

RESPONSIBILITY, INCOMPETENCE, AND PSYCHOPATHY

by

DAVID O. BRINK



The Lindley Lecture
The University of Kansas
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The E. H. Lindley Memorial Lectureship Fund was established in 1941 in memory of Ernest H. Lindley, Chancellor of the University of Kansas from 1920 to 1939. In February 1941 Mr. Roy Roberts, the chairman of the committee in charge, suggested in the *Graduate Magazine* that

the Chancellor should invite to the University for a lecture or a series of lectures, some outstanding national or world figure to speak on "Values of Living" -- just as the late Chancellor proposed to do in his courses "The Human Situation" and "Plan for Living."

In the following June Mr. Roberts circulated a letter on behalf of the Committee, proposing in somewhat broader terms that

The income from this fund should be spent in a quest of social betterment by bringing to the University each year outstanding world leaders for a lecture or series of lectures, yet with a design so broad in its outline that in the years to come, if it is deemed wise, this living memorial could take some more desirable form.

The fund was allowed to accumulate until 1954, when Professor Richard McKeon lectured on "Human Rights and International Relations." The next lecture was given in 1959 by Professor Everett C. Hughes, and has been published by the University of Kansas School of Law as part of his book *Student's Culture and Perspectives: Lectures on Medical and General Education*. The selection of lectures for the Lindley series has since been delegated to the Department of Philosophy.

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David O. Brink

Professor of Philosophy
The University of California,
San Diego

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David O. Brink
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On a broadly retributive conception of blame and punishment, these attitudes and practices are fitting responses to wrongdoing for which the agent is culpable or responsible. Such a conception explains well the two principal defenses, both criminal and moral, that agents have available if blame or punishment threatens — justifications and excuses. Whereas a justification denies wrongdoing, an excuse denies culpability or responsibility. Because excuses deny responsibility, conceptions of responsibility and excuse are interdependent. Conceptions of responsibility have implications for who should be excused, and conceptions of excuse have implications for the limits of responsibility.

Accountability plays an important role in our understanding of moral and criminal responsibility. Though moral and criminal responsibility can be distinguished, they arguably have a common structure. One plausible view about the architecture of responsibility conceives of responsibility as requiring the fair opportunity to avoid wrongdoing, where that is conceived as factoring into requirements of normative competence — the ability to recognize and respond to moral and criminal norms — and situational control — the opportunity to act on one's deliberations free from undue interference from others. Though not completely ecumenical, this approach is far from idiosyncratic and synthesizes familiar ideas from reasons-responsive approaches to moral responsibility and fair choice approaches to criminal responsibility. According to this fair opportunity conception of responsibility, excuses also factor into two main kinds — those that deny normative competence and those that deny situational control. Insanity is the most familiar and widely accepted excuse denying normative competence, though some people would also conceptualize immaturity and addiction as potential excuses involving impaired competence. Coercion and duress are the most familiar and widely accepted excuses denying situational control. Failures of either normative competence or situational control are arguably excusing, because either kind of failure deprives agents of the fair opportunity to avoid wrongdoing.

In this essay, I want to focus on the role of normative competence in responsibility and excuse. It is plausible to factor normative competence into both cognitive and volitional capacities and to treat these two sets of

capacities as individually necessary and jointly sufficient for the relevant sort of competence. The fair opportunity conception of responsibility supports a conception of excuse that treats either cognitive or volitional impairment as the basis of an excuse, and this claim about excuse has important implications for our understanding of insanity and incompetence.

We can test and apply these claims about responsibility and incompetence further by applying them to the question whether and, if so, under what conditions psychopathy excuses. Psychopathy is a vexed issue for several reasons. First, our reactive attitudes toward psychopaths are variable and sometimes ambivalent. The criminal law does not recognize psychopathy as an excuse. Psychopaths do not present themselves as traditional incompetents who are delusional or incoherent. They are typically alert, intelligent, and frequently socially at ease, even charming. Psychopaths can display cruelty and malice and typically show no remorse for the harm they do. These characteristics of psychopathy explain why many are inclined to treat it as an aggravating, rather than mitigating or excusing, factor. On the other hand, several scholars have appealed to empirical studies of psychopaths and their psychological deficits to argue that they have significantly impaired normative competence that might justify excusing their wrongdoing. Our understanding of the jurisprudential significance of psychopathy is further complicated by the fact that empirical work on psychopathy is still evolving and is currently unsettled in several respects. For these reasons, I cannot hope to resolve issues about the responsibility of psychopaths here. But the fair opportunity conception of responsibility, incompetence, and excuse can help to frame the debate about whether psychopathy can excuse in a constructive way. Moreover, there is, I will argue, good reason to be skeptical about whether we should recognize such an excuse at the present time, given what we now know about the nature of psychopathy.

Debates about the responsibility of psychopaths reveal the ways in which cases of potential excuse raise questions at the intersection of moral philosophy, moral psychology, criminal jurisprudence, and empirical psychology. The interdisciplinary nature of these issues explains part of their special interest, but it also brings risks. Because it is hard to be a master of all the relevant interdisciplinary perspectives, most of us seek to illuminate part of an interdisciplinary issue by focusing on the perspectives we know best and trying to educate ourselves about the ones we know less well. That is my aspiration here, to try to articulate one attractive conception of responsibility and excuse and then to explore how that perspective might help frame partly empirical debates about incompetence and psychopathy.

1. Responsibility as the Fair Opportunity to Avoid Wrongdoing

Here, I sketch a conception of the architecture of responsibility that draws on ideas in the reasons-responsive wing of the compatibilist tradition of thinking about free will and responsibility and ideas from the fair choice approach to criminal responsibility.² On a broadly retributive view, blame and sometimes punishment are fitting responses to wrongdoing for which the agent is culpable or responsible. More specifically, blame and punishment ought to be proportional to desert, which is itself the product of two independent variables — wrongdoing and culpability or responsibility.³

$$P \propto D (= W \times R)$$

The retributivist formula should be understood as claiming only that culpable wrongdoing is the desert basis for a *pro tanto* case for blame and punishment. That is, a plausible form of retributivism should allow that its desert-based rationale for blame and punishment can sometimes compete with and sometimes lose out to non-desert-based rationales against blame and punishment, appealing to factors such as mercy or forgiveness.⁴

This sort of broadly retributive view explains well the two main kinds of defense an agent might offer when blame or punishment threatens — *justifications* and *excuses*. Justifications deny wrongdoing, whereas excuses deny culpability or responsibility. Just as justification is the flipside of wrongdoing, so too excuse is the flipside of responsibility. These defenses are part of the criminal law but also reflect well the moral landscape. When others threaten to blame us morally, it can be appropriate to respond citing factors that would justify or excuse our behavior. Our focus here is on responsibility and excuse. Excuses provide a window onto responsibility, and our conceptions of excuse and responsibility should have corresponding structure.

If someone is to be culpable or responsible for her wrongdoing, then she must be a responsible agent. Our paradigms of responsible agents are normal mature adults who are *normatively competent*. They must be able to distinguish between the *intensity* and *authority* of their desires and impulses. This requires that agents not simply act on their strongest desires, but be capable of stepping back from their desires, evaluating them, and acting for good reasons. If so, normative competence involves *reasons-responsiveness*, which itself involves both *cognitive* capacities to distinguish right from wrong and *volitional* capacities to conform one's conduct to that normative knowledge.

