Insanity and automatism: questions from and about the Law Commission's Scoping Paper

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Journal Article

Criminal Law Review

Crim. L.R. 2012, 12, 927-945

Subject
Criminal law

Other related subjects
Criminal evidence

Keywords
Automatism; Defences; Insanity; Law Commission; Mens rea

Crim. L.R. 927 The Law Commission has now produced a Scoping Paper and not, as previously anticipated, a Consultation Paper on insanity and automatism. [1] This is perhaps the first of a number of wise moves on its part. After all, could one formulate proposals for reform of the law in the absence of answers to many of the questions it has asked? Probably not, given the paucity of data the Commission reports on the core issues. [2] But one might equally ask whether sensible proposals can be formulated in the absence of any certainty about the future direction of the law on unfitness to plead, the uncertain relationship *between* insanity and automatism (which the Scoping Paper addresses), and the functioning of the newly minted defence of diminished responsibility, with its emphasis on a causative link between the mental disorder and the homicide. All these areas of law problematically overlap, making any proposals for fundamental change—the task of the Commission—a Gordian knot of the first order.

This article is divided into four parts. First is a brief examination of the problems of overlap, crudely relating to problems of definition and the potential scope of insanity and automatism. Secondly come problems relating to the Commission's aspirations for a principled approach: should an insanity defence be based on the absence of mens rea or on an inability to attribute responsibility for the crime to the accused? The Commission, rightly I think, opts for the latter, but that inevitably draws it back into the terrain of the accused's lack of capacity, terrain that will also be entered should its earlier proposals be adopted on unfitness to plead.[3] This principled approach will also embrace the territory of strict liability offences and cover offences dealt with exclusively in the magistrates' court. Thirdly, the article considers issues of practice. The Commission is alive to the theoretical difficulties with the law, and its failure to keep pace with modern medical and psychiatric ***Crim. L.R. 928** developments, but is less certain about whether the law causes problems in practice. The statistics are very patchy, despite sterling work over a number of years by both Professors Mackay and Thomas[4]; the reporting of the relevant cases, with so many being resolved by guilty pleas, is also hazardous. There is also one chicken and egg problem; all the time the law remains theoretically problematic it is impossible to know whether accused persons who could rightly fall within its remit are excluded because practitioners are either unaware of its loose practical application or are discouraged by its potential to label individuals in a highly stigmatic fashion. Not only here are counsel trying to advise and explain law which is inherently complicated[5] but they are also doing so with clients whose own cognitive abilities have been, by definition, in question. Taking account of an accused's delusional beliefs about, for example, types of punishment[6] must make an already difficult job for counsel almost impossible. This is symptomatic of a wider problem that the criminal justice system has with mentally disordered defendants: the system tacitly assumes that defendants will be engaged, self-motivated and strategic, but this picture applies unreliably to those with mental disorder. That so few findings currently emerge of not guilty by reason of insanity can surprise no one.

All of that said, one could question the wisdom of the Commission's methodology, and the likelihood of useful responses emerging given the timeframe set. And this constitutes the fourth part of this article. The Scoping Paper was published on July 18 and the responses required by October 18.[7] The summer period may well be when some practitioners turn to, and reflect on, these tasks. But equally, given that the Commission is seeking to demonstrate a practical need for reform of the present law by garnering answers to specific questions, it may be that the response generated is both partial and anecdotal. Although the Commission has considered the issues in painstaking detail, and has been admirably clear in its published materials, including the 200 pages of further analysis of the law and what little is known about its practical application in the online *Supplementary Material*, this remains tortuous territory, and the discussion below will likely only add to those difficulties.

The final part of this article accordingly examines the nature of the questions asked and speculates about their likely answers. The Commission's Scoping Paper poses telling questions for its readers, but it is a systematic exercise only insofar as the Commission has gone through each element of the M'Naghten Rules, and the law on automatism, and broken them into their constituent parts to produce its 76 questions. Quite what the questions will garner may fail to do justice to the extensive work that has gone into producing these materials. Paradoxically, the problem is likely to be exacerbated if the Commission is right and that the way the law is applied in practice is, despite its theoretical shortcomings, largely satisfactory; then the motivation to respond amongst practitioners may not be great. ***Crim. L.R. 929** A limited response will only further deepen the quandary in which the Commission might already consider itself to be.

Problems of definition and scope

"The jurors ought to be told in all cases that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his 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 wrong … [if the defendant] labours under [a] partial delusion only, and is not in other respects insane … he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." [*M'Naghten (1843) 10 Cl. & F. 200* at 210].

The last section of the M'Naghten Rules, relating to partial delusions, is rarely referred to but it raises an interesting issue of principle. The example usually given is that it would exculpate (exculpate in the sense of resulting in the special verdict of not guilty by reason of insanity, but not in the sense of a complete acquittal) someone who made a mistake based on a delusion about self-defence, but not someone who believes a delusion that a man inflicted serious injury to his character and kills him in revenge; this accused would be convicted, assuming that he recognises that what he has done is legally wrong.[8] Knowledge of legal

wrongness, the second limb of the Rules, can thus trump its first element relating to cognitive defects. Ironically, it represents the operation of the normal rules of law overriding any special provision for those with severely cognitively disordered states. For defendants who make a mistake of fact whilst not labouring under a defect of reason from disease of the mind, a complete acquittal will result. [9]

A successful *M'Naghten* defence leads to the special verdict of "not guilty by reason of insanity". A "not guilty" verdict cannot attract punishment, or indeed any therapeutic detention which is not justified by the individual's disordered mental state. Two primary difficulties are evident. [10] First, the special verdict is over-inclusive, extending its remit to those who should properly be acquitted altogether on the basis of a defence of automatism. This group have included both those who commit offences whilst sleepwalking and those who "offend" during hyperglycaemic episodes. [11] Neither group can properly clinically be thought of as suffering from a disease of the mind which would respond to psychiatric treatment; indeed the treatment would be at best medical and, for those suffering from diabetes, proper management of their insulin levels and dietary intake. One historic example will suffice: threatened with the possibility that the special verdict of not guilty by reason of insanity would be returned, *Hennessy* pleaded guilty to offences of ***Crim. L.R. 930*** taking a conveyance and driving while disqualified. At his appeal it was argued that the defence of automatism should have been left to the jury, but the trial judge's ruling that his diabetic induced state fell within the terms of the "not guilty by reason of insanity" verdict was upheld by the Court of Appeal. [12]

This problem of over-inclusiveness has largely been remedied in England and Wales by the passage of: (a) the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 , which makes it a requirement for expert medical evidence to support a claim of insanity; and (b) the Human Rights Act 1998 , which requires domestic courts to take account of the jurisprudence of the European Court of Human Rights and to adhere to the tenets of the European Convention on Human Rights (ECHR) . Following *Winterwerp v The Netherlands* , [13] objective medical evidence is necessary for a finding that a person's mental disorder is of a kind or degree that warrants compulsory confinement before there can be compulsory admission to a mental hospital with its concomitant loss of liberty (art.5 ECHR). Finding psychiatrists who would assert that sleep-walkers and diabetics should be confined in psychiatric hospitals is not easy, hence stymieing any residual enthusiasm in the courts for disposing of such offenders in this way. Moreover, with the passage of the Domestic Violence, Crime and Victims Act 2004 a final injustice has been rectified, namely that of the automatic disposal to a psychiatric hospital of those accused of murder but found not guilty by reason of insanity. Only those whose mental disorders merit admission to a mental hospital will be dealt with in this way. If their mental disorder falls short of what is required for hospital admission, even given the accusation of murder and a finding that the actus reus had been committed, disposal in the community will be the only option. Hence, the problem of the over-inclusiveness of *M'Naghten* is of largely historical interest; and in this context arguable social defence needs cede to proper restraint in the use of therapeutic disposals.

