Psychopaths and insanity: Law, ethics, cognitive neuroscience and criminal responsibility

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Abstract

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In many jurisdictions, including England and Wales, psychopaths are unable to succeed with an insanity defence. This has been influenced by a legal view of psychopathy as a condition characterised by a reduced ability to comply with the law, which is otherwise fully understood. Evidence from cognitive neuroscience, however, may potentially challenge this traditional legal conception of psychopathy. In this regard it has already been suggested, based partly on scientific evidence, that it may be appropriate for at least some psychopaths to succeed with an insanity defence where they can be shown to lack moral competence.

In this thesis, I critically examine this possibility. I first examine the insanity defence in English law, showing how psychopaths have effectively been excluded from the defence by judicial interpretation of the insanity defence criteria. Consequently, if psychopaths lacking moral competence were to be identified, reform (or reinterpretation) of the defence would be required. I then present philosophical arguments in favour of the case that some psychopaths should gain access to an insanity defence, before clarifying which psychopaths ought potentially to succeed, and which criminal offences ought potentially to be relevant, for the purposes of a reformed or reinterpreted defence.

In order to clarify which psychopaths are relevant psychopaths (RPs), it is necessary to go beyond existing scientific evidence. It is argued, based on emerging neuroscientific findings and current research techniques, that while it is not currently possible to identify RPs, it may be possible in the future. Even if it this becomes possible, however, the philosophical case for access to an insanity defence remains deeply problematic. Although RPs may lack moral competence, for example, they may nevertheless possess other capacities relevant to criminal responsibility. After closer examination, it is argued that the case for access to an insanity defence may be best viewed as a case for mitigation rather than exculpation.

I conclude by considering some of the implications of this analysis in an English legal context, should it become possible to identify RPs. Of particular relevance is the possibility that RPs may be at high risk of causing serious harm to others. This illuminates important possible relationships between responsibility and risk, and diagnostic advancements and risk assessment, in this area. There are also broader implications for the management of psychopaths in the future, given that greater scientific understanding may lead to enhanced predictive abilities that could tempt policymakers towards more radical strategies.

This thesis contributes to an ongoing debate about the role that cognitive neuroscience may play in decisions about the criminal responsibility of psychopaths. My main contribution is to clarify how psychopaths lacking moral competence may be identified in the future, and relate this neuroscientific discourse to arguments for providing these persons with access to an insanity defence. It is argued, however, by reference to legal, policy, scientific and philosophical considerations, that the risk such persons would pose, rather than their capacity for criminal responsibility per se, may have significant legal and policy implications in England and Wales in the future.

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Introduction

0.1 Background

Psychopaths are described by the Psychopathy Checklist-Revised (PCL-R), the most widely used diagnostic test for psychopathy in forensic psychiatric populations,[1] as manipulative persons, displaying callousness and a lack of empathy towards others.[2] They are also described, among other things, as lacking remorse and guilt, and possessing a grandiose self-image.[3] In the context of a criminal trial, jurors may regard defendants displaying these characteristics and attitudes as more blameworthy.[4]

The idea that some psychopathic persons ought to be regarded as less blameworthy or, beyond this, completely excused from criminal responsibility via an insanity defence may seem counterintuitive and implausible. Some jurisdictions, such as Scotland and some US states, have explicitly prevented psychopaths from making insanity pleas. In England and Wales, an effective exclusion is accomplished at common law via judicial interpretation of the insanity defence criteria. The barring of psychopaths from access to an insanity defence in these various jurisdictions could be viewed as consistent with the intuition that these persons are more blameworthy for their actions.

Some theories of moral responsibility, however, hold that a capacity to appreciate and respond to moral considerations is an essential prerequisite for moral responsibility. Extend-

[1] S.K. Acheson, in R.A. Spies and B.S. Plake (eds), *The Sixteenth Mental Measurements Yearbook* (Buros Institute of Mental Measurements, U.S. 2005) 429.

[2] R.D. Hare, *The Hare Psychopathy Checklist-Revised* (2nd edn, Multi-Health Systems Inc. 2003); see also A. Forth, S. Bo and M. Kongerslev, 'Assessment of psychopathy: The Hare Psychopathy Checklist measures', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (Oxford University Press (OUP) 2013) 5.

[3] For more detailed discussion of the PCL-R see Chapter 2.

[4] P. Litton, 'Criminal responsibility and psychopathy: Do psychopaths have a right to excuse?', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 275, 275.

ing this basis for an excuse into the criminal law could, in theory, provide a justification for excusing severely mentally ill persons or young children from criminal responsibility via an insanity defence.[5] But if this is the case, it might be also be thought that the lack of moral concern stereotypically shown by psychopaths could also ground a excuse, provided this could be shown to derive from a lack of moral competence.

This possibility may have been present at the origin of the current insanity defence in English law. With respect to one component of the test, often referred to as the second (or evaluative) limb,[6] Lord Tindal CJ stated in *M'Naghten's Case*:[7]

> If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable...[8]

This suggests that an insanity defence might be available where a defendant was *not* aware that the act was one that he morally ought not to do.[9] Such an approach, it might be thought, could potentially accommodate a psychopath who was unable to comprehend moral considerations.

This, however, is a far cry from the current approach to the second limb in English law, where an awareness that an act was legally wrong alone may suffice to prevent success with an insanity defence (*R v Windle*[10]). This interpretation of the second limb, in conjunction with the interpretation given to other components of the insanity defence, effectively excludes psychopaths from the defence. Psychopathic defendants are presumed, barring the influence of other responsibility-undermining factors, to have been aware of the legal considerations relevant to their allegedly criminal acts.

In this thesis, I take seriously the possibility that some psychopaths ought to be provided with access to an insanity defence, and present and develop a case in favour of this. The case relies on the possibility that some psychopaths may lack moral competence. These persons are unable to comprehend the moral reasons that may represent the best reasons

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[5] Litton (n 4) 275. In England and Wales the age of criminal responsibility is 10 (s.50 of the Children and Young Persons Act 1933, as amended by the Children and Young Persons Act 1963).

[6] V. Tadros, *Criminal responsibility* (OUP 2005) 323.

[7] *Daniel M'Naghten's Case* (1843) 10 Clark & Finnelly 200 (HL).

[8] (n 7) per Lord Tindal CJ at 210.

[9] F. McAuley, *Insanity, psychiatry and criminal responsibility* (Round Hall 1993) 30–1.

[10] [1952] 2 Q.B. 826 (CA).

for refraining from committing at least some criminal offences, and therefore have a significantly reduced capacity to avoid criminal liability and punishment with respect to these offences. Given this significant disadvantage, so the argument goes, such persons ought to be permitted to plead insanity in the case of relevant alleged criminal offences and, if successful, be exempted from criminal responsibility.

0.2 Contribution

My contribution is primarily to clarify which psychopaths are relevant psychopaths, in accordance with this case, for the purposes of an insanity defence. I argue that, although it is currently not possible to identify such persons, there is empirical 'space' for psychopaths lacking moral competence, and it may become possible to identify such persons in the future. By reference to emerging findings in neuroimaging, genetics and epigenetics, and existing research techniques, I argue that it may be possible to develop a taxonomy of psychopathy subtypes. Within this taxonomy, there may be subtypes of psychopathy characterisable, in part, by a lack of moral competence. I note that there is space for subtypes featuring more subtle and specific impairments, but focus for pragmatic reasons on the possibility of a lack of generic harm-related moral competence. This is argued to be a reasonable place to start analysis-wise, given our existing understanding of psychopathy. I also argue that the development of this taxonomy may enable the development of biomarkers to assist with the identification of these 'relevant psychopaths' (RPs) in practice.[11]

In addition to this main contribution, I also consider in broad terms which criminal offences should be relevant criminal offences, in the case of RPs lacking a generic harm-related moral competence. I argue that the relevant offences are those where the prohibitions would normally be understood predominantly in terms of moral reasons concerning harm; that is, moral reasons concerning harm would normally be particularly psychologically salient as reasons for complying with these laws. Drawing on Hyman Gross's work, I suggest that the relevant offences would be harm-related offences concerning violations of the interests people may have in (among other things) their physical welfare, personal security and personal property.[12]

[11] A 'biomarker' is any measurable indicator of a biological or physiological process (see Section 5.2.5).
[12] H. Gross, *A theory of criminal justice* (OUP 1979).

0.3 Implications of contribution

The main implications of my contribution are derived from my analysis of the aforementioned case, and of the possible characteristics of relevant psychopaths. As regards the former, the case is controversial and faces a number of obstacles. Some of these can be regarded as 'external' to the case, and could represent reasons for rejecting it even if it were philosophically successful (e.g. possible public resistance to the case should it be accepted); for this reason, the case has been referred to as the 'prima facie case' for access to an insanity defence.[13] The problems 'internal' to the case, however, are substantial and represent the main focus of my inquiry.

Although I explain how some objections may be overcome, a particularly problematic issue is that nonmoral reasons, such as legal and prudential reasons, are also relevant to criminal responsibility. While RPs may be unable to appreciate that a particular act is morally wrong, they might nevertheless be able to appreciate that it is unlawful and that committing the act may lead to undesirable and unpleasant consequences should they be apprehended. This could provide adequate motivation to comply with criminal prohibitions in general, despite any particular disadvantage these persons might have in the case of relevant offences. Due to this, I argue that the prima facie case may be best viewed as a case for mitigation of culpability at a sentencing stage rather than exculpation from criminal responsibility. Thus, my clarification of relevant psychopaths and relevant offences for the purposes a reformed or reinterpreted insanity defence may be better construed as a clarification of relevant persons and offences for the purposes of mitigation.

The characteristics of relevant psychopaths, however, complicate this picture, because the lack of moral competence that may justify mitigation may also indicate risk. Given their inability to comprehend moral reasons concerning harm, RPs may pose a high risk of causing serious harm to others. Furthermore, if biomarkers are developed to identify RPs, these may also assess risk. Relevant offences may also provide evidence of RPs moral incompetence that could be used for diagnostic and/or risk assessment purposes. Recognition of these possibilities permits an exploration of possible relationships between responsibility and risk, and diagnostic and risk-assessment developments, in this area.

By reference to relevant debates in an English legal context I argue that, given the issues with the prima facie case, the risk posed by RPs, should they be identified, may have greater

[13] Litton (n 4).

legal and policy implications than any questions about their responsibility per se. The predictive properties of biomarkers, for example, may tempt policymakers towards more radical strategies. I also note that the development of 'effective' medical treatments (i.e. treatments that can significantly reduce the risk posed by RPs, and therefore the need for hospital confinement), insofar as this depends on a deeper scientific understanding, may arise in tandem with these predictive abilities; thus, scientific advancements in this area may not bring therapeutic benefits without simultaneously creating greater predictive abilities of interest to courts and policymakers. This has more general implications for society's efforts to deal with the problems posed by some psychopathic persons, because it suggests that steps made towards resolving these issues may be accompanied by legal and policy challenges arising from an ability to more readily identify, and make predictions about, such persons.

0.4 Legal focus

In addition to my focus on English law I also focus on insanity proceedings in a Crown Court context, where more serious alleged criminal offences are tried. This is in keeping with my focus, later in the thesis, on psychopaths who may pose a risk of causing serious harm to others, and the possibility of lengthy detention of such persons for the protection of others from harm. It is worth noting, however, that most criminal offences are dealt with by Magistrates' Courts in England and Wales.[14] An insanity defence is available in a Magistrates' setting, although it is understood to be rarely used.[15] While it is possible that RPs, should they be identified, may also commit more minor offences of the sort that would be tried in a Magistrates' Court, the focus on more serious offences more readily permits engagement with issues concerning long-term deprivation of liberty, and the significance of the availability of effective medical treatments to the management of such potentially

[14] Statistically, 98% of the criminal trials in England and Wales occur in Magistrates' Courts (D. Ormerod, *Smith and Hogan's criminal law* (13 edn, OUP 2011) 31).

[15] The Law Commission comments, in its recent Scoping paper: 'There are no data whatsoever on the use of the insanity defence in the magistrates' courts. We understand it is infrequently used' (Law Commission, *Insanity and automatism: Supplementary material to the Scoping paper* (July, 2012) available at <http://lawcommission.justice.gov.uk/areas/insanity.htm>, (accessed 27.6.14) para. 1.23). There are some procedural differences where insanity is pleaded in a Magistrates' Court, such as the absence of a jury. For other differences, and wider discussion, see para. 2.81–2.92 in the aforementioned *Supplementary material to the Scoping paper*.

problematic persons.[16]

0.5 Methodology and sources

This is a multidisciplinary thesis which integrates discourse from a number of disciplines. This integration requires philosophical engagement and analysis, in part because research from different disciplines may be conducted from distinct philosophical or methodological perspectives. This interdisciplinary philosophical approach is complemented, in places, by analyses specific to particular disciplines (e.g. legal and scientific analyses).

A variety of sources are utilised in this thesis. These vary throughout, according to the research questions considered, and include: primary and secondary legal sources (especially Chapters 1 and 6); sources relating to ethics (especially Chapters 2 and 3); sources concerning psychology, psychiatry and underlying theory (especially Chapter 2); and sources concerning empirical moral psychology and cognitive neuroscience (especially Chapters 4 and 5). In the References section, these sources are divided into an indexed list of 'Primary legal sources' (subdivided into 'Cases' and 'Legislation') and a more general, non-indexed, bibliography ('Other references').

0.6 Overview

I begin, in Chapter 1, by providing an initial analysis of the insanity defence in England and Wales, placing this in a historical context. I focus on how a psychopath lacking moral competence might fare with the defence on current law. This is a hypothetical discussion, as this is not a conceptualisation of psychopathy that currently confronts the English courts. It is seen that the interpretation given to much of the test is problematic for such persons, who are effectively excluded from the defence. My analysis demonstrates that reform, or significant reinterpretation, of the defence would be required before such a person could potentially succeed with an insanity defence.

In Chapter 2, I provide some clarification of what is currently meant by 'psychopathy'. After providing a historical perspective on psychopathy, I examine the psychopathy checklist revised (PCL-R), currently the most widely used psychometric test for psychopathy in

[16] Magistrates' Courts also have more limited sentencing powers (see *Halsbury's Laws of England* (10th edn, 2010) vol 92, para 6).

forensic psychiatric settings. I focus, in particular, on debates concerning the use of criminal behaviour in the PCL-R test as a criterion for psychopathy. I then move on to consider the extent to which psychopathy may be a morally evaluative concept, and accept that it may not be possible to diagnose a person as psychopathic without negatively or morally evaluating this person. Finally, I consider whether PCL-R psychopathy may be a mental disease or illness. I argue that, given issues concerning the coherence of the concept of psychopathy, it may be premature to regard PCL-R psychopathy as a disease or illness. Some of the debates encountered in this chapter are very substantial, and the goal is primarily to orientate the thesis with respect to these debates rather than to adopt firm positions.

In Chapter 3, I present the prima facie case for providing some psychopaths with access to an insanity defence for some alleged criminal offences. This initially requires some discussion of relevant responsibility theory, and of how neuroscience may be relevant to responsibility. After considering some possible objections to the prima facie case, I then examine the aforementioned issue concerning the availability of nonmoral reasons to psychopaths lacking moral competence (although I defer my conclusion on this issue to the final chapter). The Chapter ends with a return to the M'Naghten Rules, where I consider the relationship between the prima facie case and the 'knowledge' criteria in Rule 3. This permits a more precise specification of some of the conditions that would need to obtain, and reforms or reinterpretations of the defence that would need to occur, before psychopaths lacking moral competence could potentially succeed with insanity pleas.

For the arguments of the prima facie case to have real-world relevance, however, it must be the case that there are psychopaths who lack moral competence. This forms the primary focus of Chapters 4 and 5. In Chapter 4, I present a critical analysis of previously influential research concerning the ability of psychopaths to distinguish between conventional and moral transgressions or norms (i.e. make the 'moral/conventional distinction'), explaining why this research is now problematic and cannot assist with the central questions in the thesis. It cannot, in particular, show that psychopaths lack 'moral knowledge'. This research also highlights a problematic issue for research into psychopathy: even if psychopaths were to lack moral knowledge, or an ability to make a genuinely moral judgment, they might report what they believe other people might say in the circumstances. Impression management may mask experimental findings, where studies rely on reports from psychopaths.

With this in mind, my explorations in the first part of Chapter 5 focus on findings in neuroimaging, genetics and epigenetics that penetrate beneath the 'mask' that psychopaths

may present to the world. Deepening neurobiological understanding in these areas, I argue, may enable the development of a taxonomy of psychopathy subtypes. Within such a taxonomy, I argue, there is empirical 'space' for psychopaths lacking a capacity to comprehend moral reasons concerning harm; furthermore, it may be possible to develop biomarkers to identify these persons. These are the 'relevant psychopaths' (RPs) for the purposes of the prima facie case. In the second part of this Chapter, I clarify in broad terms the relevant offences for the purposes of this case.

Finally, in Chapter 6, I return to the arguments of the prima facie case and draw a conclusion regarding whether an insanity defence ought to be made available for RPs in an English legal context. I consider, first, current law and policy concerning 'diversion' and, in the event that an insanity defence were made available for RPs, the likely consequences of a finding of not guilty by reason of insanity. It becomes evident that, should this occur, RPs may not plead insanity because success with a defence could result in a lengthy hospital detention. This suggests that the prima facie case may depend, at least partly, on the availability of effective medical treatments that could reduce the need for hospital detention by reducing the risk of harm posed to others; otherwise, it may be fairer to RPs to hold these persons criminally responsible.

Even if effective treatments were available, however, the prima facie case would remain problematic. As noted above, while RPs may lack moral competence, they are nevertheless likely to retain capacities relevant to criminal responsibility. In the final analysis, I argue, the prima facie case may be best viewed as case for mitigation rather than exculpation; thus, my exploration of relevant psychopaths and relevant criminal offences may be best viewed as an exploration of a potentially mitigation-worthy group. I then proceed to consider the risk that may be posed by RPs, the role that biomarkers may play in risk assessment, and how scientific developments in this area may have wider legal and policy implications.

Chapter 1

Psychopaths and the current insanity defence in English law

1.1 Introduction

In this Chapter, I provide an initial analysis of the insanity defence in England and Wales, placing this in a historical context (I return to the defence in Chapter 3). I begin, in Section 1.2, by outlining the origin of the defence in M'Naghten's case. I then proceed, in Section 1.3, to discuss the four substantive components of the insanity defence test, contained in Rule 3 of the M'Naghten Rules. For these components, I consider how a psychopath lacking moral competence might fare. This is contrasted with a more typical legal conceptualisation of psychopathy as a volitional disorder. For the reasons stated in Section 0.4, I focus on the use of the insanity defence in a Crown Court context, in the presence of a jury.

The view of psychopathy as a condition in which there may be an inability to comprehend moral reasons is, it should be stressed, not one currently considered by the English courts. The purpose of this chapter is to consider, hypothetically, how such persons might fare with respect to the insanity defence, in order to set the scene for later discussion. It is seen that the interpretation given to much of the test is problematic for such persons, who are effectively excluded from the defence. This analysis demonstrates that reform, or significant reinterpretation, of the defence would be required before such persons could potentially succeed with an insanity defence.

1.2 The M'Naghten Rules, and historical context

The major substantive elements of the insanity defence arose following the trial of Daniel M'Naghten,[1] who shot and killed Edward Drummond, secretary to the then Prime Minister Sir Robert Peel, mistaking him for the Prime Minister.[2] His acquittal at first instance on grounds of insanity generated significant public and political interest. M'Naghten had been involved with a political organisation opposed to the Peel government's Corn Laws, which had caused hardship by leading to higher food prices.[3] His political views and hostility towards government policies had been noticed by the authorities, and his actions were viewed by many as consistent with the 'assassination rhetoric' of the organisation he was involved with (the Anti-Corn Law League).[4]

The trial also took place against a backdrop of growing concern about the possibility of the guilty 'getting off' with insanity. There had recently, for example, been an attempt on Queen Victoria's life, with the 18 year-old assailant Edward Oxford found not guilty due to insanity.[5] Despite the fact that Oxford did not go free, this verdict was very unpopular.[6]

Given these various issues, the verdict in *M'Naghten* was debated within the legislative House of Lords.[7] The House of Lords then asked the trial judges five questions with a view to clarifying the law concerning insanity.[8] Question 2 concerned the instructions to be given to a jury in the event of an insanity plea; the answers became known as the M'Naghten Rules. The Rules, as they are currently recognised, are expressed in the following passage:

> [T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his

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[1] Strictly, the correct spelling is *McNaughtan*, as revealed by historical research undertaken by Moran (R. Moran, *Knowing right from wrong: The insanity defense of Daniel McNaughtan* (Simon and Schuster 1996) xi–xiii). Here, I use the spelling customarily utilised in legal cases.

[2] *Daniel M'Naghten's Case* (1843) 10 Clark & Finnelly 200 (HL). For discussion, see for example: A.P. Simester, G.R. Sullivan, J.R. Spencer *et al.*, *Simester and Sullivan's criminal law: Theory and doctrine* (4th Revised edn, Hart 2010) ch.19; D. Ormerod, *Smith and Hogan's criminal law* (13 edn, OUP 2011) 294.

[3] D.N. Robinson, *Wild beasts & idle humours: The insanity defense from Antiquity to the present* (Harvard University Press (HUP) 1996) 163.

[4] (n 3) 164.

[5] *R v Oxford* (1840) 9 Carrington and Payne 525.

[6] Robinson comments that the verdict 'upset the Queen and much of the nation' (n 3) 164.

[7] The debates, which took place on 6th and 13th March 1843, are available here: <http://hansard.millbanksystems.com/sittings/1843/mar/> (accessed 27.6.14).

[8] Lord Tindal CJ gave a response on behalf of the judges, with the exception of Maule J who answered separately.

> crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[9]

McAuley notes that the first part of this quoted passage, concerning the presumption of sanity and sufficient reason for responsibility, corresponds to Rule 2; the remainder, concerning what must be 'clearly proved', corresponds to Rule 3.[10] The remaining Rules, 1 and 4, concern 'partial delusions' and appear to have fallen into disuse in English law.[11] Gostin *et al.* suggest that this may have been because these Rules do not substantively contribute to Rules 2 and 3.[12]

Rule 2 amounts to an adoption of negative criteria for responsibility; that is, what is of interest are factors that may undermine responsibility, which is initially presumed. Given that Rules 1 and 4 are no longer used, my analysis in Section 1.3 will focus on the components of Rule 3; this analysis will be informed by the negative approach to assessment of responsibility indicated in Rule 2.[13]

It is worth highlighting the unfortunate fate that awaited M'Naghten. Ten days after the trial, which occurred on 3rd March 1843, M'Naghten was transferred from Newgate prison to the criminal lunatic department of Bethlam Hospital to 'await the Crown's pleasure'.[14] In effect, this was an indeterminate sentence at the discretion of the Home Secretary. He remained there for 21 years, occupying a small cell (8.5 by 10.5 feet), until he was transferred to the newly opened Broadmoor lunatic asylum in Berkshire in 1864.[15] He died

[9] *M'Naghten's Case* (n 2) per Lord Tindal CJ at 210.

[10] F. McAuley, *Insanity, psychiatry and criminal responsibility* (Round Hall 1993) 22–3.

[11] L. Gostin, J. McHale, P. Fennell *et al.*, *Principles of mental health law and policy* (OUP 2010) 723.

[12] (n 11) 723). In *Sullivan*, the House of Lords regarded Rules 2 and 3 as authoritative, with Lord Diplock stating that they had been 'used as a comprehensive definition' since M'Naghten's case in 1843 (*R v Sullivan* [1984] AC 156 (HL) at 171). Ormerod comments these are 'binding law' ((n 2) 294).

[13] In addition to the substantive aspects of the insanity defence test, which I focus on here, there are also important procedural elements. For example, the defence must prove insanity on the balance of probabilities (*Sodeman v R* [1936] 2 All ER 1138 (PC)). For a helpful discussion of these procedural aspects, see A. Loughnan, ''Manifest madness': Towards a new understanding of the insanity defence', (2007) 70(3) Modern Law Review 379.

[14] Moran (n 1) 23.

[15] Moran (n 1) 24.

there the following year. Thus, it can hardly be said that he 'got off' by pleading insanity, despite post-trial newspaper reports that he was 'profitably insane' due to his avoidance of execution by hanging.[16]

1.3 Initial analysis of Rule 3

1.3.1 'defect of reason'

To recap, according to Rule 3, to succeed with an insanity plea the defendant must, at the time of the alleged offence, have been 'labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'.[17] The main English legal case concerning the 'defect of reason' component of Rule 3 is *R v Clarke*.[18] A lady alleged to have been shoplifting pleaded guilty to avoid 'the disastrous consequences' of an insanity defence.[19] At that time, all persons found not guilty by reason of insanity (also referred to as the 'special verdict') were confined to hospital indefinitely, a regime described by Gostin *et al.* as 'draconian and unnecessary'.[20]

Due to Mrs Clarke's history of depression, which in her psychiatrist's opinion may have caused 'confusion and memory lapses', it was ruled at first instance that an insanity defence was the only defence available to her.[21] On appeal, the Court of Appeal quashed her conviction. The judge at first instance, it was held, had incorrectly ruled that she was required to plead insanity.[22] The Court of Appeal took the view that the evidence in the case 'fell

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[16] Moran (n 1) 1.

[17] (n 2) per Lord Tindal CJ at 210.

[18] *R v Clarke* [1972] 1 All ER 219 (CA).

[19] *Clarke* (n 18) at 221.

[20] (n 11) 734. This was reformed by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 which introduced a more flexible regime.

[21] *Clarke* (n 18) at 220.

[22] If Mrs Clarke had been permitted to contest her case, she would have denied that she had the necessary mens rea for the offence of theft (i.e. 'dishonesty' and 'intention', under s.1(1) of the Theft Act 1968) (*Clarke* (n 18) 220). 'Mens rea' (Latin for 'guilty mind') refers to the mental component(s) of an offence. The two most common forms of mens rea are intention and recklessness. Mens rea is usually contrasted with 'actus reus' (Latin for 'guilty act'), which refers to the conduct aspect of an offence. For most offences in English law, it is only necessary for the prosecution to prove recklessness in order to secure a conviction; in these cases, the mens rea of intention is more relevant to sentencing, as it indicates a greater degree of culpability (Simester & Sullivan (n 2) 126).

very far short' of showing that Mrs Clarke had suffered from a defect of reason.[23] Ackner J commented:

> The *M'Naghten* Rules relate to accused persons who by reason of a disease of the mind are deprived of the power of reasoning. They do not apply and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full. The picture painted by the evidence was wholly consistent with this being a woman who retained her ordinary powers of reason but who was momentarily absent-minded or confused and acted as she did by failing to concentrate properly on what she was doing and by failing adequately to use her mental powers.[24]

'Defect of reason', then, has been interpreted to mean that a person must have been 'deprived' of their 'powers' of reasoning; a person, however, must not have merely suffered from a momentary lapse of those 'powers'. Where the relevant capacities were present, and a person merely failed to utilise them, that person was 'sane' at the time of the alleged offence and could not, therefore, succeed with an insanity defence. This appears to equate insanity with a more substantial, and non-fleeting, lack of rational capacity.[25]

Whether psychopaths may have a defect of reason may depend, in part, on the conceptualisation of psychopathy under consideration. This can be illustrated by considering, first, an analysis of the implications of *Clarke* for psychopathy provided by Grubin.[26] Grubin considers the possibility that psychopaths may have a defect of reason but concludes that they would fail the test in *Clarke* because, at best, they may have a fleeting impairment, rather than a 'deprivation', of rationality. Any impairment of rationality, he argues, is most likely to be associated with impulsivity and impaired volitional capacity, and consequently psychopathy may not 'get its foot in the first door' required for success with the defence (i.e. the door of 'defect of reason from a disease of the mind').[27]

This, however, assumes a view of psychopathy along the lines adopted by the Scottish Law Commission, wherein the condition is associated with an impairment of volitional ca-

[23] *Clarke* (n 18) at 221.

[24] *Clarke* (n 18) at 221 (my emphasis).

[25] (n 2) 706.

[26] D. Grubin, 'Insanity, diminished responsibility and personality disorder in England and Wales', in A. Felthous and H. Saß (eds), *International handbook on psychopathic disorders and the law* (Wiley 2012) 243, 248.

[27] (n 26) 248.

pacity.[28] The Commission took the view that psychopaths were able to appreciate what they were doing, both morally and legally, but simply found it more difficult to act in accordance with the law due to issues with self-control.[29] This translated, ultimately, into a proposed statutory exclusion for psychopathy on grounds that it was a 'personality disorder...characterised solely or principally by abnormally aggressive or seriously irresponsible conduct'; this is now law in Scotland.[30]

If, on the other hand, psychopathy is conceptualised as a condition where there may be a severe impairment, or total loss, of an ability to comprehend moral reasons, then it is conceivable that the test in *Clarke* could be negotiated. In this case, there would be an enduring, rather than fleeting, loss of reasoning 'powers' (i.e. a 'deprivation' rather than a mere lapse), although this would be confined to the domain of moral reasoning.

Success on the test in *Clarke*, however, may depend on more than the conceptualisation of psychopathy. The test may require a more holistic deprivation of rational capacity. Other reasons, besides moral reasons, are relevant to criminal responsibility. This raises the question whether a person with only a partial deprivation of rational capacity, affecting a subset of reasons relevant to criminal responsibility, should be permitted to succeed with an insanity defence. An argument that a lack of moral competence alone ought potentially to justify an exemption (or capacity-based excuse) from criminal responsibility via an insanity defence is considered in Chapter 3. It will be seen that the persistence of an ability to understand, and respond to, nonmoral reasons in psychopaths poses serious problems to the case that psychopaths lacking moral competence ought potentially to succeed with an insanity defence.

1.3.2 'from disease of the mind'

In order to establish whether psychopathy may qualify as a 'disease of the mind', it is first necessary to consider how this criterion has been interpreted. As stipulated in the Rule 3, a defect of reason must be caused by (arise 'from') a 'disease of the mind'. Some clarification

[28] Scottish Law Commission, *Report on insanity and diminished responsibility* (Scot Law Comm No 195, 2004) available at <http://www.scotlawcom.gov.uk/publications/reports/2000-2009/>, para. 2.60 (accessed 27.6.14).

[29] (n 28) para. 2.60.

[30] s.51A(2) of the Criminal Procedure (Scotland) Act 1995, as amended by s.168 of the Criminal Justice and Licensing (Scotland) Act 2010.

is provided in the case of *Kemp*.[31] In this case, an elderly man had attacked his wife for apparently no reason, and was subsequently charged with the offence of causing grievous bodily harm. In his defence, he argued that he lacked any intention to harm his wife because he was suffering from a temporary lapse of consciousness. Furthermore, he argued, this lapse did not amount to a defect of reason for the purposes of the insanity defence because it was due to a *physical* cause, arteriosclerosis; the cause was not, in other words, a 'disease of the mind'.

This argument, which was supported by medical evidence, was rejected by the judge. The term 'disease of the mind', Devlin J remarked, referred to 'the mental faculties of reason, memory and understanding' as they were ordinarily understood;[32] furthermore, the term was not intended to distinguish between disorders with physical and mental aetiologies, but to limit the scope of the 'defect of reason' criterion.[33] However, a 'disease of the mind' must first be a medical condition. In a modern context, it has been interpreted to mean 'an impairment of mental functioning caused by a medical condition'.[34]

'Disease of the mind', therefore, could be regarded as a 'medico-legal' concept: the set of 'diseases of the mind' is a subset of the set of 'medical conditions'. The nature of this subset does not depend on whether a condition is 'curable or incurable, transitory or permanent',[35] although the possibility of recurrence may be relevant where this has been associated with violence. As regards the latter, in *Bratty*, a case in which the defendant claimed he had lost full awareness of his actions due to epilepsy, Lord Denning remarked than in addition to 'major mental diseases' like schizophrenia, 'any mental disorder which has manifested itself in violence and is prone to recur' could be a disease of the mind.[36]

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[31] *R v Kemp* [1957] 1 Q.B. 399.

[32] (n 31) 407. This was reiterated by Lord Diplock in *Sullivan*, who commented that 'mind' was considered to mean 'the ordinary sense of the mental faculties of reason, memory and understanding' ((n 12) at 172 *per* Lord Diplock).

[33] (n 31) 407.

[34] 'Crown Court Bench Book' (Judicial Studies Board, 2010) <http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/crown-court-bench-book-directing-the-jury> accessed 27.6.14, 327; Law Commission, *Insanity and automatism: Scoping paper* (18th July, 2012) available at <http://lawcommission.justice.gov.uk/areas/insanity.htm> (accessed 27.6.14) para. 2.14.

[35] (n 31) at 407 per Devlin J. As Lord Diplock commented, 'it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act' ((n 12) at 172).

[36] *Bratty v Attorney-General for Northern Ireland* [1963] A.C. 386 (HL) at 387. The Law Commission (of England and Wales) notes that this definition has been criticised as both over- and under-inclusive (Law Commission, *Insanity and automatism: Supplementary material to the scoping paper* (July, 2012) available at <http://lawcommission.justice.gov.uk/areas/insanity.htm> (accessed 27.6.14) para. 2.32). It is

Significant debate concerning the meaning of disease of the mind has occurred in cases where courts have attempted to distinguish between insane and sane (or non-insane) automatism. In the former, a disease of the mind is considered to be present due to the presence of an 'internal' as opposed to an 'external' cause; consequently, the M'Naghten Rules apply. This has led to judgments such as that in *Quick*[37] where a diabetic with hypoglycaemia caused by administration of insulin was deemed to have been subject to an *external* cause and thus eligible for a defence of sane automatism. In *Hennessy*,[38] on the other hand, a diabetic with hyperglycaemia caused in part by lack of insulin was deemed to have been subject to an *internal* cause and thus only eligible for a defence of insane automatism.[39] The practical significance of these decisions is that a successful defence of sane automatism will result in an acquittal, whereas in the case of a successful defence of insane automatism a defendant will be subject to the various disposal powers of the court arising from a verdict of not guilty by reason of insanity (NGRI) which may include compulsory hospital detention (see Chapter 6).

The approach in English law to 'disease of the mind', then, has led to the inclusion of a number of conditions not typically thought of as 'mental disorders' within this category, such as diabetes[40] and epilepsy.[41] These conditions do not appear in current widely accepted medical classifications of mental disorders, such as the psychiatry-specific DSM-IV

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over-inclusive to the extent that conditions such as brain tumours or diabetes, which might seem from a commonsense perspective not to amount to 'mental' diseases, are included; it is also under-inclusive to the extent that conditions may be associated with potentially criminal behaviour other than violence.

[37] *R v Quick* [1973] 3 W.L.R. 26 (CA).

[38] *R v Hennessy* [1989] 1 W.L.R. 287 (CA).

[39] The distinction has been especially problematic where the 'external' factor is argued to be *non-physical*. In *T*, a woman who had been emotionally traumatised by a recent rape, and had allegedly committed (*inter alia*) robbery while in a 'dissociative state', was ruled to have been subject to an *external* factor (*R v T* [1990] Crim. L.R. 256 (Crown Ct)). The judge distinguished the case from the Canadian case of *Rabey*, where a male university student had attacked a female student who had scathingly failed to reciprocate his advances (*Rabey v R* [1980] 2 S.C.R. 513). The argument that his actions had been due to 'sane' automatism caused by an 'external' factor was rejected: the 'ordinary stresses and disappointments of life which are the common lot of mankind' did not 'constitute an external cause' and so remained within the category 'disease of the mind' (at 514). As Ormerod comments, while it might seem reasonable to argue that PTSD ought be regarded as caused by an external factor such as rape, it is 'unclear which if any other traumatic events will suffice' ((n 2) 300). What if, rather than PTSD, I suffer from depression, and my depression is reasonably attributable to environmental or social causes? Could my depression then be considered due to an 'external' factor? The Law Commission is, perhaps unsurprisingly, concerned about this area of law (see (n 36) especially para. 3.3–3.10).

[40] *Hennessy* (n 38).

[41] *Sullivan* (n 12); *Bratty* (n 36).

or DSM-5 systems,[42] or the mental disorder sections of the more general ICD-10 system.[43] They would also fail to qualify as 'mental disorders' for the purposes of the Mental Health Act 1983 (MHA 1983). The current definition of 'mental disorder' in s.2(1) MHA 1983, following amendments by the Mental Health Act 2007 (MHA 2007), is that this is 'any disorder or disability of the mind'. The requirement that such a disorder or disability be *of* the mind indicates an intention (by Parliament) to distinguish between 'mental' and 'physical' disorders.

Turning now to the question whether psychopathy may amount to a 'disease of the mind', it is difficult to find reported cases in which clinical personality disorder, let alone psychopathy, is discussed as a candidate for disease of the mind. One case in which psychopathy is mentioned – or, at least, the clinical term 'psychopath' is used – is *Wilkinson*, a mid-20th century case.[44] Mr Wilkinson was convicted of murdering a child, a crime to which he confessed. At first instance, his eligibility for an insanity plea was discussed. Doctors for both defence and prosecution agreed that Mr Wilkinson was a 'psychopath', but also agreed that this was a *character defect* rather than a disease (although it was admitted that some experts considered psychopathy to amount to a disease). Due to this evidence, the issue of insanity was not put to the jury; indeed, the judge remarked 'The evidence is that this man is not suffering from a disease of the mind but is a psychopath'.[45] Mr Wilkinson's appeal against this decision was subsequently rejected by the Court of Appeal.

However, in *Gallagher* the House of Lords appeared to be receptive to the idea that psychopathy was a disease of the mind.[46] The Court of Criminal Appeal, in Northern Ireland, had quashed the respondent's conviction for murder, holding that the trial judge had misdirected the jury with regard to its application of the insanity defence. The Crown then appealed to the House of Lords, which reversed this decision and restored the conviction for murder. The House of Lords, notably, did not challenge the decision made at trial that 'aggressive' psychopathy amounted to a disease of the mind.[47] Discussion focused on other

[42] *Diagnostic and statistical manual of mental disorders (DSM-IV-TR)* (4th edn, text revision, American Psychiatric Press Inc. 2000); *Diagnostic and statistical manual of mental disorders : DSM-5.* (American Psychiatric Association 2013).

[43] *The ICD-10 classification of mental and behavioural disorders: Clinical descriptions and diagnostic guidelines* (World Health Organization 1992).

[44] *R v Wilkinson* [1955] Crim. L.R. 575 (CA).

[45] Quoted in Grubin (n 26) 248.

[46] *Attorney General of Northern Ireland v Gallagher* [1963] A.C. 349 (HL).

[47] (n 46) at 351.

components of the insanity defence, in particular the limbs of the defence, which were viewed as more problematic.

More recent evidence of acceptance of the broader category of 'personality disorders' as potential diseases of the mind is seen in *R v Roach*.[48] Mr Roach suffered from a 'mixed' personality disorder and, at first instance, the jury was asked to consider, among other things, whether he was not guilty by reason of insanity.[49] Mr Roach had attacked a man with a knife, but claimed he could not remember the event; the type of insanity in question, therefore, was that of insane automatism.[50] In his appeal against his conviction for 'wounding with intent to do grievous bodily harm', the Court of Appeal considered the extent to which his mixed personality disorder could be considered a disease of the mind. This was a 'difficult borderline case', it concluded, because the defendant's state of mind may have arisen from 'external' factors such as prescribed medication rather than from mixed personality disorder per se.[51] This reasoning, however, suggests that a personality disorder may in principle qualify as a disease of the mind, provided the defendant's impairment of mental functioning is thought to be attributable to that condition.

It seems, therefore, that personality disorders, and more specifically psychopathy,[52] may amount to a disease of the mind. The main difficulties for a psychopath who attempts to plead insanity may arise, as noted in *Gallagher*, from the other components of the test.

It is important to note that the definition of 'mental disorder' in the MHA 1983 *does* include personality disorders. Prior to amendments by the MHA 2007, the MHA 1983 included the legal category of 'psychopathic disorder'.[53] This had some basis in historical conceptions of clinical psychopathy,[54] although from a current clinical perspective those

[48][2001] EWCA Crim 2698, 2001 WL 1612713.

[49](n 48) [25].

[50](n 48) [2].

[51](n 48) *per* Potter LJ [27–29].

[52]For discussion of psychopathy's status as an 'extreme' form of personality disorder, see Section 2.5.3 below.

[53]Specifically, it denoted 'a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned' (MHA s.1(2)).

[54]Forrester *et al.* argue that while there is a direct relationship between historical medical discourse on 'psychopathy' and the evolution of the legal category 'psychopathic disorder', the divergence of this category from current clinical perspectives is 'so sharp...that they might as well be considered separate entities' (A. Forrester, S. Ozdural, A. Muthukumaraswamy *et al.*, 'The evolution of mental disorder as a legal category in England and Wales', (2008) 19(4) Journal of Forensic Psychiatry & Psychology 543, 550).

falling into this category could have no medically-recognised disorder.[55] Persons with clinical personality disorders have previously fallen into this legal category.[56] Following the abolition of this category, these persons (including PCL-R psychopaths) now fall into the general category of 'mental disorder' in s.2(1).[57] Whether a condition amounts to a mental disorder for the purposes of the MHA 1983, however, is a separate issue to whether it may amount to a 'disease of the mind' in criminal law for the purposes of the insanity defence.

The Law Commission of England and Wales, which is currently reviewing the insanity defence with a view to possible reform, has suggested replacing the 'disease of the mind' criterion with a 'recognised medical condition' criterion.[58] The Commission suggests that whether a condition is recognised medically[59] could be determined by reference to accepted classification systems, such as the DSM or ICD-10 systems.[60] This, however, would not guarantee that a condition was a recognised medical condition for the purposes of a reformed defence: this was ultimately a legal matter.[61] This, to an extent at least, is a formalisation of current common law.[62]

As regards psychopathy, the Commission has voiced a concern that the evidence for this condition, which it does not distinguish from other related conditions such as antisocial personality disorder (ASPD),[63] is simply evidence that would 'ordinarily be regarded as serious criminal behaviour'.[64] For this reason, the Commission proposes excluding psychopathy from the category of legally-recognised medical conditions qualifying for a reformed insanity defence.[65]

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[55] S.P. Sarkar, 'A British psychiatrist objects to the dangerous and severe personality disorder proposals', (2002) 30 Journal of the American Academy of Psychiatry and the Law 6.

[56] e.g. *R v Collins and Ashworth Hospital Authority, ex parte Brady* [2000] Lloyd's Rep. Med. 355.

[57] This is evident, for example, from cases where the transfer of persons with high PCL-R scores via MHA mechanisms is discussed (e.g. *R (S) v Secretary of State for the Home Department* [2008] EWHC 2912 (Admin), 2008 WL 4898807).

[58] 'Insanity and Automatism Discussion Paper' (Law Commission, 23.7.13) <http://lawcommission.justice.gov.uk/publications/insanity.htm> accessed 27.6.14.

[59] I use this term very broadly, to encompass health care professionals in general.

[60] (n 58) para. 4.67.

[61] (n 58) para. 4.68.

[62] I will not examine the Commission's wider proposals, concerning a defence of 'not criminally responsible by reason of recognised medical condition', here. However, in these proposals, whether a condition is a 'disorder' or 'illness' in medical terms is unimportant; what matters is the effect that the condition may have on relevant capacities (i.e. capacity 'to conform to the law' (n 58) para. 3.1)).

[63] (n 58) para. 4.96.

[64] (n 58) para. 4.107.

[65] (n 58) para. 4.93.

This approach resembles, in some respects, the approach taken in the Model Penal Code (MPC), drafted by the American Law Institute. Some States in the United States, following the MCP, exclude from an insanity defence any 'abnormality manifested only by repeated criminal conduct or otherwise anti-social conduct'.[66] It is frequently argued that the intention of this provision is to exclude psychopathy.[67] Insofar as this is the case, this exclusion operates by denying that psychopathy qualifies as a 'mental disease or defect' for the purposes of the defence.

The Commission might be criticised, however, both for failing to distinguish between psychopathy and related conditions like ASPD,[68] and for its view that the evidence for psychopathy is only criminal behaviour. I will discuss some of the relevant debates in Chapter 2, where I will argue that a distinction should be made between psychopathy and ASPD. Psychopathy could also be distinguished from the other condition mentioned by the Commission, dissocial personality disorder (DPD), although the contrast is less marked.[69] As regards criminal behaviour, I argue that while psychopathy may currently be diagnosed this way commonly in practice, it *need not* be; I also argue that neuroscientific research may provide new ways to diagnose, or assist with the diagnosis of, psychopathy in the future that do not rely on criminal behaviours.

Taken together, the components 'defect of reason from a disease of the mind' have been referred to as the 'psychiatric element' of the defence.[70] Although, as has been seen, psychopathy may not qualify on this element due to the 'defect of reason' requirement, this aspect of the test is potentially very broad. Provided the test in *Clarke* is negotiated, many medical conditions may be included. The defence, however, does not stop there: an included condition must have caused a person to lack 'knowledge' as stated in one of two limbs of the test. That is, a 'defect of reason from a disease of the mind' must have led to a

[66] Section 4.01(2).

[67] T. Nadelhoffer and W. Sinnott-Armstrong, 'Is psychopathy a mental disease?', in N.A. Vincent (ed), *Neuroscience and legal responsibility* (2013) 229, 231.

[68] It argues that these 'may be different labels for the same kind of disorders' ((n 58) para. 4.96).

[69] I shall say rather less about this condition. As will be noted in Section 2.5.2, the DPD criteria are closer to the PCL-R criteria than the ASPD criteria, due to the inclusion of more affective and personality features, although they are less detailed. DPD is relevant to legal practice in England and Wales (see, for example, *R (TF) v Secretary of State for Justice* [2008] EWCA Civ 1457, 2008 WL 5240590, involving transfer of a patient with dissocial disorder from prison to hospital). The PCL-R, however, is more widely used in neuroscientific research into psychopathy (N.E. Anderson and K.A. Kiehl, 'The psychopath magnetized: Insights from brain imaging', (2012) 16(1) Trends in Cognitive Science 52, 53), and thus more relevant to the central themes in this thesis.

[70] Tadros (n 29) 323.

lack of knowledge of either (i) the nature and quality of an act, or (ii) the wrongness of an act. The effect of these limbs, which I shall now consider in turn, is to drastically narrow the scope of the defence by limiting its applicability to cases where there has been a loss of 'knowledge' in the relevant respects. It will be seen that, even if psychopaths lacking moral competence were to negotiate the 'psychiatric' element of the test, they would probably be excluded by both limbs as they are currently interpreted.

1.3.3 Limb 1: lack of knowledge of the 'nature and quality' of the act

The key English criminal case concerning the first limb is *Codère*.[71] I will first outline the interpretation given to the limb in this case, and then consider its implications for psychopathy. In *Codère*, a Canadian lieutenant stationed in England during the First World War was convicted of murdering a fellow Canadian soldier. In his application for leave to appeal against his conviction, and death sentence, it was argued on his behalf that 'nature' referred to the *physical* aspect of the act, and 'quality' to the *moral* aspect of the act,[72] and that a judge should 'tell the jury that "quality" means, "Did the accused person know that the act was immoral?" '.[73] There was some question as to whether Lt. *Codère* fully appreciated the moral 'wrongness' of his act, given his strange behaviour, apparent lack of grasp on reality, and the particularly violent nature of the homicide.

This argument, however, was rejected by the Court of Appeal: 'nature and quality' only referred to the 'physical character of the act' and was not intended to 'distinguish between the physical and moral aspects of the act'.[74] His application was dismissed. This position was reiterated more recently by Lord Diplock in *Sullivan*: lack of knowledge of the 'nature and quality' of the act was considered merely to mean 'he did not know what he was doing'.[75] Hypothetical examples of lack of knowledge in this sense provided in textbooks include 'A kills B under an insane delusion that he is breaking a jar', and 'A' cuts 'B's throat under the insane delusion that he is 'cutting a loaf of bread'.[76] In such examples, defendants believe they are undertaking some entirely different, noncriminal, act.

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[71] *R v Codère* (1917) 12 Cr App Rep 21 (CA).
[72] (n 71) at 23.
[73] (n 71) at 26.
[74] *Codère* (n 71) at 27.
[75] (n 12) *per* Lord Diplock at 173.
[76] Ormerod (n 2) 301.

The interpretation of the first limb in *Codère* means that a defendant can know the nature and quality of an act, and be prevented from succeeding on this limb, even where he was unable to comprehend its consequences. In *Dickie*, for example, the defendant had set fire to rubbish in a plastic bin inside his basement flat.[77] A neighbour, who smelled something burning and saw smoke emerging from Mr Dickie's window, called the fire brigade who arrived to find the defendant sitting watching a blank television set and apparently unperturbed.[78] The bin was melting, and according to firemen would shortly have set fire to the carpet. Mr Dickie, however, appeared oblivious to this danger and, insisting that he was fully in 'control' of his actions, 'lightheartedly...invited the firemen to sit down with him and enjoy a cup of tea'.[79] Later, at his trial for arson, he was found NGRI due to the effects of a hypomanic episode. Notably, however, this was via the *second* limb. As regards the first limb, he was considered to have known the nature and quality of his actions, despite apparently being oblivious to the danger created by them.[80]

Dickie helps to clarify how psychopaths would fair with respect to this limb as it has been interpreted, provided they lacked moral competence and were not excluded by the 'psychiatric' component of the test. Such persons could not succeed on this limb, because an inability to evaluate the consequences of an action (e.g. an inability to recognise that it might cause, or create a risk of, harm to others) is considered irrelevant. A person who could not grasp these qualitative consequences of an action, while being fully aware of what they were doing in a more restrictive, behavioural, sense, would be taken to have known what they were doing.

In theory, on a broader, more holistic interpretation of 'nature and quality', taking into account the consequences of an action, a person lacking an ability to comprehend moral reasons might succeed on this limb. One might also include, within the meaning of knowledge of 'nature and quality', an ability to properly evaluate one's actions, including the reasons one might have for undertaking an act. In the Canadian case of *R v Swain*, for example, the defendant scratched the letter 'X' onto his wife's chest with a knife, recognising that this would cause bleeding and pain but acting on the belief that doing so would protect her from

[77] *R v Dickie* [1984] 3 All ER 173 (CA), at 175.

[78] (n 77) at 175.

[79] (n 77) at 175.

[80] See also McAuley (n 10) 27. The verdict of NGRI was later quashed on appeal because the judge, who had used his discretion to put the issue of insanity to the jury, had now allowed the defence or prosecution a sufficient opportunity to obtain evidence relevant to the issue of insanity.

'evil spirits'.[81] It was held that he had been unable to appreciate the nature and quality of his actions. The version of the M'Naghten Rules codified in the Canadian Criminal Code differs in some respects from the test in Rule 3 utilised by English courts (e.g. 'appreciate' is substituted for 'knowledge' of nature and quality);[82] however, *Swain* illustrates further the range of possible interpretations of 'nature and quality'.[83]

I consider possible psychopath-accommodating interpretations of 'nature and quality' further in Section 3.5, after I have considered the theoretical basis of the prima facie case. At present, however, following *Codère*, psychopaths lacking moral competence are likely to have known the 'nature and quality' of their actions, and it is therefore necessary to consider how they might fare on the second limb.

