreciating risk and is therefore deemed incapable of negligence as a matter of law.”²² The

16. Adam R. Fox et al., *Psychopathy and Culpability: How Responsible is the Psychopath for Criminal Wrongdoing?*, 38 L. & SOC. INQUIRY 1, 10.

17. GOLDBERG & ZIPURSKY, *supra* note 14, at 62–63 (2020) (“[I]n applying the law of negligence, courts had settled on an ‘objective’ notion of fault. . . . As a result, considerations that would defeat or substantially mitigate blame or completely or partially excuse wrongdoing in other settings often do not suffice to defeat or even reduce liability for negligence and other torts.”).

18. *See generally* Vaughan v. Menlove (1837) 132 Eng. Rep. 490.

19. *See generally* Fletcher v. Aberdeen, 54 Wash. 2d 174, 179 (1959) (stating that a blind person is held to the standard of a blind person rather than a sighted person); Cervelli v. Graves, 661 P.2d 1032, 1037 (Wyo. 1983) (ruling that courts may tailor the standard for persons with heightened competence in specific activities); Breunig v. Am. Fam. Ins. Co., 45 Wis. 2d 536, 543 (1970) (stating that temporary bouts of insanity without forewarning can excuse the reasonable person standard); Roberts v. Ring, 143 Minn. 151, 152 (1919) (stating that a seven-year-old boy is held to the standard of an objective seven-year-old boy rather than an adult).

20. *Appelhans v. McFall*, 325 Ill. App. 3d 232 (2001).

21. RESTATEMENT (SECOND) OF TORTS § 283A (1965) (emphasis added).

22. *Appelhans*, 325 Ill. App. 3d at 236.

Massachusetts Rule and the Tender Years Doctrine both embrace the intuition that nonculpable underdevelopment partially excuses what would otherwise be negligent behavior.

Children as exceptions to the reasonable person standard, grounded in the idea of *nonculpable underdevelopment*, share similarities with a psychopath's *nonculpable impairment*. Studies of psychopaths "show that they are not capable of moral reasoning even at the level typically attainable by a normally developing four-year old."²³ "Psychopaths may be capable of a type of agency that resembles that of ordinary adults, but they clearly are *not* ordinary in terms of overall mental construction."²⁴ If psychopaths—born and condemned to be irregular moral agents—are far from the ordinary actors that tort assumes, perhaps there are reasons to consider assessing psychopaths under a framework of tailored culpability like the law does with children.

Certainly, even if the Massachusetts Rule or Tender Years Doctrine is not universally agreed to be the proper way to handle ordinary negligence vis-à-vis children, the reasons for evaluating the standards of liability are almost obvious enough for anyone to concede some justification. The reasonable person is viewed as an adult by default. Children not only lack the physical capacity to cause the same degree of harm as adults, but they are also less culpable because of their inexperience with society and the workings of the world. In fact, one recommendation to properly socialize and physically normalize a child during infancy is to allow them to be mildly negligent in order to learn how to interact with the physical world and other people (e.g., play fighting). It is their nonculpable underdevelopment that leaves the law hesitant to apply the same standard of liability as adults.

Children eventually grow up, but psychopaths are destined to exist outside the framework of ordinary prudence. Tort law is generally unforgiving toward mental impairments, but the issue with psychopathy is not an impairment of cognition, intelligence, or experience; it is uniquely one of moral agency. Unable to change and disordered from birth, can ordinary negligence be seen as fair towards psychopaths? Naturally, one would begin to think that psychopaths deserve no sympathy, and there will always remain a compelling argument that psychopaths are so dangerous to society that they should not benefit from the law. In the end, the existing psychopathy literature and society's understanding of moral frameworks leaves a dilemma for law and policy. On one horn of the dilemma, it appears that nothing can be done to equitably craft the law for psychopaths while not disproportionately hurting tort victims. On the other horn, leaving psychopathy unaccounted for also unfairly punishes those who are innately and unchangingly amoral actors.

23. Fox et al., *supra* note 16 at 8.

24. *Id.* at 17.