The article will rather focus on the second criticism; namely, that its terms are under-inclusive. The consequence of this is that offenders who are manifestly mad are nonetheless precluded from using the defence (or their advisors think they are precluded, and do not pursue it). For example, those accused of murder may raise a defence of diminished responsibility, which implies partial responsibility (see Christopher Clunis below). If this defence is rejected, the perpetrator will be convicted of murder (see Peter Sutcliffe below). Where offenders do suffer from a serious mental disorder which reduces their responsibility for their offending, and yet cannot bring themselves within the terms of *M'Naghten* because of its under-inclusive reach, then the outcomes which result can be regarded as neither appropriate nor just.

This is a terrain in which it is wise to tread gently. If the proposals in the Law Commission's Consultation Paper on *Unfitness to Plead* were to be adopted, [14] briefly that the accused should have the capacity to engage meaningfully with the trial at the point of the trial, then the effective purchase of an insanity defence should be relatively slim. Technically, all those who were so disordered at the point of the offence as to comply with the requirements of an insanity defence ***Crim. L.R. 931*** would be unlikely to be fit for plea/trial: hence, they would be diverted from any determination of full criminal culpability. [15] Indeed, the numbers using the defence would be unlikely to exceed those currently found not guilty by reason of insanity.

The relationship between unfitness to plead and insanity is dynamic but asymmetrical. [16] Three exceptions are obvious. First, there are the psychotically disordered who are sufficiently successfully medically treated in the interim between the offence and trial so as to enable them to stand trial, but for whom their mental state at the time of the offence makes unjust any finding of criminal responsibility. Secondly, there are personality disordered individuals who retain capacity with respect to trial but whose responsibility for the offence may nonetheless be questionable. [17] And thirdly, there is a category of depressed individuals, who may pose challenges to those assessing responsibility and those assessing fitness to plead, but for different reasons; serious

depression can not only affect one's capacity and willingness to engage with the trial process, but also contribute to a positive desire for a punitive outcome if an accused perceives him or herself as deserving of punishment for what they have done. [18] In all of these cases there is likely to be an apparent mismatch between what the accused is claiming as his or her mental state at the time of the offence, and their appearance at trial, or an unsettling passivity in response to grave charges, making the jury peculiarly reliant on expert evidence. Yet that expert evidence, based as it will be on gradations of behaviour, may in turn be found unconvincing in courts pre-disposed to binary decision-making. [19]

One further caveat with respect to unfitness is necessary. The Law Commission's proposals received a somewhat mixed reception from clinical and legal professionals [20]; as yet there is no clarity about whether and in what precise form these proposals might be taken forward. But what is clear is that the scope of their initiative in unfitness has the capacity in its proposed form fundamentally to erode the demand and significantly pare the necessity for reform of the law of insanity and insane automatism.

Another area of overlap concerns the relationship between automatism and insanity. The bizarre rules on the internal and external causes of automatism are so hackneyed as to not require revisiting here, although they are fully dealt with in the Scoping Paper. [21] However, the Commission does raise the less familiar ***Crim. L.R. 932*** problem that if an accused wishes to establish an internal cause for automatism, this places the burden on them to establish their mental state on a balance of probabilities. An unhappy gap can result. For a verdict of sane automatism (which requires total destruction of voluntary control) a greater loss of capacity is required than for a verdict of insane automatism. In cases of sane automatism the prosecution can achieve a conviction if they prove beyond a reasonable doubt that the accused had *some* voluntary control. But if the defence are running in parallel an argument about "internal cause" (and many conditions have internal and external contributory factors), which resulted in the accused not knowing the nature and quality of the act or not knowing it was wrong, they only have to establish this on a balance of probabilities. [22] What then happens to those who have retained some degree of voluntary capacity so accordingly cannot qualify for a complete acquittal and yet that capacity is more than sufficient to prevent them qualifying under the internal cause doctrine? The answer is that they will be convicted despite not being fully capacitous. A variant of this problem is also raised with respect the insanity defence per se [23]; an accused person who fails to discharge the burden of proof (on a balance of probabilities) for the special verdict will be convicted, yet that conviction may be secured not on the basis that the jury were convinced beyond a reasonable doubt of the accused's guilt, but where there is a more than reasonable doubt that the accused is insane. Does the law thus discriminate against those with mental disabilities? [24] The Commission is robust in identifying this as a problem and in declaring that the European Commission of Human Rights in *H v United Kingdom* was wrong when it found that the law on insanity was not in breach of art.6(2). [25] The Law Commission regards this conclusion as "inescapable". [26]

Thus, the Commission concludes that there are strong principled reasons for reform of the law; and it helpfully documents these deficiencies both in the Paper and in Pts 2, 4 and 5 of the Supplement. However, it is less certain about the operation of the law in practice and whether reform will improve this, or have unintended consequences: hence the justification for the Scoping Paper.

Issues of responsibility

One major theoretical problem the Commission identifies concerns the current incoherence of the insanity defence. As the Commission asks, is insanity essentially a denial of mens rea or a denial of responsibility for the crime? [27] The former creates a narrow basis for the defence, limiting the scope for therapeutic interventions and maximising the social defence utility of the ensuing convictions. But the Commission prefers the latter, broader view of non-responsibility and argues that it would be "fundamentally unfair and unjust to hold someone criminally responsible for their conduct if, through no fault of their own, they lacked the ***Crim. L.R. 933*** capacity to obey the law". [28] Yet down this route lies the potential problem of the medicalisation of criminality and the perceived dangers associated with amelioration of disorder but the persistence of risk. Psychiatric confinement for those with mental disorder on the border of criminal responsibility/non-responsibility is by no means a perfect solution.