It is important to frame this approach to responsibility in terms of normative *competence* and the possession of these *capacities* for reasons-

responsiveness. In particular, responsibility must be predicated on the possession, rather than the use, of such capacities. We do excuse for lack of competence. We do not excuse for failures to exercise these capacities properly. Provided the agent had the relevant cognitive and volitional capacities, we do not excuse the weak-willed or the willful wrongdoer for failing to recognize or respond appropriately to reasons. If responsibility were predicated on the proper use of these capacities, we could not hold weak-willed and willful wrongdoers responsible for their wrongdoing. Indeed, the fact of wrongdoing would itself be exculpatory, with the absurd result that we could never hold anyone responsible for wrongdoing. It is a condition of our holding wrongdoers responsible that they possessed the relevant capacities.

Normative competence, on this conception, involves two forms of reasons-responsiveness: an ability to *recognize* wrongdoing and an ability to *conform one's will* to this normative understanding. Both dimensions of normative competence involve norm-responsiveness. As a first approximation, we can distinguish moral and criminal responsibility at least in part based on the kinds of norms to which agents must be responsive. Moral responsibility requires capacities to recognize and conform to moral norms, including norms of moral wrongdoing, whereas criminal responsibility requires capacities to recognize and conform to norms of the criminal law, including norms of criminal wrongdoing.

Normative competence requires the cognitive capacity to make suitable normative discriminations, in particular, to recognize wrongdoing. If so, then we can readily understand one aspect of the criminal law insanity defense. As we will see, a full account of the elements of insanity is controversial. But most plausible versions of the insanity defense include a cognitive dimension, first articulated in the M'Naghten rule that excuses if the agent lacked the capacity to discriminate right from wrong at the time of action.⁵

But there is more to normative competence than this cognitive capacity. It is a common view that intentional action is the product of informational states, such as beliefs, and motivational states, such as desires and intentions. Though our beliefs about what is best can influence our desires, producing optimizing desires, our desires are not always optimizing. Sometimes they are good-dependent but not optimizing, when they are directed at lesser goods, and sometimes they are completely good-independent. This is reflected in cases of weakness of will in which we have beliefs about what is best (and perhaps optimizing desires) but in which we act instead on the basis of independent non-optimizing passions and desires. This psychological picture suggests that being a responsible agent is not merely having the capacity to tell right from wrong but also requires

the capacity to regulate one's actions in accordance with this normative knowledge. This kind of volitional capacity requires emotional and appetitive capacities to enable one to form intentions based on one's practical judgments about what one ought to do and execute these intentions over time, despite distraction, temptation, and other forms of interference.

If one's emotions and appetites are sufficiently disordered and outside one's control, this might compromise volitional capacities necessary for normative competence. Consider the following obstacles to volitional competence.

- Irresistible desires or paralyzing fears that are neither conquerable nor circumventable, as perhaps in some cases of genuine agoraphobia or addiction.⁶
- Clinical depression that produces systematic weakness of will in the form of listlessness or apathy.
- Acquired or late onset damage to the prefrontal cortex of the brain in which agents have considerable difficulty conforming to their own judgments about what they ought to do, as in the famous case of Phineas Gage.⁷

Each of these cases involves significant volitional impairment in which agents experience considerable difficulty implementing or conforming to the normative judgments they form.

As we will see, recognition of a volitional dimension of normative competence argues against purely cognitive conceptions of insanity, such as the M'Naghten test, which recognizes only cognitive deficits as the basis for insanity, and in favor of a more inclusive conception that recognizes an independent volitional dimension to sanity and so recognizes a wider conception of insanity as involving significant impairment of *either* cognitive or volitional competence.

Both cognitive and volitional competence involve *sensitivity* to reasons. But sensitivity is a *scalar* notion. This raises the question how responsive someone needs to be to be responsible. This is an important and difficult issue, deserving more careful discussion than I can give it here. We might begin by distinguishing different *grades* of responsiveness.⁸ We can specify the degree to which an agent is responsive to reasons in terms of counterfactuals about what she would believe or how she would react in situations in which there was sufficient reason for her to do otherwise.⁹ An agent is more or less responsive to reason depending on how well her judgments about what she ought to do and her choices would track her reasons for action. Initially, we might distinguish two extreme degrees of responsiveness.

- *Strong Responsiveness*: Whenever there is sufficient reason for the agent to act, she recognizes the reason and conforms her behavior to it.
- *Weak Responsiveness*: There is at least one situation in which there is a sufficient reason to act, and the agent recognizes that reason and conforms her behavior to it.

However, it does not seem plausible to model normative competence in terms of either strong or weak responsiveness.

Strong responsiveness is too strong for the same reason we gave for focusing on competence, rather than performance. We do not require that people actually act for sufficient reasons; it is the capacities with which they act that matter. The weak-willed are, at least typically, responsible for their poor choices. Indeed, since strongly reasons-responsive agents always recognize and conform to reasons, they would never act wrongly. But that would make wrongdoing per se excusing, which would prevent us from ever holding wrongdoers responsible.

Moreover, weak responsiveness seems too weak. It treats someone as responsive in the actual situation even if she did not respond in the actual situation and there is only one extreme circumstance in which she would recognize and respond to reasons for action. Suppose that the agoraphobe's phobia is so irresistible that she could only resist it under imminent threat of death. Should she be regarded as normatively competent in situations involving lesser threats? For instance, should she be held responsible for not leaving her house if this was the only way to prevent a minor property crime? Weak responsiveness seems too weak.

The Goldilocks standard of responsiveness evidently lies somewhere between these extremes. Of course, there is considerable space between the extremes – the gap between always and once. We might stake out an intermediate form of responsiveness.

- *Moderate Responsiveness*: Where there is sufficient reason for the agent to act, she regularly recognizes the reason and conforms her behavior to it.

Moderate responsiveness is deliberately vague; it specifies a range or space of counterfactuals that must be true for the agent to be suitably responsive. Ideally, we would be able to specify a preferred form of moderate responsiveness more precisely. But what is important, for present purposes, is that reasons-responsiveness is a matter of degree and that the right threshold for responsibility involves some kind of regularity in tracking and conforming to one's reasons.

An important part of an agent's being responsible for wrongdoing that she chose and intended consists in her being a responsible agent. This we have conceptualized in terms of normative competence and analyzed into cognitive and volitional capacities. Evidence for this view is that one seems to have an excuse, whether complete or partial, if one's normative competence is compromised in significant ways. Some of the most familiar kinds of potential excuse – insanity, immaturity, and uncontrollable urges – involve compromised normative competence.