1.3.4 Limb 2: lack of knowledge of the wrongfulness of the act

The key English legal case concerning the second limb is the House of Lords' decision in *Windle*.[84] A man had killed his 'nagging and tiresome wife' by poisoning her with aspirin.[85] His wife appeared to have been suffering from a mental disorder, and had 'constantly expressed the desire to commit suicide'.[86] As a result of prolonged contact with his wife, Mr Windle, according to medical evidence, had developed a psychiatric disorder called *folie à deux*. *Folie à deux*, included in DSM IV as 'shared psychotic disorder',[87] is thought to denote a *communicable* mental disorder in which delusional beliefs from a 'primary' sufferer may transmit to one or more 'secondary' persons who accept these beliefs as true.[88]

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[81] (1986) 53 O.R. (2d) 609 (Ont. C.A.); McAuley (n 10) 29.

[82] Section 16(1) of the Canadian Criminal Code states: 'No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong'.

[83] An appeal of the decision in *Swain* was later allowed by the Canadian Supreme Court ([1991] 1 S.C.R. 933). The appeal concerned procedural issues (the right of the prosecution to raise insanity as an issue), rather than substantive issues concerning the interpretation of 'nature and quality'.

[84] *R v Windle* [1952] 2 Q.B. 826 (CA).

[85] (n 84) *per* Lord Goddard CJ at 832.

[86] (n 84) *per* Lord Goddard CJ at 832.

[87] It has, however, been argued that *folie à deux* is a broader concept: M. Shimizu, Y. Kubota, M. Toichi *et al.*, 'Folie à deux and shared psychotic disorder', (2007) 9 Current Psychiatry Reports 200. In the DSM-V, shared psychotic disorder has been merged with 'delusional disorder', and no longer forms a separate category (American Psychiatric Association, 'Highlights of Changes from DSM-IV-TR to DSM-5' (2013), available at <http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf>, accessed 27.6.14).

[88] See, for example: M. Gelder, N. Andreasen, J. Lopez-Ibor *et al.*, *New Oxford textbook of psychiatry* (OUP 2009) Section 4.4.

Mr Windle's appeal against a conviction for murder turned on the meaning of 'wrong' in the second limb. Evidence from doctors called by both defence and prosecution had been heard at first instance, and both doctors had 'expressed the view that the appellant knew, when administering...[the]...poison...that he was doing an act which the law forbade'.[89] The judge, however, interpreted 'wrong' as '*legally* wrong',[90] and withdrew the issue of insanity from the jury. Mr Windle was convicted, and then challenged this withdrawal in his appeal.[91]

On appeal, Lord Goddard confirmed that 'wrong' in the second limb should be interpreted as 'legally wrong'.[92] He also emphasised, with respect to the insanity defence as a whole, that

> the real test is responsibility. A man may be suffering from a defect of reason, but if he knows that what he is doing is 'wrong', and by 'wrong' is meant contrary to law, he is responsible.[93]

This interpretation of 'wrong' was recently reaffirmed in *Johnson*,[94] although Latham LJ favoured *obiter* a more nuanced interpretation of 'wrong'. This more nuanced view, which is based partly on an interpretation of the second limb provided by Lord Reading in *Codère*,[95] posits that lack of knowledge of illegality will not suffice for the purposes of the limb if the defendant knew that what he had done was morally wrong. In other words, knowledge of moral wrongness acts as an additional barrier to success with the defence, should there be lack of knowledge of illegality (i.e. the test concerns whether a defendant possessed knowledge of legal *or* moral wrongness). In *Johnson*, Lord Latham specifically

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[89](n 84) at 832.

[90](n 84) at 829 (my emphasis).

[91]Lord Goddard CJ commented that 'there was some exceedingly vague evidence that the appellant was suffering from a defect of reason' ((n 84) at 832), so it is possible that even if the issue of insanity *had* gone to the jury the defence would have foundered on (at least) this criterion.

[92](n 84) at 829.

[93](n 84) 833–4.

[94]*R v Johnson* [2007] EWCA Crim 1978, [2008] Crim LR 132.

[95]After rejecting the idea of a subjective standard of morality for the first limb, Lord Reading seemingly turned his attention to the second limb and remarked: 'It is conceded now that the standard to be applied is whether according to the *ordinary standard adopted by reasonable men* the act was *right or wrong*' ((n 71) at 27 (my emphases)). From the context, it seems reasonably clear (although perhaps not beyond dispute) that Lord Reading was referring to *moral* 'right or wrong'. Lord Reading's discussion, however, seems to drift from the first to the second limb, and the view of the High Court of Australia in *Stapleton* that the judgment was 'not free from ambiguity' seems quite apt (*Stapleton v R* [1952] HCA 56 [26]).

referred to passages in Smith and Hogan,[96] Blackstone[97] and Archbold[98] that support this more nuanced account, although he pointed out that this was not an issue that could properly be discussed at the level of the Court of Appeal.[99]

The relevant passage in Archbold cautions against regarding *Windle* as authority for the proposition that 'knowledge of illegality is the sole criterion', and advocates the view that 'the defence should fail if the defendant knew either that his act was unlawful or [if he proved he did not know this] that it was morally wrong according to the standards of ordinary people'.[100] The Law Commission of England and Wales (which, as noted in Section 1.3.2, is currently reviewing the law in this area) also supports this more nuanced view.[101] In any event, on any defensible interpretation of the law with respect to the second limb, psychopaths lacking moral competence are likely to be excluded as they are likely to have known (barring other responsibility-undermining factors) that their actions were legally wrong.

It is worth noting that the interpretation given to the second limb in *Windle* has very nonspecific consequences. In the case of *Johnson*, for example, the defendant had been diagnosed with paranoid schizophrenia and suffered from delusions that people were surrounded by 'firewalls'.[102] These delusions caused him distress, and may have played an important role in his decision to attack and injure a man with a knife. His appeal against a conviction for wounding with intent to cause grievous bodily harm turned on the interpretation of 'wrong' in the second limb of the insanity defence: it was argued on his behalf that he did not believe that his actions were morally wrong, despite realising that they were legally

[96] Ormerod (n 2) 302.

[97] D. Ormerod, *Blackstone's criminal practice 2012* (OUP 2011) 47.

[98] J. Richardson, *Archbold: Criminal pleading, evidence and practice 2013* (61st edn, Sweet & Maxwell 2012) 17-83b.

[99] (n 94) [17–21].

[100] (n 98) 17–83b.

[101] 'The current law is that if it can be shown that the accused knew either that the act was morally wrong or that the act was against the law, then it cannot be said that he did not know he was doing what was wrong' ((n 36) para 2.38). It should be noted that how the law operates in practice in England and Wales may differ from this idealistic interpretation ((n 36) para 4.75–4.77). Empirical research conducted by Mackay, for example, suggests that the second limb has been interpreted more liberally in practice, with 'wrongness' potentially including the delusional belief that an action was *justified* (R.D. Mackay, B.J. Mitchell and L. Howe, 'Yet more facts about the insanity defence', (2006) Criminal Law Review 399); R.D. Mackay, 'Righting the wrong? - some observations on the second limb of the M'Naghten rules', (2009) 80 Criminal Law Review). The Court of Appeal stressed in *Johnson*, however, that this interpretation is not in accordance with current law.

[102] (n 94) [8].

wrong.[103] *Windle* was applied, and his appeal accordingly failed. *Johnson* illustrates how the approach to 'wrongness' in English law has implications well beyond psychopathy.[104]

It is helpful to end this Section with an example from a sentencing case. While the case does not concern insanity, it provides some indication of the attitude of the criminal courts towards psychopathy, insofar as this is conceptualised as a volitional disorder. In *R v Oakes*, one of the appellants, convicted murderer Kieran Stapleton, was reported to be suffering from antisocial personality disorder including 'psychopathic traits, likely to have a neuro-biological underpinning', which affected his capacity for empathy.[105] Additionally, Stapleton was reportedly prone to acting 'impulsively and with reduced self-control'.[106] At first instance, the judge had described Stapleton as a 'cold-blooded murderer' who knew precisely what he was doing.[107] The Court of Appeal agreed with this evaluation, and held that there was no reason to reduce Stapleton's sentence.[108] The issue of Stapleton's ability to comprehend the legal wrongness of his actions was not specifically discussed, but it seems to have been presumed. Expressing the view of the court, Lord Judge CJ commented:

> It takes very little imagination to reflect on the impact that this offence would have had in the locality; a young man, utterly blameless, simply gunned down as he walked down the street, and perhaps the most chilling feature of all was the sheer randomness with which [the deceased] was chosen to be the victim. [Stapleton] had decided that he was going to kill someone, and he organised a loaded firearm, carried it, and executed his plan. His attitude to the offence is chilling. He has revelled in it. That adds significantly to the seriousness of this crime.

The view that Stapleton had 'revelled' in the offence suggests that, in the courts' opinion, the appellant knew perfectly well that his actions were unlawful.

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[103] (n 94) [7], [12].

[104] *Johnson* is complicated by the fact that the appellant argued that his actions had been morally *justified*. It was not the case that he lacked an ability to comprehend moral considerations; rather, he argued that he had been led to a distorted view as to the morality of his actions by mental illness.

[105] *R v Oakes* [2012] EWCA Crim 2435, [2013] Q.B. 979 [52]. It is worth noting, however, that Stapleton's psychopathic traits were considered to fall 'short of psychopathy' [55].

[106] (n 105) [54].

[107] (n 105) [57].

[108] (n 105) [58]–[60].

But what if it transpired that Mr Stapleton was completely unable to comprehend the harm that his actions had caused? Should he be entitled to access to an insanity defence? As the above discussion of the insanity defence has shown, this option is not available in English law as it stands. Before considering the prima facie case, which argues that a lack of moral competence should justify access to an insanity defence for at least some alleged criminal offences, it is helpful to first clarify what is meant by 'psychopathy'.

Chapter 2

What is psychopathy?

2.1 Introduction

The goal of this Chapter is to provide some clarification of what is currently meant by 'psychopathy'. I begin, in Section 2.2, with a historical survey of the evolution of the concept from its origins in Pinel's work to Cleckley's influential modern formulation. It is seen that psychopathy appears to have originated as a very broad category, which has become gradually narrower over time. It is also evident that the nature of psychopathy, including its aetiological basis, has been much-contested.

In Section 2.3, I then focus on the psychopathy checklist revised (PCL-R), the most widely used psychometric test for psychopathy in forensic psychiatric settings. After outlining the main features of the test, I briefly consider a debate concerning the use of criminal behaviour as a criterion in the PCL-R. As noted in Section 1.3.2, the Law Commission of England and Wales has expressed concerns that evidence of psychopathy in practice may be little more than criminal behaviour. I suggest that while this may currently be true in many cases, research into the neurobiological correlates of psychopathy may provide other ways to diagnose, or support the diagnosis of, psychopathy that do not rely on criminal behaviours in the future.

Terms like 'callous' and 'manipulative', which are used to describe clinical psychopathy, are also value-laden and potentially morally evaluative. This raises the concern that it may not be possible to diagnose a person as 'psychopathic' without negatively or morally evaluating them. In Section 2.4, I consider this possibility further by examining the nature

of these terms, referred to by philosophers as 'thick' value terms. I conclude that this may indeed be the case: psychopathy may be an inextricably value-laden, and morally evaluative, concept. I also consider the implications of debates in this area for the role that scientific data may play in the diagnosis of psychopathy. Given the reliance of the diagnosis on such value-laden language, there may be limits on the extent to which scientific data may assist with a diagnosis of psychopathy.

Finally, in Section 2.5, I consider the possible status of psychopathy as an 'illness' or 'disease'. I focus my discussion on Wakefield's 'harmful dysfunction' account, given that this account has influenced both the DSM-IV and DSM-5 general definitions of mental disorder; the account's 'hybrid' nature also permits discussion of foundational issues surrounding the two divergent approaches to mental disorder it attempts to incorporate. I suggest that issues concerning the coherence of psychopathy as a condition (e.g. problems concerning its relationship with criminal behaviour) may currently prevent its qualification as an illness or disease according to this account and, by extension, according to the DSM-IV and DSM-5 definitions.

In theory, psychopathy's status as a mental illness or disorder could represent a necessary condition for access to an insanity defence. I note, however, that psychopathy's status as an illness or disease for medical purposes is in principle neither a necessary nor a sufficient condition for it to qualify as a 'disease' or 'disorder' for legal purposes.

Some of the debates considered in Sections 2.3 to 2.5 are very substantial and cannot be fully explored here for space reasons. The aim is primarily to orientate the thesis with respect to these debates, and thereby shed light on the nature of psychopathy, rather than to adopt firm positions.

2.2 A brief historical perspective on psychopathy: from Pinel to Cleckley

Psychopathy, which has been referred to as the 'first personality disorder',[1] has a complex history. The modern concept, relevant to tests such as the Psychopathy Checklist-Revised

[1] T. Millon, E. Simonsen and M. Birket-Smith, 'Historical conceptions of psychopathy in the United States and Europe', in T. Millon, E. Simonsen, M. Birket-Smith and R.D. Davis (eds), *Psychopathy: Antisocial, criminal, and violent behaviour* (Guilford Press 2003) 3, 28.

(PCL-R), appears to have originated in the late eighteenth and early nineteenth centuries.[2] Within this historical period, the French psychiatrist Philippe Pinel is often considered the first to have provided a clinical description of psychopathy. He used the expression 'mania without delirium' to refer to individuals who 'at no period gave evidence of any lesion of the understanding, but who were under the dominion of instinctive and abstract fury'.[3] The novelty of Pinel's concept revolved around the idea that 'insanity' (in a medical sense) could occur in the form of a disturbance of affect (emotions) without an impairment of rationality.[4]

Other influences on the modern concept of psychopathy are thought to have arisen from more moralistic psychiatric approaches. Benjamin Rush, for example, an American contemporary of Pinel, described a condition which he termed 'moral derangement'.[5] In a somewhat similar vein, J.C. Prichard, an English psychiatrist, used the term 'moral insanity' to refer to

> a morbid perversion of the natural feelings, affections, inclinations, temper, habits, moral dispositions, and natural impulses, without any remarkable disorder or defect of the intellect or knowing and reasoning faculties, and particularly without any insane illusion or hallucination.[6]

Prichard's notion of moral insanity was extremely broad.[7] Hugues Hervé remarks that at that time it became a 'wastebasket category for emotionally disordered but intellectually intact individuals who engaged in impulsive and antisocial behaviors'.[8]

In the late nineteenth century German psychiatrists, who considered the approach of English psychiatrists such as Pritchard to be excessively value-laden, attempted to develop

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[2]H. Hervé, 'Psychopathy across the ages: A history of the Hare psychopath', in H. Hervé and J.C. Yuille (eds), *The psychopath: Theory, research, and practice* (Routledge 2006) 31, 32.

[3](n 1) 4; P. Pinel, *A treatise on insanity* (Cadell & Davies 1806), 150.

[4]Millon *et al.* (n 1) 4.

[5]H. Hervé (n 2) 32–33. Rush stressed what he believed was the antisocial nature of this posited condition: the 'will', for example, became 'the involuntary vehicle of vicious actions through the instrumentality of the passions' (B. Rush, *Medical inquiries and observations upon the diseases of the mind* (Philadelphia: Kimber & Richardson 1812) 264, cited in Millon *et al.* (n 1) 4).

[6]J.C. Prichard, *A treatise on insanity, and other disorders affecting the mind* (Sherwood, Gilbert and Piper, London 1835) 6.

[7]Millon *et al.* comments that 'almost all mental conditions, other than mental retardation and schizophrenia' would today be classified as 'moral insanity' ((n 1) 6).

[8]H. Hervé (n 2) 34. Augstein argues that moral insanity was 'expressive of Prichard's religious views as well as his ideas about the human constitution' (H.F. Augstein, *James Cowles Prichard's anthropology: Remaking the science of man in early nineteenth-century Britain* (Editions Rodopi B.V. 1999) 26).

a more 'observational' approach.[9] J.L. Koch proposed that the term 'moral insanity' be replaced with the term 'psychopathic inferiority', a term which at that time was considered to be less value-laden.[10] The term 'psychopathic', introduced by Koch, indicated a belief that the various 'mental irregularities' thought to be captured by the term 'psychopathic inferiority' were caused by brain abnormalities.[11] This amounted to a belief that these conditions had a physical, or constitutional, underlying cause.[12] Like moral insanity, psychopathic inferiority was a very broad category. Christopher Patrick argues that it would cover currently recognised forms of intellectual disability,[13] antisocial personality disorder, psychopathy, and other personality disorders.[14]

Emil Kraepelin, a contemporary of Koch, later utilised the related term 'psychopathic personalities' to refer to a slightly narrower spectrum of conditions thought to be both constitutional and chronic. These included 'impulse control problems, sexual perversions, obsessional syndromes, and other "degenerative" personalities'.[15] The 'degenerative' group, for Kraepelin, included four subgroups: 'morbid liars and swindlers' who, Patrick comments, were 'charming, deceitful, fraudulent, and lacking in loyalty to others'; 'criminals by impulse', who were motivated by 'impulsive urges to commit crimes such as theft, fire setting, and sexual assault'; 'professional criminals', who were 'deliberately calculating and self-serving'; and 'morbid vagabonds', who were 'inadequate, aimless, and irresponsible'.[16] Kraepelin later removed the 'professional criminals' subgroup and added four others: 'excitable', 'eccentric', 'antisocial' and 'quarrelsome'.[17] The last two groups, characterised in turn by 'callousness-destructiveness' and 'alienation-hostility', have been argued to relate most closely to current clinical concept of antisocial personality.[18]

When these ideas were introduced to the American psychiatric profession by Meyer,

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[9] Millon *et al.* (n 1) 7–8.

[10] Millon *et al.* (n 1) 8.

[11] Millon *et al.* (n 1) 8. These terms, quoted by Millon *et al.*, are translated from Koch's original work (J.L. Koch, *Die psychopathischen minderwertigkeiten* (Maier 1891)).

[12] C.J. Patrick, 'Antisocial personality disorder and psychopathy', in D.W.T. O'Donohue, K.A. Fowler and S.O. Lilienfeld (eds), *Personality disorders: Toward the DSM-V* (Sage Publications 2007) 109, 111.

[13] Now the preferred term for mental retardation (American Psychiatric Association, 'Intellectual Disability fact sheet, DSM-V' (2013), available at <http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf> accessed 27.6.14).

[14] (n 12) 111.

[15] (n 12) 111.

[16] (n 12) 111.

[17] (n 12) 111.

[18] (n 12) 111.

some terminological changes occurred. Meyer's use of Koch's term 'psychopathic inferiority', to refer to chronic disorders of character, was replaced by Kraepelin's less value-laden term (by today's standards) 'psychopathic personality'.[19]

The proposed constitutional basis of psychopathic personality was, around this time, challenged by Karl Birnbaum who instead used the term 'sociopathic personality' to emphasise the supposed role of environmental factors in the aetiology of psychopathic personality. Millon comments that Birnbaum's revisionist views gradually gained a foothold in the United States, as an alternative psychiatric conceptualisation of psychopathy, in the period between the First and Second World Wars.[20]

For the most part, however, the standard international view of psychopathy during the interwar period corresponded to that stated in the Mental Deficiency Act 1913 in English law, which was influenced by Prichard's conceptualisation.[21] Section 1(d) of the Act defined a class of 'Moral imbeciles; that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect'.[22]

This conceptualisation gained support from Kurt Schneider's influential work, which emphasised the view that many 'psychopathic' criminals were delinquents from a early age and were mostly unreformable.[23] Schneider stressed the impulsive and aggressive features of psychopathy, while arguing that the 'social moral code' was both known and understood by these persons; they were simply 'indifferent' to this code due to a diminished capacity to experience emotions.[24]

During the interwar years a number of theorists sought to identify psychopathy subtypes. Benjamin Karpman, for example, distinguished between 'idiopathic' and 'symptomatic' subtypes.[25] The former were considered to represent 'true' psychopaths, with a constitutional aetiology; the latter, despite outwardly similar features, were posited to develop via

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[19](n 12) 111.

[20](n 1) 11–12.

[21](n 1) 12.

[22]For discussion of this Act, see for example P. Dale, 'Implementing the 1913 Mental Deficiency Act', (2003) 16(3) Social history of medicine 403.

[23](n 1) 12.

[24]Schneider's view of psychopathy, therefore, was somewhat similar to the contemporary view espoused by the Scottish Law Commission (K. Schneider, *Psychopathic personalities* (Cassel 1958) 126, quoted in Millon (n 1) 12).

[25](n 1) 12.

Conceptual Category	Criterion Number and Label
Positive adjustment	1. Superficial charm and good "intelligence"
	2. Absence of delusions and other signs of irrational thinking
	3. Absence of "nervousness" or psychoneurotic manifestations
	14. Suicide rarely carried out
Chronic behavioral deviance	7. Inadequately motivated antisocial behavior
	8. Poor judgment and failure to learn by experience
	4. Unreliability
	13. Fantastic and uninviting behavior with drink and sometimes without
	15. Sex life impersonal, trivial, and poorly integrated
	16. Failure to follow any life plan
Emotional-interpersonal deficits	5. Untruthfulness and insincerity
	8. Poor judgment and failure to learn by experience
	6. Lack of remorse or shame
	10. General poverty in major affective reactions
	9. Pathologic egocentricity and incapacity for love
	11. Specific loss of insight
	12. Unresponsiveness in general interpersonal relations

Table 2.1: Cleckley's 16 diagnostic criteria for psychopathy

a social aetiology to merely mimic idiopathic psychopathy.[26] Karpman's subtypes have influenced contemporary theories of primary and secondary psychopathy (see Section 5.2.3).

Partly due to the efforts of theorists such as Karpman, who wished to introduce subtypes, 'psychopathy' remained a broad category at this time. Hervey Cleckley, an American psychiatrist, attempted to remedy what was viewed as overinclusiveness by developing a narrower conceptualisation.[27] I will focus for the remainder of this Section on Cleckley's work, due to its significant influence on the PCL-R concept of psychopathy which will be considered further in Section 2.3.

Cleckley's *Mask of Sanity*, first published in 1941, included vignettes of patients from various walks of life.[28] From these, he derived 16 criteria aimed to facilitate the diagnosis of psychopaths (see Table 2.1[29]). A central idea of Cleckley's book was that psychopaths presented with a facade of 'robust mental health'.[30] Thus, according to Cleckley, it was only 'through ongoing observation across a range of situations that the psychopath's char-

[26](n 1) 12.
[27]Patrick (n 12) 112.
[28]H. Cleckley, *The mask of sanity* (Mosby 1941).
[29]Taken from Patrick (n 12) 113, which is based on the 5th edition of *The mask of sanity* (Mosby 1976).
[30]Patrick (n 12) 113.

acteristic deviancy' became apparent.[31] Cleckley divided his criteria into three conceptual categories which he called 'positive adjustment', 'chronic behavioural deviance' and 'emotional-interpersonal deficits'.[32]

For Cleckley, the 'positive adjustment' criteria corresponded to the 'mask' aspect of psychopathy. These were the features that appeared at first glance, presenting an initial appearance of normality. On more careful observation, however, emotional and interpersonal abnormalities became apparent. These reflected, in particular, the 'emotional underresponsiveness' and 'absence of genuine social relationships' that Cleckley believed were central features of psychopathy.[33] In addition to this, behaviours characteristic of 'chronic behaviour deviance' became evident.

This three-concept model of psychopathy ('mask' plus 'behaviour' plus 'emotional and personality features') has been very influential. An important reason for this is that Cleckley's emphasis on emotional and personality features, as central to psychopathy, appeared to distinguish psychopathy from other antisocial personalities. Furthermore, the model was able to accommodate the idea of 'the successful psychopath': this was a person who, despite exhibiting less pronounced behavioural features, nevertheless exhibited psychopathic emotional and personality features.[34] As regards successful psychopaths, *The Mask of Sanity* includes vignettes of a physician, a scientist, a businessman and even a psychiatrist.[35]

I shall comment further on the influence of Cleckley's theory on the PCL-R shortly. However, its influence extended beyond the consulting room into scientific settings. Lykken, for example, used Cleckley's criteria to study anxiety levels in what he termed 'primary sociopaths'.[36] In their responses to hypothetical scenarios presented in a questionnaire, these persons showed reduced anxiety relative to nonpsychopathic persons. 'Low anxiety' is currently used as a criterion by some researchers for distinguishing between posited subtypes of psychopath (see Section 5.2).

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[31](n 12) 113.

[32]Note that the numbering in Table 2.1 is Cleckley's, and corresponds to the order in which he discussed the criteria.

[33](n 12) 114.

[34](n 12) 114.

[35]Cleckley (n 28).

[36]D.T. Lykken, 'A study of anxiety in the sociopathic personality', (1957) 55 Journal of Abnormal and Social Psychology 6.

2.3 Psychopathy checklist-revised (PCL-R)

The 20-item Psychopathy Checklist-Revised (PCL-R) has been described as the 'gold standard' psychometric test for the assessment of psychopathy in adults, and is used widely in forensic psychiatric contexts.[37] It forms part of a 'family' of tests, which includes the Psychopathy Checklist: Screening Version (PCL:SV) and the Psychopathy Checklist: Youth Version (PCL:YV). The former is a 12 item version of the PCL-R which is used in non-forensic, as well as forensic contexts;[38] the latter is a 20 item derivative designed for use with adolescents.[39]

The PCL-R is currently presented as a two factor, four facet construct[40] as shown in Table 2.2.[41] The factor and facet structure of the PCL-R is a product of the statistical technique of factor analysis, whereby 'factors' are derived from test data.[42] The numbering of

[37] S.K. Acheson, in R.A. Spies and B.S. Plake (eds), *The sixteenth mental measurements yearbook* (Buros Institute of Mental Measurements, U.S. 2005) 429.

[38] R.D. Hare and C.S. Neumann, 'Psychopathy: Assessment and forensic implications', in L. Malatesti and J. McMillan (eds), *Responsibility and psychopathy* (OUP 2010) 93, 99–100. An example of non-forensic use in studies screening for 'corporate' psychopaths (e.g. P. Babiak, C. Neumann and R. Hare, 'Corporate psychopathy: Talking the walk', (2010) 28(2) Behavioral Sciences & the Law 174). The PCL:SV is quicker and cheaper to administer than the PCL-R (e.g. it does not require access to criminal records).

[39] C.S. Neumann, D.S. Kosson, A. Forth *et al.*, 'Factor structure of the Hare Psychopathy Checklist: Youth version (PCL:YV) in incarcerated adolescents', (2006) 18(2) Psychological Assessment 142; A.E. Forth and A.S. Book, 'Psychopathy in youth: A valid construct?', in H. Hervé and J.C. Yuille (eds), *The psychopath: Theory, research, and practice* (Routledge 2006) 396.

[40] A 'construct' can be regarded as a category devised to aid understanding. Kline provides the example of a species in biology as a construct: this category does not actually exist, but is 'useful in understanding the relationships of different types of living organisms' (P. Kline, *Handbook of psychological testing* (Routledge 1999) 25). In this sense, the PCL-R construct can be regarded a theoretical concept that is useful insofar as it may make sense of test data.

[41] R.D. Hare, *The Hare Psychopathy Checklist-Revised* (2nd edn, Multi-Health Systems Inc. 2003). See also: A. Forth, S. Bo and M. Kongerslev, 'Assessment of psychopathy: The Hare Psychopathy Checklist measures', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 5; R.D. Hare and C.S. Neumann, 'The PCL-R assessment of psychopathy: Development, structural properties and new directions', in C.J. Patrick (ed), *Handbook of psychopathy* (Guilford Press 2006) 58.

[42] For an overview of factor analysis, see P. Kline, *An easy guide to factor analysis* (Routledge 1994). Very roughly, factors represent a distillation of correlations between variables. In the case of psychological tests, these variables are test items. Scores on some items may covary, and postulated factors attempt to explain this covariance. There are many different forms of factor analysis, and there is also scope for discretion over (for example) how many factors are extracted. Because the 'facets' in this case are also derived from factor analysis, rather than added for other reasons (e.g. theoretical reasons), the current version of the PCL-R test is sometimes described as having 'four factors' (Hare and Neumann (n 41) 65). The first, 'two factor', edition of the PCL-R lacked the facet structure shown above (R.D. Hare, *The Hare Psychopathy Checklist-Revised* (Multi-Health Systems 1991)).

Factor 1: interpersonal/affective	
Facet 1: interpersonal	**Facet 2: affective**
1. Glibness/superficial charm	6. Lack of remorse or guilt
2. Grandiose sense of self-worth	7. Shallow affect
4. Pathological lying	8. Callous/lack of empathy
5. Conning/manipulative	16. Failure to accept responsibility

Factor 2: social deviance	
Facet 3: lifestyle	**Facet 4: antisocial**
3. Need for stimulation	10. Poor behavioural controls
9. Parasitic lifestyle	12. Early behaviour problems
13. Lack of realistic goals	18. Juvenile delinquency
14. Impulsivity	19. Revocation of conditional release
15. Irresponsibility	20. Criminal versatility

No factor
11. Promiscuous sexual behaviour
17. Many short-term relationships

Table 2.2: PCL-R factors, facets and items

individual items is largely derived from Cleckley's numbering (see Table 2.1 above).[43]

As shown in Table 2.2, Factor 1 of the PCL-R, described as 'interpersonal/affective', includes two subgroups: 'Facet 1: interpersonal' (including the items 'Glibness/superficial charm', 'Grandiose sense of self-worth', 'Pathological lying' and 'Conning/manipulative') and 'Facet 2: affective' (including the items 'Lack of remorse or guilt', 'Shallow affect', 'Callous/lack of empathy' and 'Failure to accept responsibility'). Factor 2, described as 'social deviance', also includes two subgroups: 'Facet 3: lifestyle' (including the items 'Need for stimulation', 'Parasitic lifestyle', 'Lack of realistic goals', 'Impulsivity' and 'Irresponsibility') and 'Facet 4: antisocial' (including the items 'Poor behavioural controls', 'Early behaviour problems', 'Juvenile delinquency', 'Revocation of conditional release', and 'Criminal versatility'). Two items ('Promiscuous sexual behaviour' and 'Many short-term relationships') fail to correlate sufficiently with either of the factors, but nevertheless form part of the PCL-R.

Factor 1 is often said to include the 'core' features of psychopathy.[44] Hare describes

[43] R. Hare, 'A research scale for the assessment of psychopathy in criminal populations', (1980) 1(2) Personality and Individual Differences 111.

[44] T.A. Widiger, 'Psychopathy and DSM-IV psychopathology', in C.J. Patrick (ed), *Handbook of psychopathy* (Guilford Press 2006) 156, 158.

these features, which are indicated by the eight items in Factor 1, as 'a constellation of interpersonal and affective traits commonly considered to be fundamental to the construct of psychopathy'.[45] This view owes much to Cleckley's hypothesis that emotional and personality features are central to psychopathy.

The PCL-R is an 'observer-rated' test, meaning that it is scored by the rater rather than the test subject. The test is administered via a semi-structured interview, with reference to historical information on the subject (e.g. from medical and criminal records).[46] In a semi-structured interview, a number of questions are fixed in advance, but the interviewer is also expected to improvise to a significant extent based on the responses of the interviewee.[47] As regards scoring, each item is scored on a three-point scale, ranging from 0 to 2, giving a maximum score of 40. For the majority of the items, a score of '0' means 'not present', '1' means 'possibly present' and '2' means 'definitely present'. A score of 30 or more is recommended as a diagnostic threshold (or 'cut-score') for psychopathy (i.e. a score of 30 or over should be taken as 'indicative of psychopathy'[48]).[49]

As the psychologist Ronald Blackburn comments, the use of a cut-score presupposes a categorical rather than dimensional approach, which is the subject of debate.[50] Dimensional conceptualisations of personality disorders theorise that personality differences vary across a continuum, a view that has been argued to better represent the nature of personality. Livesley comments, for example, that categorical approaches require 'discontinuities, or at least points of rarity, in the distribution of clinical features' that may not be present

[45] Hare (n 41) 79 (quoted in Widiger (n 44) 158).

[46] Hare and Neumann (n 41) 58. For discussion of self-report tests for psychopathy, see S. Lilienfeld and K.A. Fowler, 'The self-report assessment of psychopathy', in C.J. Patrick (ed), *Handbook of psychopathy* (Guilford Press 2006) 107.

[47] T. Wengraf, *Qualitative research interviewing: Biographic narrative and semi-structured methods* (Sage 2001) 5.

[48] J. Laurell and A. Dåderman, 'Psychopathy (PCL-R) in a forensic psychiatric sample of homicide offenders: Some reliability issues', (2007) 30 Int J Law Psychiatry 127, 128. It has been suggested, however, that a score of 25 or over may be more appropriate in the UK, due to cultural differences (D. Cooke, C. Michie, S. Hart *et al.*, 'Assessing psychopathy in the UK: Concerns about cross-cultural generalisability', (2005) 186 Br J Psychiatry 335).

[49] Forth *et al.* (n 41) 8.

[50] R. Blackburn, 'Personality disorder and psychopathy: Conceptual and empirical integration', (2007) 13(1) Psychology, Crime & Law 7, 12. For general debates about categorical versus dimensional conceptions of personality disorders, see for example: W.J. Livesley, 'Conceptual and taxonomic issues', in W.J. Livesley (ed), *Handbook of personality disorders: Theory, research and treatment* (Guilford Press 2001) 3; T. Widiger, 'Dimensional models of personality disorder', (2007) 6 World Psychiatry 79.

in reality.[51] In this vein, as regards PCL-R psychopathy, current thinking indicates that a dimensional conceptualisation is more appropriate, and that psychopathy should not be viewed as a categorical concept.[52]

Due to the nature of PCL-R scoring, however, different combinations of scores may give rise to a score of 30 or more. Thus, there is still scope for significant heterogeneity within a given high-PCL-R population.[53] Furthermore, within this heterogeneity, there may be different subtypes (or variants[54]) of psychopathy with different aetiologies (i.e. arising from different developmental origins). Although 'subtype' suggests a category, subtypes can be conceptualised in dimensional terms: the features of a subtype may be present to a greater or lesser extent.[55] In other words, psychopathic traits may vary across a continuum while also relating to distinct subtypes of psychopathy. I discuss the possibility of psychopathy subtypes further in Chapter 5.[56]

Setting aside the possibility of subtypes, although PCL-R psychopathy may currently be best thought of in dimensional terms, in a scientific research setting the use of cut-scores serves to identify a (somewhat) more homogeneous population, with respect to psychopathic traits, and facilitate comparisons between studies. As will be seen in Section 5.2, the use of different cut-scores in some recent, otherwise methodologically similar, studies has created problems by making generalisation from research findings more difficult.

The PCL-R has been subjected to considerable analysis and criticism, in part due to

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[51] Livesley (n 50) 14.

[52] J.F. Edens, D.K. Marcus, S.O. Lilienfeld *et al.*, 'Psychopathic, not psychopath: Taxometric evidence for the dimensional structure of psychopathy', (2006) 115 Journal of Abnormal Psychology 131.

[53] R. Blackburn, 'Subtypes of psychopath', in M. McMurran and R. Howard (eds), *Personality, personality disorder and violence* (Wiley 2009) 113, 113–4.

[54] I use these terms interchangeably, as used, for example, by Skeem *et al.* (J.L. Skeem, N. Poythress, J.F. Edens *et al.*, 'Psychopathic personality or personalities? Exploring potential variants of psychopathy and their implications for risk assessment', (2003) 8 Aggression and Violent Behavior 513).

[55] H. Hervé, 'Psychopathic subtypes: Historical & contemporary perspectives', in H. Hervé and J.C. Yuille (eds), *The psychopath: Theory, research, and practice* (Routledge 2006) 431, 454.

[56] A further complication is that persons with different subtypes of psychopathy may show similar scoring patterns on the PCL-R, as suggested by recent research into psychopathy subtypes. For example, in a study by Skeem *et al.*, scoring relating to two putative subtypes of psychopathy was very similar on facets 1–3 (J. Skeem, P. Johansson, H. Andershed *et al.*, 'Two subtypes of psychopathic violent offenders that parallel primary and secondary variants', (2007) 116 Journal of Abnormal Psychology 395, 404). Likewise, Hicks *et al.* found that Factor 1 scoring did not appear to distinguish between putative subtypes (B.M. Hicks, K.E. Markon, C.J. Patrick *et al.*, 'Identifying psychopathy subtypes on the basis of personality structure', (2004) 16(3) Psychological assessment 276, 281). I discuss these studies further in Section 5.2.3.

its prominent use in forensic psychiatric and legal contexts.[57] A critical analysis of this literature is beyond the scope of this thesis. However, before proceeding, I will consider some criticisms regarding the reliance of the PCL-R test on criminal behaviour as an indicator of psychopathic traits. As noted in Section 1.3.2, the Law Commission of England and Wales has expressed concern that evidence for psychopathy, like evidence for antisocial personality disorder (ASPD), may be 'no more than evidence of what would ordinarily be regarded as serious criminal behaviour'.[58] As this concern was then used as a basis for excluding psychopathy from the scope of a proposed insanity defence, it warrants further examination.

Much discussion has focused on PCL-R 'Facet 4: antisocial', given that this facet contains criteria (e.g. 'juvenile delinquency') defined by explicit reference to lists of criminal behaviours.[59] It has been argued, for example, that these criteria should be removed, due to the possibility that psychopathy may not always manifest in criminal behaviours; weighting the test in favour of these behaviours, it is argued, makes it less effective.[60] Associated with this criticism is the view that criminal behaviour is a 'downstream correlate', rather than 'part', of psychopathy:[61] in some contexts, psychopathy may manifest in criminal behaviours, while in other contexts it may not. Consequently, it has been argued, 'Facet 4: antisocial' should be excluded from the PCL-R.[62]

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[57] R.D. Hare and C.S. Neumann, 'Psychopathy as a clinical and empirical construct', (2008) 4 Annual Review of Clinical Psychology 217.

[58] 'Insanity and Automatism Discussion Paper' (Law Commission, 23.7.13) <http://lawcommission.justice.gov.uk/publications/insanity.htm> (accessed 27.6.14) para. 4.107.

[59] e.g. J. Skeem and D. Cooke, 'Is criminal behavior a central component of psychopathy? Conceptual directions for resolving the debate', (2010) 22(2) Psychological Assessment 433; Hare RD and Neumann CS, 'The role of antisociality in the psychopathy construct: Comment on Skeem and Cooke (2010)', (2010) 22(2) Psychological Assessment 446.

[60] Skeem and Cooke (n 59) 435. Broadly, the 'Facet 4: antisocial' criteria are argued to decrease the *specificity* of the PCL-R (i.e. there are more false positives), and also decrease its *sensitivity* (i.e. there are more false negatives). False positives might include people who lack many of the core psychopathic traits specified in Factor 1, but reach the cut-score because their criminal histories increase their PCL-R scores via Facet 4 in Factor 2. False negatives, on the other hand, might include persons who exhibit the core psychopathic traits, but fall short of the cut-score because they have not committed criminal offences (or, at least, have not been caught). Formally, concerning diagnostic tests in general, 'specificity' has been defined as the 'probability of the test correctly giving a negative result, given that the patient does not have the disease', whereas 'sensitivity' has been defined as the 'probability of the test correctly giving a positive result, given that the patient does have the disease' (G.J.G. Upton and I.I.T. Cook, *A dictionary of statistics* (2nd rev edn, OUP 2008))

[61] Skeem JL and Cooke DJ, 'One measure does not a construct make: Directions toward reinvigorating psychopathy research–reply to Hare and Neumann (2010)', (2010) 22(2) Psychological Assessment 455, 456.

[62] Skeem and Cooke (n 59) 442.

Even if this is true, however, removing 'Facet 4: antisocial' would not guarantee that criminal behaviour was not utilised in PCL-R assessment. As Widiger comments,

> the exclusion of the four PCL-R items concerned explicitly with criminal history would not ensure that the assessment is in fact independent of criminal behavior. Many of the remaining PCL-R items are still heavily dependent on or at least informed by criminal behavior.[63]

This can be seen with criteria such as 'lack of remorse' (item 6) and 'callous/lack of empathy' (item 8), which are 'core' affective psychopathic traits in Factor 1 (see Table 2.2). In the PCL-R manual, item 6 'lack of remorse' is said to describe

> ...an individual who shows a general lack of concern for the negative consequences that his actions, both criminal and noncriminal, have on others. He is more concerned with the effects that his actions have upon himself than he is about any suffering experienced by his victims or damage done to society.[64]

Item 8 'callous/lack of empathy', on the other hand, describes

> ...an individual whose attitudes and behavior indicate a profound lack of empathy and a callous disregard for the feelings, rights, and welfare of others. He is only concerned with Number 1, and views others as objects to be manipulated.[65]

As can be seen, in the case of item 6 it is explicitly stated that criminal behaviour may count towards an assessment of 'lack of remorse'. In the case of item 8 there is no explicit mention of criminal behaviour. However, as Widiger comments, 'callousness/lack of empathy' could be inferred from criminal behaviour such as 'the commission of particularly brutal, heinous acts of violence or...the person's attitude toward a victim's suffering'.[66] In practice, he remarks, 'PCL-R assessments are often based largely on the review of a person's criminal record'.[67]

[63] Widiger (n 44) 160.

[64] Reproduced in W.C. Myers, *Juvenile sexual homicide* (Academic Press Inc 2001) 89.

[65] Reproduced in Myers (n 64) 89.

[66] Widiger (n 44) 160.

[67] (n 44) 160. It should be noted that Skeem and Cooke are well aware of this issue, and argue that clinicians should 'avoid relying heavily on criminal acts in scoring items from other facets' and instead 'carefully weight patterns of interpersonal behavior, thoughts, and feelings across contexts' (Skeem and Cooke (n 59) 442).

Given this, the Law Commission's worry that psychopathy is evidenced by what would 'ordinarily be regarded as serious criminal behaviour' might appear to be justified. Notwithstanding this, however, even if psychopathy is assessed significantly by reference to criminal behaviour in practice, criteria such as items 6 and 8 do not *need* to be scored in this way. The presence of these traits can be inferred in numerous ways, and raters are not restricted to a 'fixed' or 'conceptually closed' list of criminal or otherwise antisocial behavioural criteria.[68] In this way, PCL-R psychopathy differs from ASPD where many more 'fixed' behavioural criteria are used (see Table 2.3).

There is also growing evidence of neurobiological correlates of psychopathy, together with evidence of a genetic contribution (see Chapter 5).[69] This supports the view that there is more to psychopathy than criminal behaviours, although the nature of psychopathy continues to be disputed. Perhaps, given our current state of scientific knowledge, the Commission is justified in taking this cautious, admittedly 'provisional', approach.[70] Given our increasing neurobiological understanding, however, this position may not be tenable for long. This research may provide other ways to diagnose, or support the diagnosis of, psychopathy that do not rely on criminal behaviours.

2.4 Is psychopathy a morally evaluative concept?

In this Section I consider the concern that the process of diagnosing a person with psychopathy may inevitably involve negatively evaluating, or morally condemning, that person. As is evident from Table 2.2, many of the terms used to describe psychopathy appear to be negatively evaluative (e.g. 'callous' or 'manipulative'). We might ordinarily apply these terms to people to express our disapproval, or to indicate that we think their behaviour is

[68] This argument derives from Meehl, who argued that symptoms should be specified implicitly by 'fallible indicators' or 'open' concepts, given our limited scientific knowledge of many psychiatric disorders; to do otherwise and utilise conceptually 'fixed' or 'closed' criteria, he argued, would lead to confusion and 'fake' psychiatric classifications (P.E. Meehl, 'Diagnostic taxa as open concepts: Metatheoretical and statistical questions about reliability and construct validity in the grand strategy of nosological revision', in T. Millon and G.L. Klerman (eds), *Contemporary directions in psychopathology* (Guilford Press 1986) 215, 216 & 222). See also Skeem and Cooke (n 59) 435.

[69] Neurobiology is one discipline within cognitive science, which is a general term for interdisciplinary research into the mind. 'Cognitive science' has been argued to include 'psychology, neuroscience, anthropology, artificial intelligence, and philosophy' (P. Thagard, 'Cognitive science', in S. Psillos and M. Curd (eds), *The Routledge companion to philosophy of science* (Routledge 2008) 531).

[70] (n 58) para. 4.106.

morally unacceptable. Along these lines Mullen, for example, has remarked the PCL-R manual serves 'to transform denunciations into management strategies'.[71]

Terms like 'callous' and 'manipulative', however, appear to be descriptive as well as evaluative. As such, these have been referred by philosophers to as 'thick terms'.[72] More formally, these terms can be said to express evaluative concepts with substantial descriptive content.[73] Examples of other thick terms include 'discretion', 'generous', 'courage', 'rude', 'pleasant' and 'exploited'.[74]

A contrast can be made with 'thin' terms, such as 'good' or 'right', which appear to be entirely evaluative. Thus, we might say for example that '*X* is good', where *X* is a subject like 'wine'. Here, the evaluative term is separate from the descriptive term. This could be contrasted with the use of a thick term to describe a subject: e.g. 'this wine is pleasant'. Here, the term appears to be both descriptive and evaluative.

The nature of the relationship between the descriptive (or factual, or nonevaluative[75]) features and the evaluative features of thick concepts is debated. One view, for example, holds that there is an 'entanglement' of facts and values within thick concepts, which cannot be reduced or split into nonevaluative and thin evaluative components.[76] If this view is true, facts and values are inextricably merged within concepts like 'callous': there are no factual (or nonevaluative) features that are distinct from thin evaluative features. What exactly is entailed by such a view is debated;[77] however, on such a view it is not possible to establish whether a thick term should apply without making an evaluation.

This view can be contrasted with a second view of thick concepts, inspired in part by the philosopher R.M. Hare.[78] On this view, in contrast to the 'entanglement' view, it is possible to develop rules or principles to identify when a term like 'callous' should apply;

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[71] P.E. Mullen, 'On building arguments on shifting sands', (2007) 14(2) Philosophy, Psychiatry, & Psychology 143, 146.

[72] M. Eklund, 'What are thick concepts?', (2011) 41(1) Canadian Journal of Philosophy 25.

[73] Eklund (n 72) 25. Erklund and other commentators in this area hold that thick value concepts are *expressed by* thick value terms, and that understanding a thick term entails an understanding of its corresponding thick concept. I adopt this usage, although the nature of concepts is a complex philosophical issue (See, for example: E. Rosch, 'Concepts', in P.C. Hogan (ed), *The Cambridge encyclopedia of the language sciences* (Cambridge University Press (CUP) 2011) 191).

[74] Eklund (n 72) 25; Tappolet C, 'Through thick and thin: Good and its determinates', (2004) 58(2) Dialectica 207, 207.

[75] I will use these terms interchangeably.

[76] e.g. H. Putnam, *The collapse of the fact/value dichotomy and other essays* (HUP 2002) ch.2.

[77] D. Roberts, 'Shapelessness and the thick', (2011) 121(3) Ethics 489.

[78] Not to be confused with the psychologist R.D. Hare, developer of the PCL-R.

one must, however, then make a thin evaluation in order to apply the thick term.[79] Thus, one could establish, without making an evaluation, whether the nonevaluative features of 'callousness' were present; if we then judged that these nonevaluative features were 'bad', we could apply the term 'callous'. The clear distinction between facts and thin evaluations in this approach indicates a 'reductive' approach to thick concepts.

The 'thick concepts' debate ultimately involves deep questions in analytic philosophy about the nature of evaluation, which cannot be explored here.[80] The position adopted, however, has implications for psychiatric diagnosis due to the current reliance of psychiatric classifications on thick terms: it may not, in particular, be possible to apply terms like 'callous' without making an evaluation.

The debate also has implications for the role that scientific data might play in the diagnostic enterprise. On the second, R.M. Hare-inspired, approach, for example, it might be thought that whether a thick term like 'callous' should apply (given an appropriate thin evaluation) could be determined by reference to scientific criteria. Perhaps, for example, one could refer to a person's scores, relative to the norm, on various empathy-related assessments (e.g. skin conductance,[81] and data from functional magnetic resonance imaging (fMRI), elicited in response to photos of people in distress). [82] These could be compared to objective scientific criteria for 'callous'. One could then, given appropriate data, make the thin evaluation that the relevant features were 'bad' and apply the term 'callous'.

The R.M. Hare-inspired approach, however, also suggests a more radical possibility. Once scientific guidelines for the assessment of 'callousness' had been established, one could simply refrain from making thin evaluations. One could establish, with the help of

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[79] Roberts (n 77) 497–8; R.M. Hare, *Freedom and reason* (OUP 1965) ch.8.

[80] Regarding this complex territory, Roberts comments for example: 'Understanding the nature of the thick is important for understanding the nature of the evaluative: for answering such questions as what it is for a concept to be evaluative, what the evaluative should be contrasted with, what it is to be competent with an evaluative concept, and what we should take the evaluative to...depend on' ((n 77) 490).

[81] Skin conductance, a traditional measure of empathy, is very nonspecific. The technique responds to emotional arousal in general, including sexual arousal, and cannot distinguish between empathetic and nonempathetic emotional arousal (H. Maibom, 'Rationalism, emotivism, and the psychopath', in L. Malatesti and J. McMillan (eds), *Responsibility and psychopathy* (OUP 2010) 228, 230–31).

[82] I take it here that although 'deviation from the norm' is evaluative, in the sense that it compares a measurement to a standard, it is not evaluative in the way that describing someone as 'bad' or 'callous' (or, indeed, 'good' or 'virtuous') might be. Savulescu and Kahane refer to this statistical form of normativity as 'a form of attributive or functional value, the kind of value we refer to when we describe lawnmowers or knives as good or bad' (J. Savulescu and G. Kahane, 'The welfarist account of disability', in A. Cureton and K. Brownlee (eds), *Disability and disadvantage* (2009) 14, 18).

scientific tests for empathy, that the nonevaluative features of callousness were present in a given case, but refrain from judging that these features were 'bad' and, in virtue of this, callous.[83] Thus, this approach to thick concepts suggests that terms like 'callous' could be replaced with objective, value-free, scientific criteria.

Where criteria were specified relative to a statistical norm, on this approach, problems might arise concerning the population with respect to which the norm was derived. Different populations may have different norms for the characteristics in question (e.g. some populations may have, on average, greater empathy). However, where these criteria were met, data could at least point to the conclusion that a person had non-evaluative characteristics that, in conjunction with a thin evaluation of 'badness', would amount to 'callousness'. Criteria specified in absolute, rather than relative, terms, could help to avoid these issues.