The Scoping Paper does not expand extensively on the justifications for its preferred approach of a denial of responsibility but it does point the reader in the direction of *Glanville Williams' Textbook of Criminal Law*. [29] Here Williams acknowledged that insanity per se is not a defence and that the M'Naghten Rules amount to little more than a denial of mens rea. Yet, as K.J.M. Smith has noted, prior to *M'Naghten* there was "nothing remotely resembling a consensus" as to the bases on which mentally incapacitated actors should not be convicted of criminal offences: the law encompassed both volitional defects

resulting in an inability to exercise self-control and lack of cognitive powers, an approach which Smith deemed an example of "judicial unintelligibility". [30] Only with the manifestly cognitively-based M'Naghten Rules (which ironically would not have encompassed Daniel M'Naghten's behaviour) did the law acquire its narrow remit. Williams concluded in a later passage in his *Textbook* that there had been a "virtual demise of the issue of responsibility" for those suffering from mental disorder [31]; indeed, the sympathetic treatment of such offenders combined with post-conviction hospital disposals under the Mental Health Act seemingly, for him, resolved the difficulty. In contrast, the Commission intends to place any insanity defence firmly on the principled territory of an inability properly to ascribe criminal responsibility. In any event one might add, given the relative paucity of hospital orders made by the courts, and the preponderance of mentally disordered offenders in prison, Williams' pragmatic approach is clearly wanting.

The Commission returns to the issue [32] in its consideration of whether it matters in practice whether someone is convicted or found insane, where it observes that the attribution of responsibility is not only about the fair labelling of those who are criminally culpable, but also about apportioning blame [33] and effecting punishment, albeit that there are other negative consequences for those found not guilty by reason of insanity. [34] Although the Commission does not state this explicitly, it seems the issue is about accountability. Can such individuals be held to account, should they be held to account and in what measure must their accountability be weighed?

These are not easy issues. From its detailed survey in Appendix C of the law of other jurisdictions it is evident that the permutations and perambulations are extensive. Not all jurisdictions have an insanity defence; some make do with a narrow defence relating to a denial of mens rea; others break responsibility's contributory elements into fair warning, deterrence, punishment, etc.; and yet others try to establish deviation from a shared moral understanding of the import ***Crim. L.R. 934*** of the law using a reasonable person comparator. A limited number of countries focus on the underlying disorder and require no linkage between the disorder and the offence. Norway would be one notable example, where those who are psychotic at the time of the offence cannot be punished; psychosis would require psychiatric evidence of a substantial impairment in the perception of reality and an inability to react adequately to ordinary impressions and influences. [35] Each approach has consequences for the discretionary scope of decision-making by judges, jurors and experts. But at the heart of any reformed law which enjoys a principled basis must lie the recognition that people's disabilities are complex, capacity is a concept which slides (some would say "is slippery") [36] according to demands of the task, and the M'Naghten Rules do already acknowledge that what is critical is the capacity to know a particular thing in relation to what has been done or to know that it is legally wrong.

There is not space here to explore why an absence of mens rea is not a sufficient basis for an insanity defence, albeit that a denial of mens rea will result in a complete acquittal if the prosecution cannot prove its presence in an offence for which mens rea is an essential element. But clearly, limiting the defence only to offences which have a mens rea severely constrains its application. [37] Equally, widening it to encompass offences where there is not a clear link between the mens rea element and the offence raises issues as to which mental disorders should "count" for exemption from liability and how severe they would need to be. Where on the spectrum of capacity does criminal responsibility lie; and does the degree of capacity required vary across offences of differing degrees of complexity or does it relate more generally to the individual's understanding of issues of deterrence and punishment? Achieving a principled basis for an insanity defence will be a demanding and detailed exercise.

However, the broader basis for an insanity defence does intuitively make sense. As Loughnan points out, we know that mental incapacity must affect the normal processes of the criminal law in a number of different ways—it can affect our ability and our desire to communicate, it affects what we might communicate and its coherence—and it will certainly affect what we believe, what we are capable of knowing and the choices, if choice is an appropriate word, we make. [38] And if the criminal law cannot operate normally for some through its role in signalling, giving fair warning and in, ideally, deterring those who might not otherwise adhere to its precepts, then is it fair to hold those individuals responsible for what they have done, and then to punish them for so doing?

Lacking the capacity to obey the law, which may stem in part from either not cognitively understanding some essential element (either understanding what one has done or appreciating its legal wrongness) or from not being able to control one's actions (albeit the latter does not currently qualify under *M'Naghten*) creates ***Crim. L.R. 935*** the basis for exculpation. The polar extremes of the debate between broad and narrow can be represented by the following quotations:

"In some disorders the patient's beliefs are so bizarre or his change of mood is so profound and inexplicable, or he is so changed in manner and conduct, that his condition can only be described as alien, or mad. In such cases it is accepted opinion in civilized countries that he should not be held responsible for his actions." (Butler Report 1975:18.6).

"The administration of justice must combine and balance justice and mercy—but this makes sense only in a context of clear moral order and authority. Courts must be allowed considerable latitude in the application of penalties, treatments, and other available options. But finding a guilty person 'not guilty by reason of insanity' is an act of moral evasion--and we all know it." (*Professor Jonathan Turley of George Washington University, USA Today, May 2006*).

因精神錯亂而無罪'是一種道德逃避行為——我們都知道這一點。"

The Butler approach [39] invites exculpation for the manifestly mad; the Turley approach would find guilty those who have committed the act, but then allow scope for discretion in the application of interventions, with punishment being seen as appropriate in some circumstances. [40]

The Commission's approach would go further than Butler in the first instance to define as "not responsible" not only the manifestly mad, but those who, without fault, lacked the capacity to obey the law. [41] This group would logically encompass those who did not have the capacity to restrain themselves (perhaps though defects in their emotional make-up or personality), but not those who could restrain themselves but chose not to on the relevant occasion. Separating the two, as has long been recognised, is problematic, and brings into the courtroom the necessity for further psychiatric/psychological evidence. There is a spectrum of degrees of capacity for responsibility. Juries should be able to recognise those normal individuals who choose not to restrain themselves, but may require expert evidence from those with knowledge of capacity and its absence to identify those on the borders of normality, and thereafter to determine who does not have the capacity to obey the law; whether that derives from a lack of understanding of their own actions, or of the law, or of an ability to restrain themselves. And if the Norwegian *Breivik* trial has taught us anything, it is that having experts address these issues does not necessarily readily resolve them. [42]

The gulf between experts' views and court-based lay decisions can be illustrated by current problems experienced in applying the equivalent of the wrongness limb of *M'Naghten* in the two cases of Andrea Yeates and Lianne Smith, both women who were held responsible for killing their children. [43] Yates drowned her children ***Crim. L.R. 936*** in order to protect them from a life in hell—a clearly psychotic delusion—but she was convicted on the basis that she knew what she was doing was wrong, albeit for her morally right. Smith suffocated her children to save them from being taken into care. The former defendant looks manifestly mad, but is precluded from a defence by narrowly drawn law: the latter's beliefs about her children being taken into care look wholly unreasonable, but less conventionally "mad": she herself, whilst evidently disturbed, was not considered *sufficiently* disturbed for a denial of responsibility. And it is perhaps worth questioning here whether our capacity for a humane response to such appalling events is limited not only by the law, but also by the unwillingness in practice by some decision-makers to absolve these offenders from a finding of guilt. The impossible choice seems to be between the medicalisation of criminality and the demonisation of the sick.