But there is more to an agent being culpable or responsible for her wrongdoing than her being responsible and having intentionally engaged in wrongdoing. Excuse is not exhausted by denials of normative competence. Among the factors that may interfere with our reactive attitudes, including blame and punishment, are *external* or *situational* factors. In particular, *coercion* and *duress* may lead the agent into wrongdoing in a way that nonetheless provides an excuse, whether full or partial. The paradigm situational excuse is coercion by another agent, as when one is threatened with physical harm to oneself or a loved one if one doesn't participate in some kind of wrongdoing, for instance, driving the getaway car in a robbery. The *Model Penal Code* adopts a reasonable person version of the conditions under which a threat excuses, namely, when a person of reasonable firmness would have been unable to resist, provided the actor was not himself responsible for being subject to duress.¹⁰ Though criminal law doctrine focuses on threats that come from another's agency, hard choice posed by natural forces seems similarly exculpatory, as in Aristotle's famous example of the captain of the ship who must jettison valuable cargo in dangerous seas caused by an unexpected storm (*Nicomachean Ethics* 1110a9-12). Situational duress does not compromise the wrongdoer's status as a responsible agent and does not challenge her normative competence, but it does challenge whether she is responsible for her wrongdoing.¹¹

So far, the conception of responsibility emerging here is a two-factor model twice over. Responsibility is factored into normative competence and situational control, and normative competence is factored into cognitive and volitional capacities. This kind of two-factor model seems plausible, in significant part because it promises to fit our practices of excuse in both moral assessment and the criminal law pretty well. Perhaps this is adequate justification. But it would be nice if there were some unifying element to its structure.

One possible umbrella concept is *control*. Freedom from coercion and duress, cognitive competence, and volitional competence all seem to be aspects of an agent's ability to control her actions. But control seems important, at least in part, because it seems *unfair* to blame agents for

outcomes that are outside their control. This suggests that the umbrella concept should be *fairness*, in particular, *the fair opportunity to avoid wrongdoing*, because failure of either normative competence or situational control violates the norm that blame and punishment be reserved for those who had a fair opportunity to avoid wrongdoing. If we treat the fair opportunity to avoid wrongdoing as the key to responsibility, we get the following picture of the architecture of responsibility.



One way to see the importance of the fair opportunity to avoid wrongdoing is to think about why strict liability is problematic. Strict liability offenses are those for which wrongdoing is sufficient for blame and punishment and culpability is not required. It may be acceptable to impose liability without culpability in civil (tort) law. But in those parts of law and morals where we are interested in *accountability*, the idea of liability without culpability is problematic. In particular, broadly retributivist practices that condition blame and punishment on culpable wrongdoing must object to strict liability as unfair.¹²

2. Excuse, Incompetence, and Insanity

Part of the appeal of understanding responsibility in terms of the fair opportunity to avoid wrongdoing is that it explains well the two main kinds of excuse — those that deny normative competence and those that deny situational control. Whereas insanity, immaturity, and uncontrollable urges involve compromised normative competence, coercion and duress compromise the agent's opportunity to exercise her normative competence. If either normative competence or situational control is significantly compromised, this compromises the agent's fair opportunity to avoid wrongdoing. In the remainder of this essay, I want to consider

how we should understand failures of normative competence and whether psychopaths are incompetent in the requisite way.

In discussing excuses, in general, and incompetence excuses, in particular, some philosophers distinguish between *excuses* and *exemptions*.¹³ The prototypical case of an exemption is a case in which an actor is not responsible for what he did because of quite general impairments of his agency. So, for instance, insanity and immaturity are sometimes described as exemptions. By contrast, excuses are sometimes claimed to be prototypically case-specific in which the agent is otherwise normal and responsible but suffered some kind of momentary lapse or interference, perhaps due to exhaustion or temporary dementia brought on by severe dehydration. But we should be careful about treating exemptions and excuses as disjoint classes. For one thing, the criminal law includes all claims to less than full culpability in the single category of excuse. Moreover, there are intermediate cases. Indeed, immaturity might affect a broad range of decision-making, but, while not episodic, nonetheless is temporary and eventually outgrown. Psychoses might also be generally incapacitating but temporary in duration if they can be treated effectively with medication. Whether temporary or long lasting, irresistible urges and paralyzing emotions may be selective in the way they undermine an agent's practical reasoning. For these reasons, exemptions are best understood as comparatively global or standing excuses.

Moral responsibility presupposes normative competence with respect to moral norms. It requires agents to be able to recognize moral norms and distinguish moral right from wrong and to be able to conform their behavior to this moral knowledge. Significant impairment of either cognitive or volitional competence would be the basis for an incompetence excuse. My sense is that our assessments of moral responsibility and excuse are potentially sensitive in two ways. First, our assessments of moral responsibility are in principle open to various kinds of impairment of competence. Multiple personality disorder, psychosis, severe depression, immaturity, addiction, irresistible impulses, and paralyzing fears might all compromise moral competence. The relevant question is whether they involve a significant enough impairment of cognitive or volitional abilities. For the most part, our moral assessments recognize these as open and at least partly empirical questions. Second, our moral assessments generally recognize that responsibility and excuse are scalar, because moral competence itself is scalar. Cognitive and volitional competence are matters of responsiveness, which is itself a matter of degree. Impairments can be partial, making it unusually hard, but not literally impossible, for some agents in some circumstances to recognize moral norms or to conform to them. In such cases, where the determinants of responsibility and excuse

are themselves a matter of degree, so too can responsibility and excuse be partial. Our moral assessments can recognize *partial responsibility* and be *multivalent*.

Criminal responsibility presupposes normative competence with respect to norms of the criminal law. It too would seem to require both cognitive and volitional competence — the cognitive capacity to recognize criminal norms and distinguish lawful and unlawful behavior and the volitional capacity to conform one's behavior to these norms, despite distraction and temptation. By contrast with our assessments of moral responsibility, assessments of criminal responsibility are more coarse-grained. First, the criminal law's only incompetence excuse is insanity. A putative form of incompetence must qualify as insanity to be excusing in American criminal law. That assumption could put pressure on the criminal law to employ an expansive conception of insanity, so as not to leave out any potential incompetence excuses, but it may also lead to a restrictive conception of incompetence excuses. Second, for the most part, American criminal law does not recognize degrees of responsibility and excuse or partial responsibility and excuse.¹⁴ Our criminal system is generally *bivalent*, treating agents as either responsible or non-responsible. Presumably, the criminal law recognizes that the capacities underlying competence and sanity are scalar in nature, but insists, perhaps on pragmatic grounds, that we privilege certain degrees of normative competence as necessary and sufficient for responsibility and excuse. There is an important question, which we will examine shortly, of where to set these thresholds. Those above the threshold are responsible and have no excuse, and those below the threshold are not responsible and have a full excuse. The natural worry about such a bivalent approach is that the threshold will be arbitrary and doesn't recognize important differences above and below the threshold. In particular, a bivalent system gives rise to worries about being overly punitive for punishing those with significant impairments that fall below the level required for a full excuse just as severely as those with no significant impairments at all. This is a potential worry about criminal justice systems that do not recognize a doctrine of partial excuse. But even in such systems, the same facts about diminished capacity that would justify partial excuse in a multivalent system can and should operate as mitigating factors at sentencing. Mandatory sentencing schemes are problematic insofar as they compromise the retributive rationale for individual desert and prevent the recognition of partial excuses as mitigating factors.

While I am interested in moral responsibility, as well as criminal responsibility, and eventually want to explore ways in which they might interact, I want to focus in the rest of this section on what the fair op-

portunity conception of responsibility implies about the way we should conceive of the insanity defense.

