

YU ISSN 0004-1270

АРХИВ

ЗА ПРАВНЕ И ДРУШТВЕНЕ НАУКЕ

БРОЈ 2

АПРИЛ – ЈУН 1997.

ГОД. LXXXIII Књ. LIII НОВОГ (III) КОЛА Књ. CVI ЦЕЛОКУПНОГ ИЗДАЊА

СЕПАРАТ

Aleksandar FATIĆ

CRIMINAL RESPONSIBILITY AND PERSONALITY DISORDER

Београд 1997.

ЧЛАНЦИ НА
СТРАНИМ ЈЕЗИЦИМА

Aleksandar FATIĆ,
saradnik Instituta za međunarodnu
politiku i privredu u Beogradu

CRIMINAL RESPONSIBILITY AND PERSONALITY DISORDER¹

– I really don't know why I did it. I'm a rotten person, Donya.
(...) It's late, it's time. I'm going to turn myself in now. But I don't
know why I'm going to do it!

Large tears were flowing down her cheeks. (...) She embraces
him tightly.

– After all, by going to take your suffering, you're wiping out
half of your crime, aren't you?

– Crime? what crime? (...) Never, never have I seen it so clear-
ly as now, and I understand my crime even less than ever. Never,
never have I been stronger and more full of conviction than I am
now! ²

— * —

According to an entire contemporary stream in the philosophy of
criminal justice, crime and punishment are forms of saying 'no'.³ By com-
mitting a crime, the offender implies that a social norm does not or should

¹ This paper was presented at the University of Keele, UK, on December 1, 1994.

² Part of the dialogue between murderer Raskolnikov and his sister in Fyodor
Dostoyevsky's *Crime and punishment*.

³ This is the view characteristic of the retributive theories of criminal justice, and in
particular of punishment. Perhaps the best known advocates of this view are Jean Hampton
and Joel Feinberg – see Hampton, J. (1984), 'The moral education theory of punishment',
Philosophy and public affairs, vol 13, pp. 209–238, and Feinberg, J. (1970), *Doing and
deserving: essays in the theory of responsibility*, Princeton University Press, Princeton.

not apply in principle, or alternatively that it does not or should not apply to the offender himself. Society, through the institution of punishment and with due excuses, implies that social norms apply equally to everyone. Punishment is intended to convey the message of a distinction between right and wrong, between the permissible and the impermissible, the tolerable and the criminally proscribable – in fact, a distinction between right *as* tolerable and wrong *as* criminally proscribable.⁴ By committing an offence, the offender implicitly denies the law-imposed distinction between right and wrong (he or she still might recognise some non-law-based distinction between right and wrong). According to prominent retributive theories, by imposing punishment, society condemns the individual, 'reaffirms the law', and conveys a morally educatory message to all of its members.⁵ Ascriptions of criminal responsibility are based on the assumption of the offender's saying 'no' to social norms, and consequently excuses from criminal responsibility apply to those who are not considered competent to have either denied or upheld these norms in the full sense. Most typically, this applies to mentally ill offenders.

I shall argue in this article that the distinction between those offenders who are 'mentally ill' or psychotic, and who are therefore typically granted excuses from criminal responsibility, and those who are merely 'mentally disordered', or 'disturbed', in particular those who suffer from anti-social personality disorders ('psychopathies'), and who are considered fully culpable for their criminal deeds, is unjustified. I shall argue that, while it is probably true that the relevant cognitive and volitional 'failures' of psychotic offenders make them *more straightforwardly* eligible for excuses from culpability, offenders suffering from anti-social personality disorders, although able to satisfy the relevant cognitive and volition criteria in isolation from each other, may well not be able to *synthesise* their cognitive and volitional competences in a way which would render them fully culpable.