The gulf between clinical and court-based lay decisions is also illustrated by disparate approaches to assessing causality, critical to assessments of culpability. Buchanan and Zonana have helpfully critiqued the inappropriate role of causal explanations from psychiatrists in criminal trials: but they also observe that what is being required in many of these trials of unusual behaviour is an explanation of "why the usual regularity failed to hold". [44] This requires both an examination of why the individual behaved out of character (since if it is in character it may require no explanation), and whether the relevant factor (pain perhaps) is sufficient to explain the behaviour (thus, pain may be regarded as sufficient to explain gruffness, but not assault). Applying this to someone with schizophrenia who kills, it is evident that the behaviour is unusual (since most of those with schizophrenia do not kill, and this individual has not killed previously). The act thus becomes unusual. Possibility explanations (rather than likelihood explanations—why something happened) seem most appropriate. A possibility explanation asks how something was able to happen given that it was not routine for the individual. And it can also incorporate the role played by mental abnormality. Possibility explanations carry less weight than likelihood explanations, but are perhaps better suited to the areas of expertise that clinicians claim; and, as Buchanan and Zonana observe, provide a framework to assist courts in assessing culpability. Indeed, moving away from causality based explanations for those suffering from mental disorder makes sense: not only is causality almost impossible to prove, [45] but requiring it may uncomfortably exclude many of the seriously disordered for whom punishment would be an anathema. Shifting to a broader responsibility-based insanity defence as the Commission is minded will necessarily entail that courts grapple with these types of sophisticated explanations and concede ground with respect to the role of greater uncertainty in verdicts. What seems to be required is a less judgmental and more problem-solving approach.

What further complicates matters is that once an issue has been raised about an accused's mental status, and their capacity to adhere to the tenets of the criminal law, making judgements about their responsibility or degree of responsibility for what they have done sits oddly. Conventionally, as Duff has asserted: **Crim. L.R. 937*

"What makes a person criminally liable is thus not 'choice' as distinct from 'character'; nor 'character' as distinct from 'choice' or action: but a wrongful action which, as the action of a responsible moral agent, manifests in and by itself some inappropriate attitude towards the law and the values it protects." [46]

But where the actions may not be those of a responsible (moral) agent, imposing punishment as a method of achieving engagement with the law may be futile. Neither deterrence nor retribution are likely to be effective and the latter unconscionable with respect to those who would be required to extract its measure from the disordered individual. Moreover, punishing people for "choices" they may have made based on irrational beliefs does not look likely to lead to any greater adherence to the law's core tenets. In this context labelling "insane" defendants as guilty, albeit insane, and then diverting them into a therapeutic environment leaves the fundamental labelling unfairness in place, albeit some believe that making such offenders take some responsibility for their actions can be therapeutic.

However, whilst the justification for fair labelling may be theoretically undeniable, its practice, in terms of my limited sense of it, is more haphazard. Thus, a lay appreciation/evaluation of what can "count" as a sufficiently disordered state, even in the context of countervailing expert evidence, results in some defendants' actions being regarded as so heinous that no psychiatric evidence can counter the desire that a defendant be held legally accountable for his/her actions, even if the ultimate disposal is likely to be therapeutic. Thus, the Commission may be being overambitious in wishing to extend the remit of the insanity defence: whilst I think they are right to argue for the inclusion of those without the capacity to adhere to the demands of the criminal law, I fear for a corrupted application of any such reformed law, when faced with the complexities of psychiatric/psychological presentations relating to those with severe personality disorder.

Issues of practice

One of the Commission's key concerns, a concern which is reflected in its 76 practice-based questions to practitioners, is whether, despite deficiencies in the law, it works reasonably well in practice: hence, is its practical application likely to be improved by tinkering with, or fundamental reform of, the law? Whether in principle it is acceptable to expect practitioners, judges and jurors to make-up for deficiencies in the law when faced with madness through a sensible and humane application of it, is another question. Leaving things to good sense may be acceptable where it works, but does good sense cover the less manifest issues, those relating perhaps to offenders with the kinds of personality disorder that impair or negate their capacity to adhere to the law? The data suggest both that cases of personality disorder have fallen within the M'Naghten Rules; and that judges not infrequently direct juries to return the special verdict, or even, on occasion, return the verdict without troubling the jury. [47] All of this could be an **Crim. L.R. 938* indication of a common-sense, humane application of the law, albeit one not wholly predictable on the face of the law. But can good sense always be relied on in particular types of abhorrent crime, where judges and juries might see aspects of "motivated/intentional" behaviour which might cause them to resile from an insanity verdict; or where practitioners are reluctant to "play ball" in resolving dilemmas created by deficient law?

Holding accountable defendants, whose sanity is questionable at the point at which they commit their offences, is fraught with unknowns. To what extent are decision-makers influenced by the nature of the insanity and its relationship to the offence (causal or correlative/incidental); and how do features (even in the presence of documented "insanity") associated with motivated/intentional offending (planning/premeditation, etc.) play out? Those with a serious mental illness are not by definition incapacitous per se and will retain the capacity to make willed decisions with respect to particular issues. And although the M'Naghten Rules require a lack of capacity with respect to their cognitive and wrongfulness limbs, these only have to be proved on a balance of probabilities. Similarly, how confident do jurors need to be that experts know what was going on in a defendant's disordered mind at the point of the offence before they would return an insanity verdict? Do the defendant's "intentional" actions merely appear so, whilst not having the same shared meaning for the defendant? Trying to unpick this morass is problematic, so it is perhaps not surprising that some decisions reflect a rule of thumb rather than the rule of law.

Two examples, not touched on the in Scoping Paper, will suffice.

Between 1975 and 1981 Peter Sutcliffe attacked an unknown number of women; he was convicted of the murders of 13 women and of 7 charges of attempted murder. Part of his defence included his assertion that he had heard voices from God telling him

to go on a mission to rid the streets of prostitutes. Notably Sutcliffe had previously worked as a grave-digger, although he was employed as a driver during the bulk of the time when the offences occurred. He was sentenced to 20 terms of life imprisonment with a recommendation that he serve a minimum of 30 years; within 3 years he had been transferred to a Special Hospital (for which the existence of mental illness, psychopathic disorder, severe mental impairment or mental impairment was a pre-requisite, s.47 Mental Health Act 1983) and remains in Broadmoor to this day. He has also become one of the few convicted murderers whose life sentences have been confirmed as whole life terms. [48]

In rejecting the defence of diminished responsibility the jury, by a majority of 10—2, may have concluded that he had fabricated his "abnormality of mind". [49] Or they may have concluded that his responsibility had not been sufficiently diminished for findings of manslaughter. It should be remembered that initially the prosecution were content to accept the plea, and only pursued prosecutions for murder once the trial judge, Boreham J., had refused to accept Sutcliffe's pleas. It is rare for a judge to reject pleas accepted by both prosecution and defence counsel, but in this case his curious view that Sutcliffe's defence could not extend ***Crim. L.R. 939*** to the killing of those women who were not prostitutes, and that the public interest in the case deserved a trial, was determinative. [50]

If Sutcliffe were so disordered and his thinking so chaotic as to have experienced and believed to be true his "voice from God", is it right that he stands as a fully responsible convicted multiple murderer? [51] Whatever label one might want to attach to Peter Sutcliffe, the fairness of the current attribution is questionable. The issue of insanity was not raised at his trial, and if it had been would he have been convicted nonetheless on the basis that the rules were then, and are now, drawn narrowly, albeit they are not invariably strictly applied? Or did his advisors take the view that his "success" in evading arrest by the police over a number of years was indicative of sophisticated planning and premeditation, making unlikely a finding that he did not know the nature and quality of his act or, if he did, that he did not know that it was legally wrong?