The evolution of the insanity defense has not been linear. Simplifying somewhat, the main debate has been whether sanity is just a matter of cognitive competence, with the result that the insanity excuse should involve a purely cognitive impairment, or whether sanity includes volitional competence as well, in which case insanity could take the form of cognitive or volitional impairment. These two different conceptions are represented by the M’Naghten test and by the *Model Penal Code* test, respectively.¹⁵ It is significant that, at least conceptually, the M’Naghten test represents a narrower conception of excuse than the *Model Penal Code*. Prior to adoption of the *Model Penal Code*, the purely cognitive M’Naghten test was the dominant conception of insanity in Anglo-American criminal law. But the *Model Penal Code* introduced a broader conception of agency and responsibility, one that recognized that responsibility has volitional, as well as cognitive, elements. Here, as elsewhere, the *Model Penal Code* proved incredibly influential, leading many jurisdictions in the United States to abandon the narrower M’Naghten test for the broader MPC test. However, this trend changed dramatically in the wake of John Hinckley’s acquittal in 1982 on grounds of insanity for the attempted murder of President Ronald Reagan. Public outcry over the verdict led to a backlash against the MPC test and a return in many jurisdictions to a narrower M’Naghten-style conception of insanity. Though the backlash was neither principled nor empirically well informed, it has reshaped the insanity defense in American jurisdictions with 52% of states now employing a purely cognitive conception and only 40% now employing a cognitive and volitional conception.¹⁶

Some interpret the M’Naghten test to ask whether the agent did in fact know that what she was doing was wrong.¹⁷ However, as the fair opportunity conception of responsibility implies, lack of knowledge shouldn’t be excusing if the agent could have known that what she was doing was wrong. The more common understanding of M’Naghten focuses on cognitive competence, not performance. For instance, the Federal insanity test, adopted in the post-Hinckley era, reflects this interpretation of M’Naghten.

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.¹⁸

One interesting issue, which we will return to later, is whether the wrongdoing that is the object of the cognitive competence is legal or moral. The most natural assumption, I think, for purposes of a doctrine of criminal responsibility and excuse would be to require that the agent have had the capacity to recognize behavior as unlawful or criminal. But the issue is contested. Britain has resolved this ambiguity in favor of legal wrongdoing, but American jurisdictions remain divided over the issue, specifying it one way in some jurisdictions, the other way in others, and letting courts resolve the matter in others.

Article 4 of the *Model Penal Code* deals with responsibility. §4.01 deals with Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (2) As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The *Model Penal Code* insanity test leaves it to legislative discretion to specify whether the wrongdoing in question is legal or moral. Like M’Naghten, it requires that the relevant incapacities be due to mental disease or defect and that there be independent evidence of this disease or defect, apart from the wrongdoing itself. Despite these commonalities, the MPC test differs from M’Naghten in several ways. In particular, it is conceptually broader than M’Naghten in three ways.

First, the most important difference is that whereas M’Naghten has a purely cognitive conception of responsibility, the MPC conception is cognitive and volitional. The MPC requires that responsible agents not only be able to recognize wrongdoing but also be able to conform their conduct to this normative knowledge. Since both cognitive and volitional competence are required, significant impairment of *either* is excusing. This contrasts with the narrower M’Naghten conception, which recognizes only cognitive impairments as excusing.

Second, the *Model Penal Code* says that one is insane if one lacks a *substantial* capacity, whether cognitive or volitional. This also contrasts with traditional understandings of M’Naghten that say, in effect, that one must be completely lacking in (cognitive) capacity to qualify as insane. Someone who had minimal cognitive competence might well qualify as sane under M’Naghten but as insane under the *Model Penal Code*. MPC

applies this same substantial capacity analysis to volitional, as well as cognitive, capacities.

Finally, the *Model Penal Code* requires that the defendant be able to *appreciate* the wrongfulness of her conduct. It is not immediately clear if this is different from the M’Naghten requirement to be able to *recognize* the wrongfulness of her conduct. These could be viewed as equivalent formulations. But one might doubt that they are equivalent and think that the MPC introduces a further requirement. By analogy, one might think that one could recognize a fine wine, perhaps without ever tasting it, but that one could only appreciate that a wine was fine if one had tasted it and/or had some sense of what made it fine. Similarly, one might be able to recognize behavior as unlawful or morally wrong without any appreciation or understanding of what makes it unlawful or morally wrong. On this view, appreciation requires at least a rudimentary understanding of *why*, as well as *that*, something is wrong. So it may not be enough to be aware that the conduct is wrong if one doesn’t have a sense of what makes it wrong. We might say appreciation involves knowing not only *that* something is wrong but also something about *why* it is wrong. Whereas M’Naghten’s knowledge requirement involves a fairly thin kind of understanding, MPC’s appreciation requirement arguably involves a thicker kind of understanding. Even if appreciation is a further requirement, there is a question whether it is a reasonable further requirement to place on sanity.

3. Fair Opportunity, Insanity, and Incompetence

As between M’Naghten and *Model Penal Code* conceptions of insanity or incompetence, the fair opportunity conception of responsibility favors something much closer to the MPC conception. However, we will see that there are reasons to broaden the MPC conception in two ways and narrow it in another.

First and foremost, the fair opportunity conception of responsibility favors a conception of an incompetence excuse that recognizes volitional as well as cognitive impairment as excusing, precisely because cognitive competence and volitional competence are individually necessary and jointly sufficient for an agent to be responsible. The *Model Penal Code* conception of insanity is an important advance on the M’Naghten conception, precisely because it recognizes an independent volitional dimension to sanity and so recognizes a wider conception of insanity as involving significant impairment of *either* cognitive or volitional competence. A failure of either kind of competence compromises the offender’s fair opportunity to avoid wrongdoing.

It might be appropriate here to consider one kind of skepticism about the bearing of volitional competence on insanity. Stephen Morse has expressed skepticism about the criminal law recognizing volitional impairment as an independent ground of excuse, and his skepticism is especially interesting, because he is otherwise sympathetic with a fair choice conception of criminal responsibility that is similar to the fair opportunity conception defended here. In his essay “Uncontrollable Urges and Irrational People,” Morse critically discusses proposals to treat wrongdoers with irresistible impulses as excused for lack of control. He claims, not implausibly, that many with emotional or appetitive disorders are nonetheless responsible, because they retain sufficient capacity for rationality (1040). In discussing excuses that appeal to uncontrollable urges, he makes clear that his conception of rationality excludes volitional components (1054). But why should we abandon a volitional dimension to normative competence and control? Morse focuses on the alleged threat posed by irresistible urges and makes several different claims about them: (1) we cannot make sense of irresistible urges, (2) we cannot distinguish between genuinely irresistible urges and urges not resisted, (3) there are no irresistible urges, because under sufficient threat of sanction we can resist any strong urge.

Morse’s focus on irresistible urges is already problematic, because it ignores the varieties of volitional impairment, which include not just irresistible urges but also paralyzing fears, depression, and systematic weakness caused by damage to the prefrontal cortex.