On an 'entanglement' view of thick concepts, on the other hand, this would not be possible. Because one must make an evaluation to establish whether a term like 'callous' should apply, this term could not be replaced with objective scientific criteria. It is also not possible, on at least one interpretation of the 'entanglement' view, to develop rules or principles that could assist with the application of the thick term.[84] The factual or nonevaluative features that make a case 'callous' on one occasion might not make a case 'callous' on another. One could not hope, therefore, to replace the term with scientific criteria.

Other philosophical approaches to thick concepts are available.[85] However, the 'entanglement' and R.M. Hare-related views presented represent extreme positions, and provide some insights into the possible implications of the 'thick concepts' debate for the diagnosis of psychopathy. It may not, in particular, be possible to diagnose a person as a psychopath, or as psychopathic, without negatively evaluating this person. There may also be limits to extent to which scientific data can assist with diagnosis of psychopathy in a given case.

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[83] On this reductive approach, it is argued that an 'outsider' could learn how to apply a thick concept without adopting the evaluative perspective of 'insiders' already possessing this knowledge (Roberts (n 77) 497).

[84] Roberts argues that a commitment to entanglement also entails a commitment to an extreme form of particularism, whereby it is not possible to develop principles to guide the application of a thick term (Roberts (n 77) 512). This is not a debate I can engage with here, but the contrast between the view of 'entanglement' I have presented and the R.M.Hare-inspired view provides some indication of the range of views possible. I make some further comments about particularism in Section 3.3.

[85] e.g. on another reductive view, inspired by the philosopher Simon Blackburn it is not possible to develop rules or principles to determine when a thick term should apply; nevertheless, a thin evaluation is still required to apply the thick term (Roberts (n 77) 499; S. Blackburn, 'Through thick and thin', (1992) 66 Proceedings of the Aristotelian Society, Supplementary Volumes 285, 298).

On any view of thick concepts, however, even an extreme 'entanglement' view, scientific data could help to reduce *biases* relevant to the application of a thick term. Simon Blackburn's colourful example of the application of the word 'fat' as a thick term by 'fattists' can be used to illustrate this. He comments:

> I shall transcribe 'fat' said with a sneer as 'fat↓' where the downward arrow signals the combination of emphasis on the first consonant and downward cadence that carries the sneer. 'fat↓' will be heard most often in the mouths of those who are repelled by or despise fatness, or who sympathize with those who do.[86]

Beryl and Amanda, Blackburn comments, are 'card-carrying fattists' until Amanda meets Clive:

> 'Clive is so fat↓' challenges Beryl. 'No, not fat↓— stocky, well-built' dreams Amanda.[87]

On Blackburn's reductive approach to thick concepts, the disagreement between Beryl and Amanda results from contextual factors, such as Amanda's feelings for Clive.[88] However, perhaps the only reason Clive is considered a candidate for an appraisal as fat↓ is that he has been viewed in an inaccurate light. Perhaps Beryl has severe astigmatism in both eyes, and her distorted vision causes Clive to appear 'larger' than he really is. In psychiatric practice, analogous distortions might be created by the values of clinicians.[89] It is possible

[86](n 85) 290.

[87](n 85) 290.

[88]For Blackburn, these factors prevent the development of rules or principles to govern the application of thick terms. To illustrate this further, Blackburn suggests that 'many fattists would recoil' at the thought of calling Pavarotti fat↓: they would wish to overlook this feature, one they would usually despise, because Pavarotti 'is so transcendentally uncontemptible in other ways' (Blackburn (n 85) 290). The word 'transcendentally' conveys the idea that whether the term applies cannot be guided by principles or rules, but is governed instead by 'uncodifiable' contextual factors (Roberts (n 77) 499). Perhaps other fattists, exposed to the same music but remaining unmoved by it, would not hesitate to apply the term.

[89]In a study by Loring and Powell, for example, case studies were presented to psychiatrists in which the gender and race of patients had been manipulated. All other case features were identical. The results suggested that diagnoses from the third edition of the Diagnostic and Statistical Manual (DSM-III), the classification system operating at the time, could be influenced not only by the race and gender of patients, but also by the race and gender of psychiatrists (M. Loring and B. Powell, 'Gender, race, and DSM-III: A study of the objectivity of psychiatric diagnostic behavior', (1988) 29 Journal of Health and Social Behavior 1; discussed in Cooper R, *Psychiatry and philosophy of science* (Acumen Publishing 2007) 133.

that scientific data could correct for such distortions, just as astigmatism-correcting spectacles might permit Beryl to observe Clive more accurately. In this sense, scientific data could make the application of a term like 'callous' more 'objective' on either of the approaches discussed.[90]

It is now possible to return to Mullen's concern, that the PCL-R provides a mechanism to 'transform denunciations into management strategies',[91] and provide more nuance. Scientific tests may help to remove bias and distortion that could compromise clinical judgment, but it may be impossible to label a person as 'psychopathic' without negatively evaluating this person. The label 'psychopath' may be inextricably bound up with negative evaluation (including moral condemnation).[92]

This does not mean that clinicians cannot, in practice, learn to suppress any tendency towards moral condemnation of those labelled 'psychopathic'. Gunn, for example, accepts that patients 'may be harder to treat if they are called "psychopaths" or any other name that is synonymous with "badness" and that invites rejection', but then adds that it is 'perfectly possible to treat good and bad people in a similar fashion', despite this being 'very difficult'.[93] The 'thick concepts' debate, however, sheds light on why it may be so difficult to refrain from judging psychopaths in this way. The debate also has nonclinical significance: in the context of the criminal trial, for example, jurors who accept that a defendant is 'psychopathic' may find it difficult to refrain from considering this person 'bad'.

Whatever the outcome of the 'thick concepts' debate, it should be noted that the PCL-R test can be, and is, used to select populations for study; furthermore, our scientific understanding of psychopathy is rapidly expanding (see Chapter 5). At the level of the individual, however, diagnosis may be an unavoidably evaluative affair. There may also be limits on the extent to which scientific data can assist with a diagnosis of psychopathy, given that this is defined utilising thick value terms.

I now move on to consider whether psychopathy should be regarded as a 'mental ill-

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[90] Likewise, scientific data could assist on Blackburn's approach.

[91] (n 71) 146.

[92] One might imagine that this is partly due to the vernacular use of 'psychopath' as a term of abuse or otherwise negative evaluation. Substituting 'psychopath' with a more neutral thick term might help to attenuate this problem, at least to an extent (although the behavioural associations might ensure that the term remained, or quickly became, negatively evaluative).

[93] J. Gunn, 'Psychopathy: An elusive concept with moral overtones', in T. Millon, E. Simonsen, M. Birket-Smith *et al.* (eds), *Psychopathy: Antisocial, criminal, and violent behaviour* (Guilford Press 2003) 32, 34.

ness' or 'mental disorder'. Like 'callous' and 'psychopathic', concepts like 'illness' and 'disorder' may also be regarded as thick value concepts. As such, the extent to which their content is evaluative, nonevaluative, or a mixture of both has been widely debated.

2.5 Is psychopathy a mental illness?

2.5.1 Introduction and scope

The issue of whether psychopathy ought to be regarded as a mental illness, disorder or disease, terms I will use interchangeably,[94] depends to a significant extent on the theory of mental illness adopted. On eliminativist accounts, for example, the evaluative nature of psychiatric concepts is argued to undermine any claim these concepts have to represent factual or 'real' disorders.[95] Along these lines, Szasz argues that 'disease' should be characterised in terms of a 'derangement in the structure or function of cells, tissues, and organs', and because mental disorders cannot be characterised in this way they are not 'real' in the way that 'physical' disorders like Parkinson's disease or viral encephalitis are.[96]

One approach to clarifying the question whether psychopathy is a mental disorder would begin by establishing a plausible or defensible account of mental disorder; psychopathy would then be tested against the criteria in this account. An account like Szasz's, for example, might be challenged by attacking the claim that 'physical' disorders are *not* evaluative in the way that mental disorders are claimed to be.[97] This would target the radical distinction between 'physical' and 'mental' disorders made by Szasz, and hence the plausibility of this eliminativist approach.

My goal in this Section, however, is more modest. Rather than attempt to identify a defensible account of mental disorder, insofar as one may exist, I will instead orientate my discussion around Wakefield's influential 'harmful dysfunction' account,[98] which has influ-

[94] This is consistent with much of the philosophical discourse in this area (Cooper (n 89) 29).

[95] T. Nadelhoffer and W. Sinnott-Armstrong, 'Is psychopathy a mental disease?', in N.A. Vincent (ed), *Neuroscience and legal responsibility* (2013) 229, 235–8.

[96] T.S. Szasz, 'Is mental illness a disease?', (1999) 49 The Freeman 38.

[97] Fulford B, Thornton T and Graham G, *Oxford textbook of philosophy and psychiatry* (OUP 2006) 345–6.

[98] J.C. Wakefield, 'The concept of mental disorder - on the boundary between facts and social Values', (1992) 47(3) American Psychologist 373, 384.

enced the recent DSM-IV and DSM-5 general definitions of mental disorder.[99] While this does not mean that Wakefield's position is philosophically defensible, it orientates the discussion towards widely accepted, or at least professionally endorsed, definitions. Appeals to these definitions could be made by policymakers to lend force to a claim that psychopathy ought to be regarded as a 'disorder' or 'illness'.[100] Discussing Wakefield's 'hybrid' account, which combines elements of divergent theories of mental illness, also permits some critical discussion of more general foundational issues. After discussing this account, I then move on to consider whether psychopathy might qualify under the DSM-IV and DSM-5 criteria.[101] As regards the ICD-10 general definition of mental disorder, I argue that this is sufficiently similar to the DSM definitions for my analysis to apply.[102]

I argue that while it is possible that PCL-R psychopathy may potentially qualify as a mental disorder according to DSM-IV and DSM-5 general criteria, it may be premature to consider whether psychopathy may amount to a disorder. Although psychopathy may represent a better candidate for a disorder than ASPD, its coherence as a condition remains debated (particularly its relationship with criminal behaviour).

In principle, however, the status of a condition as a mental disorder in medical terms is neither necessary nor sufficient for establishing that it is a disorder for legal purposes. It could be declared in a statute, for example, that psychopathy was a 'disorder' even if there were universal agreement that it was not a mental illness. It could also, as with Scots law, be accepted that psychopathy amounted to a mental disorder in a legal sense but with an express exclusion with respect to an insanity defence for *that* disorder. Thus, while the discussion in this Section may shed some light on the nature of psychopathy, it is not necessarily relevant to the qualification of psychopaths for an insanity defence (although it could be in theory).

Before embarking on this discussion, however, I will first distinguish between antisocial

[99] Cooper (n 89) 33; R. Bingham and N. Banner, 'The definition of mental disorder: Evolving but dysfunctional?', (2014) Journal of Medical Ethics 1 (doi:10.1136/medethics-2013-101661).

[100] Note that I do not defend the DSM general criteria here. These criteria have their critics, and it has even been argued that the DSM would be better off without any general definition (Bingham & Banner (n 99)). Such a definition could create the illusion that mental disorder can be defined, and add a gloss of legitimacy to the pathologising of conditions like homosexuality in social and political contexts where they may be rejected and disvalued. The status accorded to these definitions, however, makes them potentially relevant to policy.

[101] *Diagnostic and statistical manual of mental disorders (DSM-IV-TR)* (4th edn, text revision, American Psychiatric Press Inc. 2000); *Diagnostic and statistical manual of mental disorders (DSM-5)* (5th edn, American Psychiatric Association 2013).

[102] *The ICD-10 classification of mental and behavioural disorders* (World Health Organization 1992).

personality disorder (ASPD) and PCL-R psychopathy. Although the DSM-5 reproduces the DSM-IV personality disorders, including ASPD,[103] PCL-R psychopathy is absent from both and remains an 'unofficial' disorder. It is helpful to outline historically how this situation has arisen. More importantly, doing so also helps to clarify why PCL-R psychopathy is a better candidate for a mental disorder than ASPD.

2.5.2 Why Antisocial personality disorder in DSM-IV/5 is not a good candidate

As mentioned in Section 2.2, psychopathy was originally a very broad category. This was reflected in the first edition of the DSM,[104] introduced in the early 1950s, where 'psychopathy' included a range of syndromes 'encompassing sexual deviations of various kinds, addictions, and delinquency'.[105] One of the syndromes included was 'sociopathic personality disturbance: antisocial reaction'.[106] The DSM-I classification described this group as, among other things, 'chronically antisocial', 'callous and hedonistic' emotionally immature, unable to learn from punishment or experience, lacking a 'sense of responsibility' and also exhibiting an inability to 'rationalize their behavior so that it appears warranted, reasonable, and justified'.[107] At least some similarities with the Cleckley and Hare concepts of psychopathy are evident (e.g. 'callous', 'emotional immaturity' and 'irresponsibility' features).

In the DSM-II the disorder was renamed 'antisocial personality',[108] to align the terminology more closely with the then concurrent ICD-8 system.[109] Parallels with Cleckley's model of psychopathy remained evident: for example, this group was described as 'basically

[103] The DSM-V system, however, also includes a supplemental 'emerging model' of personality disorders, utilising a dimensional assessment of personality traits, as opposed to the categorical approach in DSM-IV. This is not included in the main part of the manual, but is included in Section III 'for further study' (American Psychiatric Association, 'Personality disorders fact sheet, DSM-V' (2013), available at <http://www.dsm5.org/Documents/Personality%20Disorders%20Fact%20Sheet.pdf>, accessed 27.6.14. For further information on this approach, see for example A.E. Skodol, 'Diagnosis and DSM-5: Work in progress', (2012) The Oxford Handbook of Personality Disorders 35.)

[104] *Diagnostic and statistical manual of mental disorders* (American Psychiatric Association 1952).

[105] Patrick (n 12) 115.

[106] DSM-I (n 104) 38; Patrick (n 12) 115.

[107] (n 104) 38.

[108] *Diagnostic and statistical manual of mental disorders* (2nd edn, American Psychiatric Association 1968) 79.

[109] Patrick (n 12) 115.

unsocialized' and 'incapable of significant loyalty to individuals, groups, or social values'; furthermore, they were 'grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment'.[110]

A major issue with DSM-II criteria, however, was poor reliability.[111] Following research by Robins,[112] for example, there was a move towards a more explicitly formulated, checklist-styled, behavioural approach.[113] This led to a divergence between the largely behavioural criteria for the again-renamed 'antisocial personality disorder' (ASPD), and more traditional psychopathy criteria. A diagnosis of ASPD now required, for example, an onset 'before age 15' and at least four items to be present 'since age 18' from a list of nine including, for example, 'failure to accept social norms with respect to lawful behavior'.[114]

Although this resulted in greater diagnostic reliability,[115] the approach was criticised for its significant departure from the Cleckley model of psychopathy.[116] Personality and affective criteria such as 'superficial charm' and 'affective poverty', for example, central to both the Cleckley and Hare conceptualisations of psychopathy, were lacking. In Millon's view, for example, antisocial and criminal behaviour were given 'undue prominence', and the approach failed to recognise 'that the same fundamental personality structure, with its characteristic pattern of ruthless and vindictive behavior, is often displayed in ways that are not socially disreputable, irresponsible, or illegal'. [117]

In preparation for DSM-IV, various field trials were carried out to evaluate possible changes to the criteria for DSM disorders. The ASPD field trial compared the existing DSM-III ASPD criteria with the criteria of the PCL-R,[118] and also dissocial (or dyssocial) personality disorder (DPD) in the ICD-10 system.[119] The criteria for DPD, like those in the

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[110](n 108) 43.

[111]J. Ogloff, 'Psychopathy/antisocial personality disorder conundrum', (2006) 40(6-7) Aust N Z J Psychiatry 519, 521.

[112]L.N. Robins, *Deviant children grown up: A sociological and psychiatric study of sociopathic personality* (Williams & Wilkins 1966).

[113]Patrick (n 12) 115–6.

[114]*Diagnostic and statistical manual of mental disorders* (3rd edn, American Psychiatric Association 1980) 320–1.

[115]Patrick (n 12) 116.

[116]R.D. Hare, 'Diagnosis of antisocial personality disorder in two prison populations', (1983) 140(7) The American Journal of Psychiatry; The American Journal of Psychiatry; T. Millon, *Disorders of personality: DSM-III: Axis II* (Wiley 1981).

[117]T. Millon, *Disorders of personality: DSM-IV and beyond* (John Wiley & Sons 1996). 443.

[118]Hare (n 42).

[119](n 102). T. Widiger, R. Cadoret, R. Hare *et al.*, 'DSM-IV antisocial personality disorder field trial', (1996) 105 Journal of Abnormal Psychology 3, 4.

Criterion Category	Summary Description of Criterion
A. Adult antisocial behaviour (3 or more of the following since age 15)	1. Repeated participation in illegal acts
	2. Deceitfulness
	3. Impulsiveness or failure to make plans in advance
	4. Hostile-aggressive behaviour
	5. Engagement in actions that endanger self or others
	6. Frequent irresponsible behaviour
	7. Absence of remorse
B. Age criterion	Current age at least 18
C. Child conduct disorder (3 or more of the following before age 15, social, academic, or occupational function):	*Aggression toward people or animals*: 1. Frequent bullying, threatening, or intimidation of others 2. Frequent initiation of physical fights 3. Use of dangerous weapons 4. Physical cruelty toward people 5. Physical cruelty toward animals 6. Theft involving victim confrontation 7. Forced sexual contact
	Destruction of property: 8. Deliberate fire setting with intent to cause damage 9. Deliberate destruction of property
	Deceptiveness or stealing: 10. Breaking/entering (house, building, or vehicle) 11. Frequent lying to acquire things or to avoid duties 12. Nontrivial theft without victim confrontation
	Serious rule violations: 13. Frequent violations of parental curfew, starting before age 13 14. Running away from home 15. Frequent truancy, starting before age 13
D. Comorbidity criterion	Antisocial behaviour does not occur exclusively during episodes of schizophrenia or mania

Table 2.3: Diagnostic criteria for DSM-IV-TR antisocial personality disorder

PCL-R, provide a greater emphasis on affective features and, to a lesser extent, personality features.[120] The study concluded, however, despite some evidence in favour of change, that rather than reintroducing these criteria the ASPD criteria should be slightly simplified.[121]

The criteria for ASPD in DSM-IV, which are unchanged in DSM-5, are shown in Table 2.3.[122] In addition to being aged 18 or older, a person must satisfy 3 or more of the adult

[120] While the DPD criteria are closer to the PCL-R criteria, due to the inclusion of affective and personality features, they are much less detailed and some criteria (e.g. 'need for stimulation' and 'shallow affect') are missing (ICD-10 (n 102) 159; Ogloff (n 111) 522).

[121] Patrick (n 12) 117.

[122] Table taken from Patrick (n 12) 118, which is based on information concerning ASPD and conduct disorder in DSM-IV-TR (n 101).

antisocial (since age 15), and 3 or more of the child conduct disorder (before age 15), criteria. The diagnostic criteria, like those for DSM-III ASPD, can be satisfied in various different ways (i.e. they are 'polythetic').[123] Indeed, two persons diagnosed with ASPD may share *no* diagnostic features in common. This may be contrasted with the PCL-R, where there is inevitably a significant overlapping of features between high-scoring individuals.

It might be argued that the ASPD and PCL-R criteria have emerged as different 'takes' on psychopathy, with the ASPD criteria amounting to more behaviourally-focused sources of evidence. That this is the case might be supported by reference to the differences in the populations identified by these tests: 50–80% of prison inmates have been reported to meet DSM-IV ASPD diagnostic criteria, whereas roughly 15% meet PCL-R criteria.[124] A difficulty with this argument, however, is that it assumes that the PCL-R and ASPD criteria attempt to measure or assess the *same thing*. It is arguably more defensible to hold that these relate to entirely different conceptions of psychopathy, and that the two ought not to be conflated. The difference between PCL-R psychopathy and ASPD, understood in this way, can be illustrated by two fictional clinical vignettes provided by Blair *et al*.[125] The first concerns Ryan:

> Ryan is in his mid-30s and is serving a life sentence for murder. He has always had a bad temper, and this time what looked like a typical bar-fight ended up costing someone their life. In person, Ryan gives the impression of being a slightly immature, jocular, but earnest adult. Ryan is well liked by both the other inmates and the staff on the wing and does not have any adjudications recorded against him.
>
> Ryan has approximately half a dozen offences on his record beginning at the age of 17 when he received probation for shoplifting. Although he never had any formal contact with the law before his late teens, his parents report that he started getting into trouble at home and at school at the age of 15. His parents found him difficult to manage. He broke curfew, lied frequently, vandalized property, and ran away from home. At school he frequently engaged in fights...

[123] Patrick (n 12) 117.

[124] Ogloff (n 111) 522. Ogloff comments that the terms psychopathy and ASPD (and also DPD) are 'often referred to interchangeably' (at 523), but must be carefully distinguished.

[125] J. Blair, D. Mitchell and K. Blair, *The psychopath: Emotion and the brain* (Wiley-Blackwell 2005) 4–6.

Ryan eventually found employment and moved in with his girlfriend. Despite frequent fighting over Ryan's irresponsible financial habits, continued drug dealing and over-indulgent alcohol use, the relationship remained stable. Over the years, Ryan had two affairs, but both ended because he felt worried his girlfriend would find out and leave him.

Ryan's drinking grew worse, and one evening he became involved in a fight at a local bar. The owner of the bar broke up the fight and Ryan was asked to leave. Although normally able to leave a fight, this time Ryan returned and hit his opponent with a bottle, which shattered and caused a fatal gash to the individual's throat. The police were called and Ryan immediately told them what had happened. In court, Ryan entered a plea of guilty.

Compare this with the story of Tyler:

Tyler is in his late 30s and is serving a life sentence for murdering his travelling companion in order to steal his money. On the wing, he is a heavy drug user and dealer. He is lively and entertaining to talk to in small doses, but his conversation with staff always ends up being inappropriate and suggestive. He has had various jobs on the wing, but few have lasted more than a few weeks. He is constantly in trouble due to being unreliable and for having violent outbursts when his expectations are not met. Most of the other inmates treat him with a mixture of fear and respect, which he enjoys.

Tyler's arrest record is several pages long... [A]t age 11, he was apprehended while attempting to drown a classmate who had refused to hand over his pocket money. When asked what happened to the child, Tyler laughed as he related that the kid was bigger than him and, as a consequence, he had every intention of "finishing the job" had a teacher not intervened.

After that, Tyler's life has been spent in and out of special secure settings as a child, adolescent, and adult. His list of offences includes just about every category of crime imaginable, from shoplifting and robbery, to grievous bodily harm and hostage taking...

Tyler has never been married, but has had several living-in partners. In each case, he moved in with them after "sweeping them off their feet," as he puts

> it. The longest relationship lasted 6 months, but each was marked by violence and instability. He speaks of countless instances where he was seeing other women while living with another. When asked whether he was ever monogamous, Tyler says that he has always been monogamous. When this apparent inconsistency is pointed out to him, he denies any contradiction: "I've always been monogamous, because it is physically impossible for me to be in two different places at exactly the same time. Understand?"
>
> There was overwhelming evidence that Tyler committed the crime for which he is now imprisoned; however, in court he pleaded not guilty. He still insists that he is innocent, and shows no regard for the murdered victim or his family. Despite the prospect of spending the rest of his life in prison and repeatedly being told that an appeal is futile, he is very upbeat, and speaks as though his release is imminent.

Blair *et al.* argue that while both Ryan and Tyler would meet the criteria for antisocial personality disorder, only Tyler has features consistent with psychopathy.[126] For example, he is charming in a superficial way, appears to lack empathy, remorse, and a sense of guilt, is apt to resort to violence to resolve conflicts and commits a variety of crimes (is 'criminally versatile', to use the terminology of the PCL-R). There is also a sense of the developmental nature of psychopathy in this vignette: even as a child, he displayed what by normal standards is a extreme lack of concern for another person, attempting to drown a child who refused to relinquish his pocket money.

Ryan, in contrast, appears to be more 'normal': he is described, among other things, as 'earnest', a term associated with sincerity and seriousness, is more successful with interpersonal relationships, and appears to be able to feel and communicate guilt and remorse in appropriate circumstances. His main problem, from the vignette, appears to be self-control, with his short temper apparently a crucial factor in the events which led to his commission of murder. Thus, his symptoms seem more in keeping with a legally-conceptualised 'volitional disorder' (with partial lack of control). Although Tyler has 'violent outbursts' consistent with self-control difficulties, however, there seem to be other prominent issues such as lack of empathy, guilt and remorse consistent with the 'core' features of psychopathy posited by Cleckley and Hare.

[126](n 125) 6.

I will now move on to consider whether someone like Tyler may have a mental disorder according to Wakefield's account, and under DSM-IV and DSM-5 criteria.

2.5.3 PCL-R psychopathy as a candidate mental disorder

As noted, I will orientate this discussion around Wakefield's influential 'harmful dysfunction' account of mental disorder. On this account, both a 'harm' and a 'dysfunction' must be present before a condition may be considered to be a disorder. 'Dysfunction' is understood in evolutionary terms, as a failure of an 'internal mechanism' to operate in a way for which it has been naturally selected; harm, on the other hand, is understood as a detrimental impact of a dysfunction on the wellbeing of an individual, gauged relative to social values.[127] Consequently, for Wakefield disorder 'lies on the boundary between the given natural world and the constructed social world'.[128]

In more detail, Wakefield presents an analysis of disorder in general, intended to apply to 'physical' as well as 'mental' disorders, and then refines this to accommodate mental disorders in particular.[129] Disorder in general is defined as follows:

> A condition is a disorder if and only if (a) the condition causes some harm or deprivation of benefit to the person as judged by the standards of the person's culture (the value criterion), and (b) the condition results from the inability of some internal mechanism to perform its natural function, wherein a natural function is an effect that is part of the evolutionary explanation of the existence and structure of the mechanism (the explanatory criterion).[130]

In the case of mental disorder, 'internal mechanism' is understood to be a 'mental mechanism',[131] with mental mechanisms including 'motivational, cognitive, affective, and perceptual mechanisms'.[132] A physiological dysfunction can give rise to a mental disorder on Wakefield's account, provided it causes a dysfunction in a mental mechanism.[133] Although

[127] Wakefield (n 98) 373.
[128] (n 98) 373.
[129] Like many other philosophical writers, Wakefield does not distinguish between 'disorder', 'illness' and 'disease' ((n 98) 374).
[130] Wakefield (n 98) 384.
[131] (n 98) 385.
[132] (n 98) 385.
[133] (n 98) 384.

Wakefield's definition refers to 'mechanism' in the singular, his theory does not require that each disorder is explained by a distinct mechanism. Thus, Wakefield stresses that his theory concerns the failure of functions, rather than of 'mechanisms per se'.[134]

This account, which holds that 'disorder' is a concept with both descriptive and evaluative content (i.e. is a thick value concept), is argued to address some of the shortcomings of attempts to understand 'disorder' in either purely scientific (descriptive) or purely evaluative terms. As regards the former, Wakefield notes that biomedical theories of disorder may be over-inclusive: one may, for example, have a dysfunction in one kidney without having a renal disorder because one's other kidney accommodates for this dysfunction and, overall, no *harm* is caused by this unilateral dysfunction.[135] As regards the latter, he notes that purely evaluative approaches may also be over-inclusive: there are many disvalued conditions (e.g. teething pain or, indeed, conditions like ignorance or illiteracy) that are not considered to be disorders insofar as they are not caused by a dysfunction.[136] The requirement for both dysfunction and harm, therefore, acts as a constraint against over-inclusiveness.

The account, however, inherits problems associated with both biomedical and purely evaluative reductive approaches to the concept of mental disorder. Taking purely evaluative approaches first, Wakefield's theory inherits an issue from Sedgwick's 'constructivist' account wherein mental disorders are considered to be constructs that are entirely dependent on the values of a particular culture.[137] On Sedgwick's account, a condition may properly be regarded as a disorder in one culture but not another; furthermore, a person meeting the criteria for a disorder in one culture may be 'cured' simply by moving to another culture provided the disorder in question is not considered to exist there.[138] The presence of the 'explanatory criterion' does not save Wakefield's theory from this problem: a condition like albinism could be regarded as a dysfunction in two cultures but a disorder in only one, if only one of these cultures considered the condition harmful.[139] For this reason, homosexuality also poses a potential problem for Wakefield's account. If homosexuality is a dysfunction

[134] J.C. Wakefield, 'Spandrels, vestigial organs, and such: Reply to Murphy and Woolfolk's "the harmful dysfunction analysis of mental disorder"', (2000) 7(4) Philosophy, Psychiatry, & Psychology 253, 267.

[135] Wakefield (n 98) 383–4.

[136] (n 98) 376.

[137] P. Sedgwick, 'Illness: Mental and otherwise', (1973) 1(3) The Hastings Center Studies.

[138] Nadelhoffer and Sinnott-Armstrong (n 95) 239.

[139] B. Gert and C.M. Culver, 'Defining mental disorder', in J. Radden (ed), *The philosophy of psychiatry: A companion* (OUP 2007) 415, 421.

– although this is controversial[140] – it could legitimately be considered a disorder on Wakefield's account in a society where it was disvalued and considered harmful.[141]

Problems inherited from biomedical accounts concern the nature of a 'natural function', which has been subject to considerable philosophical debate.[142] It is not possible to enter into these debates in any detail here, but there are two main approaches to natural functions, Cummins-related and Wright-related approaches.[143] Boorse, for example, who adopts a Cummins-style approach, proposes a biological account of disorder whereby function is defined relative to the current goals of an organism.[144] More specifically, the function of a 'sub-system' (i.e. any system or part of a system in the body, whether biological or mental) is defined in terms of its current contribution to the organism's goals of survival and reproduction.[145] 'Normal' functioning corresponds to what is statistically normal within an appropriate reference group (e.g. within conspecifics of the same age and sex), with 'disease' deemed to be present where the functioning of a sub-system drops below the normal range.[146]

Wakefield, on the other hand, espouses a Wright-style approach to function.[147] As noted, on this approach, the function of a mechanism (or sub-system[148]) is whatever it was naturally selected to do. Crucially, these approaches can lead to conflicting conclusions about what constitutes normal function, and therefore about whether a dysfunction is present. What counts as a natural function in an evolutionary historical context may no longer count as a function: a sub-system may have evolved to perform one function, but currently perform a different function.[149] Cooper suggests, as an example, the hypothesis that insects' wings originally functioned to regulate temperature.[150] From a Wright-style perspective, we may

[140]Cooper (n 89) 32–3.

[141](n 95) 245 footnote 9.

[142]Cooper (n 89) 30.

[143]R. Cummins, 'Functional analysis', (1975) 72(20) Journal of Philosophy 741; L. Wright, 'Functions', (1973) 82(2) Philosophical Review 139 (discussed in Cooper (n 89) 30–1).

[144]e.g. C. Boorse, 'On the distinction between disease and illness', (1975) 5(1) Philosophy and Public Affairs 49; C. Boorse, 'What a theory of mental health should be', (1976) 6(1) Journal for the Theory of Social Behaviour 61; C. Boorse, 'Health as a theoretical concept', (1977) 44(4) Philosophy of Science 542.

[145]Cooper (n 89) 30–1; R. Cooper, 'Disease', (2002) 33 Studies in History and Philosophy of Biological and Biomedical Sciences 263–282, 264–76.

[146]Cooper (n 145) 265.

[147]Wakefield (n 98) 382; Cooper (n 145) 268.

[148]Like Cooper, who discusses Wakefield's account in terms of 'sub-systems', I will use these terms interchangeably (Cooper (n 89) 30–31).

[149]Cooper (n 89) 31.

[150](n 89) 31.

be forced to draw the counterintuitive conclusion that insects that cannot fly do not have a dysfunction (and, on a purely biological approach to disorder, do not therefore have a disease).[151] Wakefield's theory can be saved from this particular problem, concerning the 'exaptation' of naturally selected functions for different purposes, by stipulating that what matters is the most recently naturally selected development.[152] Thus, if insects' wings have most recently been selected for their flying function, this is what counts as normal function for the purposes of the harmful dysfunction analysis. This means, however, that the choice of evolutionary period is extremely important for Wakefield's theory, as is knowledge of the functions that were naturally selected during the chosen period.[153]

Turning now to psychopathy, let us consider as an example the finding that psychopaths have been found to have amygdala hypofunction (abnormally low amygdala activity).[154] If the amygdala evolved because it ensured certain responses, such as a fearful reaction in response to a threatening stimulus (e.g. a threat of violence), and it no longer functions to (adequately) provide such responses, then from a Wright-style perspective there may be a dysfunction.[155] However, it might be wondered how we *know* that this was the naturally selected function of the amygdala during the evolutionary period in question.

In this regard it is notable that some theorists, such as Mealey, have argued that psychopathy may constitute an 'evolutionarily stable strategy' (ESS):[156] provided the number of psychopaths remains small, a strategy involving cheating or 'nonreciprocation' may enable this group to reproduce sufficiently and maintain its size.[157] One could perhaps construct a story whereby amygdala hypofunction served to further an ESS: nonreciprocation, for example, might be easier where one is not 'troubled' by aversive reactions that might arise where one contravenes social norms.

It should be stressed, however, that the ESS hypothesis is controversial. In particular, the game theoretical models underlying it may make assumptions that do not accurately

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[151] Cooper (n 145) 268.

[152] D. Murphy and R.L. Woolfolk, 'The harmful dysfunction analysis of mental disorder', (2000) 7(4) Philosophy, Psychiatry, & Psychology 241, 242–3.

[153] See also Cooper (n 145) 268–9.

[154] Nadelhoffer and Sinnott-Armstrong (n 95) 234.

[155] (n 95) 242–3.

[156] This game theory-based idea is from Maynard Smith (J. Maynard Smith, *Did Darwin get it right? Essays on games, sex and evolution* (Chapman & Hall 1989) chapters 7, 21 and 22). For discussion, see for example D. Dennett, *Darwin's dangerous idea: Evolution and the meanings of life* (Penguin 1995) 251–61.

[157] L. Mealey, 'The sociobiology of sociopathy: An integrated evolutionary model', (1995) 18 Behavioral and Brain Sciences 523.

characterise psychopathy. Along these lines, Murphy has argued that the ESS hypothesis may assume a lack of cognitive impairments in the 'cheating' populations, and that the model could collapse if these were added.[158] As regards cognitive impairments, psychopaths seem to have difficulty formulating long-term goals, and have problems with impulsivity; attention-related issues have also been documented.[159] It is also important to distinguish between psychopathic traits, which may be evolutionarily beneficial in moderation, and the constellation of traits that amounts to PCL-R psychopathy. There is evidence of an 'appreciable' genetic influence on psychopathic traits,[160] but PCL-R psychopathy may be disastrous as a 'strategy' in its own right. As Wakefield suggests, some psychopathic traits may be beneficial in some environments, in the way that a person heterozygous with a mutation that causes sickle-cell disease might be protected from malaria, but a more extreme constellation of traits (like homozygosity for the sickle-cell gene) may be catastrophic for an individual.[161]

It is conceivable, then, that psychopathy may involve dysfunction from a Wright-style perspective. A similar conclusion could be reached from a Cummins-style perspective. A propensity for risk-taking, and associations with alcohol abuse, drug abuse and violence, may be associated with reduced longevity.[162] Due to criminal behaviour, psychopaths may also spend a significant amount of time in prison, with concomitant reduced opportunities for reproduction. We might, therefore, conclude from a purely biomedical standpoint (i.e. attempting to exclude a value-based assessment) that psychopathy amounts to a dysfunction and, therefore, a disease.

A worry from the perspective of both accounts of dysfunction, however, is that psychopathy may not amount to a coherent condition in the first place. As discussed in Section 2.3, there are still debates about the relationship between psychopathy and criminal behaviour, for example, with some commentators arguing that this behaviour is merely a 'correlate' of psychopathy. Indeed, Camp *et al.* have argued that the core affective aspects of psychopathy are associated with a '*deficit* rather than surplus in motivation' for

[158] D. Murphy, 'Darwinian models of psychopathology', in J. Radden (ed), *The philosophy of psychiatry: A companion* (OUP 2007) 328, 335–6

[159] (n 95) 232–3.

[160] I.D. Waldman and S.H. Rhee, 'The search for genes and environments that underlie psychopathy and antisocial behavior: Quantitative and molecular genetic approaches', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 180, 193.

[161] Wakefield (n 134) 260.

[162] Nadelhoffer and Sinnott-Armstrong (n 95) 241–2.

violence, and that the criminal behaviour of psychopaths is to be explained by other (e.g. sociological) factors.[163] Until these questions are resolved, and a clearer view of the nature of psychopathy is established, it may be premature to consider whether psychopathy represents a dysfunction from a Cummins-style perspective, or is caused by a dysfunction from Wakefield's Wright-style perspective.

It is also possible that what we currently think of as PCL-R psychopathy will, following further research, fracture into various subtypes (indeed, I will suggest in Section 5.2 that this may occur, given our emerging understanding of psychopathy and the research tools, like diffusion tensor imaging, now available). Some of these subtypes may be more readily understood in scientific terms (e.g. as the result of a collision between genes and environment-induced epigenetic modifications) and may qualify less controversially as coherent conditions. Depending on the outcome of a Wright-style or Cummins-style analysis, it may be less problematic to view these conditions as dysfunctional.

Even if psychopathy were caused by a dysfunction on Wakefield's account, however, it is still necessary to establish whether this causes harm. An initial concern might be that psychopaths may not appear to suffer in any way, at least apart from any harm caused by society's response to their behaviour. However, judged relative to cultural standards, psychopaths live impoverished lives. They may be unable to form normal relationships or experience the bonds of friendship that non-psychopaths take for granted.[164] They may live shorter lives, due to repeatedly engaging in risky behaviour (in keeping with PCL-R item 3 'Need for stimulation').[165] They may also live frustrating lives, due to impaired abilities to formulate and implement long-term goals.[166] The aforementioned associations with alcohol abuse, drug abuse and violence may also lead to an increased risk of harm. Thus, psychopathy may meet the value criterion in Wakefield's account.

The main difficulty with respect to Wakefield's account, therefore, appears to be the 'dysfunction' requirement. I have suggested that it may be premature to hold that psychopathy is caused by a dysfunction from this Wright-style perspective, given debates about the coherence of the condition. It may also, therefore, be premature to take the view that psychopathy is a mental disorder according to this account. Notwithstanding this, however, it

[163] J.P. Camp, J.L. Skeem, K. Barchard *et al.*, 'Psychopathic predators? Getting specific about the relation between psychopathy and violence.', (2013) 81(3) Journal of Consulting and Clinical Psychology 467, 477.

[164] Nadelhoffer and Sinnott-Armstrong (n 95) 246–7.

[165] (n 95) 247.

[166] (n 95) 247.

is possible that psychopathy may qualify as a mental disorder on this account in the future, once we know more about it (or, alternatively, subtypes of psychopathy may qualify).

Wakefield's account has clear similarities to the general definition of mental disorder in DSM-IV and DSM-5 classification systems. Given the influence of these systems, it is worth considering how Wakefield's model might apply in the case of psychopathy. In the DSM-IV, mental disorder is defined as follows:

> [E]ach of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in a person and that is associated with present distress (a painful symptom) or disability (impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this symptom or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the person. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the person, as described above.[167]

The ICD-10 general definition is similar, although more concise (Bolton remarks that it is stated 'with less conviction, elaboration, and qualification' than the DSM-IV definition[168]).[169] I will therefore take it that, in testing psychopathy against this definition, I am also testing it (at least approximately) against the ICD-10 definition.[170]

It was accepted by the drafters of the DSM-IV definition that the 'precise boundaries' of mental disorder could not be defined, and that the definition did not provide conditions that

[167] DSM-IV-TR (n 101) xxi–xxii.

[168] D. Bolton, 'What is mental illness?', (2013) Oxford Handbook of Philosophy and Psychiatry 434, 437.

[169] This is stated as follows: '"Disorder" is not an exact term, but it is used here to imply the existence of a clinically recognizable set of symptoms or behaviour associated in most cases with distress and with interference with personal functions. Social deviance or conflict alone, without personal dysfunction, should not be included in mental disorder as defined here' (ICD-10 (n 102) 11).

[170] Given the similarities between the DSM-IV and DSM-5 definitions, as will be seen below, the ICD-10 definition is also similar to the DSM-5 definition.

were necessary and sufficient for the classification of a condition as a mental disorder.[171] This definition, however, has been widely accepted by psychiatrists,[172] and it also makes reference to both harm and dysfunction. As regards harm, mental disorders must be associated with (occur together with) negatively valued conditions such as distress and disability, or a 'significantly increased risk' of possible adverse outcomes such as death, pain and loss of freedom (I will refer to these collectively as 'harms'). As regards dysfunction, the clinical features of a disorder (presenting as a 'syndrome or pattern') must also be caused by (be a 'manifestation of') a 'dysfunction' within a person.[173] There is an exception for features occurring as 'an expectable and culturally sanctioned response', such as in response to the death of a close family member.

No attempt is made to define 'dysfunction', but if this is read in a manner consistent with Wakefield's account or, indeed, Boorse's account, it might be thought that psychopathy could potentially qualify as a mental disorder in future, if not now. Provided there was a dysfunction 'in' the person, and this manifested as symptoms that caused that person harm (in one or more of the various ways mentioned) the other conditions might appear, at least at first glance, to be met.

A potential stumbling block is the exclusion for 'deviant' behaviour or conflicts that are 'primarily between the individual and society'. This clause attempts to ensure that conditions are not pathologised where the 'harm' that results is due to society's response, rather than to a dysfunction within persons.[174] A condition like homosexuality, for example, might be harmful in some societies only because homosexuality is rejected and disvalued. Although psychopaths' deviant behaviour is not stereotypically 'political, religious, or sexual', the list is non-exhaustive and morally deviant behaviour might be included. However, provided psychopathy were established to be caused by a dysfunction, this exclusion would seem not apply (i.e. it would be the case that the 'deviance or conflict is a symptom of a dysfunction in the person').

As argued above, however, we may not be at a point where this can be established, due to issues surrounding the coherence of psychopathy; consequently, psychopathy may not

[171] DSM-IV-TR (n 101)) xxi.

[172] Gert and Culver (n 139) 415.

[173] A 'syndrome' may be defined as 'a combination of signs and/or symptoms that forms a distinct clinical picture indicative of a particular disorder' (*Concise medical dictionary* (8th edn, OUP 2010)). I take 'pattern' to be synonymous, in this context, with 'syndrome'.

[174] Nadelhoffer and Sinnott-Armstrong (n 95) 247.

qualify as a mental disorder according to DSM-IV criteria from a 'harmful dysfunction' perspective. A similar conclusion could be reached with respect to the DSM-5 criteria which, despite some differences, are broadly similar to the DSM-IV criteria. The entire definition is as follows:

> A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.[175]

This definition, like the DSM-IV definition, accords a pivotal role to the concept of dysfunction (which is again undefined). Notable differences, however, include a shorter list of possible harms, lacking any specific mention of 'risks' of harm. It is also stated that mental disorders must *usually* cause these harms, which suggests a more lenient approach to the classification of mental disorders.[176] Provided psychopathy were caused by a dysfunction, the condition might qualify as a mental disorder on this definition: as psychopaths are unable to form normal relationships, for example, or pursue long-term goals or strategies, they might be judged to have a disability relative to societal standards.[177]

To conclude, I have considered the possibility that psychopathy may qualify as a mental disorder according to Wakefield's 'harmful dysfunction' account, have briefly considered the Boorsean approach to dysfunction, and have extended this analysis to consider the general definitions of mental disorder in DSM-IV and DSM-5 classification systems. I have argued that issues surrounding the coherence of psychopathy, as it is currently understood, may mean that it is premature for psychopathy to be considered a disorder on these accounts.

[175] DSM-5 (n 101) 20.

[176] Bingham and Banner (n 99) 4–5.

[177] Like 'disorder', however, 'disability' is a problematic concept. Competing views include those provided by medical, social and welfarist models. For a discussion of these approaches, see for example J. Savulescu and G. Kahane, 'Disability: A welfarist approach', (2011) 6(1) Clinical Ethics 45.

I have not considered debates about the meaning of 'dysfunction', or the relevance of dysfunction to definitions of mental disorder, in any detail.[178] Notwithstanding this, however, the DSM-IV and -5 systems rely on a concept of dysfunction, and given the wide acceptance of these systems an argument that psychopathy is a mental disorder, made for example by policymakers, is likely to utilise the concept of dysfunction. As an account that largely parallels the DSM definitions, Wakefield's theory has provided a helpful theoretical approach to these definitions, and to relevant debates in the philosophy of psychiatry.[179]

As noted, however, whether a condition like psychopathy is regarded as a mental disorder in a medical sense is in principle neither necessary nor sufficient for it to be regarded as a 'disorder' for legal purposes. In Chapter 5, I discuss the possibility of identifying a subgroup of PCL-R psychopaths who lack an ability to appreciate moral considerations concerning harm. If this group could be identified, its legal significance could warrant making psychopathy a 'mental disease' for the purposes of a reformed insanity defence, apart from scientific and philosophical concerns (provided such a criterion was required for access to this defence). Alternatively, on an approach like that proposed by the Law Commission (see Section 1.3.2), this could warrant making psychopathy a 'recognised medical condition'. Thus, pragmatic reasons may, in the end, provide the clearest and best grounds for assigning psychopathy the legal status of a 'disorder' or 'disease'.

Finally, returning to the medical domain, even if PCL-R psychopathy does not qualify as a mental disorder under DSM-IV and DMS-5 criteria, it would qualify as a personality disorder. The DSM-IV general criteria, replicated in the main part (Section II) of the DSM-5 manual,[180] specify that a personality disorder is 'an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture'.[181] As Nadelhoffer and Sinnott-Armstrong comment, the various general criteria would be met,

[178] It has, for example, been argued that dysfunction is neither necessary nor sufficient for a condition to amount to a disorder (Cooper (n 145)).

[179] Another theory with parallels to the DSM definitions is Gert and Culver's 'distinct sustaining cause' theory. There are, however, serious problems with this theory which struggles with issues concerning over-inclusiveness (see J.C. Wakefield, 'Darwin, functional explanation, and the philosophy of psychiatry', in P.R. Adriaens and A.D. Block (eds), *Maladapting minds: Philosophy, psychiatry, and evolutionary theory* (OUP 2011) 143, 152–61).

[180] DSM-5 (n 101) 646–7.

[181] DSM-IV-TR (n 101) 633.

and psychopathy would be regarded as an 'extreme kind of personality disorder'.[182]

[182]Nadelhoffer and Sinnott-Armstrong (n 95) 248–9. All four areas in Criterion A ('cognition, affectivity, interpersonal functioning, or impulse control') are affected, as are the various additional criteria in Criteria B to D: psychopathic traits are 'inflexible and pervasive across a broad range of personal and social situations' (Criterion B), they impact on 'important areas of functioning' (Criterion C), and 'onset can be traced back at least to adolescence or early adulthood' (Criterion D). Additionally, psychopathy is not a 'manifestation or consequence of another mental disorder' (Criterion E) or 'due to the direct physiological effects of a substance...or a general medical condition' (Criterion F).

Chapter 3

The prima facie case for access to an insanity defence

3.1 Introduction

In this Chapter, I present the prima facie case for providing some psychopaths with access to an insanity defence for some alleged criminal offences. This requires an initial discussion of relevant underlying responsibility theory. The Chapter culminates with a return to the M'Naghten Rules, where I consider the relationship between the prima facie case and the 'knowledge' criteria in Rule 3. This permits a more precise specification of some of the conditions that would need to obtain, and reforms (or reinterpretations) of the insanity defence that would need to occur, if relevant psychopaths are to potentially succeed with insanity pleas (if reform were to be pursued).

The Chapter is divided into four Sections. First, in Section 3.2, I introduce a reasons-responsiveness approach to moral responsibility, beginning in Section 3.2.1 with the seminal 'social practice' account of Peter Strawson and its origins in Hume's work. Given that we may be strongly inclined to react to psychopaths' behaviour with attitudes of resentment and indignation, Strawson's emphasis on these responses as central to an understanding of responsibility is a reasonable place to start. This then leads on to discussions of Wallace's development of Strawson's theory in Section 3.2.2, and Fischer and Ravizza's refinements in Section 3.2.3. At each stage, after outlining a theory, I consider what light the theory might shed on the responsibility of psychopaths, and consider some relevant limitations of

the theory. Fischer and Ravizza's theory is seen to address some serious problems with Wallace's account, which in turn addresses some limitations of Strawson's theory.

Fischer and Ravizza's theory, however, remains susceptible to what has been termed the 'Basic Argument', an incompatibilist scepticism that doubts whether we can ever truly be responsible. 'Incompatibilism', contrary to 'compatibilism', is the view that moral responsibility is incompatible with a universe in which everything is caused (and/or random). In Section 3.2.4, I indicate how the compatibilism of the various theories discussed may be defended against this argument. I then conclude this Section, in Section 3.2.5, by explaining my focus on reasons-responsiveness compatibilism rather than 'mesh' compatibilism, its leading theoretical contender. Reasons-responsiveness compatibilism, I argue, may better represent the deficits that some psychopaths may have.

Given the scientific focus of this thesis, I then proceed in Section 3.3 to clarify how neuroscience may be relevant to moral responsibility. I note that although, from a reasons-responsiveness perspective, neurobiological factors are relevant to responsibility insofar as they impact on rational capacities, there is disagreement over the nature of the capacities required for responsible agency. Other issues include empirical problems with establishing, in practice, whether relevant capacities are impaired, and the normative issue of how to establish an appropriate threshold for responsibility to apply in cases where impairments are non-absolute. I also note that when one makes the transition from discussing moral responsibility to discussing criminal responsibility, an issue that emerges is that other, nonmoral, capacities are relevant to responsibility.

These Sections provide a theoretical background for the discussion in Section 3.4, where I outline the prima facie case. I begin by considering an important objection to the case, namely the view espoused by some proponents of reasons-responsiveness accounts that moral competence is not a prerequisite for holding persons morally responsible. Following Litton, I argue that even if these accounts are correct, they do not translate well into a criminal law context where moral reasons may provide our best reasons for refraining from committing at least some crimes and thereby avoiding harsh criminal sanctions. A second objection that arises concerns the relevance of nonmoral reasons to criminal responsibility: relevant psychopaths, who lack moral competence, may retain a responsiveness to nonmoral reasons, such as legal and prudential reasons, and it could be argued that these capacities should justify holding psychopaths criminally responsible. This issue is not easily resolved, and is discussed again in Section 6.3.

Finally, I return to the M'Naghten Rules in Section 3.5 and consider the relationship between the prima facie case and 'knowledge' in Rule 3. This Chapter provides a theoretical basis for the more scientific discussion in Chapters 4 and 5, and the discussion in Chapter 6 where I finally consider whether an insanity defence ought to be made available for some psychopaths in the case of relevant alleged criminal offences.