Experienced practitioners could have known that at court the test is applied much more liberally. Arguably, if Sutcliffe was so deluded that he believed that God had instructed him to kill, then one can see that he might have been labouring under the notion that he was adhering to some higher (albeit wholly warped) moral authority. But the issue was not raised; in law this would have been correct since "nature and quality" of the act relates to its physical and not its moral aspects. [52] Yet, paradoxically, all the experts seemed content with the notion that Peter Sutcliffe was sufficiently ill at the time of the offences to entitle him to benefit from a defence of diminished responsibility, indicating that whatever he was, he was not a fully responsible murderer. But this was not to be.

For the Commission one problem not fully explored, given its emphasis on devising an insanity defence based on a lack of responsibility, is should it embrace offenders like Sutcliffe who are demonstrably disordered (in the Butler sense) but also arguably calculatedly bad? The jury thought, with respect to partial culpability, by a majority, no. But were they inappropriately swayed by the horrific nature of his crimes? Sutcliffe was an outlier in every sense. But should our law, if based on non-responsibility, include those like him, and the Breivik's, and others suffering from personality disorder where they do not have the capacity to restrain themselves? And if it did, could we get juries to pass appropriate verdicts? Whether Parliament, the law, and the judiciary can lead in this difficult terrain is questionable: whether lay people will follow them is another matter entirely.

The second case concerns Christopher Clunis. Clunis killed Jonathan Zito in an unprovoked attack on Finsbury Park Tube Station on December 17, 1992. Jonathan Zito was unknown to Clunis, who suffered from a documented history of paranoid schizophrenia. At his trial he pleaded not guilty to murder but guilty to manslaughter, on grounds of diminished responsibility. The judge made a ss.37 / 41 hospital order with restrictions under the Mental Health Act 1983 . This disposal meant that Clunis would be subject to compulsory detention until such time as ***Crim. L.R. 940*** either a Mental Health Tribunal, or the Secretary of State for Justice, concludes that his mental disorder no longer justifies his continued detention.

But why was it that Clunis never raised the special verdict that, at the time of the offence, he was *M'Naghten* mad? Whether Clunis either knew what he was doing, or knew that it was wrong, can only be subject to speculation, since there is nothing in the public domain to explain what was in his mind at the time of the offence. His guilty plea obviated any further exploration at court; and he refused to talk to the Ritchie Inquiry about the killing. [53] The Report also records that Clunis's Responsible Medical Officer had noted that he evaded discussion of issues he did not want to address. However, what can be gleaned from his bizarre behaviour immediately after the killing is suggestive of a cognitively disordered state. Unlike Sutcliffe or Breivik, [54] there was no evidence of sophisticated planning in Clunis's case. Witnesses reported that he boarded the tube train, and sat in a seat between other passengers "as if nothing had happened". [55] There was no attempt to hide what had occurred—there were

a number of passengers on the platform at the time—or to effect an escape. Accordingly, one might at least question whether he knew that his actions were wrong, even if he knew what he had done. Could Clunis's manifest madness not have brought him within the terms of *M'Naghten* ?

When I questioned the psychiatrist who acted for the defence in the *Clunis* case about this he remarked that it had never occurred to him to consider the insanity defence. Whilst this may be a failure in the instructions he was given for the assessment, it is remarkable that the then very infrequent use of the insanity defence may have resulted in even practitioners well aware of its existence failing to apply their minds properly to its possibilities. Hence, practice may constrain usage even beyond the limited terms of *M'Naghten* : and the option of the facilitative diminished responsibility verdict in cases charged as murder all but subsumes not guilty by reason of insanity verdicts.

Why is this important given that the effective outcome at the time, of either a diminished responsibility verdict or a "not guilty by reason of insanity", could have been the same; namely, indefinite confinement in a psychiatric hospital? [56] First, fair labelling. Secondly, the legal consequences that stem from being found partially responsible as opposed to being held not guilty on grounds of insanity. The first is a conviction; the second not. And this issue can become critical in subsequent legal proceedings, as it did in the *Clunis* case.

"Partial responsibility" and compensation

In 1997, five years after the manslaughter, Clunis began proceedings against Camden and Islington Health Authority. [57] In essence, this was an action for ***Crim. L.R. 941*** negligence against the local authority who, it was alleged, had failed in their duty to care for Clunis prior to the homicide. [58] Ultimately, the case was struck out by the Court of Appeal on two grounds, but only one is relevant here: namely, that the claim was based on the plaintiff's own illegal act of manslaughter, and the maxim that plaintiffs should not benefit from their own wrongdoing applied. [59] But there is another more interesting issue. What would have happened had Clunis been acquitted on ground of insanity? Then there would have been no conviction. Could there then have been wrongdoing? The subsequent case of *Worrall v British Railways Board*, cited by the Commission in its discussion of the relationship between the insanity verdict and policy in civil law, would suggest that a claim by an "acquitted" perpetrator could succeed since that individual bears no criminal responsibility. [60] And, of course, the consequence of Clunis receiving damages could have been that, as someone who became worth suing, his secondary victims, the widow and family of Jonathan Zito, would then have been in a position, had they so desired, to sue him directly as the immediate perpetrator of their loss.

Thus the practical implications of opening up an insanity defence by basing it upon a broad notion of a lack of responsibility are considerable. And as discussed above, there are also implications for the role of those clinicians giving expert evidence in court, where notions of legal responsibility and a clinical appreciation of the difficulties of claiming causal relationships between mental disorder and offending may not neatly intersect.

Questions and answers

The appetite for Scoping Papers and their attempt to draw out from an informed audience information that may be of considerable use to those experts tasked with proposing reform is laudable. However, quite what benefit emerges is less clear; reflecting empirically on these initiatives might bring its own rewards. Having been involved some years ago in one such exercise with the Richardson Committee on reform of the Mental Health Act I am somewhat circumspect about whether the total time and effort put into such exercises by all concerned is justified. [61] My reservations about the process are compounded when the nature of the questions asked leave potentially important areas underexplored or may produce misleading answers.