First, Morse suggests that the idea of irresistible urges is not coherent (1062). We simply have no idea what it would be for an urge or desire to be irresistible. But there seems to be no conceptual problem with irresistible urges. We can conceive of paralyzing emotions or irresistible desires, as emotional states or appetites that stand in the way of implementing the verdicts of practical reason — states and appetites that are unconquerable and uncircumventable. Resistibility is a modal notion. There is a question about how unconquerable or uncircumventable impulses must be to be excusing, and there may be evidential or pragmatic problems about identifying desires that are genuinely irresistible. But the concept of irresistible desires does not seem especially problematic.

Second, Morse claims that even if we could make sense of irresistible urges, we could not distinguish between irresistible urges and urges not resisted (1062). This is the problem of distinguishing between *can’t* and *won’t*. First of all, this is an evidentiary problem, not a claim about the ingredients of normative competence. Moreover, this evidentiary problem seems no worse than the one for the cognitive dimension of normative competence, which requires us to distinguish between a genuine inability

to recognize something as wrong and a failure to form correct normative beliefs or attend to normative information at hand. Making the distinction between can't and won't is a challenge, but not an insurmountable one, in either the cognitive or volitional case. It requires that we ascertain whether the agent was moderately reasons-responsive. For instance, there are neurophysiological tests for various forms of affective, as well as cognitive, sensitivity, such as electrodermal tests of empathetic responsiveness.¹⁹ And a sufficiently consistent history of weakness of will would be evidence of problems of volitional control.

Finally, Morse claims that even if we could distinguish can't and won't, we would find that in actual cases the urges in question are almost always resistible. In discussing whether an addict's cravings are irresistible, Morse argues that they are not because if you hold a gun to the addict's head and tell him that you'll shoot him if he gives in, he can resist (1057-58, 1070). This is reminiscent of the sort of weak responsiveness that Kant requires in *The Critique of Practical Reason*.

Suppose that someone says his lust is irresistible when the desired object and opportunity are present. Ask him whether he would not control his passion if, in front of the house where he had this opportunity, a gallows were erected on which he would be hanged immediately after gratifying his lust. We do not have to guess very long what his answer would be.²⁰

Morse and Kant believe that volitional capacity is easily demonstrated insofar as agents can always resist desires and temptations under sufficient threat. In effect, this claim about the volitional dimension of normative competence is that one can't have weak responsiveness without having moderate responsiveness. Anyone who can resist an urge in one extreme situation can resist it in others. But there seems to be no good reason to accept this psychological stipulation. An agoraphobe might have such a paralyzing fear of public spaces that she would be induced to leave her home only under imminent threat of death. There is no reason to assume that we cannot have weak responsiveness without moderate responsiveness.

Weak responsiveness seems implausible as a general condition on responsibility. Cases in which a person would only react differently under a threat of imminent death, because of a paralyzing fear or compulsion, for example, seem to be cases in which we should excuse.²¹ If a desire is really only resistible in this one counterfactual case, then that seems to be a good reason for thinking that the agent is not responsible, or at

least not fully responsible, in the actual case in which she failed to resist a significantly smaller threat.

On closer inspection, it seems Morse is really ambivalent between two different kinds of skepticism about the volitional dimension of normative competence and its significance. In some moments, he denies that there is any separate volitional dimension to normative competence, beyond the cognitive dimension. At other times, he recognizes the need for a separate volitional dimension but claims that it is easily satisfied because volitional conformity to what one judges right and wrong is all of a piece. Neither form of skepticism is especially promising.

This discussion about the degrees of reasons-responsiveness is also relevant to assessing the second distinctive feature of the *Model Penal Code* conception of insanity. Whereas M'Naghten requires complete cognitive incapacity for excuse, the MPC requires only substantial incapacity, whether cognitive or volitional. We can recast this difference in terms of reason-responsiveness. Whereas M'Naghten requires only weak responsiveness, the MPC arguably requires moderate-responsiveness. Someone who was only weakly responsive to wrongdoing in the sense that she was rarely able to recognize wrongdoing and only under unusual circumstances, remote from her actual circumstances, would qualify as sane under M'Naghten but might well qualify as insane under the *Model Penal Code*. The substantial capacity test is strengthened if we remember that the criminal law is bivalent in its verdicts. In ideal criminal theory, in which we were perfectly reliable about determining just deserts, responsibility and excuse should be scalar and track the degree of normative competence. But it seems likely that criminal law doctrine, as we have it, was designed for non-ideal theory, perhaps because of doubts about the ability of courts to reliably track small differences in culpability. At least, this is one rationale for a binary system that treats responsibility and excuse as all or nothing and sets a threshold of competence above which the agent is fully responsible and below which she is fully excused, even when the determinants of responsibility are themselves scalar. The use of thresholds here must be somewhat arbitrary, forcing us to treat A and B as equally responsible even if A is barely above the threshold and B is well above it. If we set the threshold very low, then a great many who are marginally responsible will be treated as fully responsible. If, as many believe, it is more unjust to over-punish than to under-punish, then we have special reason not to set the threshold too low.²² So, as long as we operate in a binary system that does not recognize partial responsibility and excuse, there is a good argument for setting the threshold at substantial capacity, as the *Model Penal Code* does, rather than bare capacity, as M'Naghten does.

It's harder to know what the fair opportunity conception of responsibility implies about the *Model Penal Code* requirement that the agent be able to appreciate the quality of his act and its wrongfulness, in part because it is hard to know whether appreciation should be understood as a further requirement beyond recognition of wrongfulness. The greater the gap between the sort of understanding required by appreciation and recognition, the more significant the appreciation requirement. But the more significant the gap, the harder it is to justify a separate appreciation requirement. The fair opportunity to avoid wrongdoing requires agents to be able to discriminate right from wrong and recognize wrongdoing. Perhaps because the fair opportunity to avoid wrongdoing requires that the agent be able to recognize when wrongdoing is justified, for instance, as permission to do the lesser evil, it may require that the agent be able to *grade* offenses as greater and lesser. So a recognitional capacity should perhaps include a rough gradeability capacity. But it is not clear that the fair opportunity to avoid wrongdoing requires any very subtle or sophisticated form of legal or moral understanding.

We might contrast *refined morality* and *basic morality*. Refined morality can be delicate, requiring a keen appreciation of the needs and signals of others and a deft touch. However, much of morality requires fairly basic honesty, cooperation, fidelity, restraint, and fair play and a capacity for moral triage. The requirements of the criminal law are even more elemental. Two points are worth making in light of this contrast. First, our focus here is on basic morality and the criminal law, whose demands are fairly similar. The cognitive capacities necessary to recognize basic morality and the criminal law will be more modest than those necessary to recognize refined morality. Second, even if we shift focus to refined morality, it is not clear why this should induce us to switch from recognition to appreciation. The norms of refined morality may be more complex or subtle than those of basic morality, which would affect the capacities necessary for recognizing the norms in question, but there is no apparent reason that this should affect the sort of cognitive relation the agent should bear to these norms. These considerations suggest caution about embracing an appreciation standard that is significantly more demanding than a recognitional standard, especially if we focus on basic morality and the criminal law. The fair opportunity conception of responsibility seems to require only a recognitional capacity and perhaps a gradeability capacity.