3.2 Psychopaths, social practices and 'reasons-responsiveness' compatibilism

3.2.1 Hume and Peter Strawson

As noted in Section 0.1, the argument that psychopaths ought to be excused from moral or criminal responsibility is apt to meet resistance because the behaviour of psychopaths may seem unacceptable. The way psychopaths act seems, at first glance, to make them *more* blameworthy. This tendency that we have to blame or feel resentment provides a suitable starting point for a discussion of moral responsibility. If some psychopaths are to be excused from responsibility, despite arousing such strong reactions, it is necessary to critically examine the appropriateness of such a response. We might seek to identify circumstances in which such a response might seem inappropriate, and the considerations that might ground such a conclusion. We might then ask whether psychopaths ought to be excused in the light of these considerations.

A number of philosophers have employed our tendency to react in a particular way to apparently wrongful behaviours as a basis for theories of moral responsibility. Hume, in an approach later followed by Peter Strawson[1] and others, grounds his theory of responsibility in these human reactions or sentiments.[2] After considering the example of a man who is 'robbed of a considerable sum', and the 'vexation' this is likely to cause, he argues that 'remote and uncertain speculations' about determinism are unlikely to diminish these senti-

[1] It will be necessary to refer to Peter Strawson by his full name on occasion, to distinguish him from his son and fellow philosopher Galen Strawson.

[2] Hume pioneered, along with Adam Smith and others, an approach to ethics called sentimentalism. Various forms of sentimentalism are available, although they share the view that 'human reactions' have a central role in morality (A. Kauppinen, 'Sentimentalism', in H. LaFollette (ed), *International encyclopedia of ethics* (Blackwell 2013)).

ments:[3] they 'are not to be controuled or altered by any philosophical theory or speculation whatsoever'.[4]

Strawson's influential account, presented in the essay *Freedom and resentment*, proceeds along similar lines.[5] Like Hume, Strawson is concerned about the implications of the thesis of causal determinism for responsibility, and wishes to show that moral responsibility is compatible with it (thus securing a 'compatibilist' account). According to this thesis, knowledge of all the states of the universe at a particular time, together with knowledge of all natural laws, is in theory sufficient to enable one to predict all future states of the universe.[6] Like Hume, Strawson argues that the 'reactive attitudes' we have towards such things as the good or bad intentions of others, which are associated with mental states such as 'gratitude, resentment, forgiveness, love, and hurt feelings',[7] *cannot* be undermined by speculations about determinism.[8] This amounts to a psychological claim or thesis concern-

[3]Hume was particularly troubled by the possibility of divine determinism (D. Hume, *An enquiry concerning human understanding* (Beauchamp, T.L. ed, OUP 1999) 163–4 (section 8 para 35)).

[4](n 3) 164.

[5]'Freedom and resentment', in P.F. Strawson (ed), *Freedom and resentment and other essays* (Routledge 2008) 1.

[6]Fischer and Ravizza express this as follows: 'Causal determinism is the thesis that, for any given time, a complete statement of the facts about that time, together with a complete statement of the laws of nature, entails every truth as to what happens after that time' (J.M. Fischer and M. Ravizza, *Responsibility and control: A theory of moral responsibility* (CUP 1998)) 14. Scanlon presents a modified version of the thesis of causal determinism, the 'Causal thesis', intended to take into account the possibility that some events may be random: 'all of our actions have antecedent causes to which they are linked by causal laws of the kind that govern other events in the universe, whether these laws are deterministic or merely probabilistic' (T.M. Scanlon, *What we owe to each other* (HUP 1998) 215).

[7](n 5) 5.

[8](n 5) 14. More specifically, Strawson's psychological thesis concerns the roles that 'participant reactive attitudes' play in interpersonal relationships; these attitudes are 'participant' insofar as they arise from the interpersonal relationships we are involved with. Strawson initially considers two opposing views on free will and responsibility, reminiscent of the 'remote and uncertain speculations' referred to by Hume: first, there is the view of the 'optimist', who typically argues for a compatibilist account of responsibility on consequentialist grounds by referring 'to the efficacy of...practices [of moral condemnation and punishment] in regulating behaviour in socially desirable ways' ((n 5) 2); second, there is the view of the 'pessimist', who rejects this approach and is tempted by the 'obscure and panicky metaphysics' of libertarianism (a form of incompatibilism that holds that free will is possible and determinism is false (M. McKenna, 'Compatibilism', in E. Zalta, N. (ed) *The Stanford Encyclopedia of Philosophy*, (Winter 2009) <http://plato.stanford.edu/archives/win2009/entries/compatibilism/> accessed 27.6.14))(Strawson (n 5) 27)). Strawson then rejects both approaches, arguing instead that a proper grounding for an account of responsibility is to be found in 'the general structure or web of human attitudes and feelings', which provide 'endless room' for such an account ((n 5) 25). Psychologically, Strawson argues, 'a general theoretical conviction' could not change or undermine our 'participant reactive attitudes', because our commitment to 'ordinary interpersonal relationships is...too thoroughgoing and deeply rooted' ((n 5) 12).

ing the immutability of the reactive attitudes.[9]

Strawson argues that the question whether we should abandon the reactive attitudes could only arise only if we had 'utterly failed to grasp' the psychological thesis.[10] The reactive attitudes, he argues, are something we have a 'natural human commitment' to, and cannot be altered in this way. He adds, however, that even if we could do this, any decision regarding whether or not to suspend these attitudes would necessarily be based around practical issues concerning possible 'gains and losses to human life'.[11] Given Strawson's view that the reactive attitudes have a vital role in the dynamics of normal human relationships, the implication may be that we would decide, based on practical considerations, to retain these attitudes.[12]

Strawson proposes two types of case where we might *suspend* these attitudes, focusing on circumstances where resentment or indignation might arise. In the first case (following Pereboom, I call this 'Type 1'), we might be offended or injured by a person, but circumstances urge us to consider this person an inappropriate target for reactive attitudes on that occasion.[13] If, for example, a stranger spills a drink on me, and I discover that this occurred by accident, I might quickly withdraw any feelings of resentment I have towards this person due to that act.[14] I may still, however, view this person as an appropriate target of reactive attitudes in general.[15] As Fischer and Ravizza put it, this person might still be regarded as an 'apt candidate' for reactive attitudes, despite not being a *recipient* of a reaction like resentment on this occasion.[16]

In the second kind of case ('Type 2'), circumstances urge us to adopt a more radical approach. In these cases, Strawson comments, a person may appear to be abnormal psychologically in some way, or may simply be a child.[17] In these cases, our reactive attitudes are typically altered. We may suspend these attitudes entirely and adopt an 'objective atti-

[9]D. Pereboom, *Living without free will* (CUP 2001) 90–1.

[10](n 5) 10.

[11](n 5) 14.

[12]Pereboom argues that Strawson's view would be that practical considerations would 'heavily favour' retention of the reactive attitudes in such a case (Pereboom (n 9) 94).

[13](n 5) 8.

[14]Alternatively, if someone appears to gratuitously insult me, and I later discover that he was particularly stressed at that time, I might suspend any reactive attitudes towards him for that behaviour. These examples are from Pereboom (n 9) 92.

[15](n 5) 8.

[16](n 6) 7.

[17](n 5) 9.

tude' towards that person.[18] Once regarded in this light, a person is apt to be viewed as a candidate for 'treatment' (in a broad sense);[19] in a legal context, for example, they might be treated in their best interests.[20] In contrast to Type 1 cases, in Type 2 cases a person is not considered to be an apt candidate for reactive attitudes.

In order to apply Strawson's theory to psychopaths one might ask whether psychopaths are apt targets for the reactive attitudes (i.e. whether psychopaths could be Type 2 cases). There are a number of issues with Strawson's theory, however, that call into question the extent to which it provides a successful route to compatibilism.[21]

First, Strawson's view that abstract worries about determinism cannot affect the reactive attitudes is questionable. An example from Watson helpfully illustrates this.[22] Robert Harris was convicted and sentenced to death for the murder of two teenage boys, John Mayeski and Michael Baker, in California, USA, in 1978. His actions were so brutal and cold (e.g. he laughed after seeing the results of shooting one of the boys in the head at close range), and his subsequent behaviour so unpleasant that other inmates on death row opined that he was a perfect candidate for execution.[23] In his childhood, however, he had been subjected to parental rejection and shocking abuse; he had also been born prematurely, after his mother had been kicked in the stomach by his abusive father, and had lifelong speech and learning disabilities.[24] He spent years in prison, where he was raped, and was transformed from a very sensitive boy into a very 'mean' individual.[25] As Watson comments, when we read the story of his background, our initial feelings of resentment or indignation are tempered: we may come to feel that because Harris's character was formed in a way that was outwith his control, reactive attitudes may not be appropriate (or as appropriate). The difficulty for Strawson's account is that these are precisely the kinds of incompatibilist considerations that it is claimed cannot alter the reactive attitudes.[26]

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[18](n 5) 9. Strawson comments that the objective attitude may be 'emotionally toned', but lacks the variety of reactive attitudes and feelings usually encountered in interpersonal relationships ((n 5) 10).

[19](n 5) 9.

[20]The Mental Capacity Act 2005, for example, provides that where a person lacks capacity another person may make decisions for this person in their 'best interests' (s.5).

[21]See Pereboom (n 9) 95–100, 110–26.

[22]G. Watson, 'Responsibility and the limits of evil: Variations on a Strawsonian theme', in G. Watson (ed), *Agency and answerability: Selected essays* (OUP 2004) 235–43. Discussed by Pereboom (n 9) 95–6.

[23](n 22) 235.

[24](n 22) 240–1.

[25](n 22) 240–1.

[26]This story, therefore, is also a problem for Hume's account.

Second, it is debatable whether practical considerations would favour retaining the reactive attitudes, should these somehow conflict with incompatibilist considerations (although Strawson seems to think that such a conflict could not genuinely occur). One reason is that it may be possible to do without 'retributive' reactive attitudes, associated with resentment and indignation, without seriously undermining interpersonal relationships.[27] Although it may not be easy, it may be possible to accomplish this without adopting the objective attitude that Strawson reserves for Type 2 cases.[28]

These issues suggest that the reactive attitudes may not provide the basis for a theory of compatibilism proposed by Strawson. It is also the case, as Tadros comments, that by focusing on the *reactions* that a person may have to apparently wrongful conduct, Strawson's account says very little about what the target of the reactive attitudes actually is.[29] If we are inclined to suspend our reactive attitudes, we might ask what features of an agent incline us to do so. In Type 1 cases, agents appear to possess a capacity for responsible agency that persons lack in Type 2 cases lack. But what is the nature of this capacity? I will now consider Wallace's theory, which attempts to address this issue, before returning to the issue of psychopaths' responsibility.

3.2.2 Wallace's account

Wallace, who refines Strawson's theory, distinguishes between 'holding' responsible and 'being' responsible.[30] We may *hold* someone responsible, but we may only reasonably deem that they *are* responsible when it is fair to do so.[31] Where a person is held responsible, they are deemed apt candidates for reactive emotions like resentment should they breach moral obligations they may reasonably be expected to comply with.[32] In Strawson's Type 1

[27] See Pereboom (n 9) 97.

[28] Watson indicates that persons like Mahatma Gandhi and Albert Einstein have attempted to suppress such reactive attitudes while leaving other reactive attitudes intact (n 22) 255–8).

[29] V. Tadros, *Criminal responsibility* (OUP 2005) 26.

[30] R.J. Wallace, *Responsibility and the moral sentiments* (HUP 1994).

[31] (n 30) especially Ch.6. See also M. Matravers, *Responsibility and justice* (Polity Press 2007) 34–7.

[32] In addition to refining Strawson's taxonomy of Type 1 and 2 cases, Wallace attempts to bridge the gap between Strawson's reactive attitudes and moral concepts of right, wrong and obligation. Broadly, for Wallace, the reactive attitudes are connected to 'expectations' we may hold others and ourselves to. To hold someone to an expectation is to expect or demand that they respond or behave in a particular way (see, in particular, (n 30) ch.2–3). To hold someone morally responsible 'is to hold the person to moral expectations that one accepts' ((n 30) 51). For Wallace, moral expectations that we accept, and that we hold ourselves and other people to, are moral obligations ((n 30) 63).

cases, the person held responsible is not at fault. In Wallace's terms, they have not expressed a 'blameworthy quality of will'.[33] Consequently, this person ought to be excused (or it should be accepted that their actions were justified).[34]

In Type 2 cases, however, it is not fair to hold a person responsible because they lack a range of general capacities. These capacities for 'reflective self-control' are essential for responsible agency, and without these persons are not accountable for their actions.[35] Wallace argues that reflective self-control requires (1) a 'general ability to grasp and apply moral reasons' and (2) a general capacity to 'regulate...behavior by the light of such reasons'.[36] As regards (1),[37] the moral reasons in question are the 'sort that may be expressed in the form of principles'.[38] An agent must be able to understand moral principles, apply them in appropriate circumstances, and weigh them against other relevant moral principles.[39] This ability also requires ancillary capacities, such as capacities for attention and concentration.[40] As regards (2), an agent must be able to reflect critically, make specifically moral choices, and implement decisions ('translate...choices into behaviour').[41]

The appeal to fairness in Wallace's theory is justified by reference to the dispositions associated with holding a person responsible. When a person is held responsible, we are disposed to react with retributive emotions like resentment and indignation. These emotions, Wallace argues, 'naturally find expression in adverse forms of treatment' such as 'avoidance, reproach, condemnation, and scolding'.[42] Given that such treatment may be unpleasant or harmful, he argues, it is only fair to hold people responsible where they can *respond* to the sorts of practical, principle-based, *reasons* that could be used to justify the moral

[33] As Fischer puts it, they have 'not really done anything morally wrong' (J.M. Fischer, 'Review of R. Jay Wallace, *Responsibility and the moral sentiments*', (1996) 106(4) Ethics 850). The focus on the quality of a person's will (or intention) rather than on the effects of a particular action represents a nonconsequentialist ethical approach to responsibility assessment.

[34] See especially (n 30) ch.5; summarised 155–6.

[35] (n 30) 70.

[36] (n 30) 157–8.

[37] (n 30) 157.

[38] (n 30) 129.

[39] (n 30) 157. Wallace considers, for example, the principle of non-maleficence: the principle that 'one should not deliberately harm other people in the ordinary pursuit of one's own ends'. In order to apply this principle, it is necessary to have 'a sophisticated understanding of the concept of *harm*', and be aware of when harms such as physical, psychological and reputational harm to another person might arise from one's actions ((n 30) 157).

[40] (n 30) 158.

[41] (n 30) 158.

[42] (n 30) 160.

obligations they may be expected to comply with.[43] In this sense, Wallace's theory is a 'reasons-responsiveness' compatibilist theory.

The concept of a general capacity is intended to accommodate the possibility that one may not necessarily be successful with an endeavour on a particular occasion, and can contrasted with the idea of a specific capacity. Honoré provides the example of a golfer: we might say that he is able to hole six-foot puts (in a general sense), even if he is unable to hole *this* six-foot put (in a specific sense).[44] Likewise, Tadros provides the example of a footballer: we might say that he is able to score 'from difficult angles' in a general sense, even if he cannot do so on this occasion.[45]

Turning now to psychopathy, Wallace divides Strawson Type 2 cases into exemptions of shorter and longer duration.[46] As regards the latter, longer-term class of exemptions, he argues that psychopaths ought to be exempted from moral responsibility (along with, for example, very young children) insofar as they are unable to grasp and apply moral principles.[47] We have, therefore, a possible basis for part of the prima facie case for access to an insanity defence.

There are, however, some potential problems with utilising Wallace's theory as a basis for the prima facie case. Two issues I will focus on here include, first, the role given to fairness in Wallace's theory and, second, his use of the concept of a general capacity. As regards the former, it is important to note that not all theorists agree with Wallace that it is unfair to hold persons morally responsible where they lack a capacity to respond to moral reasons. Scanlon, for example, who also espouses a reasons-responsiveness approach, argues that it may be appropriate to hold persons lacking moral competence morally responsible because blame may not entail the sort of adverse treatment that Wallace has in mind.[48] I shall set this debate aside for now, however, and return to it in Section 3.4 (where I will argue that the Scanlonian approach to blame does not translate well into a criminal law context).

As regards the latter, Wallace's reliance on the concept of a general capacity, as a compatibilist strategy, is open to criticism. To appreciate this, it is helpful to consider a hypothetical example provided by Pereboom:

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[43](n 30) 131–2.

[44]A. Honoré, 'Can and can't', (1964) 73(292) Mind 463, 466.

[45](n 29) 57.

[46](n 30) 155.

[47](n 30) 155. In the former case, he argues, the influence of things like hypnotism or mind-altering drugs may make it unfair to hold someone responsible for a short part of their life.

[48](n 6); T.M. Scanlon, *Moral dimensions: Permissibility, meaning, blame* (HUP 2008).

> Colonel Mustard is threatened with torture if he fails to divulge the whereabouts of his comrades. He knows that if he talks, at least two hundred of them will be killed, but because his desire not to be tortured is irresistible, he does indeed divulge the information.[49]

As Pereboom comments, it could be argued that what Colonel Mustard does is morally wrong, given that he betrays the location of his comrades in circumstances where he knows this will lead to their deaths; however, because he cannot control the impulse that causes him to divulge this information, we might intuitively feel that he should not be considered blameworthy.[50] Thus, in this case, Colonel Mustard may seem to require an excuse, but not because he lacks a blameworthy quality of will. Because lacking a blameworthy quality of will is the only route to an excuse in Wallace's theory, this is problematic.

Wallace considers cases like this and argues, in an attempt to circumvent this issue, that these should be treated as exemptions rather than excuses. In other words, he argues that it is not appropriate to hold Colonel Mustard responsible while he is subject to the irresistible impulse, because his general capacity for reflective self-control has temporarily been lost due to coercion (i.e. a very short-term exemption is appropriate).[51] As Pereboom comments, however, a plausible alternative explanation is that rather than suffer from a momentary severe impairment of these general capacities Colonel Mustard retains the capacities but is unable to *utilise* them:

> He might well have the general capacity to grasp the reasons why divulging the relevant information in these circumstances is morally impermissible, have the general ability to apply these reasons in his predicament, and have the general power to act on such moral reasons, but only be unable in this particular situation to make use of this last general power.[52]

This is a problem for Wallace's theory. The options for Wallace are, on the one hand, an excuse where there is an apparently blameworthy quality of will and, on the other, an exemption where general capacities may plausibly be thought to be present. It is not clear

[49] Pereboom (n 9) 124.
[50] Pereboom (n 9) 124.
[51] (n 30) 197.
[52] Pereboom (n 9) 125.

how the theory can cope with the idea of a causally determined loss of access to, rather than impairment of, general powers of reflective self-control.[53]

The seriousness of the issue becomes more apparent when a 'generalisation strategy' is deployed, showing how the problems revealed by the somewhat contrived circumstances of Colonel Mustard's case are relevant to more ordinary cases.[54] Pereboom imagines a situation where an 'external manipulator' (this could be a mad scientist, or alien abductor – the intention is simply to invoke deterministic influences) is able to control the subjectively experienced force of *non*moral considerations such that they always outweigh, and seem preferable to, moral considerations.[55] General powers of reflective self-control could be present, but factors beyond the control of the agent would consistently impede access to these capacities (or, as Fischer puts it, 'disincline' an agent to use them[56]). This possibility, however, creates a new class of exemptions from moral responsibility in Wallace's theory: disinclination to utilise general powers of reflective self-control. As Fischer remarks: 'why shouldn't...[Wallace]...say that any agent who acts unreflectively in a deterministic world is not morally responsible?'.[57]

The susceptibility of Wallace's theory to an irresistible impulse, in Pereboom's thought experiment, therefore translates into a susceptibility to any disinclination, caused by deterministic (and/or random) forces, to use one's moral capacities on a given occasion. While this disinclination may seem less dramatic than an irresistible impulse induced by a fear of torture, it is no less problematic for Wallace's compatibilism. Given that unreflective actions are presumably more commonplace than the circumstances of Pereboom's case, the idea of an 'irresistible impulse' represents the thin edge of a more problematic philosophical wedge.[58]

It seems, then, that we must again look elsewhere for a satisfactory compatibilist account

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[53]Fischer (n 33) 853.

[54]The term 'generalisation strategy' is utilised by Pereboom ((n 9) 125), but is originally Wallace's term and represents something he wishes to guard against (see Wallace (n 30) 16–17).

[55]Pereboom (n 9) 125.

[56](n 33) 852.

[57](n 33) 853.

[58]It is possible that worries along these lines may have influenced the criminal law in England and Wales. Similar intuitions to those expressed by Pereboom and Fischer may underlie the legal position on 'irresistible impulse'. In *Kopsch*, Avory LCJ commented that the idea that an insanity defence could arise from the possibility that a person's 'sub-conscious mind' could take 'control of him', causing an act due to an impulse, was a 'fantastic theory...which, if it were to become part of our criminal law, would be merely subversive' (*R v Kopsch* (1927) 19 Cr. App. R. 50 (CA)).

for the purposes of the prima facie case. The final, broadly 'Strawsonian', account I will consider is the more recent account by Fischer and Ravizza.[59]

3.2.3 Fischer and Ravizza's theory

Like Wallace and Peter Strawson, Fischer and Ravizza stress the importance that we place on the intentions and attitudes that others may have towards us, and the significance that our reactions may have where these persons are considered to be responsible agents.[60] This, they comment, is bound up with a particular perspective we take towards other persons; that is, 'we are *engaged*' with these persons.[61] Like Wallace, Fischer and Ravizza also develop an account of the capacities a person must possess before it is fair to hold them responsible (i.e. the capacities required for responsible agency).[62] Unlike Wallace, however, Fischer and Ravizza add an additional criterion intended to guard against the aforementioned generalisation strategy: an agent must make these capacities his *own* by 'taking responsibility'.[63]

In this subsection, I first briefly outline the main capacities posited by Fischer and Ravizza to be essential for morally responsible agency. I then consider the implications of this theory for psychopaths who may lack moral competence. Finally, I consider the extent to which the 'taking responsibility' criterion succeeds.

At the outset, it should be noted that Fischer and Ravizza assume that an agent meets an initial 'epistemic' criterion: she must not be unaware, through no fault of her own, of the consequences of her actions.[64] Assuming this criterion is met, for an agent to be fairly held responsible she must have a capacity for 'moderate' reasons-responsiveness.[65] To be moderately reasons-responsive a person must have a capacity for 'regular receptivity' and, at the very least, 'weak reactivity' to reasons.

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[59](n 6).

[60](n 6) 5.

[61](n 6) 5.

[62]e.g. (n 6) 211.

[63]e.g. (n 6) especially Ch.8. For a helpful overview of the theory, see Matravers (n 31) 43–50.

[64]Fischer and Ravizza provide the example of a man innocently reversing his car over a kitten (n 6) 12. This 'negative' approach to defining a criterion for responsibility (i.e. there must not be an *absence* of factual knowledge) is broadly Aristotelian, as advocated in Book III of *Nicomachean ethics* (R. Crisp (ed), *Aristotle: Nicomachean ethics* (CUP 2000)). See also: I. Haji, 'On psychopaths and culpability', (1998) 17 Law and Philosophy 117, 118; W. Glannon, 'Moral responsibility and the psychopath', (2008) 1 Neuroethics 158, 165.

[65](n 6) ch.3. Moderate reason responsiveness is one of the two 'freedom-relevant' conditions specified by Fischer and Ravizza, the other being that the agent makes these capacities her own.

Receptivity to reasons requires an ability to recognise the reasons that may have a bearing on one's actions.[66] Regular receptivity requires that there is some 'minimally comprehensible pattern' to an agent's ability to recognise reasons (a completely random pattern, where a person was receptive on some occasions but not others, would not qualify); furthermore, these reasons must have some basis 'in reality' (a person must not, for example, be delusional).[67] Regular receptivity also requires an ability to be receptive to moral reasons, rather than just nonmoral reasons.[68] *Reactivity* to reasons, on the other hand, requires both an ability to make decisions based on reasons, and an ability to implement these decisions.[69] A weakly reasons-reactive person is able to act on reasons to do otherwise in at least some cases where reasons are sufficiently forceful.[70]

Applying this theory to psychopaths, we might ask whether psychopaths are receptive to moral reasons, given that a capacity for receptivity requires moral competence. Along these lines, Fischer and Ravizza suggest that at least some psychopaths may be unable to recognise reasons concerning the interests and rights of other persons. A relevant psychopath may recognise that interests and rights may provide reasons, in a superficial way, but fail to appreciate that these reasons ought to guide his actions. In Fischer and Ravizza's view, a key ingredient for morally responsible agency would be lacking, and such a person would not be an appropriate target for the reactive attitudes.[71]

One might imagine, however, that a person could possess the various capacities argued by Fischer and Ravizza to be essential for morally responsible agency but be disinclined, due to forces beyond their control, to use them. Thus, it might be thought, this theory could be susceptible to the same 'generalisation'-related problems as Wallace's theory. As regards the 'taking responsibility criterion', for capacities to be an agent's own three main conditions must be fulfilled. First, an agent must see himself as the author of his actions in the world.[72] Second, he must accept that in appropriate circumstances he may be justly and fairly held responsible and, for example, blamed or praised for his actions.[73] Third, whether

[66](n 6) 41, 69; Glannon (n 64) 161.
[67](n 6) 73.
[68](n 6) 76.
[69](n 6) 41, 69.
[70]This is intended to allow for a degree of 'weakness of will'. To illustrate this, Fischer and Ravizza provide the example of a drug user who can in at least one case refrain from taking an addictive drug: taking the drug will result in his death ((n 6) 69–70).
[71](n 6) 79.
[72](n 6) 210-11.
[73](n 6) 211.

the first two conditions apply must be 'based, in an appropriate way, on the evidence'.[74]

The first two conditions appear to be susceptible to the kind of thought experiments that threaten Wallace's theory. As Matravers comments, one could in theory be induced (e.g. by a hypnotist) to believe, first, that one is the *source* of one's behaviour and, second, that one is *justly a target* of reactive attitudes.[75] The third ('appropriateness' of evidence) criterion, therefore, appears to be the most important in terms of fending off the generalisation strategy.

Fischer and Ravizza argue that evidence for a person's belief that he is the author of his actions, and justly a target of reactive attitudes, must be derived from specific sources. The 'appropriate' sources, they suggest, include a person's knowledge of what he was taught by his parents and his own personal experiences of reactive attitudes and responses such as blame or praise.[76] The evidence arises from the 'moral address' of the community, and taking responsibility constitutes a request to join a 'moral conversation'.[77]

This, however, is rather vague. It is also reminiscent of Peter Strawson's appeal to the reactive attitudes as a basis for compatibilism. Why should the moral address of the community, through its association with the reactive attitudes, provide the appropriate sort of evidence? With the example of Robert Harris mentioned earlier, it was seen that the apparent appropriateness of reactive attitudes might be tempered or altered by considering the historical background to a case. In Harris's case, his terrible childhood might lead us to question whether he *really was* responsible. Likewise, the extent to which the 'appropriateness' criterion can guard against incompatibilism is questionable.

Along these lines, Kane argues that the 'appropriateness' condition must suggest that agents 'are not *in fact* covertly controlled, no matter what they believe'.[78] But if this is the case, he asks, how we can tell whether agents are 'in fact' covertly controlled? Returning to the case of Harris, there is a concern that his responsibility may have been undermined by a constellation of factors in his background and upbringing. We may worry that he has been, in effect, covertly controlled by his unfortunate circumstances.[79] Similar thought

[74](n 6) 211.

[75](n 31) 46–7.

[76](n 6) 213.

[77](n 6) 214.

[78]R. Kane, 'Review of *Responsibility and control: A theory of moral responsibility*', (1999) 49(197) The Philosophical Quarterly 543, 544.

[79](n 31) 48–9. As Kane puts it, 'what is the difference for my freedom and responsibility if I am controlled by dumb controllers rather than smart ones, if the control in either case is complete?' ((n 78) 545).

experiments may involve more 'clever' covert control of subjects by behavioural scientists. But if we accept that the influence of an upbringing like Harris's, or a team of behavioural scientists, might mean that it is inappropriate to believe that an agent has *in fact* taken responsibility, what about the influence of more typical circumstances such as a normal education or upbringing? Perhaps, due to my normal upbringing, I have been brainwashed into taking responsibility and have therefore not *really* taken responsibility.

Crucially, Fischer and Ravizza concede that the 'appropriateness' condition 'must remain *unanalyzed*'.[80] While they contend that they have 'rendered the compatibility claim highly attractive', they concede that they 'are *not* offering a knockdown argument for the compatibility of causal determinism and taking responsibility (and thus moral responsibility)'.[81]

The argument that Fischer and Ravizza cannot ultimately defend against is what Galen Strawson refers to as the 'Basic Argument'.[82] He outlines this, roughly, as follows: the way one is, as a person, initially results from a combination of early-life experience and heredity, and one cannot reasonably be held responsible for these things. Later in life, if one tries to change the way that one is, one's success or failure at this attempt will be determined by the way one is already, due to previous experience and heredity. This will also be the case for any further changes that one attempts to make. Overall, people 'cannot be supposed to change themselves in such a way as to be or become *truly*...or *ultimately* morally responsible for the way they are, and hence for their actions'.[83]

This argument appears, on the face of it, to undermine the possibility of any concrete basis for compatibilism. Furthermore, Fischer and Ravizza's concession might seem to amount to an acceptance of this. It has been seen that this theory, like Wallace's, has implications for the responsibility of psychopaths. However, if the theory itself is built on sand, why should its implications matter? Perhaps psychopaths are just as nonresponsible as everyone else, and a different analysis is needed here. One might, for example, ask what responsibility is *for*, rather than what it *is*. It seems that some response to the Basic Argument is required.

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[80](n 6) 236 (my emphasis).
[81](n 6) 236.
[82]G. Strawson, 'The impossibility of moral responsibility', (1994) 75 Philosophical Studies 5, 5–7.
[83](n 82) 7.

3.2.4 Responding to the 'Basic Argument'

To recap, I began this Section by asking whether an analysis of the appropriateness of our tendency to respond to psychopaths in a particular way, with emotions like indignation and resentment, might reveal conditions under which it might be appropriate to excuse psychopaths from responsibility. In the accounts of Wallace and Fischer and Ravizza psychopaths may be excused if they lack a capacity to respond to moral reasons. For Wallace, these reasons may be expressed by moral principles, meaning that an inability to grasp and apply moral principles may ground an excuse (or exemption, in Wallace's terminology). For Fischer and Ravizza a lack of receptivity to moral reasons, such that a person is unable to recognise that the rights and interests of other persons may provide reasons to guide actions, may form the basis of an excuse.

Any meaningful discussion of the moral responsibility of psychopaths must, however, be based on a presumption that *some* people can be held morally responsible. This is not to say that a lack of moral competence in psychopaths would be irrelevant in a world without moral responsibility. As Levy comments, even if we rejected moral responsibility completely, morally competent persons could still *morally evaluate* situations (and each other).[84] Psychopaths might also continue to harm other persons, due at least in part to a lack of moral competence, calling for a societal response. These persons might need to be 'quarantined' in some way.[85] However, the claim that some psychopaths should be excused from moral or criminal responsibility would lose its meaning.

One way to rescue compatibilism, and defend the possibility of moral responsibility, is to argue that the Basic Argument goes too far. Critics of Galen Strawson have argued that it is unnecessary for agents to possess the kind of self-determining agency that he attacks.[86] He comments, for example:

> As I understand it, true moral responsibility is responsibility of such a kind that, if we have it, then it makes sense, at least, to suppose that it could be just to punish some of us with (eternal) torment in hell and reward others with (eternal) bliss in heaven.[87]

[84] N. Levy, *Hard luck: How luck undermines free will and moral responsibility* (OUP 2011) 9).
[85] Pereboom suggests this approach ((n 9) Ch.6).
[86] Matravers (n 31) 26–7.
[87] (n 82) 9.

Strawson does not mean that we need to believe in heaven or hell to grasp this notion of moral responsibility, but rather that the metaphor 'very clearly expresses its scope and force' in what he refers to as the 'Western tradition'.[88]

This position is viewed by some compatibilists as requiring an excessive degree of control. Indeed, Fischer describes the position as 'a kind of metaphysical megalomania',[89] and argues that we do not require the kind of 'total control' posited by Galen Strawson to justify our practices of holding responsible.[90] Likewise, Levy argues that Strawson's position represents a 'hyperbolic conception of responsibility'.[91] What matters for moral responsibility, Levy argues, is not 'total' control but '*relevant*' control.[92]

Thus, it might be argued that the sort of freedom required for moral responsibility should be viewed in 'negative' terms as a lack of coercion, rather than in such extreme 'positive' terms as a presence of control.[93] To illustrate this approach to responsibility, we might contrast a situation where we could freely choose (in this more modest sense) to donate money to charity, with a situation where a gun is put to our heads and we are forced to hand over the money.[94] It is the lack of compulsion, in the presence of suitable agential capacities, that makes the former action 'free'.

This plausible response to the Basic Argument is one that I shall tentatively accept in this thesis. It must be noted, however, that accepting this response raises issues regarding the *sort* of freedom we may have.[95] If compatibilists must adopt a much more modest notion of control and self-determination than that targeted by Galen Strawson, this calls into question the defensibility of some of our current social practices. With respect to criminal responsibility, in particular, it might be wondered whether the harshness of the punishments routinely meted out to those deemed responsible for their crimes is justified.[96] Levy, along these lines, argues that 'many prisons are far harsher than can be justified on *any* remotely

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[88](n 82) 8–10.

[89]J.M. Fischer, 'The cards that are dealt you', (2006) 10(1/2) Journal of Ethics 107, 116 (also referred to by Levy (n 84) 3).

[90]Fischer remarks: 'To have total control would be to have control over the sun's continuing to shine, the earth's not being hit by a meteorite, and so forth. The desire for total control is a reflection of a kind of metaphysical "over-reaching," if anything is' (n 89) 116.

[91]Levy (n 84) 3.

[92]Levy (n 84) 5.

[93]This, again, represents a broadly Aristotelian approach.

[94]Matravers (n 31) 26.

[95]Matravers (n 31) 63.

[96]Matravers (n 31) 63.

plausible' compatibilist theory.[97]

Perhaps, then, compatibilism can secure some form of responsibility, but not the right sort to justify such practices (at least fully). This is not an issue that I will explore further in this thesis, but it is nonetheless raised by the compatibilist approach adopted.[98] I now move on to more briefly consider another compatibilist approach, 'mesh' compatibilism.[99]

3.2.5 Reasons-responsiveness versus 'mesh' compatibilism

I end this Section by explaining my focus on reasons-responsiveness compatibilism rather than its leading theoretical contender, 'mesh' compatibilism. Mesh theories of moral responsibility consider the extent to which there is an appropriate connection, or 'mesh', within the mind of an agent (or, Fischer and Ravizza put it, whether there is a 'suitable connection...between selected elements' of a person's 'mental economy'[100]). Where an appropriate mesh is present, a person is morally responsible for an action.[101] A person's actions are also regarded, where this mesh present, to represent an expression of his character.[102]

Mesh theories provide an alternative account of the kind of responsibility impairments that psychopaths may have. An example is provided by Frankfurt's seminal mesh account, which creates the possibility of a 'wanton'. In the remainder of this Section, I will characterise the features of a wanton, which requires an initial outline of Frankfurt's theory. I then consider some evidence that might suggest that at least some psychopaths could be like wantons. I conclude, however, that the evidence is not strong, and that reasons-responsiveness accounts may in any event better characterise the deficits that some psychopaths may have.

Frankfurt's mesh account arises from his dissatisfaction with aspects of Peter Strawson's theory, discussed in Section 3.2.[103] In particular, he argues that Strawson's theory does not appear to discriminate between human persons and other nonhuman species.[104] Frankfurt

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[97] Levy (n 84) 7.

[98] Some retributivist approaches, for example, might provide independent justifications for these practices. For some discussion of retributivist theories, see Pereboom (n 9) 159–61.

[99] 'Mesh' compatibilism is also susceptible to the Basic Argument, but it may also defended by the response considered in this subsection (Matravers (n 31) 22–8).

[100] (n 6) 185). See also the discussion by Matravers (n 31) 28–33.

[101] (n 31) 29.

[102] (n 31) 29.

[103] H. Frankfurt, 'Freedom of the will and the concept of a person', (1971) 68 Journal of Philosophy 5. Matravers comments that this is 'probably the most famous' mesh account ((n 31) 28).

[104] Frankfurt (n 103) 5–6.

argues that humans are distinguished from non-human animals by a capacity for 'reflective self-evaluation' that is associated with what he calls *second-order* desires:[105] we do not merely *desire* things (first-order desires), but *desire that we desire* things or desire that we *cease* to desire things (second-order desires).

For Frankfurt, a subset of second-order desires concern the issue of which first-order desires we should act on (i.e. which first-order desires should become our 'will'). These are second-order *volitions*.[106] When first order desires conform with second-order volitions, there is a 'mesh' between the two species of desire and an agent can be said at that point to be morally responsible.[107] Fischer and Ravizza provide the example of nicotine addiction: a man may desire to smoke a cigarette, and desire not to smoke a cigarette (both first-order desires), and desire that the first of these desires becomes his will (a second-order volition). If he then manages to refrain from smoking, he is morally responsible for this (in)action because the first-order desire to refrain from smoking *in fact* becomes his will.[108] If, on the other hand, his second-order volition does not mesh with his will (i.e. he desires that his desire to refrain from smoking becomes his will, but he nevertheless smokes the cigarette) he is not morally responsible for smoking the cigarette.

A wanton, on this hierarchical model of moral responsibility, is an agent who possess second-order desires but lacks second-order volitions.[109] Such an agent, for Frankfurt, is not a *person*. To return to the example of nicotine addiction, a wanton would experience a conflict between desiring to smoke a cigarette, and desiring not to smoke a cigarette. However, he would simply not care which of these desires became his will. As Frankfurt puts it, he would remain 'neutral' about which first-order desires were implemented.[110]

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[105] Frankfurt (n 103) 7 (my emphasis).

[106] Frankfurt (n 103) 10.

[107] (n 6) 183.

[108] (n 6) 184.

[109] Frankfurt (n 103) 11.

[110] Frankfurt (n 103) 11. Not all mesh theories are formulated in a hierarchical way. Watson's theory, for example, is a 'multiple-source' theory ((n 6) 185; G. Watson, 'Free agency', (1975) 72(8) Journal of Philosophy 205). One source is a person's values (or 'valuational preferences'), while the other is what typically motivates a person (their 'motivational preferences') (Watson 1975, 215). On this account, a person is morally responsible where there is a mesh between their valuational and motivational preferences ((n 6) 185). It is also possible to combine elements of Frankfurt's and Watson's theories, as seen in Tadros's theory (Tadros (n 29)). Roughly, Tadros takes the 'first-order desires' component from Frankfurt's account, and the 'valuational preferences' component from Watson's account, and combines them to produce what he calls a 'refined hierarchical account': a person is morally responsible where his valuational preferences mesh with his first-order desires ((n 29) 31–43).

In Frankfurt's account, as in other mesh accounts, an ability to rationally evaluate possible courses of action is a requirement for responsible agency. There is some evidence to suggest that psychopaths may have an impaired capacity in this respect. One line of evidence concerns the possibility that they may lack evaluative standards.[111] Along these lines, Litton suggests that the well-documented lack of shame, guilt, regret and remorse in psychopaths, emotions we may experience when we fail to meet our own standards, is consistent with a lack of such evaluative standards.[112] In theory, persons like this may be like a wanton: they might not care which first-order desire becomes their will, given that there are no evaluative standards to guide them.[113]

Reports by Cleckley and Hare might, in theory, support this possibility. Cleckley, for example, was struck by the apparent indifference shown by psychopaths to 'tragedy or joy or the striving of humanity as presented in serious literature or art'; these were only engaged with in the most superficial way, consistent with a shallow understanding of the standards that others may be guided by.[114] Hare remarks that psychopaths appear to differ markedly from other criminals: they 'show no loyalty to groups, codes, or principles, other than to "look out for number one"'.[115] They may also make statements, or behave in certain ways, that suggest a lack of evaluative standards. Hare, for example, mentions the criminal psychopath who (apparently in seriousness and without humour) stated that if he had one character flaw it might be that he was 'too caring'.[116] Cleckley also mentions a patient, Arnold, who would continually squander opportunities to achieve his stated goals by breaching the conditions of his parole.[117]

A more scientific line of evidence potentially supporting this concerns issues such as attentional and response-reversal problems in psychopathy.[118] As regards the former, evidence suggests that psychopaths may have difficulties focusing on targets essential for the completion of goals; as regards the latter, evidence suggests that psychopaths may have

[111] P. Litton, 'Responsibility status of the psychopath: On moral reasoning and rational self-governance', (2007) 39 Rutgers LJ 349, 375–80.

[112] Litton (n 111) 378.

[113] Litton (n 111) 377–8.

[114] H. Cleckley, *The mask of sanity: An attempt to clarify some issues about the so-called psychopathic personality* (5th edn, Mosby 1976) 40 (cited by Litton (n 111) 379–80).

[115] R.D. Hare, *Without conscience: The disturbing world of the psychopaths among us* (Guilford Press 1999) 85 (cited by Litton (n 111) 380).

[116] (n 115) 38 (cited by Litton (n 111) 380).

[117] (n 114) 345–6 (cited by Litton (n 111) 381–2).

[118] H.L. Maibom, 'Moral unreason: The case of psychopathy', (2005) 20(2) Mind & Language 237.

difficulties adapting their behaviour in situations where a previously rewarded behaviour is now punished (and vice versa).[119] In theory, this could translate into an impaired ability, in some situations at least, to assess possible courses of action in the light of one's values.

As a whole, however, this evidence is largely anecdotal, and the more scientific evidence may only suggest subtle impairments of rationality. Psychopaths are able to pursue and achieve goals, even if their objectives are frustrated on some occasions. The picture painted resembles the legal conceptualisation of psychopathy as a partial 'volitional' disorder. Indeed, the Scottish Law Commission's description appears apt: 'At most such a person has difficulties in controlling his conduct but it cannot be said that a psychopath is completely lacking in volitional capacity'.[120]

Although it is conceivable that some psychopaths may have severe rationality impairments, and be like Frankfurtian wantons, I will not pursue this line of inquiry further here. In theory, such persons could lack moral competence, but only secondary to a more general impairment of rationality. Where there was an inability to appreciate or respond to moral reasons, on such a account there would also be more general underlying problem with reasoning.[121] What is so striking about psychopaths, however, is not their irrationality per se but their apparent indifference to specifically moral concerns. By attempting to reduce these problems to general rationality-related issues, these approaches may sideline problems specifically concerning moral cognition in psychopaths. As Morse comments, this approach may 'understate' the problems that at least some psychopaths may have.[122]

It is also the case that there is no 'general rationality' system in the brain that subserves all types of rationality. Instead, distinct but overlapping systems subserve different kinds of deliberation and judgment. Furthermore, there is no single, unified, type of 'moral judgment' subserved by one system, but different forms of moral judgment that require different although sometimes overlapping brain areas.[123] Impairments may selectively involve one kind of moral judgment, while leaving other kinds intact. This complexity means that we need to become 'splitters' rather than 'lumpers', both when thinking about moral cognition

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[119] (n 118) 244–5.

[120] Scottish Law Commission, *Report on insanity and diminished responsibility* (Scot Law Comm No 195, 2004) available at <http://www.scotlawcom.gov.uk/publications/reports/2000-2009/>, para. 2.60 (accessed 27.6.14).

[121] Litton (n 111) 351.

[122] S.J. Morse, 'Psychopathy and criminal responsibility', (2008) 1(3) Neuroethics 205, 209.

[123] e.g. J. Schaich-Borg, W. Sinnott-Armstrong, V.D. Calhoun *et al.*, 'Neural basis of moral verdict and moral deliberation', (2011) 6 Social Neuroscience 398. See also Section 4.2 below.

and when conducting research into it.[124] A reasons-responsiveness approach to responsibility, accommodating the possibility of more specific impairments, has greater affinity with this emerging neuroscientific picture.

As is evident from this brief discussion of mesh compatibilism, different responsibility theories generate different conceptualisations of the deficits that psychopaths may have. These could be viewed, as Duff suggests, as arising from 'logical spaces' within these theories.[125] In mesh accounts, there is a logical space for a 'general-deficit' psychopath, where moral impairments are entailed by more general impairments of rationality.[126] In reasons-responsiveness accounts, on the other hand, there is a logical space for a 'specific-deficit' psychopath, where capacity for moral responsibility is undermined by a specific impairment of responsiveness to moral reasons.[127]

In the remainder of this thesis, I concentrate on the possibility of specific-deficit psychopaths, and the possibility that some psychopaths may lack moral competence in some respects (focusing, specifically, on harm-related moral competence). It is important to note, however, that other impairments may be present in such persons, including other rationality-related issues (e.g. difficulty formulating long-term goals). While reasons-responsiveness accounts may have a greater affinity with the impairments that some psychopaths may have, one must be careful not to over-simplify matters and view psychopathy exclusively, or excessively, through this potentially procrustean philosophical lens.

3.3 A note on neurobiological causes

In Section 3.2.5, I suggested that reasons-responsiveness accounts may have a greater affinity with the deficits that some psychopaths may have than mesh accounts, like Frankfurt's, that posit a 'general' kind of rationality. The implication is that these theories might 'map' more accurately onto the complex cognitive mechanisms underpinning rationality. The metaphor of 'mapping', however, might obscure the fact that moral responsibility is very much a normative affair. There is also scope for debate, as evident from a comparison

[124] W. Sinnott-Armstrong and T. Wheatley, 'Are moral judgments unified?', (2013) 27(4) Philosophical Psychology 451, 469–71.

[125] A. Duff, 'Psychopathy and answerability', in L. Malatesti and J. McMillan (eds), *Responsibility and psychopathy* (OUP 2010) 199, 199.

[126] Morse (n 122) 209.

[127] (n 122) 208.

of Wallace's, Fischer and Ravizza's, and Frankfurt's theories, about which capacities are required for responsible moral agency.

In this Section I clarify how neurobiological causes, such as brain activity or genetics, may be relevant to responsibility from a compatibilist perspective. To recap, from a compatibilist perspective moral responsibility is compatible with a universe in which everything is caused (and/or random).[128] What distinguishes responsible from nonresponsible agents is that the former possess certain rational capacities. Persons with these capacities are considered 'apt targets' for responses such as blame or praise. Persons without these capacities, on the other hand, are those with respect to whom we might adopt an 'objective attitude'.

Causes in the brain, therefore, are only relevant to moral responsibility from this perspective insofar as they impact on (either confer, or lead to an impairment of) relevant rational capacities. If the relevant capacities are impaired to a sufficient extent, it is no longer appropriate to hold agents morally responsible.

This compatibilist approach is broadly consistent with the approach to insanity in the M'Naghten Rules, and their interpretation by English courts. As seen in Chapter 1, a person is considered to be insane where (among other things) they had a 'defect of reason' in which they were 'deprived' of their powers of reasoning at the time of an alleged criminal offence. The focus of the test in Rule 3 is on whether rationality was impaired (i.e. to such an extent that there was a lack of knowledge, as specified in the limbs of the test) rather than on whether the defendant was caused, due to factors beyond his control, to act in a certain way.[129]

This approach, however, pushes us towards a problematic interface between causes within the brain and normative criteria. We are faced with a 'checklist' exercise, and must check the capacities that persons may possess against a list specifying the capacities required for responsible agency.[130] This raises both empirical and normative issues.

As regards empirical issues, although causes in the brain are relevant to responsibility, insofar as they impact on relevant capacities, establishing this empirically may be problematic. In the case of psychopaths, whether a person lacks a capacity to appreciate moral

[128]This incorporates the slightly modified version of the 'causal determinism' thesis, the 'causal thesis' which stipulates that these causes may be probabilistic as well as deterministic (see footnote 6, p.78 above).

[129]This might be consistent with libertarianism, a form of incompatibilism that 'embraces free will and denies that determinism is true' (McKenna (n 8)).

[130]M. Matravers, 'Holding psychopaths responsible', (2007) 14(2) Philosophy, Psychiatry, & Psychology 139.

reasons concerning harm may depend on whether a particular developmental pathway has been followed. Genetic factors may be relevant, but not in a straightforward way: genes may only create a *risk* that this state of affairs occurs; the expression of genes may also be influenced by environmental factors in a significant way, altering a person's developmental trajectory (see Section 5.2.1). Verbal reports from psychopaths may be unreliable, due to impression management (see Chapter 4). And, while it may be possible, in the future, to establish whether a psychopathic person lacks moral competence with the aid of neuroimaging (e.g. showing the functional response to morally-relevant tasks, in the context of structural findings), tests may only indicate in probabilistic terms that this is the case (see Section 5.2.5).

As regards normative issues, as noted, the nature of the capacities required for responsible agency is debated. As regards the capacities required for moral competence, for example, Wallace argues that an ability to grasp and apply moral principles is an essential requirement for accountability (Section 3.2.2). On this account, if psychopaths completely lack this capacity, they are entitled to an exemption from moral responsibility. However, not all theorists agree that a capacity to grasp and apply moral principles is a component of moral competence; indeed, some theorists, such as Dancy, have argued that there are 'no defensible moral principles'.[131] Dancy's brand of 'moral particularism', admittedly, is an extreme viewpoint, but it illustrates the debatable nature of Wallace's claim.[132]

This specific debate is 'downstream' from the central concern in this thesis, which focuses on the possibility that some psychopaths may be unable to comprehend moral reasons

[131] J. Dancy, 'Moral particularism', in E.N. Zalta (ed) *The Stanford Encyclopedia of Philosophy*, (Spring 2009 Edition) <http://plato.stanford.edu/archives/spr2009/entries/moral-particularism/> accessed 27.6.14.

[132] Dancy, as a virtue ethicist, follows McDowell, who argues that 'Occasion by occasion, one knows what to do, if one does, not by applying universal principles but by being a certain kind of person: one who sees situations in a certain distinctive way' (J.H. McDowell, 'Virtue and reason', in *Mind, value, and reality* (HUP 1998) 50, 73). It should noted that commentators such as Crisp have argued that the 'moral particularism' debate may have 'fewer implications for normative ethics' than might be thought: a particularist may merely hold, uncontroversially, that are merely *limits* to the extent to which rules or principles can guide moral reasoning (in marked contrast to Dancy's position) (R. Crisp, 'Particularizing particularism', in B. Hooker and M.O. Little (eds), *Moral particularism* (OUP 2000) 23). Crisp argues in favour of Rossian generalism, an account of moral deliberation whereby one must make a 'considered judgement' in cases where principles may conflict or are unable to accommodate a situation (W.D. Ross, *The right and the good* (OUP 1930) 16–20). There is no specified procedure for this in Ross's theory, and making a decision in cases where principles conflict relies heavily on intuition, 'gut feelings', or on what might be referred to, to use Harris's phrase, as one's 'moral nose' (J. Harris, 'Williams on negative responsibility and integrity', (1974) 24(96) The Philosophical Quarterly 265). Strict consequentialists like Harris might be inclined to dismiss such an approach as 'olfactory' moral philosophy.

related to harm: if a person lacks this capacity entirely, it does not matter for these persons whether moral competence is to be understood in terms of an ability to grasp moral principles, or in the more holistic way proposed by some moral particularists:[133] they will in any event be 'morally blind' with respect to harm-related moral reasons (and will also lack 'receptivity' to these moral reasons on Fischer and Ravizza's account).