The Commission has made an admirable stab at its 76 questions, and no doubt much material will be generated in areas currently undocumented. For example, Q.38 [62] : "In practice, is the defence of insanity applied to offences of strict liability in the magistrates' court? Please give examples". And Q.48 [63] : "Are consultees aware of cases in which the defence [of insanity] was raised by the prosecution? Please give details". ***Crim. L.R. 942***

Important issues are also explored with consultees, for example, with Q.42 and Q.43 inquiring about the stigmatic role of the label insanity. But not all of the information generated will be consistent and the Commission will then be faced with further dilemmas it has not already enumerated. Perhaps this will be helpful. What will certainly be entailed is further delay, although

given the Commission's hesitancy and the limited prospects of achieving parliamentary time for this relatively arcane area, this may make little difference.

Accepting that the questions asked are largely careful, relevant and thorough, a number of criticisms can nonetheless be made. First, it is problematic to ask questions without defining the relevant terms. Thus Q.1 is concerned with the numbers of people with mental disorder being arrested, diverted and/or charged, and with how the definitions of insanity and automatism influence these figures. The question is hard enough as it is, but are respondents to adopt the Mental Health Act 1983 definition of mental disorder (s.1 "any disorder or disability of the mind") or a clinical definition? Or just what they know? Indeed, some psychiatrists would reject the notion of a frank divide between mental and physical disorders and would prefer both to be prefaced with the term "so-called". [64] And Q.55, which relates to consultees' experience of cases where defendants receive a criminal penalty when they should have pleaded insanity, does not properly define what is regarded as a criminal penalty (does it mean any disposal not following a "not guilty by reason of insanity": that is, for example, embracing both a hospital order following a diminished responsibility verdict and/or a community penalty with a mental treatment requirement attached?). Similarly, at Q.76 the Commission seeks evidence relating to the issue of public protection where a successful sane automatism or insanity defence was associated with an obvious risk of recurrence of the behaviour. The Commission asks: "What was the outcome?" But what kind of outcome does it have in mind? Long-term or short-term? And is it really only interested, insofar as the insanity verdicts are concerned, in cases where a hospital disposal was not an option because the perpetrator's mental state did not merit one?

A second central difficulty in seeking to determine how the law is currently operating is that questions often get posed in the positive. For example, Q.8: "How frequently is automatism pleaded in the Crown Court? How often is it successful?" And Q.9: "Can consultees provide examples of pleas of insanity that have been made unsuccessfully and provide some evidence of how frequently such pleas are made?" But there are fewer questions about what is not happening, which could have had fascinating and informative answers. And some questions could potentially have produced so much more if they addressed successful and unsuccessful outcomes: for example, Q.72: "We would welcome examples of recent cases in which the automatism defence has been successfully applied in cases other than those involving road traffic offences"; the notion that it is as important to ask about "near misses" has been well documented in the accident literature, so why not ask about unsuccessful automatism defences?

There are also questions that practitioners may find impossible to answer, since they require a knowledge of what may have motivated their (disordered) clients to follow or reject legal advice (e.g. Qs 53, 54 and 56). Erskine's decision not to ***Crim. L.R. 943*** pursue a mental condition defence only came to light many years later (namely, the irrational fear that he might become eligible for the death penalty). [65] Similarly, Q.65: "Are there practical problems caused by the mismatch between the criminal law's approach and the broader criminal justice initiatives for dealing with the mentally ill?" invites an extensive analysis, which some may be more than glad to provide if they are highly motivated by the frank injustices in this field; but others will, I fear, throw up their hands in frustration. And some questions probably do not need to be asked as empirical data are already available, for example, Q.29 on the wrongness limb being more common than the cognitive limb: and Q.34 on judges accepting or directing pleas in *M'Naghten* cases. [66]

However, my primary reservation with the questions concerns their relative paucity on the effect of any broadening of criminal non-responsibility. Whilst the Commission would rightly say that the Scoping Paper is an initial call for evidence to demonstrate the practical need for law reform, and issues about its future shape will be dealt with in a subsequent Consultation Paper, one can still question and, to a limited degree, anticipate problems with any such reform. And in so doing, it can be argued that the Commission might have further explored the practicalities of such reform on the basis of existing practice, and practitioners' current problems with the law. For example, if such an approach were to be adopted a number of those with personality disorder would fall within its remit. Accepting that there would be a need to demonstrate that someone was unable to restrain themselves or the effects of their emotions, as opposed to merely failing to control themselves, it will nonetheless pose problems for jurors. The recent case of Kiaran Stapleton who murdered Anuj Bidve in a motiveless and unprovoked attack is telling. Stapleton tendered a plea of diminished responsibility in the context of what was acknowledged to be his anti-social personality disorder. But the plea was not accepted by the prosecution and following trial he was convicted by a unanimous jury after only 90 minutes deliberation. Yet Professor Eastman, a highly experienced forensic psychiatrist in the trial, observed that, unusually for him, he had personally become a bit concerned when interviewing Stapleton. He said: "I think what he is demonstrating is his substantial lack of ability to feel what other people feel. I don't think he has any real feeling for what he's done". [67] Yet Stapleton's ability to experience and express anger was not in doubt. How would a jury faced with this assessment decide whether the defendant could not restrain himself, or did not restrain himself? But the jury were even unwilling to moderate a finding of murder on the grounds that his responsibility could have been diminished. What possibility would there then be of them ever absolving such offenders of all responsibility via an extended insanity plea? Whilst the Commission has asked two relevant questions, might

more have been done to explore with practitioners the practical problems in revising the defence in the proposed manner so as better to inform any ensuing Consultation Paper?

One of the Commission's questions about the difficulties in cases involving a lack of self-control (currently excluded by *M'Naghten*) appears at Q.15: "Can consultees provide examples of cases in which the inability to plead insanity in ***Crim. L.R. 944*** cases where the accused lacked self control presented problems in practice?". The ground this question covers is largely repeated in Qs 25 and 26, but even it does not really address the issue of why defences are not used when knowledge of a loose practical application might have made this worthwhile. For example, there is no question which addresses the *Clunis* issue (should the insanity defence have been considered?). Yet something might be gleaned from the answers to Q.12: "Can consultees offer explanations as to why the number of special verdicts is so low?". And Q.32 which seeks clinical evidence of cases where a medical condition did not meet *M'Naghten* , but the accused should not, in the clinician's view, have been held criminally responsible.

Finally, I have reflected on whether there ought to have been a free response question, inviting practitioners to submit their experiences of unreported but potentially relevant cases or problems that do not fit neatly into any of the preceding 76 questions. Would examination of the unknown knowns have helped or hindered? I do not know.

Conclusions

Six obvious areas should be highlighted:

1. The Commission is right to worry about the underuse of the special verdict: fair labelling is important, and its continuing absence—through the appellation "insanity" and through its overly narrow cognitive basis—may well be contributing to the disproportionate numbers to whom the Commission points of individuals with mental disorder in the sentenced population. There are, moreover, discriminatory aspects of the special verdict to consider.