So far, the fair opportunity conception of responsibility supports the more inclusive *Model Penal Code* conception of insanity, in preference to the conceptually more restrictive M'Naghten conception. But now I want to consider two ways in which that conception of responsibility might call

for reform of the MPC conception of insanity. The first requires broadening the MPC insanity conception; the second requires narrowing it.

Like M’Naghten and all other proposed insanity tests, the *Model Penal Code* restricts the insanity defense to wrongdoing that results from incapacity “due to mental disease or defect.” Call this the *mental disease requirement*. On one reading of this requirement, it is a further condition beyond the relevant kind of incapacity, yielding a smaller class of excuses than the simple appeal to incapacity would. However, according to the fair opportunity conception of responsibility, significant impairment of normative competence is excusing. This generates the worry that the MPC conception of insanity, with its mental disease requirement, is too narrow to serve as a general incompetence excuse. This would not be a problem if insanity was just one form of incompetence among others recognized by the criminal law. For then forms of incompetence not meeting the mental disease requirement could be excused on grounds other than insanity. The problem is that insanity is the only incompetence excuse that American criminal law recognizes. Criminal law conceptualizes incompetence as insanity. But then if there are forms of incompetence that would not be recognized by the *Model Penal Code*, because of its mental disease requirement, there is reason to regard the MPC conception of insanity as an under-inclusive incompetence excuse.

Whether this is a real problem for the *Model Penal Code* depends on how we understand the mental disease requirement. The problem is real if the mental disease requirement is supposed to function as an independent requirement, one constrained by independent psychiatric criteria. This would be to treat the concept of mental illness as a diagnostic *clinical* category, perhaps drawing its evidence from the current version of the *Diagnostic and Statistical Manual of Mental Disorders*.²³ This clinical reading of the mental illness requirement would further limit the larger class of normative incapacity to the proper subclass of those whose normative incompetence is the product of clinically recognized mental illness or defect, and this would give rise to the worry that the MPC insanity test represents an under-inclusive incompetence excuse.

Alternatively, we might interpret the mental disease requirement as having no independent significance. Perhaps any form of significant normative incompetence qualifies as a mental illness. This would be to treat the concept of mental illness, for purposes of the *Model Penal Code*, as a *forensic* category. If so, there is no problem of under-inclusiveness, because the mental illness requirement is not an independent requirement above and beyond the incompetence requirement. The mental illness requirement, on this forensic reading, does not pick out a proper subset of the class of normative incompetence.

It is unclear how exactly we are supposed to understand the mental disease requirement for purposes of the *Model Penal Code* and, in particular, whether we should understand it as a clinical or forensic category. Of course, psychiatric evidence will be relevant on either reading of the requirement — on the clinical reading, as evidence that the defendant had a bona fide mental disease over and above her incompetence, on the forensic reading, as evidence that she is normatively incompetent. I suspect that most consumers of the *Model Penal Code* understand the requirement as a clinical category.²⁴ If so, we should treat its conception of insanity as only a proper part of an incompetence excuse. This would be reason to abolish the insanity test and replace it with a more general incompetence test that would include both cognitive and volitional competence. Traditional abolitionists are *hard abolitionists*, because they seek to remove the excuse provided by the insanity defense. By contrast, the form of abolitionism that the fair opportunity conception of responsibility favors is *soft abolitionism*, inasmuch as it rejects the clinical interpretation of the mental disease requirement in the insanity defense and argues for a broader excuse of normative incompetence.

The *Model Penal Code* test is potentially too narrow in another way as well. Recall that the second clause in its conception of insanity states that the required mental disease or defect should not be understood to “include an abnormality manifested only by repeated criminal or otherwise anti-social conduct” (§4.01). This is a reasonable requirement if it requires independent evidence of incapacity beyond the wrongdoing in question. Moreover, this independent evidence should presumably include psychiatric evidence beyond that contained in the defendant’s criminal record. But the clause surely goes too far in claiming that the evidence for incapacity cannot include the person’s record of social deviance. A sufficiently consistent record of social deviance, criminal and non-criminal, would be evidence of significant impairment of normative competence and would raise serious questions about whether the agent was moderately reasons-responsive. So this second clause in the MPC conception of insanity should be dropped.

If the *Model Penal Code* conception of insanity is too narrow in these ways, it is in another way too broad. For its conception of insanity treats normative incompetence as sufficient for an incompetence excuse. Though in many cases normative incompetence of the relevant kind should be sufficient for an excuse, not in all cases. In particular, in cases in which the agent is herself responsible for becoming incompetent, it seems she should not be afforded an excuse. Consider someone who suffers from a kind of mental defect that renders her normatively incompetent but that can be effectively treated with medication. Assume that she is normatively

competent when she is on her medication but that, while competent, she chooses to stop taking her medication, rendering her, in due course, incompetent. By hypothesis, she would not be competent at the time of her wrongdoing and so would qualify for the insanity defense if incompetence were sufficient for that excuse. Presumably, we want to say that the insanity or incompetence excuse should be unavailable to wrongdoers even if they were incompetent at the time of their wrongdoing if they were competent and, hence, responsible for becoming incompetent.

This would introduce into the criminal law doctrine of insanity a restriction on the availability of the excuse when the agent is responsible for what would otherwise be excusing conditions. This would be to treat insanity similar to the way in which the *Model Penal Code* treats voluntary intoxication and self-induced duress (§§2.08(4)-(5)(b) and 2.09). Consider its account of the excuse of duress, which denies situational control, rather than normative competence.

- (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
- (2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged [§2.09].

In effect, the *Model Penal Code* denies the excuse of duress when an agent who is otherwise subject to duress is responsible for her own duress. Its account of incompetence should be parallel, denying an excuse of incompetence to an agent who is otherwise incompetent but is responsible for her own incompetence.²⁵

If we were to draft an insanity test inspired by the *Model Penal Code* that could nonetheless serve as a general incompetence excuse, it might read something like this, as a first approximation.

- (1) A person is not responsible for criminal conduct if at the time of such conduct she lacks substantial capacity either to appreciate the criminality or wrongfulness of her conduct or to conform her conduct to these norms.

(2) This defense is not available to wrongdoers even if they were incompetent at the time of their wrongdoing if they were competent and, hence, responsible with respect to becoming incompetent.

Some such conception of incompetence incorporates the virtues of the *Model Penal Code*, while correcting for the respects in which its conception of excuse is both too narrow and too broad. It is the sort of incompetence excuse supported by the fair opportunity conception of responsibility.