There is presumably ample justification for the excuses for mentally ill offenders, and it can be illustrated in the perspective of what typically happens in psychotherapeutic situations. A 'mentally ill' patient communicates with a therapist about the world, a reality which appears distorted, and often quite unbearable to him or her. The world has slipped away, the patient's grip on reality has loosened and instead of being part of reality he is threatened, sometimes amused, sometimes hopelessly indifferent, but always, in one way or another, haunted by it. The psychotherapeutic situation is basically interpretative, interactive – the psychotherapist acts as an adviser, a friend, a parent, an objective and benevolent authority, the

⁴ I have in mind here only criminal offences as criminally proscribable. In a broad sense, minor misdemeanours, parking offences, smoking in a smoke free environment and similar sorts of behaviour may also be considered 'wrong' in the sense of simply being prohibited, and therefore falling outside the area of permissible behaviour. However, the term 'wrong' will refer throughout this paper to instances of criminally proscribable behaviour.

⁵ See note 2.

patient's *alter ego*, or in any other of the innumerable therapeutic roles. In general, it is fair to say (with the unavoidable oversimplifications such qualifications always carry) that the therapist acts as a medium between the patient and external world. Hence, mental illness has a crucial *epistemological* aspect. There is a gap between the mentally ill person and his/her 'objective' reality. The psychotherapist is therefore an irreducible epistemic bridge, an epistemological saviour, as it were, for the patient. The patient's perception of reality is intransparent: it may not always be wrong or distorted, but it is very difficult to say when it is a reliable perception and when not. It is by no means true that all mentally ill people do not know what they are doing all of the time, but it is virtually impossible to ascribe to them a continuous, consistent pattern of behaviour resulting from a realistic perception of the world, such as that of a healthy person. Thus from the epistemological point of view there is a strong case for arguing in favour of excuses from criminal responsibility for mentally ill offenders. Yet this is not the only, and in practice not the main, reason mentally ill offenders are excused.

Forensic psychiatry dictates that the psychiatrist will distinguish between criminally responsible offenders and those who are not so responsible on the grounds of their awareness of wrongfulness of crime and their ability to have acted otherwise (i. e. to not have committed the crime). Official forensic psychiatry and most criminal laws therefore generally place the main emphasis of criminal responsibility on the offenders *decision making* ability at the time of commission of the crime, which is based on the *will* of the offender. Culpability is determined by retrospective consideration of whether, amongst other things, the offender was able to 'have willed to act otherwise', or 'to have decided to act otherwise', at the time of commission of the offence.

In criminal proceedings, the determination of responsibility is usually based on two sorts of considerations: whether the offender 'knew that what he/she was doing was wrong (i. e. criminally proscribable) – the so-called 'McNaghten Criterion', which is the epistemic criterion, and secondly whether, from a *volitional* point of view, the offender could have helped doing what he/she presumably knew was wrong. In other words, the latter consideration is centred on whether the offender could have overcome the *temptation* to commit the crime. If the offender passes both the cognitive and the volitional test, then *mens rea* responsibility is ascribed to him/her. By *mens rea* responsibility it is meant that the offender has committed the offence in a culpable way, with the awareness of the possible consequences and the moral and legal status of the act. The cognitive and the volitional tests are normally treated separately from each other, and in two subsequent steps: the latter *follows* the former. This is represented by the Diagram 1 (see Appendix 1).

If the results of both tests are positive – if the offender is considered to have known that what he/she was about to do was criminally proscribable (and *therefore* wrong – which is crucial for the forthcoming argument), and to have been able to overcome the temptation to commit the crime (of which he/she was presumably aware as being morally wrong), the offend-

er is considered fully criminally responsible. In most cases, because the two tests are insufficiently explained and precise, only the most seriously mentally impaired offenders (those suffering from psychoses) fail both or either of them uncontroversially. In practise, this leaves one very large group of mentally disturbed offenders – so-called 'psychopaths' (people suffering from 'a character disorder, as opposed to psychotic patients who are 'the mentally ill') – outside the reach of excuses from full criminal responsibility. Psychopaths, many of whom commit the most horrifying, violent, and clearly irrationally motivated crimes, are considered responsible, and this is usually justified by the fact that there is no known effective treatment for psychopathic disorders, that they seem to be able to function normally in society for long periods of time, that they normally 'know' what they were doing was wrong, and, strictly speaking, that they 'could have willed to act otherwise'. Yet psychopathic crime is one of the most intriguing sorts of crime, one which has traditionally features the most prominently in literature. A classic literary description is to be found in Fyodor Dostoyevsky's *Crime and punishment*, where he describes how Raskolnikov committed the murder of an old money-lender:

„There was not another second to be lost. He took the axe right out, swung it up in both hands, barely conscious of what he was doing, and almost without effort, almost mechanically, brought the butt of it down on the old woman's head. At that moment he had had practically no strenght left. But as soon as he brought the axe down, new strenght was born within him.