2. Has the Commission enquired sufficiently closely as to the practical aspects of broadening the remit of the special verdict so as to make it applicable to all those to whom responsibility cannot fairly be attributed? Is there evidence that such a development would find favour with juries, judges, lawyers or clinicians, be they psychiatrists or psychologists (the latter group being the most likely to find themselves offering therapeutic care to the sub-set of personality disordered individuals who would then fall within the defence)?

3. Has the Commission directed sufficient attention to the lack of fit between psychological/psychiatric models for understanding behaviour, and the law's judgments about those behaviours? Will the Commission have sufficient data to predict the likely consequences of embracing those who cannot restrain their behaviour or their emotions? If determining guilt is not a precise science, nor is diagnosing mental states. Is it right that individuals who look objectively heinous beyond understanding should nonetheless be out with a system that largely determines guilt on the basis of subjective understanding?

4. Brenda Hale's question from 1990 remains pertinent: is it preferable to have someone who is well falsely languishing in hospital, or to ***Crim. L.R. 945*** have someone who is sick falsely languishing in prison? [68] Or, put another way, is the over-medicalisation of criminality preferable to the demonisation of the sick? Or is it better that offenders, albeit with a degree of mental disorder, should be left the opportunity to deal with their sense of guilt and address issues of self-determination in a system that does not over-apply findings of non-responsibility?

5. If mental disorder (including its less manifestly mad manifestations such as personality disorder) in the absence of a clear link (albeit an associative rather than causal link) between the disorder and the offence is to form one of the bases of non-responsibility, what precise forms of mental disorder will be embraced and what severity of form will be required? And if the link is associative, or non-existent, how should the law respond to those who are successfully treated for the disorder but remain a risk? Is it to be through some form of preventive detention, itself highly unattractive to lawyers?

6. And finally, the implicit question that underlies the Commission's dilemma about broadening the basis for an insanity defence, as to whether it is conscionable to deal with offenders as if they were responsible for crimes, including the most heinous, when they are not responsible or not fully responsible? Is it better that deficient law is applied humanely in those cases individually perceived as meritorious, or that the law be drawn coherently but applied inconsistently? In short, should the Commission strive for principled law or settle for its pragmatic application?

Setting aside my concerns about its chosen methodology and the implementation of it, the Commission has done an excellent job: the materials it has gathered together will be invaluable in any subsequent process of reform. Using single examples, as I have indeed done, can produce their own insights and the Commission's Scoping Paper may produce a wealth of valuable responses. And in any event the Commission's powerful conclusion to its review of compatibility with the ECHR [69] is alone sufficient to justify reform in this neglected area:

"As the law stands, individuals suffering from a serious mental condition who ought to be excused criminal liability and punishment, may fall outside the scope of the defence of insanity. This is in part because the present defence is governed by an outdated legal test. In addition, the very label 'insanity' may deter some mentally ill individuals from seeking to rely on the defence, resulting in their eventual conviction, imprisonment and possibly inappropriate treatment. ***Crim. L.R. 946*** "

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Footnotes

1 *Law Commission, Insanity and Automatism A Scoping Paper (July 18, 2012)*, available at: http://lawcommission.justice.gov.uk/docs/insanity_scoping.pdf [Accessed September 22, 2012]. Throughout this article paragraphs in the Scoping Paper are referred to solely by paragraph number. The Commission also published online *Insanity and Automatism Supplementary Material to the Scoping Paper*. References to these extensive materials, including Appendices, are made by part number and paragraph: available at: http://lawcommission.justice.gov.uk/docs/insanity_scoping_supplementary.pdf [Accessed September 22, 2012].

2 *Part 3, The Insanity Defence in Practice*.

3 *Law Commission, Unfitness to Plead, Consultation Paper No.197, 2010*.

4 Supplement, Appendix B and Appendix E by Professors Thomas and Mackay respectively on their research on verdicts of not guilty by reason of insanity. See also the article in this issue p.946.

5 See, for example, the directions on automatism in *Roach [2001] EWCA Crim 2698* at [3.33].

6 See *Erskine's ([2009] EWCA Crim 1425)* beliefs about the death penalty, discussed in *J. Peay, Mental Health and Crime (London: Routledge, 2010), pp.167–174*.

7 A three month period is the norm for government consultations.

8 *Windle [1952] 2 Q.B. 826* requires an absence of knowledge of legal wrongness: a belief that one's actions are morally justified is insufficient.

9 For these normal defendants, provided the belief is honestly held, and the action taken reasonable in the circumstances as the defendant believed them to be, then a complete acquittal will result, *Beckford [1988] 1 A.C. 130* .

10 A comprehensive analysis of the problems with the law is set out in Part 4.

11 R. Mackay and B. Mitchell, "Sleepwalking, Automatism and Insanity" [2006] Crim. L.R. 901.

12 *Hennessy [1989] 1 W.L.R. 287; (1989) 89 Cr. App. R. 10* .

13 *Winterwerp v The Netherlands (1979–80) 2 E.H.R.R. 387* .

14 See *Law Commission, Unfitness to Plead, Consultation Paper No.197, 2010*.

15 At present, only those unfit individuals disposed of via a hospital order with restrictions are able to re-open the issue of their responsibility for the act.

16 Whilst the Commission is less convinced of a relationship between the numbers of unfitness and insanity verdicts, the critical issue concerns whether an enlarged capacity-based unfitness test would have an impact on insanity verdicts. Moreover, unfitness to plead embraces more defendants with severe learning disability whereas insanity is currently more applicable to those with schizophreniform disorders. Unfitness findings, since 1991, have increased tenfold; insanity findings have more than quadrupled, albeit from a lower base (see

Appendix C to Law Commission Consultation Paper No.197 and Supplement, Appendix E both reporting work by Professor Mackay).

17 See Part 3, para.3.58 for three (arguably errant) recorded cases of a defence of insanity based on personality disorder; irresistible lack of control cases are currently excluded but ought arguably to be under the remit of a reformed insanity defence, see J. Peay, "Personality Disorder and the Law: Some Awkward Questions" (2011) 18 Philosophy, Psychiatry and Psychology 231. The Breivik type situation is pertinent.

18 For example, in failing to pursue a diminished responsibility verdict.

19 A. Buchanan and H. Zonana, "Mental disorder as the cause of a crime" (2009) 32 International Journal of Law and Psychiatry 142.

20 *Royal College of Psychiatrists, "Unfitness to Plead" (February 2, 2011) Consultation Response*; *Law Reform Committee of the Bar Council and the Criminal Bar Association of England and Wales, "Unfitness to Plead. A response to the Law Commission CP 197" (January 25, 2011)*.

21 In short, an internal defect leading to insane automatism and the special verdict disposals; an external influence leading to a complete acquittal: see paras 2.22–2.35.