4. Psychopathy

In light of the fair opportunity conception of responsibility and excuse, in particular, its conception of incompetence, we are now in a position to inquire whether psychopathy should be excusing and, if so, why or how. To address this issue, we also need to know something about the nature of psychopathy. Despite decades of research by psychologists, psychiatrists, cognitive scientists, neuroscientists, and criminologists, there is still much that is not known or that is contested about psychopathy, for instance, about its etiology and neuroanatomy. In what follows, I will try to focus on the syndrome of personality traits and behavior that is best understood and most directly relevant to assessments of normative competence.²⁶

Psychopathy is thought to depend on endogenous neurological and personality factors, even if its psychological and behavioral expression can sometimes be affected by nurture, education, and other environmental factors. Psychopathic personality and behavior in adults is usually traceable back to childhood, with adult onset both rare and contested. Hervey Cleckley's pioneering work on psychopathy in *The Mask of Sanity* (1941) has been extremely influential and remains helpful. It is noteworthy that Cleckley's clinical observations included both unsuccessful or criminal psychopaths and so-called successful psychopaths whose deviance did not include criminal behavior or who had not been caught and convicted for criminal behavior. As the title of Cleckley's book suggests, he was struck by the superficial appearance of normalcy in most psychopaths. Unlike familiar forms of mental illness that might qualify for an insanity defense, psychopaths do not usually present as obviously mentally disturbed. They are not delusional, incoherent, unusually anxious, or especially prone to suicide. In fact, psychopaths are usually quite intelligent and articulate and display superficial social skills and even charm. But if one looks beneath this veneer and examines their history, psychopaths display similar personality traits and behavior. They tend to be egocentric and to have shallow affect or emotion and little insight into the emotional lives of others; they

are insincere and untruthful; and they lack remorse for their wrongdoing. These traits lead to various behavioral problems. They regularly engage in antisocial behavior that causes hardship to others; this antisocial behavior is typically inadequately motivated and imprudent; they fail to learn by experience from their mistakes; their behavior is aimless and displays no life plan; and they are unable to sustain lasting and satisfying interpersonal relationships.²⁷

Building on Cleckley's work, Robert Hare developed an extremely influential diagnostic tool for psychopathy — the Hare Psychopathy Checklist — Revised (PCL-R).²⁸ Developed in prison populations, it purports to be a general psychopathy construct but is perhaps best suited for diagnosing criminal psychopathy. The PCL-R tests the following traits and behaviors.

1. Glibness/superficial charm
2. Grandiose sense of self-worth
3. Need for stimulation/proneness to boredom
4. Pathological lying
5. Conning/manipulative
6. Lack of remorse or guilt
7. Shallow affect
8. Callous/lack of empathy
9. Parasitic lifestyle
10. Poor behavioral controls
11. Promiscuous sexual behavior
12. Early behavior problems
13. Lack of realistic, long-term goals
14. Impulsivity
15. Irresponsibility
16. Failure to accept responsibility for one's own actions
17. Many short-term marital relationships
18. Juvenile delinquency
19. Revocation of conditional release
20. Criminal versatility

The test is administered by trained professionals based on an extensive review of the subject's file and a structured interview. For each item, a subject will be scored between 0 and 2 points, with total scores ranging between 0 and 40 points. Adults scoring above 30 are deemed determinately psychopathic; those scoring below 20 points are deemed determinately non-psychopathic. The PCL-R was originally conceptualized as a two-factor model of psychopathy consisting of interpersonal and affective items

and impulsive and anti-social lifestyle items.²⁹ The PCL-R has proven extremely useful at predicting recidivism rates among criminal offenders and so is increasingly being used for purposes of assessing suitability for parole and early release programs.

One important aspect of ongoing research on the nature of psychopathy involves distinguishing it from other sorts of psychological disorders. The American Psychiatric Association's *Diagnostic and Statistical Manual* recognizes Conduct Disorder as a pattern of persistent conduct in which the rights of others or other social norms are violated (*DSM-5* pp. 469-71). Individuals who are adults with CD and have a history of CD tracing back to adolescence are diagnosed with Antisocial Personality Disorder (ASPD) (§301.7).³⁰ Though both CD and ASPD include psychopathic factors, neither requires the full range of psychopathic factors. In fact, CD and ASPD can cover many different kinds of antisocial behavior, many of which do not seem to threaten normative competence or justify an insanity or incompetence defense. However, psychopathy is a special case, worth distinguishing from this larger class. Recent work on psychopathy suggests several distinguishing marks of psychopathy.³¹

1. ASPD and CD can involve reactive aggression in which the subject responds with disproportionate anger and aggression to some kind of provocation. By contrast, psychopathy involves instrumental aggression in which the subject uses aggression to get what he wants, regardless of the importance or stability of these objectives.
2. Many individuals with CD experience guilt or remorse in response to the wrongs and harms they commit. By contrast, psychopaths do not experience guilt or remorse, typically blaming their victims.
3. ASPD need not involve significant emotional deficits. By contrast, psychopaths display shallow affect. They have significant empathy deficits; they tend to display low situational social anxiety, as measured by electrodermal tests; and they display little fear and have difficulty with aversive learning in which behavior is modified in response to the prospect of punishment for noncompliance.
4. Psychopaths are alleged to have trouble distinguishing moral and conventional norms, where moral norms, unlike conventional norms, are supposed to be serious, invariant, and not conditional on local authorities and taboos.
5. ASPD and reactive aggression often involve prefrontal cortex damage; psychopathy often involves amygdala damage.

So, there is some consensus about the distinctive features of psychopathy. It is typified by a syndrome of personality and behavioral traits. Though superficially normal in intelligence and affect, psychopaths tend to have shallow affect and deficits in empathy, anxiety, and fear. They tend to be impulsive, engaging in dangerous and imprudent behavior, often for fleeting or insubstantial purposes. They do not pursue long-term objectives or life-plans. They are manipulative and pathological liars, using aggression instrumentally and experiencing little or no remorse for the harm they cause others. They are not able to sustain lasting interpersonal relationships. Perhaps the most disturbing aspect of psychopathy is that there is no good evidence of any effective form of treatment.³² However, some consolation can be taken in the fact that the careers of psychopaths tend to be limited, with the antisocial behavioral expressions of psychopathy dropping sharply after the age of 40.³³ Until we are better able to document the neuropsychological deficits of psychopaths and devise surgical or pharmacological interventions or provide effective behavioral therapies, diagnoses of psychopathy will mainly be relevant to blocking the early release of psychopathic criminals and perhaps justifying civil commitment for especially dangerous psychopaths, at least until such time as they are no longer a significant threat to others.

5. Psychopathy, Incompetence, and Excuse

We are now in a better position to address the question whether and, if so, why psychopathy provides a legal or moral excuse. As I noted at the outset, views are mixed about whether psychopathy excuses. On the one hand, psychopathy is not recognized as an excuse under existing insanity doctrine, and many would regard psychopathy as an aggravating, rather than a mitigating, factor. The psychopath's apparent indifference to the suffering of others and lack of remorse for the wrongs he commits and harms he causes may seem to make him more deserving of blame and punishment. On the other hand, several philosophers and legal academics have argued that we should recognize psychopathy as an excusing condition. Because some of them have argued or implied that psychopaths have impaired normative competence, their arguments engage the fair opportunity conception of responsibility and excuse that I have developed here.

One reason that psychopathy is not recognized as a legitimate insanity defense may be that it is not recognized as a distinct personality disorder in the *DSM*, and all extant insanity tests require that the incapacity be the product of a mental disease or defect.³⁴ If we conceptualize that requirement as involving a distinct clinical diagnosis over and above the

incapacity itself, that might explain reluctance to recognize psychopathy as a form of insanity. While this might explain reluctance to recognize an insanity defense for psychopathy, it would not be a good justification of that reluctance. For one thing, there is significant consensus, as we have seen, that psychopathy is an empirically valid construct, which is both narrower and more pathological than ASPD, which is not thought to involve sufficient incompetence to warrant an insanity defense. Moreover, we saw that for purposes of assessing responsibility and excuse we should understand mental disease or defect as a forensic category that is not independent of normative incompetence. This is why the fair opportunity conception of the incompetence excuse drops the requirement that normative incompetence be the product of mental disease or defect, provided only that the agent is not herself responsible for being incompetent.