A further normative issue concerns the minimum threshold of capacity for holding a person responsible, where impairments are non-absolute. This is an issue that I do not consider in this thesis, given that my interest is in the possibility of psychopaths with a complete lack of capacity with respect to harm-related moral considerations. In cases of a partial incapacity, setting the relevant threshold is a complex normative issue, which groups such as philosophers and policymakers may approach differently, rather than a purely empirical one.[134]

Other normative issues, however, cannot be avoided in this thesis. As mentioned earlier, some theorists have argued that moral competence should not be a prerequisite for holding persons morally responsible. For these theorists, it is appropriate to hold psychopaths lacking moral competence morally responsible, and where appropriate blame these persons. I consider this problem for the prima facie case for access to an insanity defence further in the next Section (where, as noted, I argue the 'Scanlonian' approach to blame does not translate well into a criminal law context).

Another, perhaps more significant, problem arises once a transition is made from discussing moral to discussing criminal responsibility. An ability to respond to nonmoral reasons is relevant to criminal responsibility, and there are likely to be nonmoral reasons (in particular, legal and prudential reasons) for complying with criminal prohibitions. In the criminal legal context, then, it becomes more problematic to argue that a lack of moral competence ought to ground an exemption from criminal responsibility (i.e. a capacity-based excuse), obtained via an insanity defence. It might be argued, as Morse does, that moral reasons provide the 'best' reasons for refraining from committing at least some crimes; but

[133] Little uses an aesthetics analogy to illustrate the 'holism' of some moral particularists. These persons, she argues, might take the view that 'Natural features carry their contribution to an action's moral status in the way that a given dab of paint on the canvas carries its contribution to the aesthetic status of a painting: the bold stroke of red that helps balance one painting would be the ruin of another; and there is no way to specify in non-aesthetic terms the conditions in which it will help and the conditions in which it will detract' (M.O. Little, 'Moral generalities revisited', in B. Hooker and M.O. Little (eds), *Moral particularism* (OUP 2000) 276, 280).

[134] Glannon (n 64) 160–1.

this does not change the fact that relevantly impaired psychopaths are likely to have access to other kinds of reasons that might ground capacity for criminal responsibility. This is perhaps the most serious objection to the prima facie case; although I consider it in Section 3.4, it continues as an issue throughout this thesis.[135]

In summary, then, from a compatibilist perspective neurobiological factors are relevant to responsibility insofar as they impact on rational capacities. If these cause capacities necessary for responsible agency to be sufficiently impaired (beneath a minimum threshold), it may be inappropriate to hold a person morally responsible. Responsibility assessment, however, is an intrinsically normative affair, and issues such as the nature of the relevant capacities, and minimum thresholds of capacity for holding a person responsible, can be debated. Identifying, empirically, whether established criteria have been met may also be problematic in practice.

3.4 Moral competence, moral responsibility and criminal responsibility

As discussed in Section 3.2.2, not all responsibility theorists hold that a person must possess moral competence before they may reasonably or fairly be held morally responsible. For Wallace, this requirement is based on the dispositions thought to be associated with the stance of holding a person responsible. Where we hold a person responsible, and then subsequently come to believe that this person *is* responsible, we are apt to respond with reactive emotions associated with blame, such as resentment. We may also respond with sanctions, and treat harshly the person deemed blameworthy. Wallace argues that due to this possibility it is unfair to hold persons morally responsible where they lack the capacity to comply with moral obligations they may have breached. Fischer and Ravizza adopt a similar approach, arguing that it is not fair to hold persons morally responsible where they lack moral competence.[136]

An alternative view resists this fairness-based approach, and maintains that it is appropriate to hold persons morally responsible, and where appropriate blame these persons for their actions, where they lack moral competence. Theorists espousing this approach argue

[135] It also informs my final discussion in Chapter 6, where I argue that the prima facie case may best be viewed as an argument for mitigation rather than exculpation.

[136] See Section 3.2.3.

that all that is required for a person to be reasonably held responsible is a general capacity for practical rationality.[137] Blame, they argue, should be viewed as a demand for a response, such as an explanation or apology, rather than as a basis for retributive reactive attitudes and sanctions;[138] furthermore, it is appropriate to hold a person responsible where they are able to explain and justify their actions in general nonmoral terms, rather than in specifically moral terms.

Scanlon, a leading proponent of this view (which I will refer to as 'Scanlonian'), argues that the ultimate importance of blame, beyond any associated demand for an explanation or apology, resides in the implications it has for the relationships we can have with others.[139] To deem a person blameworthy for an action, for example, is to hold that the action 'shows something about the agent's attitudes toward others' that limits the ways in which others can associate with this person.[140] This might be contrasted with the more ordinary relationships we may have with our neighbours. We might notice that we do not share certain interests, for example, and this might limit the sorts of relationships we could have with them; however, we can still relate to these persons in many ways.[141] Where moral blame and criticism are appropriate, however, this may have much more serious implications for the relations that a blamed person may have with others.

As regards moral competence, Scanlon argues that it makes no difference whether the attitudes revealed by blameworthy conduct arose because an agent was unable to comprehend moral reasons, or simply because the agent *ignored* these reasons. In both cases, the implications are the same: our capacity to relate to this person is impaired in certain ways. As Scanlon puts it: 'A person who is unable to see why the fact that his action would injure me should count against it still holds that this *doesn't* count against it'.[142]

This approach to blame has prompted a debate about the relevance of moral competence to the responsibility of psychopaths. Talbert, following Scanlon, argues that a capacity to appreciate nonmoral reasons alone is sufficient to justify holding psychopaths morally responsible and, where appropriate, blaming them.[143] Although psychopaths may not be able

[137] P. Litton, 'Psychopathy and responsibility theory', (2010) 14(5) Philosophy Compass 676, 679.
[138] (n 137) 679–80.
[139] (n 137) 680.
[140] (n 48) 128.
[141] Litton (n 137) 680.
[142] Scanlon (n 6) 288.
[143] M. Talbert, 'Blame and responsiveness to moral reasons: Are psychopaths blameworthy?', (2008) 89 Pacific Philosophical Quarterly 516.

to 'meaningfully deny that a particular state of affairs counts as a *moral* reason', he argues, they may nevertheless 'hold that what others call a moral reason is in fact no reason at all'.[144] In other words, morally competent persons may recognise that performing a certain action in certain circumstances would be morally wrong, and due to this judge that the action ought not to be undertaken. A person lacking moral competence may not grasp this moral reason, but may nevertheless recognise that others are responding to a reason. They may then reject this reason. Given this, Talbert argues, psychopaths' actions reveal a 'normative commitment' to the rejection of these reasons, which they may not understand as moral reasons; furthermore, this rejection amounts to a blameworthy quality of will.[145]

Talbert targets, in particular, the capacity for 'receptivity' to moral reasons posited by Fischer and Ravizza to be a requirement for responsible moral agency. As discussed in Section 3.2.3, Fischer and Ravizza argue that it is inappropriate to hold psychopaths morally responsible insofar as they lack a regular receptivity to moral reasons. Where this is the case, psychopaths are unable to recognise that the interests and rights of other persons may provide sufficient reasons to guide their actions.[146] Fischer and Ravizza accept, however, that such psychopaths may have a *superficial* understanding of these reasons. They may recognise that other people find these reasons sufficient to guide their actions. Unlike Fischer and Ravizza, however, Talbert argues that a commitment to the view that these superficially understood reasons are *not* reasons (to refrain, for example, from acting) may ground moral responsibility by amounting to a blameworthy quality of will (i.e. actual ill-will, or an otherwise blameworthy indifference to moral reasons).

Although the Scanlonian position is controversial, and there is potential for further discussion,[147] for present purposes I will accept that psychopaths' behaviour may express what Talbert refers to as 'a kind of disregard' for the interests of others.[148] Robert Hare reports the story of a high PCL-R scoring man who robbed a petrol station on the way to a party,

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[144](n 143) 532.

[145](n 143) 520. Like Peter Strawson, Wallace and others, proponents of the Scanlonian positions hold that blame is a response to the 'quality' of a person's will, manifested by their actions (Litton (n 137) 679).

[146](n 6) 79.

[147]Levy, for example, argues that 'it is simply false that expressing contempt, ill-will, or moral indifference is independent of moral knowledge' (N. Levy, 'The responsibility of the psychopath revisited', (2007) 14(2) Philosophy, Psychiatry, & Psychology 129, 135. For a response to Talbert (n 143), see D. Shoemaker, 'Attributability, answerability, and accountability: Toward a wider theory of moral responsibility', (2011) 121(3) Ethics 602.

[148]M. Talbert, 'Accountability, aliens, and psychopaths: A reply to Shoemaker', (2012) 122(3) Ethics 562, 572.

and seriously injured a man, in order to acquire some beer; the explanation was that he had forgotten his wallet, and preferred not to walk home 'six or seven blocks' to get it.[149] Assuming, for argument's sake, that this psychopathic person lacked any comprehension of the moral reasons that might count against his actions, but nevertheless recognised that such reasons existed and that other people were moved by them, it might be accepted that his actions may have expressed, in some minimal sense, ill-will warranting blame in the Scanlonian sense. Although he may have lacked any grasp of the moral nature of the reasons in question, he may nevertheless have recognised that these reasons were important to others before disregarding them. At the very least, some disrespect may be indicated by his actions.

It is possible that the superficial understanding of moral reasons mentioned by Fischer and Ravizza, and argued by Scanlon and others to be sufficient for the purposes of blame, may enable psychopaths to function in the world. Elliott comments that the psychopath 'understands morality well enough to manipulate it':[150]

> He is aware of the fact that most people do abide by certain moral values and principles, and he is aware of what these values and principles are. His understanding of moral norms and concepts is at least sufficient to prevent him from being puzzled when others condemn him for his moral breaches.[151]

From a Scanlonian perspective, if a person disregards moral considerations we may value, and treats these as meaningless and dispensable, this may significantly impair the relations that we can have with this person. We might blame this person, and demand that they provide an explanation or apology. This might also occur in the absence of any negative response, or inclination towards such a response. Perhaps we could simply recognise that our potential for meaningful relations with such a person had been impaired, without feeling resentment or wishing for some form of retribution. We might simply avoid this person. This is the sense in which advocates of a Scanlonian approach argue that it is perfectly possible to hold that a person *is* morally responsible for a wrongful action without

[149] R.D. Hare, *Without conscience: The disturbing world of the psychopaths among us* (Guilford Press 1999) 58–9.

[150] C. Elliott, 'Diagnosing blame: Responsibility and the psychopath', (1992) 17 Journal of Medicine and Philosophy 199, 205.

[151] (n 150) 205.

responding, or being inclined to respond, in a negative way.[152] Furthermore, it does not matter from this perspective whether a person *could* have treated us differently.

From the perspective of the criminal law, however, this approach is arguably inadequate where psychopaths lacking moral competence are concerned. The formal mechanisms of the criminal law ensure that where a person is found to be responsible for a criminal act, and also criminally liable, very severe sanctions may be imposed.[153] These may include public moral denunciation, associated with being labelled a 'criminal' and a 'bad' person, and criminal confinement in harsh prison conditions. This goes well beyond a relationship-related impairment. Where a receptivity to moral reasons could have enabled this person to avoid the criminal conduct in question, and a lack of moral competence has made this much more difficult or impossible, it could be argued that imposing such penalties on a person lacking moral competence is grossly unfair.[154]

This argument regarding the criminal responsibility of psychopaths, advanced initially by Morse and more recently by Litton, views access to moral reasons as access to the *best* reasons for complying with many laws.[155] Without access to these reasons, an individual lacks access to an important source of motivation to act lawfully. This can also be understood in terms of opportunity: without access to moral considerations, a vital safeguard against unlawful behaviour is lost, and such persons have a significantly reduced opportunity to avoid punishment.[156] These persons are much more likely to act unlawfully in circumstances where others, in possession of moral competence, might find lawful behaviour relatively straightforward.

This argument, if accepted, potentially supports the conclusion that although it may be reasonable to hold psychopaths who lack moral competence morally responsible from a Scanlonian perspective, it is unreasonable or unfair to hold these persons *criminally* respon-

[152]Litton (n 137) 680.

[153]I adopt Duff's distinction between responsibility and liability. On Duff's account, criminal responsibility is a necessary but not sufficient condition for criminal liability. A defendant who is called to answer for his actions, and thereby held criminally responsible, may be found to *be* responsible; however, he may then 'block the transition' to liability (as Duff puts it) by pleading a defence (A. Duff, *Answering for crime: Responsibility and liability in the criminal law* (Hart 2007) 21). Such a defence could amount to a justification (e.g. self-defence) or an excuse. If unsuccessful, a defendant will be liable to criminal conviction and criminal punishment.

[154]P. Litton, 'Criminal responsibility and psychopathy: Do psychopaths have a right to excuse?', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 275, 284–5.

[155]Morse (n 122) 208; Litton (n 154).

[156](n 154) 284–5.

sible. Additionally, if an insanity defence is conceptualised as a route to an exemption from criminal responsibility (i.e. a capacity-based excuse), this argument potentially supports the view that psychopaths should be provided with access to an insanity defence. It may provide, therefore, a central component of the prima facie case.

The argument, however, is problematic in a number of ways. It may rely, for example, on an intrinsic or 'internal' connection between moral judgments and motivation, as advanced by the thesis of moral motivational internalism (MMI). Whether MMI is true, however, is highly controversial.[157] As such, the thesis cannot assist with a defence of the prima facie case without introducing complex and contested metaethical issues.[158]

MMI is not a thesis I will attempt to defend. However, even if MMI is true, a further problem is that nonmoral reasons, such as legal and prudential reasons, are also relevant to criminal responsibility. As regards the latter, for any moral reason that could motivate a person to comply with a law, there could in theory be substituted a prudential reason that could have exactly the same effect. Perhaps I am blind to the moral reasons that might motivate me to refrain from harming you in the pursuit of a goal; however, if I believe that I may be apprehended and punished for this action, I may refrain from committing it. Thus, it could be argued that a responsiveness to nonmoral reasons ought to be sufficient to ground criminal responsibility, and that a lack of access to moral reasons should only amount to a mitigating factor at a sentencing stage, rather than the basis for an exemption via an insanity defence.

Duff's discussion of a 'partial psychopath', derived loosely from Cleckley's model of psychopathy, is in keeping with this approach. Such a person lacks the capacity to appreciate

[157] e.g. Brink, 'Moral realism and the sceptical arguments from disagreement and queerness', (1984) Australasian Journal of Philosophy 111.

[158] MMI may be espoused by both metaethical rationalists and metaethical sentimentalists. From a rationalist perspective, a person may be practically irrational if they judge that they morally ought to do something and are not then motivated to do it (M. Smith, 'The truth about internalism', in W. Sinnott-Armstrong (ed), *Moral psychology vol. 3: Neuroscience of morality: Emotion, brain disorders, and development* (MIT Press 2007) 207). From a sentimentalist perspective, moral judgments have been argued to be associated with emotional dispositions, such as a disposition to feel guilty if one fails to act in accordance with one's own judgments, or a disposition to blame others if they breach their obligations (N. Southwood, 'The moral/conventional distinction', (2011) 120 Mind 761, 767–769). MMI has been argued to be relevant to the moral competence of psychopaths: if MMI is true, a lack of motivation in the context of apparently normal moral judgments may amount to evidence that psychopaths do not make 'proper' moral judgments. This, however, may not be a claim that can be supported empirically (N. Levy, 'The responsibility of the psychopath revisited', (2007) 14(2) Philosophy, Psychiatry, & Psychology 129).

moral considerations, but can deliberate and act prudentially.[159] As such, he is 'responsable' (a term utilised by Duff to mean 'response-able', or able to respond[160]) to prudential reasons but not to moral reasons. In theory, Duff argues, this person is prudentially responsible, such that he may be 'called to answer...for his imprudent actions', but not morally responsible and so cannot be 'called to account...for his morally wrongful actions'.[161] Although this is a somewhat idealistic conception of psychopathy (as Duff acknowledges), it might nevertheless be argued that where a person is able to recognise and respond to prudential reasons, it is not appropriate to exempt this person from criminal responsibility: they can, and should, be required to answer for their imprudent actions.[162] A similar argument could be made with respect to their unlawful actions.

In response to this, it might be argued that moral reasons are the reasons that *usually* lead people to act in accordance with the law, despite their access to legal or prudential reasons.[163] These represent the most forceful reasons, and far outweigh the motivating effects of any prudential considerations. I do not refrain from injuring you because I might be apprehended; I do so because this is *wrong*. The thought that it is morally wrong eclipses the motivating effects that any prudential reasons might have on my actions. A loss of access to moral reasons, therefore, could significantly reduce my capacity to refrain from committing at least some criminal offences, because I would be forced to rely on prudential considerations which, in comparison, are likely to be much less compelling. My opportunity to act lawfully would be drastically curtailed and, consequently, it would be unfair to hold me criminally responsible.

One problem with this response, if it is accepted, is that not all criminal offences are equally 'moral'. Given the likely availability of other reasons relevant to criminal responsibility, any tenable prima facie case would appear to depend significantly the nature of the offence in question. Some criminal prohibitions, while conveyed partly in a way intended to appeal to prudential rationality (e.g. there is a mandatory minimum sentence), may be more essentially 'moral' than others. Other prohibitions, on the other hand, may be largely

[159] Duff (n 153) 41, and fn.8.
[160] (n 153) 39.
[161] (n 153) 41.
[162] On Duff's account, a person is held responsible when they are called to answer for, or explain, their actions (see also footnote 153, p.104).
[163] Morse (n 122) 209.

or entirely nonmoral prohibitions.[164] It is therefore important to clarify which offences are the relevant offences. These would be the offences that, should the prima facie case succeed, were relevant offences for the purposes of a reformed/reinterpreted insanity defence.

This is a task that I undertake in Section 5.3. Given my focus on the possibility of psychopaths lacking comprehension of harm-related moral considerations, I consider which offences may be most 'moral' in this sense.[165] An issue that quickly arises is that the concept of 'harm' does not easily permit a narrowing down of criminal offences. Duff argues, for example, that if 'prevention of harm' is used to justify the existence of offences on the basis that the offences 'contribute ultimately or indirectly' to prevention, the number of offences covered would be huge.[166] Given this issue, I argue that it may be reasonable to limit relevant offences to those where the prohibitions would normally be understood largely in terms of moral reasons concerning harm; that is, where moral reasons concerning harm would, in persons possessing moral competence, be particularly psychologically salient relative to other nonmoral reasons.

Even in the case of relevant offences, however, nonmoral reasons remain relevant to criminal responsibility. Indeed, in the case of paradigmatic harm-related offences, such as murder, these may be particularly motivating or forceful. These offences, after all, may be associated with particularly harsh criminal sanctions. Thus, the problem posed by responsiveness to nonmoral reasons remains, and it could still be argued that mitigation rather than exculpation may be appropriate. I return to this issue in Chapter 6, where I reach a conclusion on the question whether an insanity defence ought to be made available to some psychopaths.

In addition to these more theoretical issues, there are also more practical issues with the prima facie case. One practical problem for the case concerns the likely consequences of success with an insanity plea. The central argument of the case, as I have presented it, is that it may be unfair to hold some psychopaths criminally responsible, insofar as they lack moral competence, for relevant offences because they have had an inadequate opportunity, relative to other citizens, to avoid the harsh consequences of criminal liability. However,

[164] Duff, for example, suggests that strict liability offences may represent offences with respect to which we may be criminally responsible without being morally responsible ((n 153) 20–1).

[165] This pragmatic focus is explained further in Section 5.2. Although psychopaths with more complex and specific moral impairments are possible, given our current level of scientific understanding a generic harm-related moral incompetence is argued to be a reasonable starting point for inquiry.

[166] Duff (n 153) 137.

if the outcome of success with an insanity plea is indefinite hospital detention this may, in its own way, be equally harsh (or even worse). Recent news stories about Joanne Dennehy, who was given a 'whole life' prison sentence for murdering three men, highlight this issue.[167] Dennehy, who had a 'psychopathic personality', reportedly laughed when the judge described her as 'a cruel, calculating, selfish and manipulative serial killer'. In addition to murdering the three men, she had also attempted to murder two others. If, in a different legal context, Dennehy were found not guilty by reason of insanity, it would hardly be appropriate to let her go free.

Given the choice, many defendants might prefer to face criminal sanctions, including imprisonment, rather than be labelled 'insane' and compulsorily detained in hospital for what might potentially be a lengthier period (as seen, for example, in cases like *Sullivan*[168] and *Clarke*[169]). The consequences of a special verdict, therefore, may blunt the force of the prima facie case; indeed, from a defendant's perspective, it might be argued that it was *fairer* to hold relevant psychopaths criminally responsible, irrespective of their moral competence.

An implication of this particular problem is that the prima facie case may depend, in part, on the existence of effective medical treatments for psychopathy (by 'effective' I mean treatments that can significantly reduce the duration of hospital detention). Otherwise, the distinction between 'treatment' and 'punishment' may be rather empty in practice. I set this particular issue aside for now, and return to it in Chapter 6.

I now move on to consider further how a lack of moral competence may relate to 'knowledge' in the M'Naghten Rules. This permits some clarification of the nature of the reforms to an insanity defence that would be required if relevant psychopaths are to potentially succeed with insanity pleas.

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[167] Guardian newspaper, 'Joanne Dennehy given whole-life jail sentence for triple murder' 28.2.14) <http://www.theguardian.com/uk-news/2014/feb/28/joanna-dennehy-whole-life-jail-sentence> accessed 27.6.14. There are different forms of 'life' sentence. Where a 'whole life' order is made, a prisoner will never be released. In other cases, prisoners on life sentences must serve a minimum term after which release is subject to approval by a Parole Board; if released, these persons are monitored for the remainder of their lives and subject to recall to prison ('Life sentences' (Sentencing Council) <http://sentencingcouncil.judiciary.gov.uk/sentencing/Life-sentences.htm> accessed 27.6.14).

[168] *R v Sullivan* [1984] AC 156.

[169] *R v Clarke* [1972] 1 All ER 219 (CA).

3.5 The prima facie case and 'knowledge' in the M'Naghten Rules

In order to succeed with an insanity plea, under Rule 3 of the M'Naghten Rules it is required that a defect of reason, caused by a disease of the mind, has caused a person (at the time of the alleged offence) to lack knowledge of either the 'nature and quality' of their act (limb 1), or that it was 'wrong' (limb 2). As is clear from the discussion in Section 1.3, the English courts have adopted a very restrictive approach to the interpretation of the limbs. Limb 1 has been reduced to an assessment of whether a person knew the bare physical characteristics of the act, and in limb 2 knowledge has been equated with knowledge that an act was legally wrong (on a non-nuanced reading, at least[170]). Consequently, if a person knew what they were doing in the minimal sense required for limb 1, and knew that the act was legally wrong, they cannot succeed with an insanity defence.

I have highlighted the possibility of broader interpretations of both limbs. As regards limb 1, 'nature and quality' could be interpreted to include the consequences of one's act. This could, in theory, include an awareness of the harm or distress caused by one's actions. It could also include qualitative features of one's action such as the fact that it was 'cruel'.[171] On broader readings, therefore, limb 1 could require moral competence: in order to appreciate that my action was 'cruel', for example, I may require an ability to appreciate moral reasons (as discussed in Section 2.4, thick concepts like 'cruel' may be unavoidably morally evaluative). Furthermore, as indicated by the case of *Swain*,[172] limb 1 could be interpreted to require an ability to morally evaluate one's reasons for undertaking a particular action. As regards limb 2, knowledge might be expanded to include knowledge of the moral wrongness of one's action.

But how can a 'defect of reason' cause a 'lack of knowledge'? Sinnott-Armstrong and Ken Levy make the helpful suggestion that 'lack of knowledge' might be understood to arise from a 'defect of reason' if one's existing beliefs do not respond to 'reasons to the contrary'.[173] In *R v Johnson*, mentioned in Section 1.3.4, the appellant's delusional belief that people were surrounded by 'firewalls' might have persisted despite any arguments or

[170] As noted, moral competence may be relevant in cases where a defendant lacked knowledge of illegality.
[171] Tadros (n 29) 327.
[172] (1986) 53 O.R. (2d) 609 (Ont. C.A.).
[173] W. Sinnott-Armstrong and K. Levy, 'Insanity defenses', in J. Deigh and D. Dolinko (eds), *The Oxford handbook of philosophy of criminal law* (OUP 2011) 299, 306.

evidence to the contrary.[174] Along these lines, Sinnott-Armstrong and Levy suggest that M'Naghten's belief that 'the prime minister was out to get him' may have been similarly impervious to reason.[175]

This plausible way of understanding the link between reasoning and knowledge may also apply to moral beliefs. Perhaps I believe, due to a delusion, that it is morally acceptable, or even morally *obligatory* to kill a person. Perhaps I believe that God is commanding me to do this: perhaps, for example, I believe that I have been sent a message through my television set conveying God's will, thereby making it unshakeably clear that if I do not kill my neighbour a great plague will wipe out half of humanity. No amount of arguing can persuade me that it may be morally wrong to kill him. In this case, I could be said to have a lack of moral knowledge resulting from an impairment of reasoning.

The impairment of rationality in this example, however, is substantial and appears to go beyond a mere impairment of moral reasoning. Indeed, my ability to reason morally may be intact, but operate within the constraints of a delusional misrepresentation of the world. If so, this does not apply straightforwardly to psychopathy. In the case of relevant psychopaths, there may be an accurate interpretation of at least nonmoral features of the world, in the context of a substantial impairment of moral reasoning capacity. Indeed, it may be incorrect to say that certain (relevantly impaired) psychopaths may have delusional moral beliefs, or inappropriate moral beliefs based on a delusional interpretation of the world; it may be more correct to say that they have *no* moral beliefs.

Perhaps we could say that relevant psychopaths may have a lack of moral knowledge, due to a defect of reason, where they cannot be *induced* to form moral beliefs. No amount of arguing and remonstrating can persuade them that there is anything really 'right' or 'wrong' about a proposed plan or action. This plausible interpretation, however, creates a problem: what do we mean by *really* right or wrong? On a broader interpretation of the M'Naghten Rules, what depth of understanding or knowledge should be required? I noted in Section 3.4 Elliott's insightful comment that psychopaths may understand morality 'well enough to manipulate it': they know that people have moral beliefs, and may also know that people have reasons for these beliefs. They may, however, fail to appreciate the significance of these beliefs, because they are unable to recognise these reasons as moral reasons.

[174] *R v Johnson* [2007] EWCA Crim 1978, [2008] Crim LR 132 [8]. It should be noted that the nature of delusions, including whether they are genuinely beliefs, is debated (see, for example, L. Bortolotti, *Delusions and other irrational beliefs* (OUP 2010).

[175] (n 173) 306.

If a lack of moral competence is to provide grounds for success with an insanity plea, consistent with the prima facie case, 'knowledge' must be interpreted in a deeper sense. Mere abstract and superficial knowledge, such as knowledge of what other people might believe, in the absence of an ability to appreciate in this deeper sense, must not prevent success with a plea (at least with respect to relevant alleged offences). The relevant standard must therefore be an inability to appreciate the wrongness of an act, or its morally relevant characteristics (e.g. whether it was harmful, or cruel). Or, to express this positively, capacity for criminal responsibility must require an ability to *appreciate* the moral wrongness, or evaluate the morally relevant features, of an act.[176]

In this regard, it is noteworthy that some jurisdictions, such as Scotland, have preferred the term 'appreciate' to the term 'knowledge'.[177] The Scottish Law Commission, for example, commented that unlike 'mere' knowledge, 'appreciation' connoted 'something wider than simple knowledge' and included a 'level of (rational) understanding'.[178] It was argued that while 'cognitive failing' correctly featured in the M'Naghten Rules, narrowly characterising this as 'knowledge' had been a mistake.[179]

It is possible, then, to clarify some of the conditions that would need to obtain, and the necessary features of a reformed M'Naghten-style defence, if some psychopaths are to succeed with insanity pleas. First, psychopathy must qualify as a 'disease of the mind'. I argued in Section 1.3.2 that this currently appears to be the case in English law. Second, 'defect of reason' must accommodate the possibility of a specific impairment of moral reasoning.[180] Third, one or both of the limbs of the defence must assess moral competence. In the case of the first limb, a moralistic interpretation of 'nature and quality' could ensure that an inability to appreciate the consequences of an action, its morally qualitative features (e.g. that it was 'cruel'), or to morally evaluate the reasons for undertaking an action, could rebut the presumption of sanity. In the case of the second limb, this could be achieved by

[176] This could be described as a 'thick' standard of rationality, in contrast to a 'thin' standard as applied in a case like *R v Windle* [1952] 2 Q.B. 826; S.J. Morse, 'Culpability and control', (1994) 95(1) University of Pennsylvania Law Review 1587, 1636–7.

[177] Scottish Law Commission (n 120) para 2.42–2.51. Another example is seen in Section 4.01 of the Model Penal Code, adopted by some United States jurisdictions: 'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he (or she) lacks substantial capacity either to appreciate the criminality/wrongfulness of his (or her) conduct or to conform his (or her) conduct to the requirements of the law' (for discussion, see Sinnott-Armstrong and Levy (n 173)).

[178] (n 120) 2.47.

[179] (n 120) 2.48.

[180] See Sections 1.3.1 and 1.3.2.

specifying that an inability to appreciate that an act was morally wrong (rather than simply to 'know' this in a superficial way) could rebut the presumption.

As noted earlier, however, psychopathy is explicitly excluded from the insanity defence in Scots law. It is also conceptualised as a volitional disorder with incomplete loss of voluntary control. I have argued in Section 3.2.5 that a 'specific-deficit' account of psychopathy may better represent the moral impairments that some psychopaths may have. However, before seriously considering a change to the law to accommodate psychopaths, in Scotland or elsewhere, persuasive evidence is required that a lack of moral competence is present in at least some cases. It is necessary to show that some psychopaths *in fact* lack a capacity to respond to moral reasons, and are in fact unable to possess more than an abstract knowledge of morality. It is necessary, therefore, to move beyond theoretical debates and consider the empirical evidence.

This is the main focus of Chapters 4 and 5. In short, I argue that while it is not currently possible to identify such persons, given our emerging neurobiological understanding of psychopathy it may become possible in the future. I then return to the question whether an insanity defence should be made available, in the event that such persons were identified, in Chapter 6.

Chapter 4

Psychopaths and the moral/conventional distinction

4.1 Introduction

In this short Chapter I outline, and critically examine, research concerning psychopaths and the moral/conventional distinction (MCD). This research has been highly influential, and has been cited in various philosophical papers and books to support the contention that psychopaths may be unable to distinguish moral wrongs from nonmoral wrongs.[1] Levy, for example, has argued that this research shows that psychopaths may lack moral knowledge.[2] Given the use of 'knowledge' as a criterion in the insanity defence, and the potential relevance of moral knowledge to this defence, this research could have significant legal implications.

Problems with this research, however, have become increasingly evident, and a recent study has contradicted the initial influential findings. It is helpful to examine this research further, and the paradigm on which it is based. My examination of the existing research in this area confirms that it cannot clarify whether psychopaths may lack moral competence.

[1] Some examples of the use of this research to support philosophical arguments about psychopaths include work by Nichols (S. Nichols, *Sentimental rules: On the natural foundations of moral judgment* (OUP 2004)), Prinz (J. Prinz, *The emotional construction of morals* (OUP 2007)), Fine and Kennett (C. Fine and J. Kennett, 'Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment.', (2004) 27 Int J Law Psychiatry 425) and Levy (N. Levy, 'The responsibility of the psychopath revisited', (2007) 14(2) Philosophy, Psychiatry, & Psychology 129).

[2] Levy (n 1).

It also highlights issues relating to impression management by psychopaths, and the need to look beyond expressed moral verdicts at the brain activity underlying these verdicts (something I will focus on in Chapter 5).

The ability to judge that a particular transgression is morally wrong requires an ability to make a 'moral judgment'. Given that the ability of psychopaths to make moral judgments is central to this thesis, it is important to consider what might be meant by this.

4.2 What is a moral judgment?

A 'moral judgment' has been defined as 'the mental state or event of judging that some act, institution, or person is morally wrong or right, good or bad'.[3] Providing a more precise definition, however, proves to be a very problematic and controversial task. It has been remarked, for example, that this task is 'more controversial than defining a psychopath'.[4] I will tentatively accept the broad definition above, which is provided by Schaich-Borg and Sinnott-Armstrong. Four main issues, however, that are relevant to the scientific discussion below and in Chapter 5, should be noted.

First, it may be unclear whether a particular judgment is a moral or a nonmoral judgment: what 'counts' as a moral judgment, for example, may vary between cultures.[5] This is particularly relevant in the case of MCD research (see below). Second, different kinds of moral judgment may require distinct capacities.[6] Some moral judgments, for example, require an ability to infer another person's mental states, such as their intentions. Indeed, evidence shows that these judgments may be selectively disrupted by transcranial magnetic stimulation.[7] This means that impairments may selectively involve one kind of moral judgment, while leaving other kinds intact.

Third, a capacity to make a moral judgment depends on ancillary capacities. In this regard, some recent research by Schaich-Borg *et al.* is particularly illuminating.[8] When

[3] J. Schaich-Borg and W. Sinnott-Armstrong, 'Do psychopaths make moral judgments?', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 107, 109.

[4] (n 3) 109.

[5] (n 3) 109.

[6] (n 3) 109.

[7] L. Young, J.A. Camprodon, M. Hauser *et al.*, 'Disruption of the right temporoparietal junction with transcranial magnetic stimulation reduces the role of beliefs in moral judgments', (2010) 107 Proceedings of the National Academy of Sciences 6753.

[8] J. Schaich-Borg, W. Sinnott-Armstrong, V.D. Calhoun *et al.*, 'Neural basis of moral verdict and moral deliberation', (2011) 6 Social Neuroscience 398.

healthy participants were confronted with a range of hypothetical scenarios, reasonably distinct brain areas were utilised during deliberation-related, as opposed to verdict-related, phases of moral judgments. 'Moral deliberation' was considered to include such activities as identifying and weighing moral principles (whether consciously or unconsciously) that might enable the recognition of morally significant features of a situation, and consideration of which actions might be in keeping with a particular moral conclusion.[9] Although there are some obvious parallels between the deliberative processes required for reaching a moral verdict and the sort of ancillary capacities posited by responsibility theorists such as Wallace, however, some of the processes involved may not be relevant to moral or criminal responsibility.[10] This makes the business of applying scientific results to legal practice more complicated: what is scientifically significant may not be legally significant.

Fourth, insofar as a moral judgment is taken to include a commitment to a particular conclusion, such judgments must be distinguished from emotions such as guilt or shame which may accompany these judgments.[11] As Schaich-Borg and Sinnott-Armstrong comment, one may feel guilty about something without *endorsing* this feeling as morally appropriate (requiring a moral judgment).[12] Rawls makes a similar point with respect to what he terms 'residual' guilt. If I have been brought up in a strictly religious way and due to this believe that attending a cinema is 'wrong', attending a cinema later in life may continue to induce feelings of guilt despite my rejection of the values I was brought up to endorse.[13]

I now turn to research on the moral/conventional distinction, beginning with an outline of the test utilised in these experiments and the theory underpinning it.

4.3 The moral/conventional distinction test

The theory underlying the moral/conventional distinction (MCD) test was originally developed by Turiel,[14] and MCD research is sometimes referred to as being in the 'Turiel

[9] Schaich-Borg *et al.* (n 8 399.
[10] (n 3) 10.
[11] (n 3) 10.
[12] (n 3) 10.
[13] J. Rawls, *A theory of justice* (2nd Revised edition edn, OUP 1999) 422.
[14] E. Turiel, *The development of social knowledge: Morality and convention* (CUP 1983).

tradition'.[15] Turiel, along with other developmental psychologists such as Nucci[16] and Smetana,[17] argue that humans normally distinguish between 'moral' and 'conventional' norms, an ability that is learned throughout the course of normal development.[18] According to Nucci, for example, 'morality and convention emerge as distinct conceptual frameworks at very early ages', and 'undergo distinct patterns of age-related developmental changes'.[19]

The MCD is viewed by theorists such as Turiel as 'both psychologically real and psychologically important'.[20] This derives from the view that there is something special about moral judgments that sets them apart from other judgments. Specifically, moral judgments are thought to carry a particular 'force': if something is judged to be morally wrong, so the hypothesis goes, this 'wrongness' cannot be altered by authority.[21]

Experimental subjects are asked to consider hypothetical vignettes, usually involving children, and evaluate these along the following four dimensions: permissibility ('Was it OK for X to do Y?'), seriousness ('Was it bad for X to do Y?' and, if so, 'On a scale of 1 to 10, how bad was it for X to do Y?'), justification ('Why was it bad for X to do Y?') and authority-dependence ('Would it be OK for X to Y if the authority says that X may do Y?').[22] 'OK' (or 'Yes') responses are scored as '0' and 'not OK' (or 'No') responses are scored as '1'.[23] 'Moral' transgression examples usually concern a victim who has been clearly harmed in some way (e.g. a child pulling another's hair);[24] a 'conventional' transgression example might be 'drinking soup out of a bowl'.[25]

Initial findings have supported an MCD in both children and adults.[26] In particular,

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[15] Sousa, however, identifies some theoretical differences within this tradition or approach (P. Sousa, 'On testing the "moral law"', (2009) 24(2) Mind & Language 209, 214).

[16] L.P. Nucci, *Education in the moral domain* (CUP 2001).

[17] J.G. Smetana, 'Understanding of social rules', in M. Bennett (ed), *The development of social cognition: The child as psychologist* (Guilford Press 1993).

[18] Sousa (n 15) 209.

[19] Nucci (n 16) 8.

[20] D. Kelly, S. Stich, K.J. Haley *et al.*, 'Harm, affect, and the moral/conventional distinction', (2007) 22(2) Mind & Language 117.

[21] W. Sinnott-Armstrong and T. Wheatley, 'Are moral judgments unified?', (2013) 27(4) Philosophical Psychology 451, 462–4.

[22] The quoted questions are taken Schaich-Borg and W. Sinnott-Armstrong (n 3) 115.

[23] (n 3) 115.

[24] (n 20) 119.

[25] Sousa (n 15) 210.

[26] (n 20) 119. See, for example: L.P. Nucci and E. Turiel, 'Social interactions and the development of social concepts in preschool children', (1978) 49(2) Child Development 400; J.G. Smetana, 'Preschool children's conceptions of moral and social rules', (1981) 52(4) Child Development 1333.

'moral' transgressions have been rated by subjects as more serious, the 'wrongness' as independent of authority, and decisions have been justified by reference to justice, harm or rights.[27] Breaches of 'conventional' transgressions have been rated as 'less serious', the 'wrongness' as authority-dependent, and appeals to justice, harm or rights have typically *not* been made to justify decisions.[28] These patterns have been observed across a wide age-range, from children of around three years old to adults, and across 'a substantial array of different nationalities and religions'.[29]

Notwithstanding this, some of the core theoretical commitments held by proponents of the MCD have recently been challenged. Some studies have shown that supposedly 'conventional' transgressions may evoke a '*moral*' response. Haidt *et al.*, for example, reported that subjects from low socio-economic status groups in Brazil and the United States deemed that privately cleaning a bathroom with rags cut from the national flag, or privately having sexual intercourse with a dead chicken before cooking and eating it, were serious 'moral' transgressions.[30] Similarly, Nichols reported that etiquette rules prohibiting actions that might induce disgust (e.g. 'spitting at the table') were considered by most test subjects (college students in the United States) to be 'impermissible, very serious and not authority contingent';[31] this effect was also more marked in subjects more prone to disgust.[32]

Additionally, Kelly *et al.* have reported data that challenges the extent to which supposed 'moral' transgressions are authority-independent and, as such, 'general in scope' (i.e. apply at all times and in all places).[33] Participants were presented with 'grown up' scenarios, as opposed to the more usual 'schoolyard'-type scenarios.[34] These included scenario-pairs aiming to probe whether 'harm norms' were authority independent (e.g. the permissibility of the spanking of children by teachers where this was either prohibited or permitted by authorities), and whether these norms generalised (e.g. the 'wrongness' of whipping as a punishment for sailors on ships 300 years ago, as opposed to now). The results appear to undermine both the authority-independence and generality of scope of 'moral' prohibitions

[27](n 20) 119.

[28](n 20) 119.

[29]Kelly *et al.* (n 20) 119. See also Nucci (n 16) 10.

[30]J. Haidt, S.H. Koller and M.G. Dias, 'Affect, culture, and morality, or is it wrong to eat your dog?', (1993) 65(4) Journal of Personality and Social Psychology 613.

[31]S. Nichols, 'Norms with feeling: Towards a psychological account of moral judgment', (2002) 84 Cognition 222, 231.

[32](n 31) 231–32.

[33](n 20) 119.

[34](n 20) 122.

(e.g. spanking was more likely to be scored as permissible where this was not prohibited by an authority,[35] and whipping was more likely to be scored as permissible where this occurred in the distant past[36]).[37]

Both of these lines of research challenge the view, advocated by Turiel and followers, that a moral domain is distinguished from a conventional domain by the 'force' that moral judgments alone may have. They indicate both that moral judgments may be authority-contingent (Kelly *et al.*), and therefore lack this force, and that supposedly 'conventional' transgressions may possess this force (Haidt *et al.* and Nichols).

In addition to these empirical issues, there are also issues with the MCD paradigm. Sinnott-Armstrong and Wheatley, for example, suggest that a 'conventional' example like knot-tying may pose problems for the distinction: the 'wrongness' of tying a knot incorrectly (because this causes it to slip) remains 'wrong' even if an authority (e.g. a teacher) gives you permission to tie it that way, and hence is 'authority-independent'; tying it wrongly may also cause 'serious harm' if a mountain climber relies on it to carry his weight.[38] It is also possible to think of 'moral' transgressions that are *trivial* and therefore not 'serious' (e.g. a 'white' lie, such as saying that one feels 'OK' when one in fact feels unwell but wishes to avoid embarrassing or awkward questions). Due to issues like these, it has been argued that even if the MCD is a distinction that many people make at the level of commonsense, it is not capable of 'neatly carving out two conceptual domains'.[39]

There are therefore various issues, both empirical and philosophical, with this paradigm that should caution against placing significant weight on MCD-related findings.[40] In any

[35]Kelly *et al.* (n 20) 127–8.

[36]Kelly *et al.* (n 20) 126–7.

[37]This study has been criticised by Sousa, who argues that the methodology and analysis are problematic and do not permit such confident conclusions to be drawn (n 15). I cannot enter into a discussion of Sousa's criticisms here, although as Shoemaker comments Sousa's arguments 'carry over to a kind of general (albeit guarded) skepticism about the moral/conventional distinction as well' (D. Shoemaker, 'Psychopathy, responsibility, and the moral/conventional distinction', (2011) 49 The Southern Journal of Philosophy 99, 107 fn.39). Any victory for Sousa, then, may be a pyrrhic one. Sousa's critique is complicated by the fact that he may defend a conceptualisation of the MCD that differs markedly from that espoused by many proponents of the distinction (see S. Stich, D.M.T. Fessler and D. Kelly, 'On the morality of harm: A response to Sousa, Holbrook and Piazza', (2009) 113(1) Cognition 93, especially 95–6).

[38](n 21) 463–4.

[39](n 37) 123. For an attempt to defend the MCD philosophically, see N. Southwood, 'The moral/conventional distinction', (2011) 120 Mind 761.

[40]In this vein, Shoemaker has argued that *too much weight* has been placed on the MCD by philosophers. Philosophers, he argues, are 'ill-advised to put much, if any, weight on "the" distinction in drawing conclusions about the moral judgments or agential capacities of psychopaths' (n 37) 123.

event, as will be seen in the next Section, initial findings in this area regarding psychopathy are problematic and may now have been refuted.

4.4 Blair *et al.*'s research, and a more recent study

Blair's hypotheses concerning psychopaths and the MCD were related to his proposed 'violence inhibition mechanism' (VIM) in humans.[41] VIM activation was posited to account, in some non-human animals, for an attacker's inclination to withdraw when presented with submission cues, an inclination potentially overruled by executive processing.[42] In humans, the VIM was posited to be required for the development of empathy, 'moral' emotions such as shame and guilt, [43] and the ability to distinguish between moral and conventional transgressions. Based on the hypothesis that there may be VIM dysfunction in psychopaths, Blair proposed that adult psychopaths may be unable to make the MCD.[44] He made the following predictions: (1) psychopaths would not distinguish between 'moral' and 'conventional' rules; (2) they would interpret 'moral' rules as conventional rules; and (3) they would make fewer references to victims' distress or suffering than non-psychopaths.[45]

Blair and colleagues conducted two influential MCD studies with adult psychopaths. The initial study involved 10 psychopaths and 10 non-psychopaths, obtained from Ashworth and Broadmoor Special Hospitals.[46] All 20 subjects met the legal criteria for 'psychopathic disorder' in the Mental Health Act 1983 (prior to amendments by the Mental Health Act

[41] R.J.R. Blair, 'A cognitive developmental approach to morality: Investigating the psychopath', (1995) 57 Cognition 1, 2–3.

[42] (n 41) 3. Executive processing (or functioning) refers to cognitive processes that are thought to perform 'supervisory' or 'regulatory' roles, and may refer to both conscious (e.g. deliberative reasoning) and unconscious (or less conscious) processes (D. Purves, E. Brannon, R. Cabeza *et al.*, 'Principles of cognitive neuroscience', (2008) 577). The VIM theory drew on ethological observations indicating that aggression in animals is curtailed by 'submission cues' from conspecifics (i.e. members of the same species), such as a dog baring its throat to an aggressor ((n 41) 3).

[43] The VIM was posited to be involved with 'perspective taking' (or 'role taking'), whereby one sees things from another's point of view. Repeated experiences of perspective taking in childhood, in the presence of a normal VIM system, were posited to lead to the mere *thought* of distress in others generating an empathetic response ((n 41) 4–5). Blair also postulated that the withdrawal prompted by VIM activation would eventually develop into an inhibition of violent actions ((n 41) 5). This theory has now been updated to emphasise a role for the ventromedial prefrontal cortex, in addition to the amygdala (which was central to the VIM theory) (R.J.R. Blair, 'The amygdala and ventromedial prefrontal cortex in morality and psychopathy', (2007) 11(9) Trends in Cognitive Sciences 387).

[44] (n 41) 9–13.

[45] (n 41) 13.

[46] (n 41) 13.

2007), and the PCL-R was used to divide these persons into clinically 'psychopathic' and 'non-psychopathic' groups.[47] There were reportedly no significant differences in age or intelligence between the two groups.[48]

The MCD test deployed four 'moral' scenarios: (i) 'a child hitting another child', (ii) 'a child pulling the hair of another child and the victim cries', (iii) 'a child smashing a piano' and (iv) 'a child breaking the swing in the playground'. The four 'conventional' scenarios were (i) 'a boy child wearing a skirt', (ii) 'two children talking in class', (iii) 'a child walking out of the classroom without permission' and (iv) 'a child who stops paying attention to the lesson and turns his back on the teacher'.[49] Following the presentation of each scene, subjects were asked the 'permissibility', 'seriousness' and 'justification' questions (see Section 4.3). Subjects were then told: 'Now what if the teacher said before the lesson, before X did [the transgression], that "At this school anybody can Y if they want to. Anybody can Y" '; subjects were then asked the 'authority-dependence' question.

The results indicated that psychopaths, as a group, made no significant MCD in terms of permissibility, seriousness or authority-dependence. Inter-group comparisons, however, revealed that the only significant difference between psychopaths and non-psychopaths was with respect to *authority dependence*. A surprise was that psychopaths differed on this criterion from non-psychopaths because they reported conventional transgressions to be authority *independent* (i.e. they were rated as if they were 'moral'); Blair had predicted that both moral and conventional transgressions would be reported as authority *dependent* (i.e. rated as 'conventional').[50]

As regards this finding, Blair reasoned as follows:

> These subjects were all incarcerated and presumably motivated to be released.

[47] Only 16 items were scored, yielding a total out of 32 rather than 40. The scores out of 32 were scaled up (multiplied by 40 and divided by 32) to yield a score out of 40 ((n 41) 14 (table 1)). The items not scored were numbers 1, 2, 4 and 13 ('Glibness/superficial charm', 'Grandiose sense of self-worth', 'Pathological lying' and 'Lack of realistic goals' respectively). The reason for this omission was that subjects were scored from file, rather than the 'standard protocol' of file and interview, and it was difficult to obtain this information from file ((n 41) 13).

[48] (n 41) 13–4.

[49] (n 41) 14. Blair comments that school-based transgressions were used because 'piloting had shown that teachers were regarded by the subjects as legitimate authority figures for *children*', whereas nurses had not been regarded by all subjects as 'legitimate authority figures for other *adults*' ((n 41) 14 (my emphasis)).

[50] (n 41) 17. Six psychopaths, as opposed to one non-psychopath, responded in this way; conversely, only two psychopaths, as opposed to eight non-psychopaths, made a clear MCD on the authority dependence criterion.

> All wished to demonstrate that the treatments they were receiving were effective. They therefore would be motivated to show how they had learned the rules of society...[51]

From this argument (that the psychopaths were lying in order to make a good impression) Blair concluded that the psychopaths were unable, in comparison with non-psychopaths, to make the MCD.[52] The second study by Blair *et al.* produced very similar results,[53] and these were interpreted in the same way.

Although it may be true that psychopaths lie frequently, however, various interpretations of the data are possible. It might be the case, for example, as suggested by Blair *et al.*, that adult psychopaths cannot make the MCD and believe that conventional and moral norms are both similar to *conventional* norms.[54] However, an alternative explanation, as suggested by Schaich-Borg and Sinnott-Armstrong, is that psychopaths cannot make the MCD and believe that conventional and moral norms are both similar to *moral* norms.[55] Yet another possibility is that psychopaths *can* make the distinction, but only misrepresent their responses in the case of conventional transgressions.[56]

To attempt to adjudicate between these possible explanations, Aharoni *et al.* recently presented more 'grown up' scenarios to a group of 109 imprisoned offenders with a range of PCL-R scores.[57] Unlike Blair *et al.*, Aharoni *et al.* informed participants in advance that half of the cases had been pre-rated as 'moral' transgressions and half pre-rated as 'conventional' transgressions, and asked participants to categorise these correctly (a 'forced-choice'

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[51](n 41) 23.