22 Part 2, para.2.79.

23 Paragraph 2.93; see also Pt 5, para.5.44 where the analysis is attributed to T. Jones.

24 See arts 4, 5 and 14 of the United Nations Convention on the Rights of People with Disabilities and commentary thereon by C. O'Mahoney available at: http://disabilityandhumanrights.com/2011/08/11/mental-illness-and-criminal-responsibility/ [Accessed September 22, 2012] and fn.145 to the Scoping Paper.

25 See Pt 5, paras 5.42–5.59. The Commission in Pt 5 also sets out the various articles of the ECHR which, in its view, makes the current law defective; it also importantly asserts that requiring the defendant to prove his or her defence of insanity violates art.6(2). See also Q.61.

26 Part 5,para.5.59.

27 Paragraph 2.73.

28 Paragraph 2.73.

29 *Glanville Williams, Textbook of Criminal Law, 2nd edn (London: Stevens & Sons, 1983), pp.642–645*.

30 *K.J.M. Smith, Lawyers, Legislators and Theorists (Oxford: Clarendon Press, 1998), pp.99–100*.

31 *Williams, Textbook of Criminal Law (1983), p.651*.

32 At para.2.121.

33 See the New Zealand Law Commission's approach cited at Pt 4, para.4.3.

34 Setting aside the possibility of compulsory hospital treatment, there are also potential consequences relating to, for example, future employment possibilities or the right to travel: see para.2.122.

35 I am grateful to Professor Høyer of the University of Tromsø for a preliminary analysis of the Breivik decision and for an understanding of the Norwegian Criminal Code; mandatory psychiatric care would follow such a finding of psychosis. The court is free to form its own opinion as to the expert evidence presented and in Breivik's case, having observed that there was no sharp boundary between psychotic ideation and reality, concluded that his bizarre ideas could be understood as perverted political convictions.

36 The finding that Ian Brady lacked capacity with respect to his decision to refuse nutrition is illustrative: *Collins Ex p. Ian Stewart Brady [2000] Lloyd's Rep. Med. 355* at [65].

37 See para.2.74.

38 *A. Loughnan Manifest Madness: Mental Incapacity in Criminal Law (Oxford: Oxford University Press, 2012), pp.5–6*.

39 *Lord Butler, Report of the Committee on Mentally Abnormal Offenders, Cmnd.6244 (London, HMSO 1975)*.

40 See also examples from other jurisdictions in the Supplement, Appendix C.

41 See further *W. Wilson, Central Issues in Criminal Law (Oxford: Hart Publishing, 2002), pp.288–289*, and *N. Lacey, State Punishment (London: Routledge, 1988), p.74*. Insanity is an exculpatory defence: if the wrongdoer has not the wherewithal to understand the purpose of punishment, there is no reason to punish; moreover to punish those who cannot follow rules is both unfair and, more importantly, inappropriate.

42 Two psychiatrists concluded that Breivik was psychotic at the time of the killings, and two others that he suffered from both a narcissistic personality and a dissocial personality disorder, but that he was not suffering from any psychotic disorder. The court found him criminally responsible for the deaths of 77 people. Breivik denied both being psychotic and being criminally responsible, although he admitted the killings.

43 Yates in the US (see paras 2.52–2.54) and Smith in Spain (see *The Guardian, July 3, 2012*).

44 See Buchanan and Zonana, "Mental disorder as the cause of a crime" (2009) 32 International Journal of Law and Psychiatry 142, 144.

45 See *Peay, Mental Health and Crime (2010), Ch.4*.

46 R. Duff, "Choice, Character and Criminal Liability" (1993) 12 Law and Philosophy 345, 380.
47 Part 3, para.3.58 for three cases of personality disorder between 1975 and 1988; Pt 3, para.3.54 where it is noted that in over half of cases between 1997–2001 the jury had little, if any, deliberative role.
48 High Court July 16, 2010, upheld in the Court of Appeal on January 14, 2011.
49 Perlin's review of the research suggests that true fabrication is rare; it is invariably detected and that apparently what is much more likely is for the insane to attempt to pass themselves off as sane; *M. Perlin, The Jurisprudence of the Insanity Defence (Carolina Academic Press,1994), pp.236–247*.
50 Personal communication (Boreham J.).
51 The Lord Chief Justice, in dealing with the appeal against the imposition of whole life terms, noted: "We are not, of course, suggesting that the man who perpetrated these crimes was in any ordinary sense of the words 'normal' or 'average' … [the] sheer abnormality of his actions themselves suggest some element of mental disorder". He added: "There is, however, no reason to conclude that the appellant's claim that he genuinely believed that he was acting under divine instruction to fulfil God's will carries any greater conviction now than it did when it was rejected by the jury." (*The Telegraph, January 14, 2011*).
52 See *Codère (1917) 12 Cr. App. R. 21* at 27, discussed at Pt 2, para.2.36.
53 Although he communicated with intelligence and humour on other matters with the inquiry team: *The Report of the Inquiry into the Care and Treatment of Christopher Clunis, Chaired by Jean Ritchie QC (HMSO, 1994), para.41*.
54 In Breivik's case there was evidence of planning over a period of years prior to the killings. Indeed, the court was critical of the psychiatrists who failed to consider alternative explanations beyond psychosis that might account for his unusual beliefs.
55 *The Report of the Inquiry into the Care and Treatment of Christopher Clunis (1994), para.39.3.9*.
56 With a finding of diminished responsibility the sentencing judge has a complete discretion: it is open to the judge to impose a life sentence of imprisonment, a fixed term, a non-custodial penalty or to invoke the disposal options under the Mental Health Act 1983 .
57 *Christopher Clunis (by his next friend Christopher Prince) v Camden and Islington Health Authority Unreported December 5, 1997 CA*.
58 *J. Peay "Thinking Horses, not Zebras" in D. Webb and R. Harris (eds), Mentally Disordered Offenders: Managing People Nobody Owns (London: Routledge, 1999)*.
59 See however, *Meah v McCreamer (No.1) [1985] 1 All E.R. 367* cited in *Clunis* but held not to be authoritative as the issue of public policy had not been raised explicitly.
60 *Worrall v British Railways Board [1999] C.L.Y. 1413*; Pt 2, para.2.111
61 Notably, there is an online version of the questions at the Law Commission's consultation hub, available at: https://consult.justice.gov.uk/law-commission/insanity-and-automatism [Accessed September 22, 2012]. This facility, which may enhance responses, is not apparent on the face of the Scoping Paper.
62 Paragraph 2.78.
63 Paragraph 2.101.
64 See R. Kendell "The distinction between mental and physical illness" (2001) 178 British Journal of Psychiatry 490.
65 See *Peay, Mental Health and Crime (2010), pp.167-174*.
66 R. Mackay, "Fact and Fiction about the Insanity Defence" [1990] Crim. L.R. 247, 251.
67 *H. Carter, "Tattooed face of man who scored highly on sadistic scale in tests" The Guardian, July 27, 2012)*.
68 *B. Hoggett, Mental Health Law, 3rd edn (London: Sweet & Maxwell, 1990)*.
69 Part 5, para.5.89.