The old woman was bareheaded, as always. Her scanty, light-coloured, greying hair, smeared thickly all over with oil as it always was, had been plaited into a rat's tail and gathered together under the remains of a horn comb which jutted out at the nape of her neck. The blow landed smack on the crown of her head, something made easy by her smallness. She cried out, but very faintly, and suddenly sank in a heap to the floor, though even then she managed to raise both arms to her head. In one hand she was still holding the 'pledge'. At that point, with all his might, he landed her another blow, and another, each time with the butt and each time on the crown of the head. The blood gushed out as from an upturned glass, and her body collapsed backwards. He stepped back, allowed her to fall and at once bent down over her face: she was dead. Her eyes were goggling out of her head as though they might burst from it, while her forehead and all the rest of her features were crumpled and distorted in a convulsive spasm.“⁶

After Raskolnikov turned himself in, he was subjected to psychological evaluation:

„(...) at that point it was concluded that the crime itself could only have been committed in a state of some temporary disturbance of the mind, as it were, under the influence of some dangerous monomania involving murder and robbery for murder and robbery's sake, without ulterior motive

⁶ Dostoyevsky, F., 1991., p. 114.

or thought of gain. This decision happened to coincide with the arrival of the latest fashionable theory of temporary insanity, the application of which to certain criminals is so frequently the object of such effort in our time.(...) To the great annoyance of those who supported this opinion, the criminal made practically no attempt to defend himself; in response to the final and deciding questions as to what had induced him to murder and what had made him commit robbery, he replied quite succinctly, with the most brutal precision, that the cause of the whole thing had been his rotten social position, his poverty and helplessness, and his desire to secure the first steps of his career with the help of at least three thousand roubles, which he had counted on finding the home of the murdered woman. As for the murder, he had embarked upon it as a result of his frivolous and cowardly nature, which had, moreover, been overwrought by deprivation and failure. To the question as to what had prompted him to turn himself in, he replied bluntly that it had been genuine remorse. All this was almost indecent...“⁷

All these elements clearly show that the classification of 'temporary insanity' could not have been correct, that Raskolnikov knew what he was doing, that he got away with consciously committing a premeditated murder in a bizarrely rational, uncaring and calculated way. In contemporary systems, Raskolnikov would have been classified as a psychopath and considered fully responsible. This principle in most existing systems of criminal justice is based on the standard psychiatric classification of mentally troubled patients between those suffering from neuroses, psychoses and psychopathies. This is illustrated in more detail by Diagram 2 (see Appendix 2).

~*~

What Andrew von Hirsch calls 'the quasi psychiatric criterion', mentioned in the above diagram, clearly poses ethical questions in relation to its application, because it is an artificial criterion devised to include those cases where the nature of the crime suggests that 'something must have been wrong with the offender', or that he is extremely likely to repeat the crime, and yet the psychiatric knowledge available does not enable us to classify the offender as mentally ill. This leaves the offender fully liable, although with the added qualification that 'something must have been mentally wrong with him'.

One of the most commonly shared symptoms found in psychopaths is the deep conviction that they are 'primitively', irremediably different from everyone else. This alone gives rise to the question whether a psychopath can really be expected to respond to external norms in a normal way. The distinction between the cognitive and volitional aspects of responsibility ('The McNaghten Criterion' and the ability to have chosen not to commit the crime), if taken into account in two different steps (as is the case in practise), is unsatisfactory. It is possible for the offender to have

⁷ Ibid., p. 614.

satisfied both *discrete* criteria of the McNaghten Criterion and the ability to have chosen to act otherwise, and yet not to have been able to *act* otherwise in a sufficiently complete sense.