[52]Further findings were, first, that while both groups were more likely to use 'welfare' justifications (i.e. 'any reference to the welfare of the victim') for the 'moral' tasks, psychopaths were (as predicted) significantly less likely to do so than non-psychopaths ((n 41) 18). Second, significant correlations were found between the tendency of subjects to 'judge conventional transgressions as moral' and the individual PCL-R items 'lack of remorse or guilt', 'callous/lack of empathy' and 'criminal versatility' ((n 41) 19–20).

[53]Psychopaths, however, made a significant MCD on the 'seriousness' criterion, and there were also correlations between the treatment of conventional transgressions as moral transgressions and individual PCL-R items (i.e. significant correlations with 'lack of remorse or guilt' and 'criminal versatility', but not with 'callous/lack of empathy'): R. Blair, L. Jones, F. Clark *et al.*, 'Is the psychopath 'morally insane'?', (1995) 19(5) Personality and Individual Differences 741, 746–8. See also Schaich-Borg and Sinnott-Armstrong (n 3) 115–6.

[54](n 41) 23–4.

[55](n 3) 116.

[56](n 3) 116.

[57]E. Aharoni, W. Sinnott-Armstrong and K. Kiehl, 'Can psychopathic offenders discern moral wrongs? A new look at the moral/conventional distinction.', (2012) 121(2) Journal of Abnormal Psychology 484, 485.

method).[58] Questions concerned the 'seriousness' and 'authority-dependence' dimensions, as outlined in Section 4.3 (the 'authority-dependence' question was 'If there were no rules, customs, or laws against the act, would it still be wrong?'[59]); participants were also asked to record whether the transgressions involved harm. The use of a forced-choice method aimed, first, to remove any desire to impression-manage by rating all transgressions as 'moral' transgressions and, second, to incentivise participants to impression-manage by achieving the 'correct' answers.

Overall, the incarcerated group performed well (82.6% of pre-rated moral transgressions were classified correctly), although lower than student controls (where 92.5% were classified correctly).[60] Within the incarcerated group, there was no significant difference in performance between high PCL-R ($\geqslant$25) and low PCL-R ($\leqslant$15) offenders; there was also no significant difference in ratings of harm between high and low PCL-R offenders.[61]

There are potential issues with the validity of these findings, and also with their ability to adjudicate between the various possible interpretation of Blair *et al.*'s findings. As regards the former, Aharoni *et al.*'s finding were a 'null' result (i.e. no difference between low and high PCL-R groups was found). As Aharoni *et al.* themselves accept, a much larger sample size (>5000 subjects) might reveal a difference between these groups.

As regards the latter, Levy has argued that informing participants that half of the cases had been pre-rated as 'moral' transgressions, and half as 'conventional', significantly altered the nature of the experiment.[62] In particular, he argues, informing participants in this way made the test an assessment of their ability to determine 'most people's views', rather than make judgments for themselves.[63] Thus, the studies by Aharoni *et al.* and Blair *et al.* may not be comparable, and it may not be possible to refute Blair *et al*'s findings with the modified MCD methodology utilised by Aharoni *et al.*

In response to this, it could be argued that psychopaths may have been doing *precisely this* in Blair *et al.*'s studies (i.e. answering the questions by reference to what most people think). If they were keen to impression-manage, presumably the most effective way to do this would be to think carefully about what the 'correct' answers would be for most people.

[58](n 57) 486.
[59](n 57) 487.
[60](n 57) 488.
[61](n 57) 490.
[62]N. Levy, 'Psychopaths and blame: The argument from content', (2014) 27(3) Philosophical Psychology 351, 356.
[63](n 62) 356.

4.5 Summary

It has been seen that various possible interpretations are available of the oft-cited studies by Blair *et al.*, and they do not show that psychopaths cannot make the moral conventional distinction. The more recent study by Aharoni *et al.* also appears to contradict Blair *et al.*'s initial conclusions (although differences in methodology may complicate matters somewhat). I have also outlined some methodological problems with the MCD paradigm, that should caution against placing significant weight on MCD research findings (although these issues can be sidelined, given issues with the findings themselves).

A significant issue that has been highlighted is the possibility of impression management by psychopaths. Even if psychopaths cannot make moral judgments for themselves, they may nevertheless provide passably 'normal' answers. This means that it is important to look beyond reported moral verdicts at the brain activity underlying these verdicts. I will now move on to consider this further, together with the prospects for identifying 'relevant psychopaths' lacking moral competence (i.e. that ought potentially to be given access to an insanity defence) by reference to neurobiological data such as neuroimaging findings.

Chapter 5

Relevant psychopaths and relevant criminal offences

5.1 Introduction

In Chapter 3, I presented some key components of a case arguing that psychopaths ought, prima facie, to be given access to an insanity defence in the case of at least some alleged criminal offences. In Chapter 4 I explained why previously highly-cited research concerning the performance of psychopaths on the moral/conventional distinction test cannot assist with the issue of whether psychopaths lack moral competence. I also suggested that it is important to look beyond the reported moral verdicts of psychopaths at underlying brain activity. In this Chapter, I develop this idea by clarifying, by reference to neurobiological findings, which psychopaths ought be to provided with access to an insanity defence (Section 5.2); I also extend this discussion to consider which criminal offences ought to be relevant offences for the purposes of a reformed, psychopath-accommodating, insanity defence (Section 5.3). I assume for the purposes of this discussion that there is, potentially, a prima facie case, prior to a more critical discussion in Chapter 6.

As regards the issue of which psychopaths ought, prima facie, to qualify for an insanity defence, I consider the possibility that there may be a subgroup of PCL-R psychopaths lacking moral competence. I examine psychopathy research in three related domains of enquiry: brain structure and function (Section 5.2.2), genetics (Section 5.2.3), and epigenetics (Section 5.2.4). I argue, based on the implications of this research and the techniques available,

that future research could identify such a subgroup. This claim necessarily goes beyond current research findings; however, I argue that it is plausible that such a group may be identified. I end the Section by considering the possibility that diagnostic biomarkers may be developed to identify relevant psychopaths (Section 5.2.5), before drawing together my claims about this group (Section 5.2.6). In this final subsection, I also explain my focus on possible psychopaths exhibiting a general inability to comprehend moral considerations concerning harm.

In Section 5.3, I then consider which criminal offences ought to be considered relevant offences for the purposes of the prima facie case. I argue that the relevant criminal offences are those where the prohibitions would normally be understood largely in terms of moral reasons concerning harm. That is, although prudential and other reasons might be taken to motivate compliance with the law, moral reasons concerning harm are likely to be particularly psychologically salient. By lacking access to these moral reasons, relevant psychopaths are at a particular disadvantage, relative to other citizens. Drawing on Gross's classification of criminal offences according to harm, I suggest that relevant offences may be those that involve violations of interests such as those in physical welfare, personal security or personal property. Although this is potentially a very wide group, some kinds of offences, where moral reasons concerning harm would normally be less psychologically salient, would be excluded.

5.2 Which psychopaths?

5.2.1 Introduction: behind Cleckley's mask

As noted, verbal reports from psychopaths can be problematic due to impression management. Specifically, psychopaths may report what they know other people are likely to believe without making a decision for themselves. Cleckley, as noted in Section 2.2, argued that psychopaths developed a facade of 'robust mental health'. Initially, this facade might seem convincing, but on closer examination it appeared to mask psychological problems, in particular problems related to affect.[1]

[1] Cleckley speculated that psychopaths may suffer from something like a 'semantic aphasia', a neurological disorder involving language processing, in which emotions were mislabelled (H. Cleckley, *The mask of sanity: An attempt to clarify some issues about the so-called psychopathic personality* (5th edn, Mosby 1976) 385). This hypothesis has not been supported experimentally, although some abnormalities in language

Following studies such the moral/conventional distinction research discussed in Chapter 4, it might be thought that moral competence could form part of the psychopaths' facade. Closer examination, it might be hypothesised, might reveal serious problems with moral cognition. If this is the case, however, this has not thus far been revealed by empirical moral psychology research. In a recent overview of the field, Schaich-Borg and Sinnott-Armstrong report that any identified abnormalities appear to be 'subtle'.[2] Some of these studies, which utilise neuroimaging, are discussed in Section 5.2.2.

In one recent (non-neuroimaging) study employing hypothetical vignettes, PCL-R psychopaths even lacked the normal bias towards unfairly blaming those responsible for purely accidental harms.[3] Vignettes describing intentional and attempted harms elicited normal responses. As the authors note, the scoring pattern with respect to accidental harms is potentially consistent with a *more* morally appropriate response, and with greater 'forgiveness' of the non-culpable, causally responsible, agents in the vignettes; however, the responses of psychopathic participants to these vignettes may have been due to a reduced sensitivity to the harm caused, rather than to a greater reflection on the mental state of the person described to be responsible for the accident.[4]

The reasons for these findings may be, in part, methodological. For example, apparently similar studies may utilise different cut-scores for psychopathy, making comparisons difficult. The psychological tests administered may also be very 'blunt' instruments, and fail to distinguish between different possible routes to the same moral verdict (as was the case in the 'accidental harms' experiment just mentioned). Additionally, sample sizes may be too small, and there may be problems with statistical analyses (e.g. the lumping together of data arising from different sorts of moral judgments).[5]

There may also, however, be significant heterogeneity among PCL-R psychopaths, and important findings may be obscured by a lumping together of different subtypes. As men-

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processing have been found. Kroner *et al.*, for example, found that PCL-R psychopaths did not show the increased response times seen in controls when they were presented with negatively valenced phrases (e.g. 'People have it in for me') (D.G. Kroner, A.E. Forth and J.F. Mills, 'Endorsement and processing of negative affect among violent psychopathic offenders', (2005) 38(2) Personality and Individual Differences 413, 416).

[2] J.Schaich-Borg and W. Sinnott-Armstrong, 'Do psychopaths make moral judgments?', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 107, 124.

[3] L. Young, M. Koenigs, M. Kruepke *et al.*, 'Psychopathy increases perceived moral permissibility of accidents', (2012) 121(3) Journal of Abnormal Psychology 659.

[4] (n 3) 664.

[5] W. Sinnott-Armstrong and T. Wheatley, 'Are moral judgments unified?', (2013) 27(4) Philosophical Psychology 451, 470.

tioned in Section 2.3, within what is currently designated as a 'high PCL-R' group (i.e. scores of 30 or more) there may be various qualitatively distinct subtypes. If a subgroup lacks moral competence, findings relating to this group may be lost in the analysis. Sample size might currently obscure findings from this subgroup, although it is also possible that tests are currently unable to distinguish between this group and other PCL-R psychopaths possessing moral competence.

The possibility that there may be a subgroup of PCL-R psychopaths lacking moral competence forms the overall focus of this Section. I examine psychopathy research in three related domains of enquiry (brain structure and function, genetics, and epigenetics) and argue, based on the implications of current research and the techniques available, that future research could identify such a subgroup. My claim necessarily goes beyond what has been established scientifically; however, psychopathy research is in its early stages and, I argue, it is plausible that such a group may be identified.

The structure and content of this Section is as follows. In Section 5.2.2, I outline some recent studies into the moral cognition of psychopaths, focusing on studies that have revealed an abnormal contrast between reported verdicts and brain activity (Sections 5.2.2.1 and 5.2.2.2). In theory, this might amount to evidence of a Cleckleyan 'mask', although more research is required to clarify this. I then expand the discussion to consider broader brain abnormalities found in psychopaths (Section 5.2.2.3). This provides a snapshot of current neuroimaging research into psychopathy; it also clarifies what is scientifically possible regarding the sub-classification of psychopathy. Given the complexity of the abnormalities found in psychopathy, and neuroimaging techniques such as diffusion tensor imagine (DTI), I argue, there is scope for the characterisation of a range of adult psychopathy subtypes.

Any taxonomy of psychopathy subtypes is likely to benefit considerably from a greater understanding of the genetic factors underlying the condition. In Section 5.2.3, I briefly review current research in this area. Unfortunately, despite evidence of a genetic contribution to psychopathy, very little is currently known about specific genes involved in its aetiology. There is not, I will argue, sufficient understanding to properly support the contention, advanced by some theorists, that psychopathy should be divided into subtypes with 'predominantly genetic' and 'predominantly environmental' aetiologies. My discussion, however, highlights the probabilistic influence that genes may have on the development of psychopathy: genes may increase the *risk* of developing psychopathy, but there are no genes 'for' psychopathy. In future, it may be possible to associate constellations of predisposing genes

with neuroimaging findings, as part of a taxonomy of psychopathy subtypes.

Ultimately, any taxonomy of psychopathy subtypes in adults should be underpinned by an understanding of how the condition may develop over time, as the product of an interaction between genes and environmental influences. It has become apparent relatively recently that social environmental influences, such as early-life adversity, may significantly alter the course of brain development by inducing long-lasting changes in the epigenetic control of gene expression. In Section 5.2.4, I outline some of the relevant research, and explain how future findings in this area may clarify how psychopathy develops over time. This research has barely begun in the case of psychopathy; however, a brief discussion of research in this emerging field shows, conceptually, how an understanding of the epigenetics of psychopathy may contribute to the development of a taxonomy of subtypes.

Having clarified how a taxonomy may be made possible by developments in these three broad domains of neurobiological research, I then turn my attention in Section 5.2.5 to the development of biomarkers. A 'biomarker' is any measurable indicator of a biological or physiological process. The scientific identification of a subtype (or subtypes) of psychopathy characterised by a lack of moral competence is likely to generate biomarkers that could be used to identify these persons in a clinical or legal context. However, the move from group-based scientific study to the identification of individuals is a complicated one. A particular problem is that information from biomarkers may only indicate a probability that a particular diagnosis or classification is appropriate. This discussion foreshadows my later discussion, in Chapter 6, of practical implications of the development of biomarkers to identify relevant psychopaths.

Finally, in Section 5.2.6, I draw together the various strands of this discussion and summarise my claims about 'relevant psychopathy', relating this to the earlier discussion concerning the prima facie case for access to an insanity defence. I also explain why I have chosen to focus on the possibility of a lack of generic harm-related moral competence, rather than on the more specific moral impairments that are empirically possible. The possibility of a lack of harm-related generic moral competence underpins my discussion of 'relevant criminal offences' in Section 5.3.

5.2.2 Identifying relevant brain areas and circuits

One of the main brain areas implicated by neuroimaging studies in psychopathy is the ventromedial prefrontal cortex (vmPFC).[6] The vmPFC is posited to play an important role in moral and social learning, as evidenced by research into adults who have sustained vmPFC lesions early in life.[7] In one study, Anderson *et al.* found that adults with bilateral vmPFC lesions acquired prior to 16 months had histories of severe antisocial behaviour, and performed poorly on a Kohlbergian test of moral reasoning.[8] Adults with vmPFC lesions acquired in adulthood, as opposed to early-life, have also been shown to have abnormal moral cognition;[9] the abnormalities, however, are more subtle, with performance on a Kohlbergian test reported as normal.[10]

Given the apparent involvement of the vmPFC in psychopathy, a number of researchers have sought to compare the performance of vmPFC lesion patients and psychopaths on tests of moral cognition. I focus initially on tests involving philosophical moral dilemmas, because some of these studies have utilised functional magnetic resonance imaging (fMRI) to examine the brain activity of psychopaths undertaking the tests.[11] Before considering the performance of psychopaths, in comparison to vmPFC patients, on these tests, it is helpful

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[6] N.E. Anderson and K.A. Kiehl, 'The psychopath magnetized: Insights from brain imaging', (2012) 16(1) Trends in Cognitive Science 52, 56.

[7] S.W. Anderson, A. Bechara, H. Damasio *et al.*, 'Impairment of social and moral behavior related to early damage in human prefrontal cortex', (1999) 2 Nature Neuroscience 1032; S.W. Anderson, H. Damasio, D. Tranel *et al.*, 'Long-term sequelae of prefrontal cortex damage acquired in early childhood', (2000) 18(3) Developmental Neuropsychology 281.

[8] Anderson *et al.* 1999 (n 7). In the relevant test, the 'standard moral judgment interview', subjects are presented with moral dilemmas and interviewers evaluate the reasons given to support responses. Reasons are divided into three main developmental levels, each of which contains two subdivisions. Both adult early-life vmPFC lesion patients performed at the lowest level, 'preconventional, stage 1' ((n 7) 1034; Schaich-Borg and Sinnott-Armstrong (n 2) 111.

[9] e.g. M. Koenigs, L. Young, R. Adolphs *et al.*, 'Damage to the prefrontal cortex increases utilitarian moral judgements', (2007) 446 Nature 908; L. Young, A. Bechara, D. Tranel *et al.*, 'Damage to ventromedial prefrontal cortex impairs judgment of harmful intent', (2010) 65(6) Neuron 845.

[10] Anderson *et al.* 1999 (n 7) 1034.

[11] fMRI does not examine brain activity directly, but measures localised changes in magnetic fields that occur when oxygen is utilised within the brain. When blood flow increases to an active brain area, deoxygenated haemoglobin is diluted by oxygenated haemoglobin; this alters the magnetic field in this area, which is then detected by the scanner. There are limits to the spacial and temporal resolution of fMRI, which may amount to millimeters and seconds (K.A. Kiehl, 'Without morals: The cognitive neuroscience of criminal psychopaths', in W. Sinnott-Armstrong (ed), *Moral psychology Vol 3: Neuroscience of morality: Emotion, brain disorders, and development* (MIT Press 2007) 121, 130–1). See also N.K. Logothetis, 'The underpinnings of the BOLD functional magnetic resonance imaging signal', (2003) 23(10) Journal of Neuroscience 3963.

to outline this experimental paradigm.

5.2.2.1 Psychopaths and moral dilemmas

In these tests, subjects are presented with hypothetical scenarios likely to generate conflicting intuitions. They are then asked whether they endorse a particular action. 'Trolley' scenarios are a particularly well known example.[12] These thought experiments were originally developed by Foot;[13] more recently, they featured in a battery of scenarios developed by Greene *et al*.[14] The battery is divided into 'non-moral' and 'moral' scenarios, with moral scenarios subdivided into pairs of 'personal' and 'impersonal' scenarios (or dilemmas).[15]

As regards the 'trolley' moral scenario-pair, the impersonal dilemma runs as follows:

> You are at the wheel of a runaway trolley quickly approaching a fork in the tracks. On the tracks extending to the left is a group of five railway workmen. On the tracks extending to the right is a single railway workman.
>
> If you do nothing the trolley will proceed to the left, causing the deaths of the five workmen. The only way to avoid the deaths of these workmen is to hit a switch on your dashboard that will cause the trolley to proceed to the right, causing the death of the single workman.
>
> Is it appropriate for you to hit the switch in order to avoid the deaths of the five workmen?[16]

In the corresponding personal dilemma, 'you' are instead 'on a footbridge over the tracks'; it is only possible to save five workmen by pushing a 'large...stranger off the bridge

[12](n 2) 117. For a helpful discussion of these scenarios, see W. Glannon, *Brain, body, and mind: Neuroethics with a human face* (OUP 2011) ch.4.

[13]Foot, P., 'The problem of abortion and the doctrine of the double effect', (1967) 5 Oxford review 5.

[14]J.D. Greene, R.B. Sommerville, L.E. Nystrom *et al.*, 'An fMRI investigation of emotional engagement in moral judgment', (2001) 293 Science 2105; materials available at <http://www.sciencemag.org/content/293/5537/2105/suppl/DC1>, accessed 27.6.14.

[15]An act was designated 'personal' by Greene *et al.* if three conditions were met: first, the act could 'reasonably be expected to lead to serious bodily harm'; second, the harm would 'befall a particular person or a member or members of a particular group of people'; third, the harm was not simply 'the result of deflecting an existing threat onto a different party' ((n 14) 2107 Note 9). Actions thought not to meet these criteria were designated 'impersonal'.

[16](n 14). This dilemma is referred to as 'Sidetrack' ((n 2) 117).

and onto the tracks' to stop the trolley, although this will kill him.[17] A decision must be made as to whether it is 'appropriate' to do this.

Greene *et al.* predicted that acts in personal moral dilemmas would be more emotionally salient (i.e. prominent in the attention and consciousness of subjects),[18] and that subjects would be more likely to judge these to be morally wrong (i.e. impermissible, irrespective of consequentialist considerations).[19] This prediction, based on a theorised role for the vmPFC in moral deliberation, has been supported by various studies; furthermore, the vmPFC is normally active during decisions concerning personal moral dilemmas.[20]

Adult-acquired vmPFC lesion patients, in contrast, were more likely to consider the acts in personal moral dilemmas *permissible*.[21] These differences, however, appeared in only a subset of personal moral scenarios, termed 'high conflict' scenarios because controls found them more controversial, took longer to make a decision, and were more likely to disagree.[22] The question whether psychopaths may also exhibit this abnormal pattern has guided recent research utilising this paradigm in psychopathy.

Results have been mixed. Three studies have reported no significant difference in the responses given to moral scenarios (both personal and impersonal) between psychopaths and nonpsychopaths.[23] One study found that a subgroup of psychopaths, primary or low-anxious psychopaths, were significantly more likely to judge the acts specified in 'high conflict' personal moral dilemmas as permissible (in comparison to both nonpsychopaths and secondary/high-anxious psychopaths).[24] This study also found that psychopaths as a

[17]This dilemma is referred to as 'Footbridge' (n 14).

[18]The mechanisms of this process are debated: P. Vuilleumier, 'How brains beware: Neural mechanisms of emotional attention', (2005) 9 Trends in Cognitive Science 585.

[19](n 14) 2016.

[20]e.g. J.D. Greene, S.A. Morelli, K. Lowenberg *et al.*, 'Cognitive load selectively interferes with utilitarian moral judgment', (2008) 107 Cognition 1144; (n 2) 118. For a helpful review of some of the theory underlying this, and relevant disputes, see Y.R. Avramova and Y. Inbar, 'Emotion and moral judgment', (2013) 4(2) WIREs Cognitive Science 169, 171–3.

[21]Koenigs *et al.* (n 9).

[22](n 9) 909-10.

[23]A.L. Glenn, A. Raine and R.A. Schug, 'The neural correlates of moral decision-making in psychopathy', (2009a) 14(1) Molecular Psychiatry 5; A.L. Glenn, A. Raine, R.A. Schug *et al.*, 'Increased DLPFC activity during moral decision-making in psychopathy', (2009b) 14 Molecular Psychiatry 909; M. Cima, F. Tonnaer and M.D. Hauser, 'Psychopaths know right from wrong but don't care', (2010) 5 Social Cognitive and Affective Neuroscience 59; J. Pujol, I. Batalla, O. Contreras-Rodríguez *et al.*, 'Breakdown in the brain network subserving moral judgment in criminal psychopathy', (2012) 7 Social Cognitive and Affective Neuroscience 917.

[24]M. Koenigs, M. Kruepke, J. Zeier *et al.*, 'Utilitarian moral judgment in psychopathy', (2012) 7 Social Cognitive and Affective Neuroscience 708.

whole (i.e. low- and high- anxious psychopaths combined) were significantly more likely than nonpsychopaths to report that they would perform the acts specified in *impersonal* moral dilemmas.

Interpretation of these results is complicated by methodological issues, such as the use of varying PCL-R cut-scores for psychopathy,[25] and the use of different wording in the questions posed to subjects.[26] Koenig's *et al.* attempted to distinguish between primary and secondary psychopaths, subgroups that may have differing aetiologies and characteristics (see Section 5.2.3 below for further discussion). However, the finding in this study that all PCL-R psychopaths (cut-score $\geqslant$30) were more likely to endorse performing the acts in impersonal dilemmas raises the possibility that laboratory conditions, or the way that the test was administered, may have had a general effect on the willingness of psychopaths to answer 'Yes' to questions.[27] A reasonable conclusion is that, thus far, there is limited empirical support for this vmPFC-related hypothesis.

What is perhaps more important than these results, however, is the finding of abnormal brain processing in the context of apparently normal answers to questions.

5.2.2.2 Moral verdicts versus brain activity

In the studies by Glenn *et al.* and Pujol *et al.*,[28] apparently normal answers to personal moral dilemmas were accompanied by abnormal brain activity. In the study by Glenn *et al.*, for example, there was evidence of reduced amygdala activity[29] and increased activity within the dorsolateral prefrontal cortex;[30] Pujol *et al.* found a 'significant and selective' inverse correlation between PCL-R scores and activation of the posterior cingulate cortex and right angular gyrus.[31] These findings suggest that psychopaths utilise different strategies to reach

[25] e.g. in Cima *et al.*'s study, a cut-score of $\geqslant$26 or more was used ((n 23) 60), whereas in Pujol *et al.*'s study a total-score of $\geqslant$20, or Factor 1 score of $\geqslant$10 was used (n 23). As regards the issue of cut scores, it might be thought that, given the dimensional nature of psychopathy, lower PCL-R scores need not necessarily be problematic empirically. However, it is possible that only higher-scoring individuals will have detectable abnormalities involving moral judgments.

[26] Cima *et al.* and Pujol *et al.* both asked whether subjects 'would' do the specified act ((n 23) 62), whereas Glenn *et al.* asked whether it was 'appropriate' to do the specified act ((n 2) 119–20). Given the potential for confusion arising from nonmoral uses of these words it would have been better, as Schaich-Borg and Sinnott-Armstrong comment, to ask participants whether they morally 'ought' to do the acts ((n 2) 120).

[27] (n 2) 119.

[28] Glenn *et al.* (n 23); Pujol *et al.* (n 23).

[29] Glenn *et al.* 2009a (n 23) 6.

[30] Glenn *et al.* 2009b (n 23) 910.

[31] Pujol *et al.* (n 23) 920.

the same moral verdicts as others.[32]

This hypothesis is also supported by a study utilising 'moral' images rather than philosophical dilemmas. In this study, psychopaths (PCL-R score $\geqslant$30) were asked to decide whether photographs depicted moral transgressions and, if so, to rate these in terms of severity.[33] Apparently normal ratings of 'moral' transgressions were associated with abnormal brain activity. For example, psychopaths showed reduced vmPFC activity when 'moral' pictures were viewed, relative to controls, and lacked the correlation of amygdala activity with ratings of severity seen in controls.[34]

It is possible that findings like these might eventually show that psychopaths are thinking about what others might think or believe, rather than making moral judgments for themselves.[35] In Harenski *et al.*'s study, the authors speculated that increased activity within the temporoparietal junction (TPJ), an area thought to be involved with the attribution of beliefs to other persons, might be consistent with this; this was a hypothesis, they suggested, that warranted further study.[36]

It might be objected, however, that even if this conclusion could be supported, and it becomes possible to establish that a person, on a particular occasion, made a faux-moral judgment by reporting how others might respond, this would not prove that they *could not* make a moral judgment for themselves. They might simply have been disinclined to make a moral judgment on that occasion, and the data could reflect non-use, rather the absence, of a capacity.[37] However, these observed functional abnormalities occur against a backdrop of various other brain abnormalities, including structural abnormalities, which I now consider. Although this research is in its early stages, the data invites us to consider the possibility that these functional abnormalities may represent a manifestation of a more concrete, neurobiologically grounded, condition.

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[32](n 2) 124.

[33]C.L. Harenski, K.A. Harenski, M.S. Shane *et al.*, 'Aberrant neural processing of moral violations in criminal psychopaths', (2010) 119(4) Journal of Abnormal Psychology 863.

[34](n 33) 868.

[35](n 2) 124.

[36](n 33) 871.

[37]As Vincent puts it: 'we should not expect to find any differences in the scans of those people who *lack a given capacity and that is why they do not use it* and those who *possess that capacity but never the less do not use it*, because in both cases the area of the brain associated with that capacity will not get used' (N.A. Vincent, 'Neuroimaging and responsibility assessments', (2011) 4(1) Neuroethics 35, 45).

5.2.2.3 Wider abnormalities

There are two main contemporary neurobiological theories of psychopathy, developed by Blair and Kiehl respectively.[38] Blair's theory, which was mentioned in Section 4.4, holds that amygdala dysfunction plays a central role in the development of psychopathy. In a more recent version of the theory, Blair also stresses the role of the vmPFC.[39] In this model, coordination between the amygdala and the vmPFC is essential for normal emotional learning and socialisation; this is considered to be disrupted in psychopathy.[40] Kiehl's 'paralimbic dysfunction' model incorporates evidence of abnormalities in other brain areas, beyond the amygdala and prefrontal cortex.[41]

In the remainder of this subsection, I present a selective overview of some of the relevant findings concerning the amygdala, before moving on to consider evidence relating to the prefrontal cortex; I end by briefly commenting on Kiehl's 'paralimbic dysfunction' theory. The literature is vast, and its expansion in recent years has been described as 'meteoric'.[42] Given the context of this discussion, within a multidisciplinary thesis, I draw particularly from recent reviews by Anderson and Kiehl (2012) and Koenigs (2012);[43] I incorporate, however, some more recent findings, particularly those concerning structural brain abnormalities in psychopaths. This discussion provides a snapshot of the current state of neuroimaging research in this area. It also helps to clarify what may be possible in terms of future sub-classification of psychopathy.

The amygdala plays a key role in emotional learning, whereby environmental stimuli are associated with emotional responses.[44] It is also involved with detecting threatening cues in the environment (e.g. threatening faces),[45] and otherwise emotionally salient visual information or sounds.[46] As noted above, fMRI investigations have shown reduced amyg-

[38] Anderson and Kiehl (n 6) 54.

[39] R.J.R. Blair, 'The amygdala and ventromedial prefrontal cortex in morality and psychopathy', (2007) 11(9) Trends in Cognitive Sciences 387.

[40] (n 39) 389.

[41] (n 6) 54.

[42] (n 6) 54.

[43] Anderson and Kiehl (n 6); M. Koenigs, 'The role of prefrontal cortex in psychopathy', (2012) 23 Reviews in the Neurosciences 253.

[44] (n 6) 55; Blair (n 39) 389–90; B.J. Everitt, R.N. Cardinal, J.A. Parkinson *et al.*, 'Appetitive behavior: Impact of amygdala-dependent mechanisms of emotional learning', (2003) 985 Ann N Y Acad Sci 233.

[45] M. Davis and P.J. Whalen, 'The amygdala: Vigilance and emotion', (2001) 6(1) Mol Psychiatry 13.

[46] (n 6) 55.

dala activity in psychopaths in response to 'moral' pictures;[47] reduced activity has also been observed in response to fearful faces.[48] Structural magnetic resonance imaging (sMRI) has also shown reduced grey matter in the amygdala,[49] a finding which may be consistent with reduced functioning.[50]

As regards the prefrontal cortex, as noted earlier the vmPFC has been implicated in a number of studies. Part of the orbitofrontal cortex (OFC) within the vmPFC has, in particular, been implicated.[51] In addition to reduced vmPFC activity in a number of fMRI studies in adult psychopathy,[52] reduced grey matter density has been found in adult psychopaths within the vmPFC.[53] This reduction in grey matter may, again, reflect reduced function within this area.[54] It should be stressed, however, that vmPFC *lesions* have not been identified in psychopaths.[55]

It does not necessarily follow from reduced function or even reduced grey matter volume that there is a 'dysfunction', because brain systems may simply be used *differently* in psychopaths. In one study by Sommer *et al.*, for example, the OFC was one of several brain areas activated in preference to the mirror neuron system in psychopaths, in contrast to nonpsychopaths, in response to tasks requiring the attribution of emotional states to others.[56] The mirror neuron system has been posited, as a component of empathy, to enable the recognition of others' emotional states by permitting a rapid 'simulation' of their be-

[47] i.e. in Harenski *et al.*'s study (n 33).

[48] R. Blair, D. Mitchell, K. Peschardt *et al.*, 'Reduced sensitivity to others' fearful expressions in psychopathic Individuals', (2004) 37(6) Personality and Individual Differences 1111; A.A. Marsh and E.M. Cardinale, 'Psychopathy and fear: Specific impairments in judging behaviors that frighten others', (2012) 5 Emotion 892.

[49] e.g. E. Ermer, L.M. Cope, P.K. Nyalakanti *et al.*, 'Aberrant paralimbic gray matter in criminal psychopathy', (2012) 121(3) Journal of Abnormal Psychology 649.

[50] (n 49) 650.

[51] There is some variability in the use of the terms vmPFC and OFC, with some commentators apparently using these interchangeably. Strictly speaking, the orbitofrontal cortex refers to that part of the cortex that lies above the orbital plate area of the frontal bone, and although there is some overlap the OFC extends laterally beyond the area of the vmPFC (J.T. Cacioppo and G.G. Berntson, *Handbook of neuroscience for the behavioral sciences* (Wiley 2009) 747; A. Bechara, 'The role of emotion in decision-making: Evidence from neurological patients with orbitofrontal damage', (2004) 55 Brain and Cognition 30, 30).

[52] Koenigs (n 43) 258.

[53] (n 43) 256.

[54] (n 6) 56.

[55] Blair (n 39) 388.

[56] M. Sommer, B. Sodian, K. Döhnel *et al.*, 'In psychopathic patients emotion attribution modulates activity in outcome-related brain areas', (2010) 182(2) Psychiatry Research: Neuroimaging 88.

haviour.[57] Although psychopaths were able to attribute emotional states, OFC activity appeared to reflect the use of a more outcome-related neuronal system.[58] Thus, psychopaths appeared to be focusing on the value of particular goals and outcomes rather than others' emotional states. The authors note that this is consistent with a manipulative approach to social interaction.[59]

It might be thought that an ability to successfully manipulate others would be dependent on an intact, or even superior, capacity to understand what others are thinking and feeling.[60] This capacity is referred to as 'theory of mind' (ToM), or 'mentalising', and includes the capacity to perspective-take, or 'put oneself into someone else's shoes'.[61] More broadly, this capacity permits one to understand commonsense or 'folk' psychology in terms of notions such as beliefs, intentions and desires, and utilise this to explain and predict behaviour.[62] In this regard, initial studies have suggested that PCL-R psychopaths have no impairment of ToM.[63]

More recently, however, fMRI evidence suggests that subtle impairments of ToM may be present in at least some psychopaths.[64] In one study by Decety *et al.*, subjects were presented with images depicting persons in situations that were both painful and non-painful, and were asked to imagine how either themselves or others would feel in these situations (thus contrasting 'imagine-self' and 'imagine-other' activities).[65] In contrast to nonpsychopaths, PCL-R psychopaths showed significantly reduced functional interaction between the amygdala and OFC during imagine-other tasks. The implication is that there was a significantly reduced emotional response to inferences concerning the emotional states of

[57] S.G. Shamay-Tsoory, 'The neural bases for empathy', (2011) 17(1) The Neuroscientist 18, 19; A. Goldman and K. Mason, 'Simulation', in P. Thagard (ed), *Philosophy of psychology and cognitive science* (North Holland 2007) 267.

[58] (n 56) 93.

[59] (n 56) 94.

[60] S.G. Shamay-Tsoory, H. Harari, J. Aharon-Peretz *et al.*, 'The role of the orbitofrontal cortex in affective theory of mind deficits in criminal offenders with psychopathic tendencies', (2010) 46(5) Cortex 668, 669.

[61] Shamay-Tsoory (n 57) 18.

[62] D. Bolton and J. Hill, *Mind, meaning and mental disorder: The nature of causal explanation in psychology and psychiatry* (2nd edn, OUP 2003) 11.

[63] e.g. J. Blair, C. Sellars, I. Strickland *et al.*, 'Theory of mind in the psychopath', (1996) 7 Journal of Forensic Psychiatry 15; M. Dolan and R. Fullam, 'Theory of mind and mentalizing ability in antisocial personality disorders with and without psychopathy', (2004) 34 Psychological Medicine 1093.

[64] J. Decety, C. Chen, C. Harenski *et al.*, 'An fMRI study of affective perspective taking in individuals with psychopathy: Imagining another in pain does not evoke empathy', (2013) 7 Frontiers in Human Neuroscience 1.

[65] (n 64).

others (i.e. impaired 'affective' ToM), associated with reduced activation of the OFC by the amygdala.[66] Amygdala activity during imagine-other tasks was inversely correlated with scores on PCL-R Factor 1.

The use of fMRI to study functional interaction between brain areas in this study shows another potential use of this tool. Brain areas do not function in isolation, but interact in complex networks. It is also noteworthy that the amygdala-OFC/vmPFC circuit studied by Decety *et al.* is the circuit argued by Blair to be important for the development of psychopathy.[67] This study, therefore, illustrates a technique that can assist with the development of a taxonomy of psychopathy subtypes in the future.

Another important technical advancement is the development of diffusion tensor imaging (DTI), a form of MRI that permits the study of white matter, and functional activity (nerve impulses) in white matter, via measurement of water diffusion within the brain.[68] This technique can permit a precise mapping of interactions between different brain structures in real time and underpins current efforts by the Human Connectome Project to construct a map of normal functional and structural connections within the brain.[69]

Where normal connections are disrupted, it is also possible to make inferences about the integrity of white matter. As regards psychopathy, three recent DTI studies have found evidence of reduced white matter integrity in the uncinate fasciculus, a tract containing fibers

[66] 'Affective' ToM has been hypothesised, in a model developed by Shamay-Tsoory *et al.*, to require an ability to make inferences about the emotional states of others and respond, emotionally, to these inferences ((n 57) 21). As such, it is posited to require an ability for both 'cognitive' and 'emotional' empathy (see Shamay-Tsoory (n 57); J. Decety and M. Svetlova, 'Putting together phylogenetic and ontogenetic perspectives on empathy', (2012) 2(1) Dev Cogn Neurosci 1). Components of 'emotional' empathy have been theorised to include emotional contagion (e.g. in early life, babies may cry because other babies are crying). This phenomenon, which relies partly on a capacity to recognise emotions in others, has been observed in rodents and is thought to be the oldest component of empathy phylogenetically ((n 57) 18). As regards 'cognitive' empathy, evidence suggests that different brain regions, particularly within the medial prefrontal cortex, temporoparietal junction and medial temporal lobe may underwrite different mentalising capacities ((n 57) 18).

[67] (n 64) 9. Blair argues that normal functioning within this circuit is essential for the development of 'care-based' morality, thereby enabling a basic understanding of harm-related morality early in life; he also posits that this enables the development of an ability to make the moral/conventional distinction (Blair (n 39) 388).

[68] For some helpful discussion of this technique, see E. Aharoni, C. Funk, W. Sinnott-Armstrong *et al.*, 'Can neurological evidence help courts assess criminal responsibility? Lessons from law and neuroscience', (2008) 1124 Ann N Y Acad Sci 145, 158. For more detailed discussion, see D. Le Bihan and H. Johansen-Berg, 'Diffusion MRI at 25: Exploring brain tissue structure and function', (2012) 61(2) Neuroimage 324.

[69] 'The Human Connectome Project' <http://www.humanconnectomeproject.org> accessed 27.6.14.

connecting the amygdala with the OFC (as well as other structures).[70] In theory, findings like these might support Blair's theory of the aetiology of psychopathy. However, it would be necessary to show that white matter disruption in this tract was present developmentally, rather than just in adults, and this has not been established.[71] What is more important is the potential of this technology, given its ability to study brain function and structure in real time. This may in future permit a much more precise and detailed understanding of the development and adult manifestations of psychopathy.

Finally, as mentioned, Kiehl has proposed the involvement of 'paralimbic' brain areas in psychopathy.[72] Evidence for this wider involvement includes evidence of grey matter volume reductions in areas such as the hippocampus, parahippocampal areas and posterior cingulate cortex.[73] Evidence for this wider involvement underscores the complexity of psychopathy. As Anderson and Kiehl comment, this complexity 'leaves open the possibility of multiple neurodevelopmental pathways' to similar psychopathy phenotypes.[74] In other words, within this complexity there is room for various subtypes of psychopathy. These may in the future be uncovered by the aid of techniques such as DTI.

5.2.3 Identifying relevant genes

Any future taxonomy of psychopathy subtypes will require a greater understanding of genetic contributions to the development of psychopathy. Unfortunately, current knowledge of the genetic basis of psychopathy is limited. Behavioural genetics studies, which examine the extent to which there may be a genetic contribution at a population level, indicate that psychopathic traits may be 'moderately to highly' heritable.[75] However, 'candidate gene'

[70] M.C. Craig, M. Catani, Q. Deeley *et al.*, 'Altered connections on the road to psychopathy', (2009) 14(10) Molecular psychiatry 946; J.C. Motzkin, J.P. Newman, K.A. Kiehl *et al.*, 'Reduced prefrontal connectivity in psychopathy', (2011) 31(48) J Neurosci 17348; S.S. Hoppenbrouwers, A. Nazeri, D.R. De Jesus *et al.*, 'White matter deficits in psychopathic offenders and correlation with factor structure.', (2013) 8(8) PLoS One e72375.

[71] One study in adolescents with conduct disorder, a risk factor for the development of psychopathy, has not reproduced these findings (S. Sarkar, M.C. Craig, M. Catani *et al.*, 'Frontotemporal white-matter microstructural abnormalities in adolescents with conduct disorder: A diffusion tensor imaging study', (2013) 43(2) Psychol Med 401).

[72] Anderson and Kiehl (n 6) 57–8.

[73] (n 6) 58.

[74] (n 6) 58.

[75] A.L. Glenn and A. Raine, *Psychopathy: An introduction to biological findings and their implications* (New York University Press 2014) 23; see also I.D. Waldman and S.H. Rhee, 'The search for genes and environments that underlie psychopathy and antisocial behavior: Quantitative and molecular genetic approaches',

molecular genetic studies, which examine specific genes in individuals, are at an early stage. In a recent review of research in this area, Glenn and Raine note that only eight specific genes have thus far been studied in psychopathy.[76] As such, studies into genetic influences on psychopathy lag far behind those conducted on mental disorders such as depression or schizophrenia.[77]

Of the studies conducted thus far, some genes (e.g. the low-expressing variant of the monoamine oxidase gene A, MAOA-L) have been associated with psychopathic traits.[78] Evidence from one study indicated that the presence of more psychopathic trait-associated genes correlated with higher Factor 1 scores,[79] a finding consistent with the hypothesis that multiple genes with small, potentially cumulative, effects are relevant to most psychopathic traits and behaviours.[80]

Some of the genes associated with psychopathic traits, however, are extremely common. For example, 25–30% of U.S. persons are homozygous for the long allele of the serotonin transporter gene SLC6A4 (i.e. carry two copies of this gene), a genotype that has been associated with an increased risk of developing psychopathy.[81] The vast majority of homozygotes for this gene will never develop psychopathy.[82] The influence that a particular gene may have on the development of psychopathy is complex, and is likely to depend on both environmental influences and the effects of numerous other genes.

This complexity means that a person may have a full compliment of 'risk genes' without developing psychopathy. It also means, as Viding *et al.* comment, that 'there are no genes *for* psychopathic traits',[83] in the way that there may be a gene 'for' conditions like cystic

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in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 180.

[76]Glenn and Raine (n 75) 36.

[77]A.L. Glenn and A. Raine, 'The neurobiology of psychopathy', (2008) 31(3) Psychiatric Clinics of North America 463, 463.

[78]e.g. T. Fowler, K. Langley, F. Rice *et al.*, 'Psychopathy trait scores in adolescents with childhood ADHD: The contribution of genotypes affecting MAOA, 5HTT and COMT activity', (2009) 19 Psychiatric Genetics 312.

[79]J. Hoenicka, G. Ponce, M.A. Jiménez-Arriero *et al.*, 'Association in alcoholic patients between psychopathic traits and the additive effect of allelic forms of the CNR1 and FAAH endocannabinoid genes, and the 3′ region of the DRD2 gene', (2007) 11 Neurotoxicity Research 51.

[80](n 75) 47.

[81](n 75) 47; A.L. Glenn, 'The other allele: Exploring the long allele of the serotonin transporter gene as a potential risk factor for psychopathy: A review of the parallels in findings', (2011) 35(3) Neuroscience & Biobehavioral Reviews 612.

[82](n 75) 47–8.

[83]E. Viding, M.G. Fontaine and H. Larrson, 'Quantitative genetic studies of psychopathic traits in minors: Review and implications for the law', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on*

fibrosis inherited via a Mendelian mechanism.[84] Psychopathy, as it is currently understood, is best viewed as a 'multifactorial' condition, given the relevance of environmental factors, rather than a strictly genetic one.[85]

Our current state of knowledge about the genetics of psychopathy means that it is difficult to properly support a division, posited by some theorists, of psychopathy into 'primary' and 'secondary' subtypes. As noted in Section 2.2, Karpman proposed 'idiopathic' and 'symptomatic' subtypes of psychopathy, with predominantly genetic and predominantly environmental aetiologies respectively.[86] This theory has been very influential.[87] Along these lines Mealey, for example, has proposed theories of primary and secondary psychopathy from an evolutionary psychology perspective.[88] For Mealey, in primary psychopaths genetic factors give rise to a reduced tendency towards physiological arousal, and render persons 'selectively unresponsive to the cues necessary for normal socialization and moral development';[89] social factors, such as poor parenting, were posited to be more important for the aetiology of secondary psychopathy.[90] Somewhat similarly, Porter has proposed two subtypes, a 'fundamental' (primary) type posited to have a predominantly genetic aetiology, and a 'dissociative' (secondary) type posited to have a predominantly environmental aetiology.[91]

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psychopathy and law (OUP 2013) 161, 175–6.

[84]For Mendelian versus non-Mendelian inherence, and a more general introduction to medical genetics, see D.A. Warrell, T.M. Cox and J.D. Firth (eds), *Oxford textbook of medicine* (5 edn, OUP 2010) Section 4.2.2.

[85]W. Glannon, 'Moral responsibility and the psychopath', (2008) 1(3) Neuroethics 158, 161.

[86]B. Karpman, 'On the need of separating psychopathy into two distinct clinical types: The symptomatic and the idiopathic', (1941) 3 Journal of Criminal Psychopathology 112. Hervé points out, however, that although Karpman is often credited as the first to make this distinction, others such as Partridge had previously advanced a similar distinction (H. Hervé, 'Psychopathic subtypes: Historical & contemporary perspectives', in H. Hervé and J.C. Yuille (eds), *The psychopath: Theory, research, and practice* (Routledge 2006) 431, 432).

[87]N.G. Poythress and J. Skeem, 'Disaggregating psychopathy', in C.J. Patrick (ed), *Handbook of psychopathy* (Guilford Press 2006) 172, 173.

[88]L. Mealey, 'The sociobiology of sociopathy: An integrated evolutionary model', (1995) 18 Behavioral and Brain Sciences 523 (discussed by Hervé (n 86) 445; J.L. Skeem, N. Poythress, J.F. Edens *et al.*, 'Psychopathic personality or personalities? exploring potential variants of psychopathy and their implications for risk assessment', (2003) 8 Aggression and Violent Behavior 513, 523–4).

[89](n 88) 536.

[90]As mentioned in Section 2.5.3, Mealey also proposed that psychopathy represented an evolutionarily stable strategy (ESS).

[91]Secondary psychopaths are posited to develop affective features of psychopathy, such as emotional dissociation and detachment, due to psychological trauma; primary psychopaths, on the other hand, are posited to have been born with these affective features (S. Porter, 'Without conscience or without active conscience?

Some evidence for the existence of subtypes has arisen from studies utilising cluster analysis.[92] 'Cluster analysis' refers to a range of statistical techniques that can organise complex data into more homogeneous groups or clusters; these techniques are used widely to assist with the development of scientific classifications.[93] With respect to psychopathy, Hicks *et al.* found that a high PCL-R group could be grouped into clusters with low and high trait anxiety.[94] 'Trait anxiety' refers to a disposition towards anxiety across situations that persists over time.[95] Low trait anxiety, consistent with Mealey's hypothesis, has been posited to be a feature of primary psychopathy, and has also been associated with 'attentional rigidity' in laboratory tests (i.e. difficulties attending to information peripheral to pursued goals).[96] Hicks *et al.*'s high-anxiety cluster were reported to be more aggressive and impulsive, potentially consistent with secondary psychopathy.[97] More recently, Skeem *et al.* have conducted a methodologically similar cluster analysis with similar results.[98]

The use of anxiety as a distinguishing characteristic of primary psychopaths, however, is debated, and it is possible that it may not perform the demarcating role that some theorists suppose.[99] In future, behaviour genetic studies could incorporate parameters, such as measures of trait anxiety, that could potentially distinguish between subtypes (thus far, this has not been attempted).[100] Given debates surrounding the utility of anxiety as a demarcator, however, satisfactory validation of these theories may require a more highly developed understanding of the specific genes that underlie psychopathy and the contribution they may make to its development.

The etiology of psychopathy revisited', (1996) 1(2) Aggression and Violent Behavior 179, 183; discussed by Hervé (n 86) 447–8, and Skeem *et al.* (n 88) 522–3).

[92]For a review, see Poythress and Skeem (n 87).

[93]M.S. Aldenderfer and R.K. Blashfield, *Cluster analysis: Quantitative applications in the social sciences* (Sage Publications 1984) 7–9.

[94]B.M. Hicks, K.E. Markon, C.J. Patrick *et al.*, 'Identifying psychopathy subtypes on the basis of personality structure', (2004) 16(3) Psychological Assessment 276.

[95]J. Skeem, P. Johansson, H. Andershed *et al.*, 'Two subtypes of psychopathic violent offenders that parallel primary and secondary variants', (2007) 116 Journal of Abnormal Psychology 395, 396.

[96]J.P. Newman, 'Psychopathic behavior: An information processing perspective', in D.J. Cooke, A.E. Forth and R.D. Hare (eds), *Psychopathy: Theory, research and implications for society* (Kluwer Academic Publishers 1998) 81; W.A. Schmitt and J.P. Newman, 'Are all psychopathic individuals low-anxious?', (1999) 108(2) Journal of Abnormal Psychology 353; Hervé (n 86) 442.

[97](n 94) 278.

[98](n 95).

[99]Hervé suggests, along these lines, that there may be subtypes of primary psychopathy with differing levels of trait anxiety (n 86) 442–3.

[100]Skeem *et al.* (n 95) 405–6.

Finally, it is necessary to distinguish between the risk of developing psychopathy conferred by a person's genes, and the severity and nature of psychopathy that may develop.[101] First, consistent with a dimensional view of psychopathy, within the class of high PCL-R psychopaths (scoring 30 or more) there are persons with differing severities of psychopathy. More severe psychopaths may have inherited a greater number of psychopathy-associated genes (and/or psychopathy-associated genes with more significant effects), and this rather than any environmental influence may explain the phenotype developed; alternatively, environmental (e.g. social) factors may have played a greater role in the aetiology.

Second, within this space of possibilities there may be qualitatively distinct subtypes. As regards the issue of moral competence, and the possibility of access to an insanity defence, some psychopaths may lack an ability to comprehend moral reasons concerning harm (I refer to these persons as 'relevant psychopaths').[102] Once our understanding of the genetic factors underlying psychopathy develops, it may be possible to identify specific constellations of genes associated with such a phenotype. This could then be combined with neuroimaging data to classify such persons within a taxonomy of psychopathy subtypes.