By knowing that something is criminally proscribable, the psychopathic offender does not necessarily exhibit knowledge that *he/she as a particular person* ought not to commit a crime. A substantial body of clinical evidence points to the fact that the almost non-existent definition of psychopathy perhaps can be best filled by the characterisation of the psychopathic patient as one who does not consider that 'common', regular norms apply to him/herself.⁸ The psychopath considers him/herself unbridgeably detached from his fellow man, although he/she is often perfectly aware of them and their ordinary relations, and is usually able to simulate the same sorts of ordinary relationships. Yet the very basis of his/hers psychopathy is the bottom line conviction that he/she is 'primitively' different (different in an irremediable way). Hence an overwhelming amount of his/her activity is seen by him/herself as a simulation of ordinary relations, activities and presence of reality as they seem to appear to others. On the other hand, the crime, the excursion outside the regular, common zone of activity is justified by the distorted picture of him/herself - a picture that does not amount to psychotic delusions, but that for precisely this reason often enables psychopathic offenders to realise the sorts of crimes which a delusional offender would be able to commit with much less probability of success.

In this light, the ability to have altered one's course of action, although perhaps perfectly unimpaired when taken by itself, is dramatically altered in light of the epistemological confusion created on the cognitive level. The person might know that what he/she is about to do is criminally proscribable, and that it is widely considered to be morally wrong as well; the psychopath might also be aware that there are certain methodological, moral and theoretical grounds for believing that criminal proscribability ought to be taken as at the same time designating moral wrongfulness, and yet he/she might easily not be able to see how the social norm which he/she is breaking could possibly apply with a sufficient force to him/herself. The very phenomenon of psychopathy which makes it so difficult to define and treat - the deeply embeded conviction that the person is fundamentally different from everyone else, unaccompanied by treatable psychotic symptoms, is at the same time at the core of the epistemological mystery of psychopathic crime.

The psychopath might have a very strong and healthy volitional capacity - he/she might be able to quit smoking or even using drugs, to achieve outstanding professional and personal results requiring a large amount of personal discipline; yet this volitional capacity cannot be put to use if the cognitive aspect of judgement is impaired. The main problem

⁸ In French literature, the term *sociopath* is typically used instead of 'psychopathy', or 'anti-social personality disorder'.

with the present classification of responsibility in psychopaths and psychotic patients is that it takes into account only the element of *recognition* in the cognitive test (The McNaghten Criterion), without paying sufficient attention to the element of *valuation*. Clearly the psychopath may very well recognise which acts are criminally proscribable and which are not, and even which acts, from a certain external, objective point of view are immoral and which are not, but he/she might be, and in fact in all probability is, unable to internalise this valuation and apply it to him/herself in the situation of choosing to commit a crime. He/she might be unable to see the norms as *internally* obliging, the same as he/she is unable to see regular, common relationships with other people as an organic part of him/herself. In this context, punishment will do nothing for the offender - it will deepen the gap between him/her and everybody else, it will increase the anxiety and the temptation to commit a crime, and it will create a more vicious and dangerous repeat.

-*-

Regarding the widespread view in forensic psychiatry that psychopathy, or anti-social personality disorder, is not to be considered a legitimate excuse from criminal responsibility, it is sometimes argued that psychopathy is a problem of character, and that every person is at least to a considerable extent responsible for the development of his or her character, while criminal responsibility is a matter of intention, and only *external* influences on intentions can provide legitimate excuses from it.⁹ In this sense, psychosis is taken to represent an external influence, because of the severe disturbance of perception and cognition that occur in some psychoses. On the other hand, since the offender who is also a psychopath can be considered to have been able to control the development of his or her character, which might have been the prime cause of the crime, psychopathy is taken to be an 'internal' factor in the commission of crime, and therefore a factor which can be legitimately incorporated into the notion of full criminal responsibility.¹⁰

This view, traditionally accepted in forensic psychiatry, does not take into account the epistemological perspective in psychopathy, and possible cognitive failures on the level of cognition of norms, which can bring the psychopath much closer to the psychotic than is usually thought, and which can be discerned with the help of some of the examples and systematisations referred to herein. This would then provide a ground for claiming that there should be no difference in principle between the status of culpability of psychopaths and psychotic patients, which would then amount to an abolitionist stance regarding psychopathic crime.