If this becomes possible, and relevant psychopaths can be identified, the dimensional nature of psychopathy is likely to raise the difficult issue of thresholds. What if only some of the associated genes are present, and only some of the relevant neuroimaging findings are identified? Although this may, in part, be a question that science can address it may also, to a significant extent, be a normative issue. As noted in Section 3.3, it may be necessary to determine the threshold by reference to policy or other normative considerations.[103] This is not an issue that I specifically address in this thesis, given my focus on the possibility of a complete lack of harm related moral competence (see Section 5.2.6 below), although it may be relevant to practice in the future.

5.2.4 Understanding the epigenetic control of relevant genes

Ultimately, any taxonomy of psychopathy in adults should be based on an understanding of how the condition may develop over time, as the product of an interaction between genes and environmental influences. The brain develops in stages, within which there are windows or

[101] Glannon (n 85) 161.

[102] There is also the possibility for more specific moral impairments. I explain why I have focused on a more generic lack of harm-related moral competence in Section 5.2.6.

[103] See also Glannon (n 85) 160–1.

sensitivity periods where maturing systems are particularly vulnerable to insult.[104] During these periods, there is heightened neural plasticity, and either positive or negative experiences (and numerous other environmental factors, such as the effects of toxins or trauma) may have a profound effect on subsequent development.[105] This complexity means that there may be numerous developmental trajectories (or neurodevelopmental pathways) to an adult psychopathy phenotype.

The relevance of genes to the development of psychopathy can be illustrated by the aforementioned example of the serotonin transporter gene SLC6A4. Parallels can be drawn between experimental findings in persons homozygous for the long allele of this transporter gene and findings in psychopathy.[106] These include reduced activation of the amygdala in response to aversive (negative) stimuli, and reduced functional interaction between the amygdala and the vmPFC. Blair's theory of the aetiology of psychopathy, mentioned earlier, posits an interaction between the amygdala and vmPFC in basic moral learning. The effects of this gene, in homozygotes, might interfere with this process by reducing sensitivity, during a developmental window, both to the emotions of others and to punishment.[107]

Data like this suggest that some children may have 'hard to socialise' genotypes and that, barring a supreme effort by competent parents, psychopathy or an otherwise antisocial personality might result. This possibility was illustrated by Lykken in the diagram shown in Figure 5.1.[108] For Lykken, a 'sociopath' was a person whose antisocial character resulted

[104] C. Heim and E.B. Binder, 'Current research trends in early life stress and depression: Review of human studies on sensitive periods, gene–environment interactions, and epigenetics', (2012) 233(1) Experimental neurology 102, 104; S.L. Andersen, 'Trajectories of brain development: Point of vulnerability or window of opportunity?', (2003) 27(1) Neuroscience & Biobehavioral Reviews 3.

[105] For a review of various environmental factors thought to increase a risk of psychopathy, see Glenn and Raine (n 75) 134–41. Hormones, which may be influenced by environmental factors, are also important to brain development (see Glenn and Raine (n 75) Ch.2).

[106] Glenn (n 81) 614 (Table 1).

[107] Glenn and Raine (n 75) 146. To elaborate on Blair's theory somewhat, an interaction between the amygdala and vmPFC is posited to enable children to learn the 'goodness and badness' of actions ((n 39) 389). Children are posited to learn from parental displays of emotions such as happiness, fear or disgust which objects in their environment ought to be avoided and which objects may be safely approached. Normally, displays of emotion may induce a modification of behaviour: signs of distress, such as fear or pain, may encourage a cessation of behaviour, and anger may indicate a violation of moral or other expectations or rules. Findings that psychopaths have difficulties processing cues that may normally convey signs of distress in others (e.g. fearful or sad faces, and fearful or sad tones of voice) could therefore be regarded as reflective, at least in part, of a generally impaired ability to acquire basic moral competence in this way (R.J.R. Blair, S.F. White, H. Meffert *et al.*, 'Emotional learning and the development of differential moralities: Implications from research on psychopathy', (2013) Annals of the New York Academy of Sciences 36, 36–7).

[108] Adapted from D.T. Lykken, *The antisocial personalities* (Psychology Press 1995) 11. Lykken's diagram

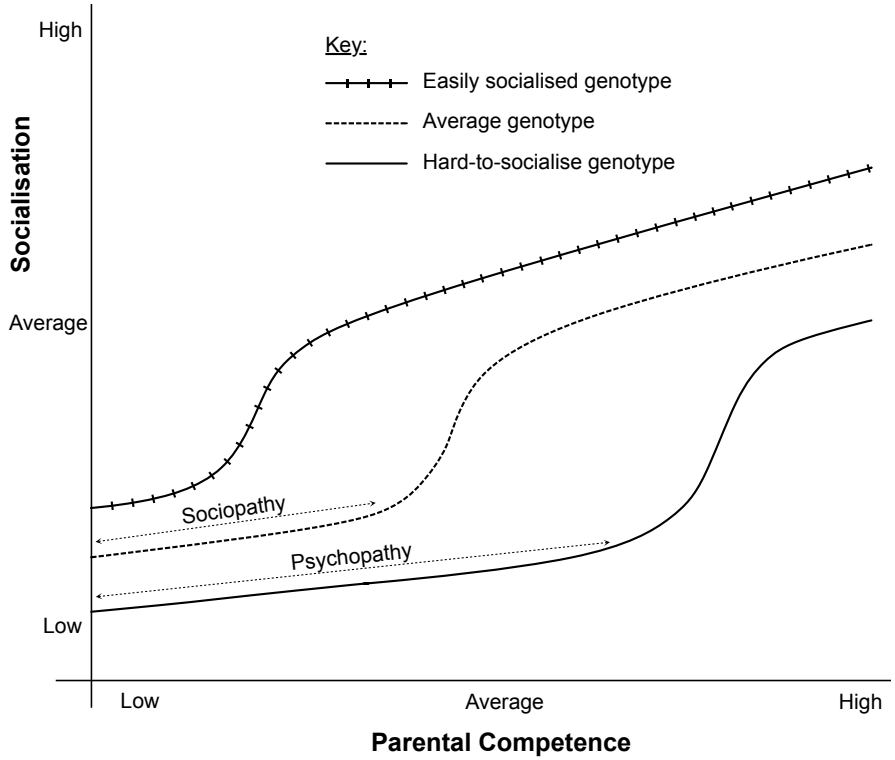

Figure 5.1: Lykken's relationship between genotype, socialisation and parental competence

primarily from parental failure rather than genetic factors.[109] This diagram does not accommodate factors such as the influence of peer groups that might play an important role in the development of psychopathy.[110] However, it conveys the idea that there may be more or less 'socialisable' genotypes that respond differently to socialising influences; it also accommodates the idea that the quality of socialising influences is likely to vary within a population.

The serotonin transporter example might suggest a picture where a static genetic influence creates a barrier to socialisation and moral development. In reality, however, environmental influences may significantly alter the expression of genes, creating a much more complex picture. It is now known that long-term and potentially heritable changes, including 'silencing' (deactivation) of gene expression, can occur in response to environ-

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also includes bell-shaped curves to indicate the view that most parents would have average competence, and most persons would eventually obtain average levels of socialisation.

[109](n 108) 7.

[110]Glenn and Raine (n 75) 28.

mental factors.[111] Furthermore, the mechanisms responsible for these epigenetic regulatory changes may be sensitive, particularly within developmental windows, to specific social experiences.

Early insights into the significance of such socially-induced epigenetic changes have been provided by animal studies. Rat pups reared by mothers with naturally-occurring low levels of licking and grooming ('LG') together with arched-back nursing ('ABN') showed, in contrast to pups reared by high-LG-ABN mothers, higher levels of DNA methylation of a hippocampal glucocorticoid receptor gene.[112] This level of methylation, which was induced within the first postnatal week,[113] persisted into adulthood with the relevant pups (i.e. those reared by low-LG-ABN mothers) eventually showing increased aggression towards other adult male rats. The effect of the methylation, which disrupted normal regulation of the gene, was to alter the stress-response in affected animals, and subsequent brain development.[114]

It has been proposed that similar mechanisms may operate in humans, and may in some cases explain the development of antisocial behaviour.[115] Caspi *et al.* found that abused children possessing a low-expressing variant of a gene for the enzyme monoamine oxidase A (MAOA-L) were much more likely to exhibit antisocial behaviour as adults than those with a high-expressing variant of the gene.[116] The enzyme is involved in the breakdown of neurotransmitters such as serotonin, meaning that persons with MAOA-L may have higher levels of such neurotransmitters. It has been suggested that epigenetic suppression of a glucocorticoid receptor gene, resulting from early-life adversity, may reduce MAOA-L expression leading to much higher levels of these neurotransmitters; this may then dramatically

[111] T.-Y. Zhang and M.J. Meaney, 'Epigenetics and the environmental regulation of the genome and its function', (2010) 61 Annual Review of Psychology 439; N. Tsankova, W. Renthal, A. Kumar *et al.*, 'Epigenetic regulation in psychiatric disorders', (2007) 8(5) Nature Reviews Neuroscience 355.

[112] I.C.G. Weaver, N. Cervoni, F.A. Champagne *et al.*, 'Epigenetic programming by maternal behavior', (2004) 7(8) Nature Neuroscience 847.

[113] This was the only time where maternal care differed between the low- and high LG-ABN mothers (n 112) 489–50.

[114] I.C.G. Weaver, M.J. Meaney and M. Szyf, 'Maternal care effects on the hippocampal transcriptome and anxiety-mediated behaviors in the offspring that are reversible in adulthood', (2006) 103(9) Proceedings of the National Academy of Sciences 3480; Tsankova (n 111) 361–2.

[115] Some evidence that similar mechanisms may operate in humans has been provided by postmortem analysis of the brains of persons with a history of childhood abuse, showing increased methylation of hippocampal glucocorticoid receptors (P.O. Mcgowan, A. Sasaki, A.C. D'Alessio *et al.*, 'Epigenetic regulation of the glucocorticoid receptor in human brain associates with childhood abuse', (2009) 12 Nature Neuroscience 342; see also Heim and Binder (n 104) 107–8).

[116] A. Caspi, J. McClay, T.E. Moffitt *et al.*, 'Role of genotype in the cycle of violence in maltreated children', (2002) 297(5582) Science 851.

effect the functioning of the amygdala-vmPFC network (leading, for example, to increased amygdala activity and a bias towards the identification of threats).[117]

This research is in its early stages, and it does not apply in an obvious way to psychopathy where reduced rather than increased amygdala activity has been observed. However, conceptually, this early epigenetic work shows how environmental effects can alter the expression of genes, during developmental windows, to dramatically alter developmental trajectory. A metaphor that helpfully conveys how these mechanisms operate is that of a loaded gun: some genes may 'load the gun' and create a risk of developing a condition like psychopathy, while an environmental factor may 'pull the trigger' by inducing an epigenetic change to the expression of a gene (such as a glucocorticoid receptor gene).[118]

Research into the epigenetic changes and associated environmental stimuli that might pave the way, in the context of an appropriate genotype, to the development of psychopathy has barely begun.[119] The gun-trigger metaphor, however, can accommodate the idea of a person born with a 'hair trigger', at high risk of developing psychopathy. It can also accommodate the possibility of a 'born psychopath': perhaps the 'trigger' could be 'pulled' *in utero*. Epigenetics may also help to explain why a gene such as the aforementioned serotonin receptor gene may be very common (with 25–30% of U.S. persons homozygous), while less than 1% of persons go on to develop psychopathy. In short, any future taxonomy of psychopathy subtypes may require a much fuller understanding of the relevance of epigenetic regulation, and environmental triggers, to the development of psychopathy.

5.2.5 Developing biomarkers

Development of a taxonomy of psychopathy subtypes, via the means discussed above, is likely to enable the development of diagnostic biomarkers. Broadly, a 'biomarker' is any measurable indicator of a biological or physiological process.[120] Examples of biomark-

[117] J.W. Buckholtz and A. Meyer-Lindenberg, 'MAOA and the neurogenetic architecture of human aggression', (2008) 31(3) Trends in Neurosciences 120, 126–7.

[118] (n 117) 127.

[119] Even in more highly researched conditions, such as schizophrenia, the aetiological role of epigenetic regulation is largely terra incognita (e.g. L.F. Wockner, E.P. Noble, B.R. Lawford *et al.*, 'Genome-wide DNA methylation analysis of human brain tissue from schizophrenia patients', (2014) 4 Translational Psychiatry e339).

[120] I. Singh and N. Rose, 'Biomarkers in psychiatry', (2009) 460 Nature 202. More specifically, a 'biomarker' has been defined as 'A characteristic that is objectively measured and evaluated as an indicator of normal biological processes, pathogenic processes, or pharmacologic responses to a therapeutic interven-

ers include changes in brain activity measured by fMRI in response to a task, structural brain features measurable by DTI, particular gene sequences and epigenetic characteristics (e.g. whether DNA methylation has occurred).[121] Thus, efforts to understand the development of psychopathy along different developmental trajectories, and the characteristic epigenetic, genetic and neuroimaging features of identified subtypes, may simultaneously generate biomarkers that could be used to classify individuals within an established taxonomy.

If this taxonomy includes a subtype (or subtypes) characterisable, at least in part, by an inability to appreciate moral considerations concerning harm, biomarkers might enable the identification of such persons. I have referred to these persons as 'relevant psychopaths'. It is important, however, to recognise some limitations of the use of biomarkers in diagnosis, and problems inherent in the move from a scientific classification to clinical or legal practice.

The move from establishing that a particular biomarker is valid scientifically, as an indicator of some underlying process, to establishing that it is valid for the purposes of individual diagnosis or assessment is not a straightforward one.[122] Although there may be a statistically significant correlation between a particular biomarker and some process at a group level, establishing this correlation within a given individual may be problematic. This 'group to individual' problem has recently been highlighted with regard to the prospects of predicting risk of violence from the possession of the MAOA-L gene;[123] however, it is also relevant to neuroimaging findings and the identification of psychopathy subtypes. It is one thing to derive a taxonomy scientifically, but another to classify an individual within that taxonomy.

Recent efforts to identify subtypes of schizophrenia by neuroimaging, however, suggest that this may provide valuable information.[124] In one study, for example, around 80% of

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tion' (Biomarkers Definition Working Group, 'Biomarkers and surrogate endpoints: Preferred definitions and conceptual framework', (2001) 69(3) Clinical Pharmacology & Therapeutics 89, 91).

[121] (n 120) 204.

[122] M. Rutter, 'Biomarkers: Potential and challenges', in I. Singh, W.P. Sinnott-Armstrong and J. Savulescu (eds), *Bioprediction, biomarkers, and bad behavior: Scientific, legal, and ethical challenges* (OUP 2013) 188, 198.

[123] J.W. Buckholtz and A. Meyer-Lindenberg, 'MAOA and the bioprediction of antisocial behavior: Science fact and science fiction', in I. Singh, W.P. Sinnott-Armstrong and J. Savulescu (eds), *Bioprediction, biomarkers, and bad behavior: Scientific, legal, and ethical challenges* (OUP 2013) 131, 142–3.

[124] V.D. Calhoun and M.R. Arbabshirani, 'Neuroimaging-based automatic classification of schizophrenia', in I. Singh, W.P. Sinnott-Armstrong and J. Savulecu (eds), *Bioprediction, biomarkers, and bad behavior:*

patients were classified correctly.[125] Studies thus far have been small, and face problems concerning the influence of other factors (e.g. psychiatric comorbidity, or antipsychotic drugs) on neuroimaging. The extent to which such issues can be overcome in future remains to be seen, although this early work raises the possibility that future diagnosis of psychopathy subtypes could rely significantly on neuroimaging.

Notwithstanding this, information from biomarkers may only indicate a *probability* that a particular condition is present within an individual.[126] The most reliable information may be obtained where data from multiple biomarkers is combined with data concerning environmental and social risk factors.[127] Thus, in the case of relevant psychopaths, it may be important to combine information from neuroimaging with information from genetic screening, epigenetic screening, and social and environmental history. As regards the last two sources of data, knowledge that an individual had been subjected to environmental triggers, such as early abuse, could strengthen an inference made, in conjunction with relevant neuroimaging and other data, that this person could be classified as a 'relevant psychopath'. Even where this additional information was available, however, information from biomarkers might only *assist* with the determination that an individual was a 'relevant psychopath'. Professional judgment may still be required; furthermore, evaluations, along the lines discussed in Section 2.4, could influence decision-making insofar as the labelling of individuals utilised thick value terms.

There may also be more technical issues with future attempts to identify relevant psychopaths. While saliva or peripheral blood may suffice for the purposes of genetic screening,[128] for example, epigenetic profiles in the brain are different from profiles in peripheral tissues like blood, and vary across functionally different brain areas.[129] Ideally, epigenetic screening *in vivo* would require a biopsy from a specific brain region of interest (e.g. vmPFC or amygdala). This is unlikely to be desirable in practice, given its highly invasive

Scientific, legal, and ethical challenges (2013) 206, 224.

[125] Y. Takayanagi, Y. Kawasaki, K. Nakamura *et al.*, 'Differentiation of first-episode schizophrenia patients from healthy controls using ROI-based multiple structural brain variables', (2010) 34(1) Progress in Neuro-Psychopharmacology and Biological Psychiatry 10.

[126] (n 120) 203.

[127] (n 120) 203.

[128] For reservations about saliva, however, see T.D. Gunter, M.G. Vaughn and R.A. Philibert, 'Behavioral genetics in antisocial spectrum disorders and psychopathy: A review of the recent literature', (2010) 28(2) Behavioral Sciences & the Law 148, 153.

[129] M. Davies, M. Volta, R. Pidsley *et al.*, 'Functional annotation of the human brain methylome identifies tissue-specific epigenetic variation across brain and blood', (2012) 13(6) Genome Biology R43.

nature. Future advances may overcome such problems (e.g. by providing non-invasive ways of performing epigenetic screening).[130]

I consider some of the practical implications of the use of biomarkers to identify relevant psychopaths (including the possibility that they may also assess risk) in Chapter 6. As a final comment, it is worth noting that the probabilistic nature of information from biomarkers complicates efforts to identify psychopaths lacking moral competence in a legal setting. As noted in Section 3.3, neurobiological factors may undermine capacity for responsibility by undermining rational capacities. However, if biomarkers are developed to identify relevant psychopaths, a court is unlikely to be presented with an unequivocal scientific determination that an individual is a 'relevant psychopath'. Some deliberation (e.g. by a jury) is likely to be required before such evidence can be applied in an individual case. Nevertheless, information from biomarkers could provide important additional information that could guide decisions, and have wider policy significance.

5.2.6 'Relevant psychopaths'

I have argued in this Section that it is possible that a taxonomy of psychopathy subtypes, achieved by advances in the three broad domains of neuroscientific research discussed, may include psychopaths who lack an ability to comprehend moral reasons concerning harm. Furthermore, I have argued, it may be possible to identify these persons by means of biomarkers; data from biomarkers, however, may only indicate a probability that a particular person is a relevant psychopath (i.e. a psychopath lacking an ability to comprehend moral reasons concerning harm).

It is important, however, to adopt a developmental perspective in this context. As noted in Section 5.2.2, patients with vmPFC lesions acquired early in life develop more severe moral impairments than those with lesions acquired late in life. The former preformed at the lowest 'preconventional' level on a Kohlbergian test of moral reasoning, reflecting an 'egoistic' approach to rules.[131] This 'punishment-and-obedience orientation' is described in the test as follows:

[130] Developments in diagnostic neuroimaging, however, may mean that epigenetic screening is unnecessary in practice. Epigenetic screening may be more useful as a research tool to assist with the development of the taxonomy.

[131] Anderson *et al.* (n 7) 1034.

> The physical consequences of action determine its goodness or badness regardless of the human meaning or value of these consequences. Avoidance of punishment and unquestioning deference to power are valued in their own right, not in terms of respect for an underlying moral order supported by punishment and authority (the latter being stage 4).[132]

In contrast, persons with vmPFC lesions acquired late in life performed normally on this test, although, as discussed earlier, more subtle abnormalities of moral cognition have been found. The marked difference in performance on this Kohlbergian test between early- and late-acquired vmPFC lesion patients has inspired the comparison of the vmPFC to a primary sense.[133] As regards late-acquired vmPFC patients, Roskies suggests the analogy of a sighted person who has become blind later in life: a person with late-acquired blindness may not be able to see, but they have already acquired colour-related concepts and can understand and appreciate what is meant by concepts like 'green'; analogously, late-acquired vmPFC patients may have acquired a competency with moral concepts, retained post-lesion, due to the normal functionality of the vmPFC during development (with, presumably, appropriate input from other brain areas, such as the amygdala). In contrast, early-acquired vmPFC lesion patients, like persons blind from birth, never acquire a competency with moral concepts.

This analogy might seem to lose its force, given that vmPFC lesions have not been identified in psychopathy. However, as was seen from the discussion in Section 5.2.4, genes can interact with the environment during sensitivity periods (or developmental windows) to dramatically alter brain development. It is unnecessary for there to be a localised, readily-observable, lesion within the brain. 'Lesion-like' conditions can instead be brought about by a collision between environmental triggers, such as early-life deprivation, and a predisposing genotype.[134] Our understanding of how this operates in humans is at an early stage, but it is empirically possible that circuits that are crucial for the development of moral compe-

[132] L. Kohlberg, 'The claim to moral adequacy of a highest stage of moral judgment', (1973) The journal of philosophy 630, 631.

[133] A. Roskies, 'Are ethical judgments intrinsically motivational? Lessons from "acquired sociopathy" ', (2003) 16(1) Philosophical Psychology 51, 59–60.

[134] Early deprivation (e.g. institutional upbringing) has been associated with both impaired cognitive development and abnormalities in white matter in humans, with reduced white matter integrity identified in areas including the uncinate fasciculus (e.g. R.M. Govindan, M.E. Behen, E. Helder *et al.*, 'Altered water diffusivity in cortical association tracts in children with early deprivation identified with tract-based spatial statistics (TBSS)', (2010) 20(3) Cerebral Cortex 561).

tence, such as the amygdala-vmPFC circuit emphasised in Blair's theory, could be rendered inactive during crucial developmental periods. There is ample scope, or 'empirical space', for a subtype (or subtypes) of psychopathy exhibiting an inability to comprehend moral reasons concerning harm.

In terms of responsibility theory, and the prima facie case for access to an insanity defence, this also means that there is empirical space for a subtype of psychopathy to occupy Duff's 'logical space' of nonresponsibility.[135] Some psychopaths may lack a capacity to comprehend moral reasons concerning harm (i.e. lack receptivity to these reasons), and it may be possible to identify these persons utilising biomarkers in the future. The philosophical arguments concerning the prima facie case for access to an insanity defence may therefore have real-world relevance in the future, even if they currently lack this.

There is, however, empirical space for subtypes of psychopathy with more specific moral impairments. Perhaps, for example, as opposed to a general moral 'blindness' concerning harm, some psychopaths may grasp moral reasons concerning harm in general but fail to comprehend moral reasons relating to deception. Given that different brain systems may mediate moral judgments concerning dishonesty and harm,[136] more subtle and specific impairments may be possible. If such persons were identified, we might limit the class of relevant criminal offences for the purposes of a reformed, psychopath-accommodating, insanity defence to the narrow range of prohibitions with respect to which these persons' judgments were impaired (e.g. to offences concerning misrepresentation).

Although a heterogeneity of moral impairments is possible in psychopathy, I limit myself in Section 5.3 to discussion of a more generic lack of harm-related moral competence. This is a pragmatic decision. As psychopathy research develops, subtypes with more complex and subtle impairments may emerge, and legal systems may need to respond to these developments. A generic lack of harm-related moral competence, however, provides a reasonable starting point for discussion, given the current state of psychopathy research. I also focus, for simplicity's sake, on the possibility of a complete lack of harm related moral competence. This avoids issues relating to thresholds, where psychopathic individuals may have a reduced, rather than absent, ability to comprehend moral reasons.

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[135] See Section 3.2.5.

[136] C. Parkinson, W. Sinnott-Armstrong, P.E. Koralus *et al.*, 'Is morality unified? Evidence that distinct neural systems underlie moral judgments of harm, dishonesty, and disgust', (2011) 23(10) Journal of Cognitive Neuroscience 3162.

5.3 Which criminal offences?

As noted, I assume that 'relevant psychopaths' (RPs) lack an ability to comprehend moral reasons concerning harm. In this Section, I consider which criminal prohibitions RPs may be least likely to comprehend, given such a generic moral impairment. This permits a specification, in broad terms, of the offences RPs may find it most difficult to refrain from committing, and also of the offences that are likely to be relevant for the purposes of a reformed insanity defence (provided the prima facie case is accepted). Although this approach is theoretical I also consider, following this discussion, the possible relevance of experimental findings suggesting that psychopathy may not affect 'disgust-related' morality.

Assuming a complete blindness to harm-related moral considerations in the case of RPs, an initial difficulty is that this could in theory be relevant to most criminal prohibitions. As noted in Section 3.4, 'prevention of harm' may potentially justify the existence of a vast number of criminal offences.[137] One might include 'remote' harms, such as the possibility of harm resulting from the possession of a firearm, within the scope of a Harm Principle utilised to justify criminalisation.[138] To appreciate this, it is helpful to consider the Harm Principle further.

Feinberg's influential version of the Harm Principle holds that 'It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values'.[139] For Feinberg, 'harm' is understood in an extremely broad way as a 'setting back, or defeating of an interest'.[140] An individual's 'interests' are in 'the things that make his life go well'.[141] Anything that makes our lives worse, by impairing our ability to pursue valued goals, constitutes a harm on this welfarist view.[142] Damage to a person's property may also represent a harm, provided it adversely impacts on a person's welfare (or well-being).[143]

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[137] A. Duff, *Answering for crime: Responsibility and liability in the criminal law* (Hart 2007) 137.

[138] A.P. Simester, G.R. Sullivan, J.R. Spencer *et al.*, *Simester and Sullivan's criminal law: Theory and doctrine* (4th Revised edn, Hart 2010) 643–5.

[139] Feinberg, Joel, *The moral limits of the criminal law. Vol.1: Harm to others* (OUP 1984) 26.

[140] (n 139) 33. Simester and Sullivan comment that Mill does not provide a definition of 'harm' ((n 138) 638).

[141] (n 138) 639–40.

[142] (n 138) 40.

[143] (n 138) 40.

Feinberg's Harm Principle is positive (or permissive), and can be contrasted with Mill's negative (or exclusionary) version:[144]

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[145]

This version negatively constrains State intervention: where there is no harm to others, or no risk of harm to others, the State cannot intervene to restrict the liberty of citizens.[146]

Gross describes four broad groups or categories of criminal offence where a person's interests may be harmed in the Feinbergian sense.[147] The first is 'violations of interest in retaining or maintaining what one is entitled to have'.[148] This group includes harms to 'life, liberty, property, physical well-being, and security'. Many crimes violate these interests, such as murder, theft, rape, arson and kidnapping. The second group is 'offences to sensibility'.[149] These harms are more subtle, and include mental states such as annoyance, embarrassment, fear, alarm or disgust. Where these are 'objectionably unpleasant', they may be addressed by offences such as those concerning necrophilia or exhibitionism.[150] The third group concerns harms that result in an 'impairment of collective welfare'.[151] Relevant offences include espionage, counterfeiting, or building code violations that may impair community rather than specifically individual interests.[152] The final group concerns 'violations

[144]Duff (n 137) 123.

[145]J.S. Mill, *On liberty* (Routledge 1869) para. 9.

[146]Simester and Sullivan (n 138) 638. It is possible to espouse both versions of the Harm Principle without contradiction, although there is the potential for conflict between the principles. In particular, Feinberg's version does not rule out the criminalisation of conduct for non-harm related reasons (e.g. because conduct offends public morals) (Simester and Sullivan (n 138) 645). Feinberg's version, however, does not specify what the grounds might be such non-harm related criminalisation.

[147]H. Gross, *A theory of criminal justice* (OUP 1979) 119–21; see also Simester and Sullivan (n 138) 640.

[148]Gross (n 147) 119.

[149](n 147) 119.

[150](n 147) 120.

[151](n 147) 120.

[152](n 147) 120.

of governmental interests', and is protected by offences such as those relating to tax fraud, or contempt of court.[153]

Gross's taxonomy illustrates just how pervasive 'harm' may be with respect to criminal prohibitions. An inability to appreciate moral considerations relating to harm might, in theory, reduce one's ability to comply with any of these criminal laws. However, as Gross comments, it is only the first group that seems to concern relatively pure or 'full-blooded harms'.[154] Although fraudulent completion of a tax form, for example, might be harmful in a Feinbergian sense (it could set back governmental interests by depleting financial resources), this harm appears to be more remote than the harm caused by arson or murder. Perhaps tax fraud on a massive scale could cause comparable harms: resources for healthcare, for example, could be depleted leading to a spike in mortality rates. However, in more ordinary circumstances the governmental harm suffered due to the fraudulent completion of an income tax form seems more remote, or less direct, to the harm suffered by the victim of an assault or robbery.

Other examples of 'remote' criminal harms, provided by Duff, include offences such as 'failing to display a car's excise licence or to produce driving documents when required to do so by a police officer'.[155] In these cases there is no obvious connection between the offences and harm (unless this is, perhaps, connected with the waste of State resources, where documents must then be requested more formally). It is possible that simply knowing that offences like these are unlawful, in a thin legalistic manner, may represent the extent of most people's engagement with these prohibitions.[156]

The 'remoteness' in question is perhaps best understood as a lack of psychological salience. In the case of 'full blooded' harms, moral reasons relating to harm might be expected to figure much more prominently among the reasons normally taken to favour compliance with the relevant 'category one' prohibitions. Prudential and other reasons (e.g. legal reasons) may also be relevant, but in the final analysis moral reasons amount to the 'best' available reasons (along the lines argued by Morse) and ultimately motivate lawful

[153](n 147) 120–1.

[154](n 147) 121.

[155]Duff (n 137) 137.

[156]The use, or abuse, of the term 'harm' to describe the consequences of committing some criminal offences raises broader issues concerning the coherence of the concept of harm itself. In this vein, it has been argued that there may be no coherent concept that can cover the numerous common uses of the term 'harm', and that the concept may not be able to unify morality as argued by some philosophers (Sinnott-Armstrong and Wheatley (n 5) 460).

behaviour. In Gross's other categories, moral reasons relating to harm are likely to be less salient. They may be relevant, but prudential and other nonmoral considerations are likely to figure much more prominently among the reasons normally taken to motivate compliance with these laws. An otherwise competent adult with a 'blindness' to moral reasons concerning harm, therefore, might be expected to have a much greater, and possibly normal (or near-normal), capacity to comply with these prohibitions.

It may, therefore, be reasonable to limit relevant offences to those concerned with the harms falling into Gross's first category: that is, offences concerned with harm to 'life, liberty, property, physical well-being, and security'. This would still include a large class of offences, as one would presumably need to include attempted offences, and offences such as conspiracy to commit an offence or possession of a weapon with intent to commit an offence. However, offences to sensibility, collective welfare and governmental interests (in Gross's taxonomy) could be excluded on the basis that associated harms were more remote.

If this is accepted, it might be argued that some qualification is required given evidence suggesting normal 'disgust'-related morality in psychopaths (assuming this held for RPs).[157] Disgust may have evolved to facilitate an avoidance of disease, such as infection obtained by eating contaminated meat;[158] however, it may also underlie the visceral sense of 'wrongness' we may feel when confronted with stories involving incest or cannibalism. While these activities may be associated with harm, they may also continue to feel 'wrong' in this way, and also be judged as morally wrong, in circumstances where there is no readily identifiable harm.[159]

It is possible that the 'force' of some criminal prohibitions derives, at least in part, from the ability of the offences in question to elicit disgust. Perhaps, for example, I do not commit murder just because it represents a great harm which I believe it would be wrong to cause, but also because the very idea disgusts me. Thus, with respect to some prohibitions

[157] Blair *et al.* (n 107) 37. A.L. Glenn, R. Iyer, J. Graham *et al.*, 'Are all types of morality compromised in psychopathy?', (2009) 23(4) Journal of personality disorders 384; E. Aharoni, O. Antonenko and K.A. Kiehl, 'Disparities in the moral intuitions of criminal offenders: The role of psychopathy', (2011) 45 Journal of Research in Personality 322.

[158] J. Haidt and J. Graham, 'When morality opposes justice: Conservatives have moral intuitions that liberals may not recognize', (2007) 20(1) Social Justice Research 98.

[159] See, for example, F. Bjorklund, J. Haidt and S. Murphy, 'Moral dumbfounding: When intuition finds no reason', (2000) 2 Lund Psychological Reports 1; discussed in J. Prinz, *The emotional construction of morals* (OUP 2007) 29–32.

psychopaths, like non-psychopaths, may benefit from an additional 'yuck' factor that may inhibit certain criminal behaviours. This could provide a reason for denying relevant psychopaths access to an insanity defence for certain strongly disgust-related offences, even where they involve Gross's 'first category' harms, because loss of access to harm-related moral considerations may be less critical.

This, however, may be to attribute an importance to disgust that is unwarranted. First, there is evidence that despite its association with morality, disgust is mediated by different (although overlapping) neural networks in different circumstances: the disgust that may be associated with thoughts of committing nonsexual offences, such as murder, may differ, including in terms of its 'force', from that associated with thoughts of sexual offences like incest or of 'pathogen'-related acts like touching faeces.[160] Second, and perhaps more importantly, despite increasing interest in the neuroscience of disgust, it remains unclear how disgust and moral judgments are related.[161] Disgust may merely *amplify* moral judgments (i.e. what is judged to be wrong seems more wrong), rather than give rise to moral judgments that would not occur in its absence.[162]

Given these issues it seems premature to qualify relevant, harm-related, offences with exceptions where offences are apt to arouse significant disgust. If disgust merely amplifies moral judgments, then in the case of RPs there may be no harm-related moral judgments to amplify. I will not, therefore, attempt to refine the suggested relevant offences in this way.

[160] J.S. Borg, D. Lieberman and K.A. Kiehl, 'Infection, incest, and iniquity: Investigating the neural correlates of disgust and morality', (2008) 20(9) Journal of Cognitive Neuroscience 1529.

[161] D. Pizarro, Y. Inbar and C. Helion, 'On disgust and moral judgment', (2011) 3(3) Emotion Review 267.

[162] (n 161) 267–8.

Chapter 6

Relevant psychopaths, access to an insanity defence and wider issues

6.1 Introduction

In this Chapter I consider whether the 'relevant psychopaths' (RPs) identified in Chapter 5 ought to be provided with access to an insanity defence in an English legal context. To recap, the prima facie case cannot currently succeed, whatever its philosophical merits, because it is not possible to identify psychopaths lacking moral competence. Empirical evidence currently supports only subtle impairments of moral cognition in psychopaths. Nevertheless, I have argued, there is empirical 'space' for such persons; for the reasons stated, I have focused on the possibility of psychopaths lacking an ability to comprehend moral considerations concerning harm. In the future, scientific research may identify such persons, and diagnostic biomarkers may be developed. This means that the philosophical arguments of the prima facie case may obtain real-world relevance in the future.

In this Chapter, I consider whether RPs, should they be identified and should biomarkers be developed, ought to be given access to an insanity defence in English law. I begin, in Section 6.2, with an overview of the current law and policy in England and Wales regarding the 'diversion' of mentally disordered offenders away from the criminal justice system to a more medical treatment-orientated pathway, and focus on the role that the insanity defence plays as a diversion mechanism. I consider how RPs might fare, should an insanity defence be made available to them. An issue that arises is that RPs might elect not to plead insanity:

because success with a defence might result in a lengthy hospital detention, these defendants might prefer a prison sentence.

In Section 6.3, I return to the philosophical arguments of the prima facie case. Although the case may rely on the availability of 'effective' medical treatments (i.e. that could significantly reduce the need for hospital confinement by reducing the risk posed by RPs), there are other problems with the case. In particular, even if RPs lack moral competence they may possess other capacities relevant to criminal responsibility. This means, I argue, that the case may be better viewed as an argument for mitigation of culpability at a sentencing stage, where relevant offences have been committed, rather than exculpation. My exploration of relevant psychopaths and relevant criminal offences in this thesis, therefore, may be better viewed as a clarification of circumstances where mitigation may be appropriate.

The possibility that RPs may have a high risk of causing serious harm to others, however, also has implications for my analysis. It might be expected that individuals with an inability to comprehend moral reasons concerning harm would be more likely to cause serious harm to others. Furthermore, if biomarkers are developed to identify these persons, these may also assess risk of harm to others. My explorations of relevant psychopaths and relevant criminal offences, therefore, may also amount to the specification of a high-risk group, and offences that could provide evidence of their moral incompetence. I suggest that the risk posed by RPs, rather than their responsibility, is likely to be central to any future policy debate concerning RPs in an English legal context. Moreover, the predictive utility of biomarkers for RPs might tempt policymakers towards more radical strategies.

The discussion in this Chapter is necessarily speculative, given that RPs have not yet been identified. It also relies on a presumption that the legal and policy context for future developments will be broadly similar to what is currently the case. My suggestion that RPs may have a high risk of causing serious harm to others, and that diagnostic biomarkers may therefore assess this risk, is also speculative (although I argue that this is plausible). I consider some of the limitations of my analysis in Section 6.3.2, before summarising my arguments and drawing a conclusion.

6.2 Current law and policy, and the consequences of a finding of NGRI

In this Section I focus on the possibility of 'diversion', rather than criminal punishment of RPs, in line with my focus on the insanity defence. I first consider what is meant by diversion, before outlining how PCL-R psychopaths currently fare with respect to diversion policy. I then move on to consider the implications of the availability of an insanity defence, as a diversion mechanism, for RPs. The discussion is informed by the fact that no clinical treatments for psychopathy have yet been shown convincingly to reduce risk of reoffending.[1]

Lord Bradley, in a report requested by the last Labour government, defined diversion as follows:

> 'Diversion' is a process whereby people are assessed and their needs identified as early as possible in the offender pathway (including prevention and early intervention), thus informing subsequent decisions about where an individual is best placed to receive treatment, taking into account public safety, safety of the individual and punishment of an offence.[2]

Lord Bradley viewed diversion as a system of mechanisms, encountered at various points throughout the 'offender pathway' from initial interaction with the police to criminal incarceration, enabling persons to be managed in a more treatment-orientated manner.[3] For example, at an early stage in the pathway police may opt to arrange hospitalisation or community care for persons, rather than arresting or charging them; likewise, the Crown Prosecution Service (CPS) may elect not to prosecute because a person is considered to be mentally disordered.[4] A person may also be diverted for treatment or assessment pre-trial, or diverted at a sentencing stage or from prison.[5]

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[1] J.R.P. Ogloff and D. Wood, 'The treatment of psychopathy: Clinical nihilism or steps in the right direction?', in L. Malatesti and J. McMillan (eds), *Responsibility and psychopathy* (OUP 2010) 153.

[2] Lord Bradley, 'The Bradley Report: Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system' (Department of Health, 2009) <http://www.centreformentalhealth.org.uk/pdfs/Bradley_report_2009.pdf> (accessed 27.6.14) 16.

[3] P. Bartlett and R. Sandland, *Mental health law: Policy and practice* (4 edn, OUP 2013) 285.

[4] (n 3) 285.

[5] (n 3) 285.

One of the issues confronted in the Report was the scope of the population targeted by the policy. Lord Bradley adopted a definition of 'offenders with mental health problems' utilised by NACRO (the National Association for the Care and Resettlement of Offenders) to indicate the relevant population. This includes

> those who come into contact with the criminal justice system because they have committed, or are suspected of committing, a criminal offence, and who may be acutely or chronically mentally ill...It also includes those in whom a degree of mental disturbance is recognised, even though it may not be severe enough to bring it within the criteria laid down by the Mental Health Act 1983.[6]

Bartlett and Sandland suggest, reasonably, that the Mental Health Act 1983 (MHA 1983) criteria referred to in this imprecise definition are criteria for detention rather than mental disorder, given that 'mental disorder' is defined in an extremely general way by the MHA 1983 (see Section 1.3.2).[7] This definition includes personality disorders, as noted earlier,[8] and it is also clear from the Report that Lord Bradley considered personality disorders to fall within the targeted population.[9] As a personality disorder, PCL-R psychopathy (and, presumably, any psychopathy subtypes) would therefore qualify.

With respect to the outcome of diversion, Lord Bradley accepted an inevitable conflict between the objectives of treatment and the goal of reducing the risk of reoffending. 'Safeguarding the public', he remarked, 'must always remain a top priority'; the aim was not only to 'improve treatment and outcomes for offenders and their families', but also to 'contribute positively to the public safety agenda'.[10] Diversion, therefore, was viewed as a policy that balances the healthcare of offenders with wider criminal justice-related considerations.[11]

Although the Bradley Report was commissioned by a previous administration, largely as an attempt to take stock of practices in England and Wales, it has been highly influential. Bartlett and Sandland comment that the Report, which included 82 recommendations, has 'galvanised action right across the criminal justice system' and has 'generated much subsequent activity'.[12] As such, it provides an indication of current policy. A commitment to

[6] Bradley report (n 2) 17.
[7] (n 3) 285–7.
[8] In Section 1.3.2.
[9] Bradley report (n 2) 17.
[10] Bradley report (n 2) 10.
[11] Bartlett and Sandland (n 3) 287.
[12] Bartlett and Sandland (n 3) 287.

this policy was also stressed by the Ministry of Justice in 2008, following the amendments to the MHA 1983 by the MHA 2007.[13]

Notwithstanding this, the most likely route to diversion for PCL-R psychopaths found guilty of a more serious offence is currently from prison, rather than at a sentencing stage or other stage in the offender pathway: those diverted tend either to be the acutely ill, or persons at or near the end of their sentences considered unsafe to release.[14] This may be the case, to a significant extent, for resource-related reasons. At the present time, the psychiatric system is operating at full capacity, and there are limited beds to accommodate either those diverted at sentencing or indeed at a later stage from prison.[15]

The relevance of resources to the possibility of diversion at a sentencing stage was also highlighted by the Court of Appeal in *Birch*, the leading case concerning the making of hospital orders.[16] The court favoured a general policy of diversion, even where there was substantial culpability (blameworthiness).[17] However, it was accepted that a lack of secure hospital places might justify a prison sentence where a mentally disordered offender was considered by a court to be dangerous.[18] Where it is thought to be 'necessary for the protection of the public from serious harm', a restriction order is likely to be attached to a hospital order and hospital confinement is likely to be much longer (see below); thus, the hospital resource implications, in terms of occupation of a place (or 'bed'), become more

[13] *Mental Health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders* (Ministry of Justice 2008) 1.2: 'The Act reflects the continuation of the Government's policy that mentally disordered people who commit offences should receive specialist mental health treatment rather than being punished, wherever that can safely be achieved'.

[14] L. Gostin, J. McHale, P. Fennell *et al.*, *Principles of mental health law and policy* (1 edn, OUP 2010) 704. This latter group has included offenders with personality disorders (e.g. dissocial personality disorder in *R (on the Application of TF) v Secretary of State for Justice* [2008] EWCA Civ 1457, 2008 WL 5240590; see also (n 3) 390–91).

[15] Gostin *et al.* (n 14) 704.

[16] *R v Birch* (1990) 90 Cr. App. R. 78 (CoA).

[17] (n 16) at 90; Bartlett and Sandland (n 3) 369. Provided the relevant conditions are met, a court can currently make a hospital order for any offence where the sentence is not fixed by law (i.e. any offence except murder). The sentence for murder is explicitly fixed as 'imprisonment for life' by s.1 of the Murder (Abolition of Death Penalty) Act 1965. Amendments to s.37 MHA 1983 by Sch.26(2) para. 8 of the Criminal Justice Act 2003 (CJA 2003) ensure that the 'dangerous offender' provisions in s.224 to 226B of the CJA 2003, which require courts to impose a life sentence or an extended sentence where specified serious violent or sexual offences have been committed, do not affect the ability of a court to make a hospital order (see s.37(1A) MHA 1983; Bartlett and Sandland (n 3) 365). Note that although the phrase 'fixed by law' could, in theory, apply to many offences with a fixed minimum sentence, the Law Commission argues that this only applies in practice to murder ((n 21) 31 fn.116); I accept this interpretation here.

[18] (n 16) at 89. 'Mentally disordered' is used here in the legal sense, as defined in the MHA 1983.

substantial.[19]

The question I will now consider is what might transpire should an insanity defence become available for a subset of psychopaths (RPs) on the grounds that these persons lacked moral competence. For the moment, I will set aside philosophical issues concerning the prima facie case, which will be discussed further in Section 6.3. An immediate issue that arises is that these persons, assuming they were aware of their RP status, might not plead insanity due to the adverse consequences of success with a plea. To appreciate this, it is helpful to consider the current legal framework in England and Wales further.

The basis of the insanity verdict is provided in Section 2 of the Trial of Lunatics Act 1883 (which, despite the archaic title, remains in force). This specifies that where a jury concludes that the defendant 'did the act or made the omission charged' but was 'insane, so as not to be responsible' in law, they must return a 'special verdict' of not guilty by reason of insanity (NGRI). As Gostin *et al.* comment, the verdict is 'special' because, rather than be freed, a defendant found NGRI is subject to the various disposal powers of the court.[20] S.5 of the Criminal Procedure (Insanity) Act 1964 (CPIA 1964) provides that the court must make a hospital order, a supervision order, or an order for an absolute discharge (s.5(2)).[21] These disposals can be viewed as implementing, in the context of a successful insanity defence, wider diversion policy.

For more serious alleged offences, where the 'custody threshold' is reached (i.e. a custodial sentence would have been warranted), is it appropriate to consider a hospital order.[22] The other conditions for a hospital order are those specified in s.37 MHA 1983.[23] These include, among other things, that a defendant suffers from a 'mental disorder' as defined in

[19] It is also possible, as Bartlett and Sandland suggest, that the diversion policy in *Birch* is simply 'ignored' by many courts, although this is an empirical claim which I cannot explore further here ((n 16) at 396).

[20] (n 14) 733.

[21] See: Law Commission, *Insanity and automatism: Supplementary material to the scoping paper* (July, 2012) available at <http://lawcommission.justice.gov.uk/areas/insanity.htm> (accessed 27.6.14) para 2.99–2.104.

[22] Section 142 of the Criminal Justice Act 2003 (CJA) specifies a number of sentencing principles applicable to all offenders, including those with mental health problems. Courts must consider, when deciding on a sentence, the following purposes of a sentence: punishment, rehabilitation and reform, crime reduction, reparation and public protection (s.142(1)). In the CJA, sentencing is graded in proportion to the seriousness of an offence. Seriousness is determined by reference to factors such as culpability, harm caused (or potentially caused) by a criminal offence, and relevant previous convictions (s.143). Where a sentence is not fixed by law (i.e. is not murder), it must also be the shortest possible taking into account the offence's seriousness (Bartlett and Sandland (n 3) 364). Exceptions are made, however, for 'dangerous offenders', irrespective of whether a mental disorder is present (see footnote (n 17), p.161 above; Bartlett and Sandland (n 3) 365).

[23] Section 5(4) of the CPIA 1964.

the MHA 1983,[24] that this disorder is of a 'nature or degree' warranting detention and that 'appropriate medical treatment' is available (s.37(2)(a)).[25]

It is important to note that in the context of a successful insanity defence, as with diversion at a sentencing stage, the fact that a disorder is considered 'untreatable' is unlikely to prevent hospital detention. There are two main reasons for this. First, 'treatment' has been defined very widely to include nursing care, 'psychological intervention and specialist mental health habilitation, rehabilitation and care',[26] the 'purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations'.[27]

Second, treatment must only *aim* to achieve these ends. Prior to amendments by the MHA 2007 a so-called 'treatability' test, applying only to 'psychopathic disorder' and 'mental impairment', operated whereby it was necessary that treatment was 'likely to alleviate or prevent a deterioration' of a patient's condition.[28] A major difficulty with this approach was that some patients, including persons with personality disorder, might not cooperate with treatment. Consequently, even if appropriate treatment were available, these persons could not be admitted because treatment was unlikely to 'alleviate or prevent a deterioration' of their condition.

This problem was publicly highlighted when Michael Stone, who had a severe antisocial personality disorder,[29] was convicted for the brutal murder of a mother and child, and serious wounding of another child, with a hammer while they were out walking their dog.[30] Stone was not considered treatable and therefore had not been detained under the MHA 1983.[31] This added to governmental concerns that psychiatrists were 'cynically hiding behind' the treatability requirements in the MHA 1983 to avoid dealing with such troublesome

[24]This must be supported by written or oral evidence from two registered medical practitioners (s.12(2) MHA 1983).

[25]Detention must also be the most appropriate disposal 'having regard to all the circumstances' of the case, including 'the nature of the offence and the character and antecedents of the offender' (s.37(2)(b)).

[26]s.145(1) MHA.

[27]s.145(4) MHA.

[28]e.g. s.3(2)(b) of the old MHA 1983, in the case of admission for treatment. 'Mental impairment' was defined in s.1(2) as 'a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned'. See also Gostin *et al.* (n 14) 99–100.

[29]H. Prins, 'The Michael Stone inquiry: A somewhat different homicide report', (2007) 18(3) Journal of Forensic Psychiatry & Psychology 411, 415.

[30]*R v Stone* [2005] EWCA Crim 105, 2005 WL 353379).

[31]A. O'Loughlin, 'The offender personality disorder pathway: Expansion in the face of failure?', (2014) 53(2) Howard J Crim Justice 173, 177.

patients.[32] It also provided an impetus for the development of the Dangerous and Severe Personality Disorder (DSPD) Programme, which aimed to manage such problematic individuals and reduce harm to the public (I shall discuss this further below).[33]

The problematic element, that treatment was 'likely to alleviate or prevent a deterioration', was subsequently abolished by the MHA 2007, and it is now only necessary that appropriate treatment is *available*.[34] As Peay comments, this dilutes the treatability criteria such that they become 'not predictive but aspirational'.[35] This also means that RPs, even where they might not cooperate with attempts to treat them, could (on current law) be compulsorily detained in hospital following a finding of NGRI.

It might be thought that this approach to treatment and treatability would give rise to human rights issues.[36] In *Hutchison Reid v UK*, however, the European Court of Human Rights (ECtHR) held that compliance with Article 5(1) of the European Convention on Human Rights (ECHR), concerning the 'Right to liberty and security', merely requires that detention is necessary to *prevent harm to others*.[37] The fact that Mr Reid's antisocial personality disorder was 'not currently perceived as curable or susceptible to treatment' was no barrier to detention.[38]

Thus, the treatability status of psychopathy, at least on current law, is unlikely to pre-

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[32] A. Maden, 'Dangerous and severe personality disorder: Antecedents and origins', (2007) 190 British Journal of Psychiatry s8, 8.

[33] Maden (n 32).