⁹ See Carl Elliot, *Puppetmasters and personality disorders: Wittgenstein, mechanism and moral responsibility* in Philosophy, Psychiatry and Psychology, 1993, vol. 1, no 1, pp. 91-100.

¹⁰ For an account along these lines, see *ibid*.

The epistemological dimension of psychopathic crime has not been brought to the fore very often in philosophical and sociological writings, and to my knowledge, not much more often in psychiatric ones. It certainly does deprive the offender of the excuses which ought to apply if one recognises the epistemological intransparency in the presumed valuational judgements inherent in the commission of crime. To put it more clearly, the psychopathic offender perhaps does not say 'no' by committing a crime in the same sense and in the same way as the psychotic offender; he/she may not be excusable either on the basis of failing the *complete* cognitive test (not knowing that the action is a crime and morally wrong), or on the basis of failing the *complete* volitional test in its pure form. However, he/she may have a fundamental breakdown in the ability to *synthesise* the presumed cognitive and volitional competences into an organically unique pattern of action, because he/she may very well be unable to *apply* either of these presumed competences in an internal, personal perspective, as underneath Diagram 2. This, after all, is in accordance with the definition of psychopathy as a personality disorder. If this is true, then it means that the psychopath is deprived of that synthesising agent which would, ideally, enable him/her to function normally *without interruption*. The lack of continuous capacity to respond to external norms would then justify an abolitionist stance towards the punitive handling of psychopathic crime from an ethical perspective. This would then leave space for arguing in favour of therapy for psychopathic offenders, similarly to what is done with psychotic ones. While there is a certain weight in the argument that poor therapeutic results with psychopaths do not justify treatment as opposed to punishment, there is no ground whatever for the corresponding argument that punishment would do any good – in fact, even the greatest supporters of criminal responsibility for psychopathic offenders, many more of whom tend to be on the legal than on the medical side, are aware that punishment in fact further degrades the mental status of psychopathy. If the epistemological aspect of the issue is taken seriously, then there is simply no morally admirable alternative to the treatment of psychopathic offenders. Although this conclusion is perhaps unwelcome from a strictly preventionist point of view, from an ethical point of view it seems to be without a serious alternative, both in the context of psychiatric and legal professions.

Selected references:

Brady, J. P. et al., (ed.), *Psychiatry: a century of promise and advancement: a bicentennial volume of the University of Pennsylvania*, New York, Spectrum Publications, 1977.

Dostoyevsky, F., *Crime and punishment*, Harmondsworth, Pelican, 1991.

Feinberg, J., *Doing and deserving*, Princeton, Princeton University Press, 1970, in particular essay 'Justice and personal desert'.

Gunn, J. and Taylor, P., *Forensic psychiatry: clinical, legal, and ethical issues*, Oxford, Butterworth-Heinemann, 1992.

Hampton, J., *The moral education theory of punishment*, Philosophy and public affairs, vol. 13, 1984.

Hare, R. D., *Psychopathy: theory and research*, New York, Wiley 1970, Approaches to behaviour pathology series.

Henry, A. D., *Forensic psychiatry*, New York, Ronald Press and Co., 1965.

Kretschmer, E. et al., *Psychiatry*, Wiesbaden, Office of military government for Germany, 1948.

Sadoff, R. L., *Forensic psychiatry: a practical guide for lawyer and psychiatrists*, Springfield, IL, Thomas, 1988, American series in behavioural science and law.

Von Hirsch, A., *Past and future crimes*, Manchester, Manchester University Press, 1985.

APPENDIX 1

MENS REA RESPONSIBILITY

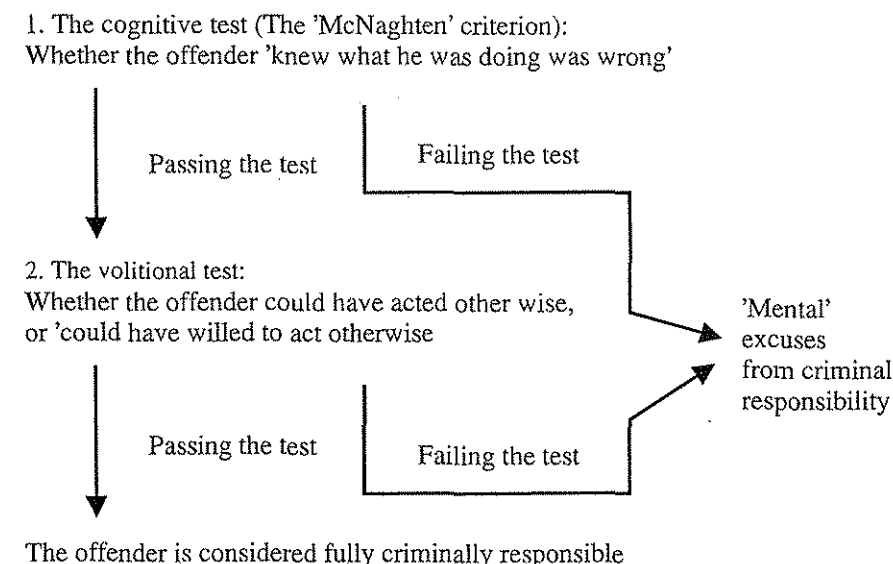


Diagram 1

APPENDIX 2

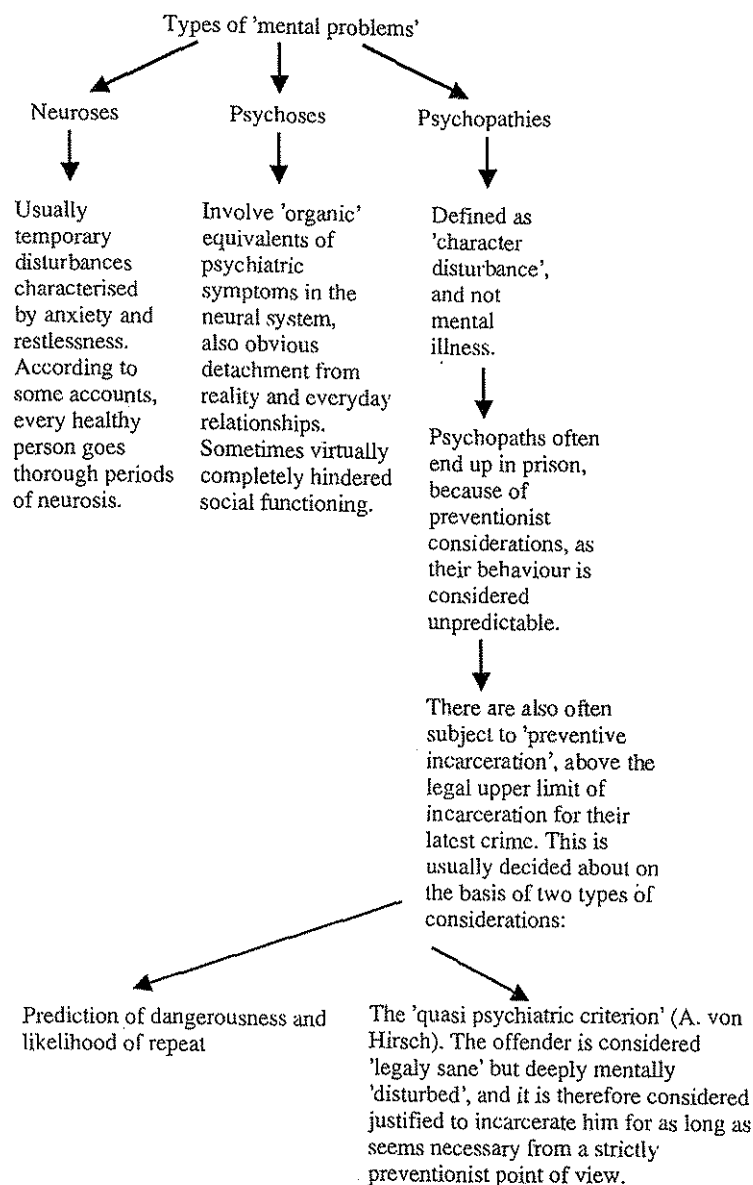


Diagram 2

КРИВИЧНА ОДГОВОРНОСТ И ПОРЕМЕЋАЈИ ЛИЧНОСТИ

– Резиме –

Намера овог рада је да укаже на извесне когнитивне и моралне проблеме у раширеној пракси приписивања кривичне одговорности оним починиоцима кривичних дела који пате од разних врста поремећаја личности, односно психопатија. Специфичност психопатије је у томе што није реч о менталној болести, која би преступника у значајној пропорцији случајева квалификовала за смањење казне или чак за ослобађање од кривичне одговорности, већ о једној са тачке гледишта форензичке психијатрије и судства граничне категорије менталних поремећаја, за које се, у већини правних система, приписује пуна или незнатно смањена кривична одговорност за почињена кривична дела.

Са теоријске стране посматрано, концептуализације саме структуре кривичне одговорности најчешће се повезују са чувеним критеријумом Мек Нотенових Правила (McNaghten Rules), који захтева да је преступник у време чињења кривичног дела свестан самог правног и моралног статуса дела, дакле да је оно забрањено и морално недопустиво, као и додатни критеријум способности уздржавања од чињења дела, дакле способности да се делује и другачије, одсуства принуде, итд. Ова два услова конституишу општу структуру „теста“ који свако кривично дело треба да прође да би се могла приписати пуна кривична одговорност.

У овом раду истакнуте су карактеристике психопатије, посматране уопштено, које доводе у питање претпоставку о томе да психопате-преступници задовољавају оба горе наведена услова. Чак и уколико се може показати да психопате задовољавају и један и други услов, постоји велика вероватноћа да, као последица саме дефиниције психопатије као поремећаја личности, психопата није у стању да на когнитивном нивоу на одговарајући начин синтетизује своје претпостављено знање о