[34] s.37(2)(a) MHA 1983. More specifically, 'appropriate treatment' of a person is treatment that is 'appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case'(s.3(4) MHA). Guidance on what is meant by 'appropriate' treatment is provided in Chapters 6 and 35 of the MHA 1983 Code of Practice ('Mental Health Act 1983 Code of Practice' (Department of Health, 2008)). See also Gostin *et al.* (n 14) 485–8.

[35] J. Peay, 'Personality disorder and the law: Some awkward questions', (2011) 18 Philosophy, Psychiatry and Psychology 231, 238–9.

[36] Following the enactment of the Human Rights Act 1998, English courts must take into account the jurisprudence of the European Court of Human Rights (ECtHR) (s.6 of the 1998 Act).

[37] *Hutchison Reid v United Kingdom* (Application 50272/99, (2003) 37 EHRR 9) at 213. The relevant ECHR provision was Art.5(1)(e), permitting deprivation of liberty where cases concern 'the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants'.

[38] (n 37) at 213. To elaborate, following *Winterwerp v The Netherlands*, compulsory confinement can only occur and continue to occur, consistent with Article 5 ECHR, where 'objective medical expertise' shows that an 'unsound mind' results from a 'true mental disorder' (Application 6301/73, (1979) 2 EHRR 387, para. 39). The 'unsoundness of mind' must be more than just a deviation of 'views or behaviour...from the norms prevailing in a particular society' (para. 37), and the 'mental disorder' must be 'of a kind or degree warranting compulsory confinement' (para. 39). *Hutchison Reid v UK* establishes that a risk of reoffending may meet the 'kind or degree' criterion ((n 37) para. 52). See also Bartlett and Sandland (n 3) 204–6.

vent hospital detention following a verdict of NGRI. A further issue is that detention via a hospital order is for no more than 6 months in the first instance, subject to renewal by a 'responsible clinician'.[39] In such a case, as noted in *Birch*, the patient simply 'passes out of the penal system and into the hospital regime', where 'Neither the Court nor the Secretary of State has any say in his disposal'.[40] This might be viewed as a preferable, even pleasant, alternative to a prison sentence by an RP (depending on the length of the likely prison sentence). However, where it is deemed 'necessary to protect public from serious harm', a restriction order may be attached to a hospital order.

In *Birch*, the Court of Appeal stressed that what matters, where restriction orders are made by a court, is the *seriousness* of the harm to the public that might result should the defendant reoffend, rather than the *risk* of harm per se.[41] The nature of the harm has been held to include psychological harm;[42] however, where a disorder has previously manifested in violence, and it is thought that this might recur, the court in *Birch* held that there must be a strong presumption in favour of making a restriction order.[43] This is consistent with the legal position with respect to homicide: where an alleged offence is murder, a court is *required* to make a restriction order (provided the conditions for a hospital order, including the presence of a mental disorder, are satisfied).[44]

The relationship between a diagnosis of RP and risk of harm to others must be speculative. However, it is possible that an RP diagnosis may also be a powerful risk factor. This might be unsurprising, given the moral 'blindness' of RPs. It is also possible that many of the individual biomarkers that contribute to a diagnosis of RP may assess risk. The science of 'neuroprediction' is in its infancy, but biomarkers such as the MAOA-L gene (discussed

[39] s.20 MHA 1983. 'Responsible clinician' is defined in s.34 MHA, and must be an 'approved clinician'. An approved clinician may be a registered medical practitioner, a psychologist, a nurse, an occupational therapist or a social worker (Mental Health Act 1983 Approved Clinician (General) Directions 2008, Sch.1 para 1). Patients, and nearest relatives, may also apply to a Mental Health Tribunal to challenge the detention after 6 months (see Gostin *et al.* (n 14) 600–1)).

[40] *Birch* (n 16) at 84.

[41] (n 16) at 88. Furthermore, the harm 'need not...be limited to personal injury', and a risk of serious harm to a single person (rather than, say, a general risk to the public) may suffice ((n 16) at 88). Although a 'high possibility of a recurrence of minor offences' is not sufficient ((n 16) at 88), where more minor offences could have been much more serious (e.g. victims were lucky to escape with minor injuries) a restriction order may be justified (*R v Cowan* [2004] EWCA Crim 3081, 2004 WL 2932914).

[42] *R v Macrow* [2004] EWCA Crim 1159, 2004 WL 1929113.

[43] It was held, following *Gardiner*, that where a disorder manifests in violence 'there must be compelling reasons to explain why a restriction order should *not* be made' (*R v Gardiner* [1967] 1 W.L.R. 464 (CA) at 649 (my emphasis); *Birch* at 88). See also Bartlett and Sandland (n 3) 373.

[44] As per CPIA 1964 s.5(3).

in Section 5.2) are already known to be powerful risk factors: Nadelhoffer and Sinnott-Armstrong comment that persons with the MAOA-L gene and a history of early-life abuse are 'several hundred times more likely to commit a violent crime by the age of 25'.[45] Thus, it is possible that the development of biomarkers to identify RPs may also, simultaneously, have significant legal implications by assessing risk. In an English legal context, RPs who were to plead insanity on that basis might, if successful, automatically be given a hospital order with a restriction order.

The effect of a restriction order, made under s.41 MHA 1983 (where deemed 'necessary for the protection of the public from serious harm'), is to limit the discretion of a responsible clinician to transfer, discharge, or grant a leave of absence for an inpatient; instead, permission must be granted by the Secretary of State for Justice. The restriction is also indefinite.[46] Although the court in *Birch* stressed that a restriction order is not a 'means of punishment' but of protecting the public,[47] discharge from hospital, should it occur, is likely to be conditional, with patients subject to monitoring and the possibility of immediate recall to hospital.[48] This monitoring, which is conducted by the Mental Health Casework Section (MHCS) of the Ministry of Justice, may continue for years after discharge.[49] Moreover, patients with psychopathy are apt to be detained for lengthy periods. The duration of such detentions are no longer recorded officially;[50] however, statistics from December 2004 reveal that of 412 patients with 'psychopathic disorder', 33 had been detained for more than 30 years.[51] Psychopathic disorder, as noted earlier, is not the same as PCL-R psychopathy, but personality disordered persons, including PCL-R psychopaths, would previously have been detained under this category.[52]

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[45] This is posited to be due to the effects of the environment on the epigenetic regulation of gene expression (T. Nadelhoffer and W. Sinnott-Armstrong, 'Neurolaw and neuroprediction: Potential promises and perils', (2012) 7(9) Philosophy Compass 631, 636).

[46] This follows the abolition of provisions for time-limited restriction orders in s.41 MHA by the MHA 2007. Previously, s.41(1) stated: 'the offender shall be subject to the special restrictions set out in this section, *either without limit of time or during such period as may be specified in the order*'. The italicised words were removed by the 2007 Act.

[47] (n 16) at 89.

[48] Bartlett and Sandland (n 3) 370.

[49] This regime is analogous to a conditional release from prison and may, as Bartlett and Sandland comment, represent a 'conceptual intersection between treatment and punishment' ((n 3) 370).

[50] (n 3) 377.

[51] 'Home Office statistical bulletin: Statistics of mentally disordered offenders 2004' (Home Office, 2005) <http://www.nacro.org.uk/data/files/nacro-2005121602-19.pdf> (accessed 27.6.14) Table 15.

[52] Although 30 persons with recognised mental illnesses had been detained for over 30 years, this was from a total of 1970 such persons, indicating a much greater likelihood of lengthy detention for the 'psychopathic

An RP defendant who successfully pleads insanity on the basis that he or she lacks moral competence, then, may therefore (on current law, at least) spend a very long time in hospital. Indeed, they might spend the rest of their life there. It is perhaps difficult to compare high-security hospital and prison settings: despite operating under similar regimes of control, for example, a hospital stay might be more comfortable. However, with the uncertainty surrounding the possibility of release, and the psychiatric stigma of being considered 'mad' (or, due to being identified as 'dangerous', the double stigma of being considered both 'mad' and 'bad'[53]), the possible consequences of a finding of NGRI are unlikely to be viewed favourably. A reasonable but morally incompetent RP may well prefer a prison sentence, rather than risk a longer detention and the stigma associated with becoming an object of psychiatric curiosity. Such a person may not plead insanity, even if a suitably reformed insanity defence were available; and, if a judge were to exercise discretion and put the issue of insanity before a jury, such a person might simply change their plea to guilty.[54]

As regards the prima facie case, which focuses on the outcome for the individual rather than any wider societal considerations, it might even be argued in this context that it was fairer to hold RPs criminally responsible. Indeed, as noted earlier in Section 3.4, the prima facie case may depend on the existence of 'effective' treatments that can significantly reduce the duration of hospital confinement by reducing risk. Otherwise, the distinction between 'treatment' and 'punishment' may be meaningless in practice.

There is, however, an issue that complicates this equation, which is the possibility of diversion to hospital at the end of a prison sentence. A particularly trenchant criticism of the DSPD programme, which largely recruited patients (including PCL-R psychopaths) from prisons,[55] has been that the idea of 'treatment' has been used as a ploy to 'warehouse' or detain problematic individuals who represented a danger to society but could no longer be detained in prison.[56] Tyrer *et al.* report that those who placed offenders in the programme knew 'full well' that there would be 'very little active treatment...given'.[57] Many DSPD patients, they comment, were 'frustrated by long waits for, and inadequate staffing of, psy-

disorder' group (discussed in Bartlett and Sandland (n 3) 377).

[53](n 3) 278–81.

[54]As occurred, for example, in the epilepsy-related case of *R v Sullivan* [1984] AC 156 (HL).

[55]O'Loughlin (n 31) 180.

[56]P. Tyrer, C. Duggan, S. Cooper *et al.*, 'The successes and failures of the DSPD experiment: The assessment and management of severe personality disorder', (2010) 50(2) Medicine, Science and the Law 95, 97–8; O'Loughlin (n 31) 189.

[57](n 56) 98.

chological programmes', and hopes of 'treatment efficacy leading to early release' were not realised.[58] There is something very troubling about the (alleged) use of 'treatment' in this way, and RPs concerned about this possibility might on balance opt to plead insanity. As Litton comments, in such a case persons may 'feel they will be able to manipulate their way to release from civil confinement'.[59]

Concerns about this possibility may also be heightened if future attempts are made to screen for RPs within prisons, with a view to transferring these persons to hospital for 'treatment', as occurred in the case of the DSPD programme. I will now move on to consider, with further reference to the arguments of the prima facie case, whether an insanity defence should be made available for RPs.

6.3 Should an insanity defence be made available to relevant psychopaths?

And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.
– T.S. Eliot, *Little Gidding*[60]

6.3.1 Exculpation, mitigation and risk

In Section 0.1, I noted that the stereotypical traits of psychopaths may be associated, intuitively, with increased blameworthiness in the context of a criminal trial. Closer examination, however, has revealed a complex picture. At least some psychopaths may lack moral competence, and in this case it may be argued that they lack a capacity important to criminal responsibility. The prima facie case for access to an insanity defence, outlined in Chapter 3, attempts to make the case that psychopaths lacking moral competence ought to

[58](n 56) 98. There were also programme-wide issues with the implementation of treatments: Burns *et al.*, who evaluated the programme, reported that the DSPD units in England implemented different treatment regimes, and that treatments were distributed according to 'no rational pattern' (T. Burns, J. Yiend, T. Fahy *et al.*, 'Treatments for dangerous severe personality disorder (DSPD)', (2011) 22 Journal of Forensic Psychiatry & Psychology 411, 424). Indeed, patients only undertook, on average, 2 hours of psychological treatment per week (Burns *et al.* 2011, 421).

[59]P. Litton, 'Criminal responsibility and psychopathy: Do psychopaths have a right to excuse?', in K.A. Kiehl and W.P. Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (OUP 2013) 275, 293.

[60]T.S. Eliot, *Collected poems 1909-62* (New edn, Faber and Faber 2002) 222.

be granted access to an insanity defence for at least some alleged criminal offences. These are offences where the prohibitions are normally understood largely in moral terms, and where moral reasons normally provide the best reasons for lawful behaviour.

In Chapter 5, I clarified, by reference to emerging neurobiological findings, the nature of relevantly impaired psychopaths. While these individuals have not yet been identified, I argued, there is nevertheless ample scope for the identification of psychopaths lacking an ability to comprehend moral reasons concerning harm. I have suggested that there is also scope for more specific impairments, but have focused for pragmatic reasons on the possibility of a more generic harm-related lack of moral competence. I have also argued that it may be possible to develop biomarkers to identify these 'relevant psychopaths' (RPs). I also clarified which criminal offences would be relevant offences, drawing on Gross's philosophy.

In Section 6.2, I also considered the consequences of a finding of not guilty by reason of insanity (NGRI) in England and Wales. This permitted an exploration of the practical implications of making an insanity defence available for RPs. It became clear that, given the possibility of lengthy hospital detention justified on the basis of risk, RPs might elect not to plead insanity. In the absence of effective medical treatments (i.e. that can reduce the need for hospital detention by reducing risk), an insanity plea may only become attractive where there is a perceived threat of an end-of-sentence diversion to hospital (i.e. 'warehousing').

This is telling, because the prima facie case, which appeals to the unfairness of punishment in the face of RP's moral incompetence, may rely on the existence of effective medical treatments. Otherwise, as noted earlier, it may be fairer (from the perspective of the accused, if not society) to hold RPs criminally responsible and, where appropriate, punish them than it would be to treat them as nonresponsible.

Even if effective medical treatments become available for RPs, however, it is far from clear that the prima facie case should succeed. Even where relevant criminal offences are concerned (and, therefore, moral reasons concerning harm normally provide the most psychologically salient reasons for acting lawfully) RPs are likely to have had access to non-moral reasons for acting lawfully (e.g. legal and prudential reasons). Unless capacity for criminal responsibility is viewed through an exclusively moralistic lens, it is difficult to justify granting access to an insanity defence in these circumstances.

It might be argued, contrary to this, that the prima facie case does not require an exclusively moralistic approach, but just an approach that recognises the drastic effect that a

deprivation of normally salient moral reasons would have in the case of relevant offences. Relative to other citizens, it might be argued, RPs are at a significant disadvantage and their opportunity to act lawfully has been significantly reduced. A difficulty with this argument, however, is that it may ignore the motivating effect that nonmoral reasons may have. Perhaps I *really* don't want to be apprehended and punished; or, more positively, perhaps I *really* want to act lawfully because this is most effective way to achieve my goals. A lack of moral competence, even in the case of relevant offences, may be insufficient to vitiate capacity for criminal responsibility. Mitigation at a sentencing stage, rather than exculpation, may be the most appropriate option.

This is not to argue that there may not be circumstances in which RPs may justifiably succeed with an insanity defence in the future. The effects of a comorbid mental disorder, for example, might justify success with a defence, or contribute to a successful defence in the event that an insanity test utilised a 'thicker' standard of rationality than that adopted under current English law. My analysis in this thesis has focused on arguments that a lack of moral competence alone should justify success with an insanity defence, and that reform (or reinterpretation) of the insanity defence in English law should occur to accommodate RPs on this basis. These arguments, I have concluded, are unpersuasive given the relevance of nonmoral reasons to criminal responsibility.

Litton correctly identifies a number of undesirable consequences that could result should psychopaths succeed with insanity pleas on the basis of moral incompetence alone. There might be a backlash against the insanity defence in general, for example, with jurors becoming more likely to reject pleas from non-psychopathic defendants.[61] Victims might feel insulted and disrespected if psychopaths were found NGRI, given their intuitions about psychopaths' blameworthiness.[62] People might even come to question the basis of legal responsibility itself, given the counterintuitive association of apparent blameworthiness with nonresponsibility.[63]

As Litton comments, the media might also play an important role here: once reduced to soundbites or conveyed via striking headlines, the complex arguments of the prima facie case may be miscommunicated.[64] However, as I have shown, the case itself is very problematic. Even if the message were to be effectively conveyed and understood, it is likely

[61] Litton (n 59) 292.
[62] (n 59) 292.
[63] (n 59) 293.
[64] (n 59) 293.

to encounter significant resistance. If presented as an argument for mitigation rather than exculpation, on the other hand, it may be better received.

In Section 3.5, I outlined some of the conditions that would need to obtain, and features that a reformed M'Naghten-style defence would need to have, for RPs to potentially succeed with insanity pleas. Among other things, it would need to be the case that an inability to appreciate, in a moralistic way, the nature and quality of an action, or that it was wrong, could rebut the presumption of sanity. While this may be correct, a dogmatic legal assertion (e.g. made in a future statute) that RPs could be exempted under such circumstances, despite possessing nonmoral capacities relevant to criminal responsibility, could quite reasonably cause confusion, resentment and the undesirable consequences mentioned by Litton.

In Section 6.2, I suggested that biomarkers for RPs may also assess risk; if so, and RPs are 'high risk' individuals, a future debate in England and Wales about their management is perhaps more likely to be framed in terms of risk than responsibility.[65] Given societal concerns with *non*-relevant psychopaths and other 'DSPD' individuals, RPs may simply be regarded as a subset of a much larger risk-related problem. Issues concerning the insanity defence, which is rarely used and, since the abolition of the death penalty, holds more symbolic than practical significance, may simply be pushed aside.[66] Issues concerning the culpability of RPs, and the possibility of mitigation, may also be sidelined: the potentially mitigating factor of moral incompetence may, after all, be associated with a greater risk of serious harm to others.

Given the possibility that biomarkers for RPs may also assess risk, my explorations into the possible relationships between psychopathy and the insanity defence in this thesis may also represent explorations into a potential 'high risk' group. Aside from the issue of their responsibility, RPs may represent a subgroup of psychopaths at high risk of causing serious harm to others. Furthermore, from this perspective, 'relevant offences' may represent offences that could provide *evidence* of RPs' moral impairments for the purposes of diagno-

[65] While the costs of, and access to, tests such as fMRI may currently be an issue, this might be expected to become less problematic over time. In a UK private healthcare context, an MRI scan currently costs on average £490 ('What does an MRI scan cost in the UK?' (Private Healthcare UK, 2014) <http://www.privatehealth.co.uk/private-healthcare-services/diagnostic-imaging/mri-scans/mri-scan-prices/> accessed 27.6.14).

[66] Between 1997 and 2001, for example, it was successfully used in England and Wales only 72 times in a Crown Court setting (R.D. Mackay, B.J. Mitchell and L. Howe, 'Yet more facts about the insanity defence', (2006) Criminal Law Review 399, Table 1). In 'death penalty' States in the United States, where success with an insanity plea may enable a defendant to escape execution, the insanity defence has a much more poignant significance.

sis and/or risk assessment. Although mitigation might be appropriate where these offences are committed, their commission could also be regarded as a manifestation of RPs' moral incompetence.

If RPs are identified, and are a high-risk group, their management would likely raise similar problems to those encountered in the management of other DSPD individuals in England and Wales. Some helpful insights into these problems can be gleaned by examining proposals made at the origins of the DSPD programme. 'DSPD' is an administrative category, rather than a clinical diagnosis. The criteria, which are still in use, require the presence of a 'significant' personality disorder, which need not be PCL-R psychopathy, and a risk of causing 'serious physical or psychological harm' to others.[67] One of the strategies proposed by the Labour government in 1999, in the Green consultation paper *Managing dangerous people with severe personality disorder*,[68] was that the entire DSPD group be managed in a specialist 'third service'.[69] These proposals, labelled 'Option B', arose in the wake of well-publicised cases such as that of Michael Stone. They proved to be highly controversial, and were not adopted.[70]

It was noted in the consultation paper that the Prison Service 'has always resisted holding together its most difficult to manage prisoners, preferring instead to disperse them throughout a number of high security prisons'.[71] The stress for staff associated with managing such patients, it was remarked, could only be exacerbated where large groups were present who were also being detained indefinitely.[72] It was also noted that where difficult DSPD persons are grouped together 'Prison rules would not apply...but there would need

[67] More specifically, these have been, first, that a person is 'more likely than not to commit an offence within five years that might be expected to lead to serious physical or psychological harm from which the victim would find it difficult or impossible to recover'; second, that they have 'a significant disorder of personality'; and, third, that the 'risk presented appears to be functionally linked to the significant personality disorder' (Tyrer *et al.* (n 56) 95).

[68] Department of Health & Home Office, *Managing dangerous people with severe personality disorder: Proposals for policy development* (1999); O'Loughlin (n 31) 173.

[69] Department of Health & Home Office, *Reforming the Mental Health Act. Part II: High risk patients* (Cm 5016-II, 2000) para. 2.4.

[70] The more conservative 'Option A' proposals, which largely maintained the existing legal framework, were also not adopted (M. Rutherford, 'Blurring the boundaries: The convergence of mental health and criminal justice policy, legislation, systems and practice' (Sainsbury Centre for Mental Health, 2010) 48). Instead, a pilot programme was developed in five locations: two secure hospitals, and three high-security prisons ((n 31) 173–4).

[71] (n 68) 18 para. 34.

[72] (n 68) 18 para. 34.

to be some provision of similar control mechanisms'.[73] Objections to the 'Option B' proposals, reported in Part II of the subsequent White Paper *Reforming The Mental Health Act*, echoed these concerns, with worries expressed that it would not be possible to manage DSPD persons gathered together in Option B facilities 'safely in a suitable therapeutic environment'.[74]

Turning now to RPs, in the absence of effective (i.e. significantly risk-reducing) medical treatments it might nevertheless be desirable to detain these persons for 'treatment', in whatever modest ways were available, to protect the public from serious harm (assuming RPs were a high-risk group). This could be effected either at a sentencing stage, via diversion to hospital (e.g. via s.37 MHA, with a restriction order attached under s.41[75]), or later via transfer from prison. However, the 'Option B' debate indicates that grouping these persons together, should this management strategy be pursued, would prove to be highly problematic. Such a strategy could create difficulties for staff and, by necessitating a prison-like environment, undermine attempts to treat RPs.

The practical necessity of prison-like conditions in such an environment could be viewed as an inevitable 'convergence' between hospital and prison regimes. Rutherford's report in 2010 for the Sainsbury Centre for Mental Health identified an ongoing 'convergence' in legislation, policy and practice in the mental health and criminal justice spheres in England and Wales.[76] While this process was viewed as beneficial in some respects (e.g. it enabled greater cooperation and between organisations in the pursuit of shared goals, such as diversion), concerns were raised about a blurring of lines between prisons and hospitals. Convergence, it was suggested, might 'de-professionalise' staff, create a non-therapeutic environment, and lead to confused professional roles (e.g. with psychiatric nurses acting more like prison officers).[77]

While the idea of 'dispersing' RPs rather than grouping them together may seem like the solution, a further difficulty is that this strategy may be inapplicable in a hospital setting. RPs, like other highly psychopathic persons, may not mix well with other patients who

[73](n 68) 18 para. 34.

[74](n 69) para. 2.6.

[75]It is also possible to divert initially to hospital for treatment, with an order for subsequent transfer to prison (s.45A MHA). For critical discussion of these 'hybrid' orders, see J. Laing, 'The proposed hybrid order for mentally disordered offenders – a step in the right direction?', (1996) 18(2) Liverpool Law Rev 127; Bartlett and Sandland (n 3) 380.

[76](n 70) 8.

[77](n 70) 86.

may be vulnerable to exploitation or abuse.[78] Thus, to the extent that hospital detention is pursued as an option (e.g. at sentencing, or after a prison sentence has been served) this may require dedicated, specialist, facilities. These might be designed to house RPs in conjunction with other DSPD persons.[79] However, in facilities like this, a prison-like environment might be unavoidable.

The implementation of a prison-like regime in a high-security hospital is also expensive. Maden reports a hospital-based cost per DSPD patient per year of £200,000.[80] This is significantly more expensive than prison confinement, which has been estimated at approximately £34,000 per prisoner per year.[81] Given that the duration of detention may be lengthy for RPs (and potentially for life), cost to taxpayers may therefore be considerable.

Many of these issues would be addressed if effective treatments (as I have defined this) became available for RPs. It is currently possible, for example, to render activity within specific neuronal circuits light-sensitive.[82] This opens up the possibility of direct and precise manipulation of activity within circuits as a treatment for some psychiatric disorders. In theory, the amygdala-vmPFC circuit hypothesised by Blair to be important in the aetiology of psychopathy could be directly manipulated. Future 'optogenetic' therapies, if they are developed, may require specialist facilities, as well as specialist monitoring and care of persons undergoing such therapy. They may, therefore, be expensive. However, overall, given the reduced need for hospital detention, such therapies may make it more economically feasible to detain RPs in a hospital setting.

There may, however, remain a residual 'effectively untreatable' group of RPs that requires lengthy confinement. Furthermore, treatments for RPs may not be effective for non-

[78] Litton (n 59) 293.

[79] The current government plans to abolish the 'DSPD' label but continue the programme, discontinuing it within hospitals but expanding it within prisons (O'Loughlin (n 31) 183). The DSPD concept, therefore, is likely to continue to be relevant, although the label may become defunct.

[80] (n 32) 10. This is high for forensic civil confinement: the cost of detention and treatment in a medium secure unit in the UK has been estimated at £451 per bed per day, equivalent to £162,360 per patient per year, although calculating of the cost of forensic civil confinement is complex given variable care requirements (J. Walker, J. Craissati, S. Batson *et al.*, 'How to get better value for money from psychiatric care units' (Health Service Journal, 27 Feb 2012), <http://www.hsj.co.uk/resource-centre/best-practice/commissioning-resources/how-to-get-better-value-for-money-from-psychiatric-care-units/5041168.article> accessed 27.6.14).

[81] The average cost of prison per prisoner per year in England and Wales in 2011–12 was £34,771. 'NOMS Annual Report and Accounts 2011-12' (Ministry of Justice, 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218336/prison-costs-summary-11-12.pdf> accessed 27.6.14.

[82] D.J. Anderson, 'Optogenetics, sex, and violence in the brain: Implications for psychiatry', (2012) 71(12) Biological Psychiatry 1081.

relevant psychopaths (i.e. psychopaths possessing moral competence[83]). 'Relevant psychopathy', then, can be seen as part of a larger problem that may need to be addressed therapeutically in a piecemeal way. RPs are also, potentially, members of the even larger group of DSPD persons in England and Wales.[84]

6.3.2 Limitations of analysis, and conclusion

It is important to note some possible issues with my discussion of RPs. The most obvious issue is that this group has not yet been identified. I argued, in Section 5.2, that there is an empirical 'space' for this group, and that psychopaths lacking a capacity to comprehend moral reasons concerning harm may be identified in the future. This, of course, is an empirical 'bet' and it is possible that RPs, as I have defined them, will not be discovered. It is also possible that subtypes may exhibit specific moral impairments (e.g. concerning deception, or specific domains of harm), rather than a generic impairment. I have suggested, however, that a generic harm-related moral impairment is a reasonable place to start, analysis-wise, given our current state of knowledge. I have also focused on the possibility of a *complete* inability to comprehend moral reasons concerning harm, in order to side-step complex threshold-related issues.

It may also be the case that not all RPs, should it become possible to identify them, pose a 'high risk' of serious harm to others. Although it may be difficult to imagine how a person lacking an ability to comprehend moral reasons concerning harm might navigate through life without causing serious harm to others, how the condition manifests itself may depend significantly on context. This idea is relevant to current debates about the relationship between criminal behaviour and psychopathy: due to concerns about context, some commentators have argued that criminal behaviour may represent a 'downstream correlate' of psychopathy (see Section 2.3). Notwithstanding this debate, however, within a particular context, an increased incidence of criminal behaviour, relative to other persons in that context, could provide evidence of relevant psychopathy. That is, the commission of multiple 'relevant offences' could be viewed as 'in keeping with' a diagnosis of RP, provided this was supported by other data (e.g. information from psychological assessment and biomark-

[83] This again raises the issue of thresholds, given that there may be a 'gray area' in terms of degrees of competence between relevant and non-relevant psychopaths.

[84] As noted above, however, the current government plans to abolish the 'DSPD' label (footnote 79, p.174).

ers). Additionally, insofar as the RP diagnosis assesses risk, the commission of relevant offences could play a role in risk assessment.

Another possible issue is that it may transpire that not all RPs are PCL-R psychopaths (which I have hitherto supposed). RPs may stray beyond any possible subset of PCL-R psychopathy. This might not be surprising, given that the PCL-R is derived from the clinical tradition (in particular, as has been seen, the work of Cleckley) rather than from neurobiological research. Future developments may lead to a refinement of, or departure from, the PCL-R. For present purposes, however, given our current knowledge of psychopathy subtypes, it seems reasonable to orientate discussion around this test. In addition to its prominent use in forensic clinical settings, it is also widely used to select subjects for neuroscientific research.

A further issue to note is uncertainty regarding the scale of the problem posed by RPs. If the RP group is small, relative to PCL-R psychopaths as a whole, then the issues raised by RPs may be dwarfed by those raised by the broader psychopathy group. Alternatively, however, RPs may form a larger group, possibly extending beyond the category of PCL-R psychopaths. This represents an additional area of uncertainty regarding the concept of 'relevant psychopathy'.

Despite issues such as these, the concept of 'relevant psychopathy' has provided a useful means of examining the possible interaction between the insanity defence in English law and psychopathy in this thesis. Although current evidence does not support the existence of RPs, it is possible that such persons may exist and that biomarkers may be developed to identify them. As such, the empirical requirement of the prima facie case may be met in the future: that is, psychopaths lacking moral competence may exist, and it may be possible to identify them.

Even if it becomes possible to identify RPs, however, it has been seen that are significant problems with the prima facie case. Perhaps the most serious is that RPs may have access to nonmoral reasons for refraining from committing criminal offences. Thus, even where relevant criminal offences are concerned (i.e. where moral reasons concerning harm might normally provide the most salient reasons for acting lawfully) RPs may be responsive to nonmoral reasons, such as legal and prudential reasons, that may ground criminal responsibility. In these circumstances, I have argued, mitigation may be more appropriate than exculpation.

The discussion of relevant psychopaths and relevant offences in this thesis, therefore,

may more properly amount to a clarification of relevant psychopaths and offences for the purposes of mitigation. However, I have also suggested that biomarkers for RPs may assess risk. This changes the complexion of things further: rather than amount to an exploration of which psychopaths, and which offences, may be relevant for the purposes of a reformed (or reinterpreted) insanity defence, or for the purposes of mitigation, my efforts may have clarified the nature of a potentially high-risk group, and the criminal offences that might provide evidence of the impairments of moral cognition exhibited by members of this group.

That diagnostic tests may also assess risk might be unsurprising, given that a clinical diagnosis may carry with it a prognosis and permit predictions about the course of a condition or illness.[85] The implications, however, go beyond RPs as I have defined them. In addition to (or instead of) the more generic harm-related lack of moral competence I have focused on, neuroscientific research may identify psychopathy subtypes characterised by more specific, legally-relevant, impairments.[86] This may enable predictions to be made, with respect to psychopathic persons, concerning more specific criminal behaviours in the future.

Risk assessment, however, is inherently error-prone. The 'Option B' proposals, mentioned above, also included proposals to enable the detention of DSPD persons in civil rather than criminal proceedings.[87] This essentially amounted to a form of 'pre-emptive' detention, where persons could be detained because they were considered at high risk of seriously harming others before they had committed any crime. Perhaps unsurprisingly, these proposals were highly controversial. Concerns were raised, among other things, about the reliability and accuracy of DSPD assessment, including its reliance on risk assessment.[88]

But could the 'neuropredictive' abilities of biomarkers diminish these concerns? In a House of Commons debate on the Option B proposals, the then Home Secretary Jack Straw accepted that 'taking away the liberty of individuals who have not been convicted of a proportionate criminal offence' was 'a very grave step to take' and should not be taken lightly.[89]

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[85]I. Singh and W. Sinnott-Armstrong, 'Introduction: Deviance, classification, and bioprediction', in I. Singh, W.P. Sinnott-Armstrong and J. Savulescu (eds), *Bioprediction, biomarkers, and bad behavior: Scientific, legal, and ethical challenges* (OUP 2013) 1, 3.

[86]Furthermore, these do not necessarily need to be impairments of moral cognition, given that other kinds of reasoning, and other cognitive capacities, are relevant to criminal responsibility.

[87](n 68) 16.

[88](n 69) para. 2.6. Current risk-assessment tools have been described as only 'moderately' accurate (M. Yang, S.C.P. Wong and J. Coid, 'The efficacy of violence prediction: A meta-analytic comparison of nine risk assessment tools', (2010) 136(5) Psychological Bulletin 740).

[89]HC Deb 15 February 1999, vol 325, cols 601-613, col 605 <http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990215/debindx/90215-x.htm> accessed 27.6.14.

Nevertheless, he suggested that such reforms could be compatible with the ECHR.[90] In the context of a climate of fear, prompted perhaps by a Michael Stone-like incident, a greater predictive ability may make more radical reforms politically palatable.

If biomarkers for some subtypes of psychopathy also assess risk of future violence or otherwise criminal behaviour, then the quest for a deeper scientific and medical understanding of psychopathy may simultaneously usher in an era where more radical reforms, such as the pre-emptive detention of RPs, become more tempting. Given that the development of effective treatments might depend on a greater understanding of psychopathy, an ability to identify and potentially treat such persons may emerge in tandem with a predictive ability of interest to courts and policymakers.

Returning, finally, to the issue of criminal responsibility, it seems probable that the risk posed by RPs, should they be identified, would have greater policy implications in England and Wales than any questions raised concerning their responsibility. It has been seen that the prima facie case is problematic, and may only amount to a case for mitigation rather than exculpation. The relevant psychopaths and relevant offences for the purposes of this case may be most relevant to a debate about risk, and its use as a justification for compulsory detention to protect others from serious harm.

Psychopathy is a problematic condition in part because it seems to straddle both the medical and legal domains. Scientific research into psychopathy may fracture this condition into a variety of subtypes, some of which are of greater clinical interest, and some of which are of greater legal interest. Whether the term 'psychopathy' will survive such a process, should it occur, remains to be seen. It might be desirable that the term disappears from medical and legal use, to be replaced with less value-laden terminology. In any event, a greater scientific understanding of psychopathy may simultaneously have medical, legal and wider policy implications.

[90] As noted above, in *Hutchison Reid v UK* the ECtHR held that civil detention could be justified purely on the basis of risk of harm to others.

Conclusion

In this thesis I examined a case for providing at least some psychopaths with access to an insanity defence for some alleged criminal offences, focusing on the insanity defence in English law. This has been termed the 'prima facie case' for access to an insanity defence, because even if it were successful, we might nevertheless reject it for other reasons (e.g. wider policy reasons).

I began, in Chapter 1, by undertaking an analysis of the insanity defence, in order to show how psychopaths lacking moral competence might fair with respect to the law as it currently stands. It was seen that several components of the insanity defence test, contained in Rule 3 of the M'Naghten Rules, are problematic due to their interpretation by English courts: the 'defect of reason' criterion, and the two 'limbs' of the test. I also discussed the more typical legal conception of psychopathy, as a condition characterised by a partial lack of volitional capacity (i.e. lack of self-control); psychopaths conceptualised in this way are also unlikely to succeed with an insanity plea, and are effectively excluded from the defence.

Chapter 2 provided some clarification of what is meant by 'psychopathy'. In it, I considered a number of issues that are subject to considerable debate. The goal was primarily to orientate the thesis with respect to these debates rather than adopt firm positions. I began with a historical survey of the evolution of the concept from its origins in Pinel's work to Cleckley's influential modern formulation. I then focused on the psychopathy checklist revised (PCL-R), the most widely used psychometric test for psychopathy in forensic psychiatric settings, before moving on to consider the evaluative nature of psychopathy and the question whether psychopathy may be a mental illness.

With respect to the PCL-R, I noted that the use of criminal behaviour in assessment has been debated, and considered the Law Commission's concerns that evidence of psychopathy may simply arise from criminal behaviour. I did not attempt to resolve this debate. However,

I suggested that the Law Commission's concerns about the use of criminal behaviour in practice to diagnose psychopathy may not be tenable for long; in particular, research in neurobiology may provide other ways to diagnose, or support the diagnosis of, psychopathy that do not rely on criminal behaviours in the future.

As regards the evaluative nature of psychopathy, I concluded that it may be impossible to diagnose a person with psychopathy without negatively evaluating this person. I noted that this does not prevent there from being a science of psychopathy; however, it may mean that the identification of individuals as psychopathic is unavoidably evaluative. There may also be limits on the extent to which scientific data can assist with a diagnosis of psychopathy, given the use of thick terms in the PCL-R.

As regards the possible status of psychopathy as an 'illness' or 'disease', I considered the possibility that PCL-R psychopathy may qualify as such under Wakefield's influential 'harmful dysfunction' account and, therefore, under the related DSM-IV and DSM-5 general definitions of mental disorder. I suggested that issues surrounding the coherence of psychopathy as a condition (e.g. problems concerning its relationship with criminal behaviour) may currently prevent its qualification as a illness or disease. I made the point, however, that although access to an insanity defence could, in theory, depend on a condition's status as an illness or disease, this need not be the case. In principle, a condition's status as an illness, disease or disorder (terms I use interchangeably) in medical terms is neither necessary nor sufficient for it to amount to a 'disease' or 'disorder' for legal purposes.

This discussion provided some background for my presentation of the prima facie case in Chapter 3. I initially discussed the responsibility theory underlying the case, explaining why reasons-responsiveness compatibilism may provide a more satisfactory basis for the case than mesh compatibilism (the main rival theory). I then considered one of the key objections to the case from this perspective, arising from reasons-responsiveness theories that deny that moral competence is a prerequisite for holding persons morally responsible; I argued, following Litton, that this 'Scanlonian' approach does not translate well into a criminal law context. I then addressed a further challenge to the case, arising from the relevance of nonmoral capacities to criminal responsibility. This challenge, I argued, is more problematic for the case; however, I deferred more substantial discussion of this issue to the final Chapter.

At the end of Chapter 3, I considered the relationship between the prima facie case and the 'knowledge' requirements in the M'Naghten Rules. This permitted clarification of the

conditions that would need to obtain, and features that a reformed M'Naghten-style defence would need to have, for psychopaths lacking moral competence to potentially succeed with insanity pleas.

For the prima facie case to have real-world relevance, however, it must be the case that there are psychopaths who lack moral competence. This formed the primary focus of Chapters 4 and 5. In Chapter 4, I examined research concerning the performance of PCL-R psychopaths on the moral/conventional distinction test. In theory, this line of research might show that psychopaths lack an ability to distinguish between moral and conventional wrongs or norms. This inability could indicate a lack of moral knowledge, potentially relevant to the 'knowledge' requirement of a reformed insanity defence. However, initial claims that psychopaths could not make this distinction were controversial, and appear to have been contradicted by a more recent study utilising a larger population. Consequently, I concluded, current research in this area cannot assist with the prima facie case.

An issue that emerged from this discussion was that impression management by psychopaths may mask experimental findings. Even if psychopaths were to lack moral knowledge, or an ability to make a genuinely moral judgment, they might report what they believe other people might say in the circumstances. This is potentially problematic for any studies of moral cognition in psychopathy that rely on expressed moral judgments.

With this in mind, my explorations in the first part of Chapter 5 looked behind the Cleckleyan 'mask' at neuroimaging, genetics and epigenetics research in psychopathy. I focused, in particular, on where this might lead in the future, and on the potential for developing a deeper understanding of psychopathy in neurobiological terms. I argued, given emerging findings and techniques such as diffusion tensor imaging, that there is scope for the development of a taxonomy of psychopathy subtypes. Within this system, I argued, there is empirical 'space' for psychopaths lacking a capacity to comprehend moral reasons concerning harm. Furthermore, it may be possible to develop biomarkers to identify these persons in practice. I noted that there is also 'space' for psychopaths with more specific impairments of moral cognition, but elected for pragmatic reasons to focus on the possibility of a lack of generic harm-related moral competence. I termed these persons 'relevant psychopaths' (RPs).

In the second part of Chapter 5 I considered, in broad terms, which offences should be relevant offences for the purposes of a reformed, psychopath-accommodating, insanity defence (assuming that the prima facie case is successful). I argued that the relevant of-

fences would be those where the prohibitions would normally be understood primarily in terms of moral reasons concerning harm. Where RPs lack these particularly salient reasons, these persons are at a significant disadvantage relative to other citizens. Drawing on Gross's classification of offences according to harm, I suggested that these could be offences involving violations of interests such as those in physical welfare, personal security and personal property. Although this potentially encompasses a wide variety of offences, some kinds of offences where moral reasons concerning harm would normally be less psychologically salient (e.g. fraudulent completion of a tax form), would be excluded.

Finally, in Chapter 6, I returned to the arguments of the prima facie case and considered whether an insanity defence should be made available for RPs in England and Wales. First, I considered the current law and policy concerning diversion and, in the event that an insanity defence were made available for RPs, the likely consequences of a finding of not guilty by reason of insanity (NGRI). An issue that arose is that RPs may not plead insanity because success with a defence could result in lengthy hospital detention. This suggests, I argued, that the prima facie case may depend, at least partly, on the availability of 'effective' medical treatments (i.e. that could reduce the duration of hospital detention by reducing risk of harm to others).

Even if effective treatments were available, however, the prima facie case remains problematic. In particular, while RPs may lack moral competence, they are likely to retain capacities relevant to criminal responsibility (e.g. an ability to respond to legal and prudential reasons). Consequently, I argued, the arguments of the prima facie case may be better viewed as arguments for mitigation of culpability rather than exculpation. Thus, my exploration of relevant psychopaths and relevant criminal offences in the thesis may be better viewed as a clarification of potentially mitigation-worthy persons, and the circumstances where mitigation may be appropriate.

I also argued, however, that RPs may have a high risk of causing serious harm to others. Thus, my exploration of relevant psychopaths and relevant criminal offences in this thesis may also be viewed as the specification of a possible 'high-risk' group, and of the offences that could provide evidence of their moral incompetence. This suggestion was necessarily speculative, given that RPs have not yet been identified; nevertheless, I argued, it seems plausible insofar as RPs are a morally 'blind' subset of psychopaths lacking a capacity to comprehend moral reasons concerning harm.

I concluded my discussion in Chapter 6 by considering the possibility that diagnostic

biomarkers for RPs may also assess risk. I suggested that the 'neuropredictive' properties of diagnostic biomarkers for RPs, and other identifiable subtypes of psychopathy, may enable more precise prediction of violent or otherwise criminal behaviours in the future. This may tempt policymakers towards more radical policies, such as pre-emptive detention. Consequently, the development of diagnostic biomarkers for RPs (and/or other subtypes of psychopathy with more specific impairments) may have significant policy implications.

A significant issue that has emerged is that greater scientific understanding of psychopathy, which may be important clinically, may also lead to a greater predictive ability of interest to courts and policymakers. We cannot easily divorce the clinical implications of scientific research developments in this area from the legal and policy implications. Greater understanding of psychopathy may identify at least some subtypes with a greater risk of violent or otherwise criminal behaviour, and diagnostic biomarkers for these individuals may also assess risk.

This also means that the development of effective medical treatments for some of the most problematic psychopathic persons, insofar as this depends on greater scientific understanding, may coincide with the development of ways to more accurately gauge risk. Greater predictive ability may also arise in circumstances where effective treatments are not yet available. This highlights the complexity of the problems for society posed by some psychopaths. This is not merely a problem that effective treatments can 'solve' but one where scientific advancements, made perhaps with the ultimate goal of developing treatments in mind, may generate risk-assessment capabilities that tempt policymakers towards more radical policies.

As regards the nature of these more radical policies, I have suggested that pre-emptive detention may be pursued, and may also be more politically feasible if a high-risk group, such as RPs, could be identified and their risk assessed with greater accuracy. Another possibility is the development of a screening programme for RPs (assuming biomarkers were cost-effective). How these might operate in practice, and the implications of such developments (e.g. legal and ethical), are not something I have examined here but could be explored in further research. A critical issue is that even 'more accurate' risk assessment tools would remain imperfect: false positives could lead to inappropriate detention, and false negatives could lead to inappropriate release. In the background, however, are social and political issues: e.g. how much risk should society tolerate, and to what extent should politicians pursue a 'public safety' agenda in such areas? Clarification of what is meant by

'high risk' may also be desirable: this appears to be a partly statistical, and partly normative, concept.

The development of biomarkers to identify subtypes of psychopathy would also raise significant admissibility concerns. At what point is an emerging test (e.g. performance on fMRI in response to a task, or the presence of a particular gene variant) suitable for use in a legal context? A particular difficulty, mentioned in Section 5.2.5, is the 'group to individual' problem. While it may be possible to identify subtypes of psychopathy within populations, and by reference to these findings develop biomarkers, applying these findings at an individual level may be highly problematic. Information from biomarkers may only indicate a probability that a person falls into a particular group. Thus, while this data may be useful in practice, and may be of interest to policymakers, decisions about individuals are likely to be error-prone. Additionally, values, along the lines discussed in Section 2.4, may also influence decision-making at this level where the labelling of individuals utilises thick terms. Given the significance of this problem for practice, and the dangers that may arise should it be ignored, it may be desirable to focus on this issue in future research.

The possible development of effective medical treatments (as I have used the term), that could reduce the need for hospital detention by significantly reducing risk of harm to others, also raises various issues that could be explored in further research. A particularly salient issue is that RPs diverted for medical treatment might refuse treatment. While it might seem difficult to grasp why a person would refuse a treatment that could make them 'moral', the consequences of successful treatment could be very distressing. If, as an adult, one were to come to understand the moral significance of harming others, where this had previously been lacking and where one had previously caused great harm, coming to appreciate this could be traumatising. Although RPs might not be able to appreciate, in advance, how distressing this might be, they might nevertheless know that other, previously treated, RPs had been traumatised by the therapy. This could undermine attempts to treat adult RPs, if consent were required.

At least under current law, it is possible that invasive attempts to treat RPs (e.g. via optogenetic treatments) would not require consent. Currently, under the Mental Health Act 1983 (MHA), medical treatment may be administered compulsorily,[1] although exceptions

[1] s.63 provides that 'The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering'.

are made in some cases, such as for neurosurgery[2] where 'consent and a second opinion' from an approved doctor is required (s.57).[3] Given that deep brain stimulation, a technique involving the neurosurgical implantation of pacemakers, is not included under s.57,[4] it is possible that some invasive therapies, like optogenetic therapy, would not be included under this section.[5]

As regards the possibility of coercive effective treatment, cooperation by RPs might be needed for the learning of 'care based' morality (to utilise Blair's term[6]): this may require specialist input from therapists, and a desire from patients to acquire this knowledge. However, it might be possible to coercively bestow a *capacity* for this learning. Perhaps a developmental window could be 'forced open' later in life. This could make it practically feasible to compulsorily administer some aspects of future 'moral' treatments for RPs. The ethical defensibility, or otherwise, of this could be a question for future research.[7]

Many of the issues raised in this thesis concerning the management of RPs are also relevant to the wider group of non-relevant psychopaths and, in England and Wales, the administratively-defined group of Dangerous and Severe Personality Disorder (DSPD) persons. With respect to these other groups, similar issues arise concerning long-term detention, where this is deemed necessary to protect the public from serious harm (e.g. the cost to the State of hospital detention, and problems associated with 'convergence' where these persons are grouped together[8]), and the availability of effective treatments. The group I have focused on, however, is distinct in that it has been defined by reference to theories of moral responsibility; this has permitted a more theoretically-grounded exploration of possible relationships between psychopathy, criminal responsibility and risk, and the relevance of effective treatability to the management of RPs.

It was argued, in the final analysis, that the prima facie case for access to an insanity

[2] i.e. 'any surgical operation for destroying brain tissue or for destroying the functioning of brain tissue' s.57(1)(a).

[3] Second opinion approved doctors (SOADs) must be consultant psychiatrists with at least five years experience (P. Bartlett and R. Sandland, *Mental health law: Policy and practice* (4 edn, OUP 2013) 411.

[4] Bartlett and Sandland (n 3) 413.

[5] s.57(1)(b) states that 'other forms of treatment' may be included under s.57 following 'regulations made by the Secretary of State'. The Care Quality Commission, an independent heath care regulatory body, has called for deep brain stimulation to be included under this section ((n 3) 413).

[6] See Section 5.2.2.3.

[7] In this regard, see for example T. Douglas, 'Criminal rehabilitation through medical intervention: Moral liability and the right to bodily integrity', (2014) 18 Journal of Ethics 101.

[8] See Section 6.3.1.

defence for RPs is not persuasive, and may be better construed as an argument for mitigation. A further option, which I have not explored, concerns the possibility that RPs could be treated as possessing a diminished capacity for criminal responsibility: in the case of relevant alleged offences they may possess some, but not all, of the relevant capacities. This might also justify mitigation, but RPs would not be regarded as fully criminally responsible.

In England and Wales there is a defence of 'diminished responsibility', but this is only available where the alleged offence is murder.[9] Success with the defence downgrades an offence to manslaughter, and permits judicial discretion with sentencing.[10] If RPs were to be viewed as possessing diminished responsibility with respect to alleged relevant offences, these offences would extend well beyond murder. Thus, reforms to the defence might be appropriate; alternatively, the creation of a specific 'psychopathy' defence, in recognition of RPs' reduced capacity in the case of relevant offences, might be warranted. This could be topic for further research. What is meant by 'diminished responsibility' in English law, however, would require careful examination.

To summarise, I have argued in this thesis that the prima facie case for providing some psychopaths with access to an insanity defence may obtain real-world relevance in the future, in the event that it becomes possible to identify psychopaths lacking moral competence. Even if this occurs, however, the philosophical arguments underlying the case are problematic. A particular problem is the claim that a lack of moral competence alone ought potentially to justify an exemption from criminal responsibility in some cases. Given the relevance of nonmoral reasons to criminal responsibility, the prima facie case may be best viewed as an argument for mitigation rather than exculpation.

It is also possible, however, that psychopaths lacking moral competence will pose a high risk of causing serious harm to others. Consequently, the clarification of relevant psychopaths and relevant offences undertaken in this thesis may also amount to a clarification of a high-risk group and the offences that may provide evidence of their lack of moral competence. I have explored a number of ways in which this might have policy implications, focusing on the relationships between responsibility and risk, and the use of biomarkers for diagnostic and risk assessment purposes. Should RPs be identified, the risk posed by these persons, rather than their capacity for criminal responsibility per se, may have significant

[9] s.2 of the Homicide Act 1957.

[10] A.P. Simester, G.R. Sullivan, J.R. Spencer *et al.*, *Simester and Sullivan's criminal law: Theory and doctrine* (4th Revised edn, Hart 2010) 714–5.

policy implications.

The discussion, however, has also raised issues that go beyond psychopathy. Just as developments in cognitive neuroscience may render existing clinical categories obsolete, and reveal complexity where there is thought to be uniformity, these scientific developments may reveal legally significant categories where there are thought to be none. As our understanding of moral and other legally-relevant aspects of cognition deepens, this is likely to create challenges for courts, juries, and policymakers. While psychopathy is just one particularly problematic case, it illustrates a number of the difficulties that may lie ahead. In this way, this historically contested condition remains highly relevant.

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