правном и моралном статусу дела са својом способношћу да делује другачије. Уколико је то случај, онда постоје јаки разлози за разматрање реконцептуализације психопатије у контексту кривичне одговорности у циљу умањивања кривичне одговорности психопата-преступника. Реч је о томе да, у таквом случају, постоји висока вероватноћа да психопата није у стању да *континуирано* задовољава оба критеријума за кривичну одговорност, јер га његова базична психолошка и „лична“ отуђеност од социјалног окружења која је део дефиниције психопатије (отуда термин „социопатија“) лишава способности да у пуној мери *интернализује* перцепцију правне и моралне норме коју крши и да је на унутрашњем нивоу *интегрише* са вољним елементом способности за уздржавање од чињења кривичног дела. Управо оваква *интернализација* когнитивног елемента кривичне одговорности (знање о правно-моралној проскрибованости дела), и њена *синтетизација* на унутрашњем нивоу са вољним елементом кривичне одговорности (способности за уздржавање од чињења дела) представљају претпоставке смисла стандардне структуре кривичне одговорности на основу традиционалног критеријума Мек Нотенових правила. Ова систематизација, структура одговорности, и аргументи против приписивања пуне кривичне одговорности психопатама-починиоцима кривичних дела, уочавају се и у приложеним дијаграмима.

У форензичким и кривичноправним дискусијама које се воде у вези са проблемом психопатије и кривичне одговорности постоје велике поделе, и овај недостатак консенсуса захтева повратак концептуалним разматрањима структуре кривичне одговорности, што је и намера овога рада. Закључак текста је да је, услед проблематичних основа претпоставке о оправданости приписивања пуне кривичне одговорности психопатама-преступницима, правно и морално безбеднији и оправданији приступ прихватање либералније позиције, и третирање психопатије као једног од разлога за смањење или чак ослобађање од кривичне одговорности.