Gary Watson offers one rationale for excusing wrongdoing by psychopaths. In “Responsibility and the Limits of Evil: Variations on a Strawsonian Theme”³⁵ Watson discusses the case of Robert Harris, who had a long history of aggression and cruelty and was convicted for killing two boys as part of a carjacking. Harris expressed no remorse for the killings and in fact seemed to enjoy the suffering of his victims.³⁶ It is not known whether Harris was a psychopath, but much of his personal history suggests that he might well have been. After noting our revulsion toward characters, such as Harris, Watson suggests that their failure to recognize and respond to basic moral considerations may place them outside the community of participants in the reactive attitudes. This is a theme he develops and applies in particular to psychopathy in “The Trouble with Psychopaths.”³⁷ While acknowledging that psychopaths display a disregard for the interests of others that allows us to attribute wrongdoing to them, Watson expresses doubts about their accountability for wrongdoing. He claims that psychopaths are constitutionally disqualified as members of the moral community because they are “unreachable by the language of moral address.” What needs explanation here is what would make psychopaths beyond the scope of moral address. The explanation required by the fair opportunity conception of responsibility and apparently endorsed by Watson is that psychopaths lack normative competence, in particular, the ability to recognize and respond to reasons, especially moral reasons. But whereas Watson assumes that psychopaths lack normative competence or, at least, moral competence, this is an issue we need to investigate.

We have conceptualized normative competence as involving both cognitive capacities — the ability to make normative discriminations and recognize wrongdoing — and volitional capacities — the ability to conform one’s actions to this normative knowledge. Some early work on psychopathy suggested that it compromises volitional, rather than

cognitive, competence.³⁸ On the volitional interpretation of psychopathy, psychopaths recognize what they should do but have affective or motivational problems acting on their normative beliefs and regulating their behavior as they recognize they ought. However, this view of psychopathy as involving volitional deficits has given way to the view that it involves primarily cognitive deficits. On this cognitive interpretation of psychopathy, psychopaths lack the ability to make suitable normative discriminations and recognize wrongdoing.

6. Cognitive Incompetence?

This cognitive interpretation of psychopathic deficits fits with the common observation that psychopathy involves a kind of normative or moral blindness akin to color blindness in which psychopaths just don't perceive normative, especially moral, issues the same way that normals do.³⁹ It also fits with the claims of moral philosophers and criminal law theorists who advocate recognizing a M'Naghten-style excuse for psychopathy.⁴⁰ However, this cognitive conclusion is more often asserted than defended. It merits more careful assessment.

The most complete defense of a M'Naghten-style excuse for psychopathy of which I am aware is that offered by Cordelia Fine and Jeanette Kennett in their article "Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment."⁴¹ They accept, at least for purposes of argument, a M'Naghten-style conception of excuse as limited to cognitive incompetence, in part because this is a feature of the Australian criminal code that they want their arguments to engage.⁴² They claim that the ability to know or appreciate that an act is legally wrong requires moral, and not just legal, understanding. Thus, they conclude that criminal cognitive competence requires moral cognitive competence. Fine and Kennett then defend the claim that psychopaths lack basic moral cognitive competence — the idea that psychopaths are morally blind — by appeal to psychological deficits exhibited in psychopathy — the alleged inability of psychopaths to distinguish between conventional and moral norms and their affective deficits, in particular, their empathy and fear deficits. This is the right kind of argument. The question is whether it is compelling. Closer inspection, I think, reveals some grounds for skepticism.

The fair opportunity conception of responsibility insists that normative competence and, in particular, cognitive competence is necessary for responsibility. This implies that the ability to recognize moral wrongdoing is a necessary condition of moral competence and, hence, moral responsibility. So if psychopathy compromises cognitive moral competence, this

raises serious questions about whether psychopaths should be held morally responsible. But it is less clear that moral competence is necessary for criminal responsibility. Criminal responsibility, we said, would seem to involve a kind of normative competence to recognize and conform to norms of the criminal law. Criminal law doctrines of insanity sometimes fudge this issue by insisting only that the agent had the ability to recognize or appreciate that her conduct was wrong. This leaves unspecified whether the norms whose violation is in question are criminal or moral. But the criminal law only punishes violations of the criminal law, not moral wrongs per se. This is why many (but not all) jurisdictions that address the ambiguity specify that the focus should be on the capacity for recognizing criminal wrongdoing.

One might distinguish criminal and moral forms of normative competence in this way and still claim that criminal competence requires moral competence. One might concede that there could be a bare recognitional capacity for criminal wrongdoing that did not presuppose moral competence but insist that a proper appreciation of why conduct is criminal requires understanding the moral basis for its criminalization. This line of argument emphasizes the *Model Penal Code's* insistence that criminal responsibility requires the agent be able to *appreciate* the criminality of his conduct. It contrasts the sort of *thin* recognitional capacity required by M'Naghten with a *thicker* one required by the MPC.

There are complicated issues here. First, it is not obvious why criminal responsibility should require a thick, rather than a thin, ability to recognize criminality. Why isn't it enough if the agent was able to recognize that his conduct was illegal and had the ability to conform to the requirements? Why must the agent also be able to appreciate or understand why that conduct is criminal? Second, even if cognitive competence requires appreciation and a thicker recognitional capacity, it is not clear that appreciation of criminal wrongdoing requires moral understanding. Perhaps it only requires, in addition to recognizing criminal offenses, some appreciation of the comparative seriousness of various criminal offenses in the form of a rough ability to grade criminal offenses. Perhaps moral competence would be helpful in performing such comparative assessments, but it is not clear why it should be necessary. Criminal offenses might be graded by the severity of the sanction for noncompliance, which would not require moral competence.

The case for thinking that criminal cognitive competence requires moral cognitive competence has not yet been made. Consequently, we might want to keep the sort of cognitive competence required for criminal responsibility and for moral responsibility distinct. This may affect the sort of excuse that we think psychopaths might have available to them.

7. The Moral/Conventional Distinction

Fine and Kennett appeal to frequently cited studies claiming that psychopaths have trouble discriminating between moral and conventional norms. Elliott Turiel and colleagues found that psychological normals distinguish consistently and reliably between conduct that is morally wrong and conduct that is wrong by virtue of social convention.⁴³ Turiel's test depends on the idea that, in contrast with conventional transgressions, moral wrongs are (1) are independent of local authority, (2) involve harm, rights violations, or unfairness, (3) are temporally and geographically invariant, and (4) are more serious. Moral prohibitions on murder or assault score higher on all four dimensions than rules of mere etiquette. Turiel found that the ability to make the moral-conventional distinction was well established even in very young children, who distinguish between moral prohibitions on hitting classmates and conventional requirements of classroom etiquette. In two studies, James Blair applied Turiel's Moral-Conventional Transgressions task (MCT) to subjects in prison populations and mental hospitals who had high scores on the PCL-R, concluding that psychopaths cannot discriminate reliably between moral and conventional norms and treat moral norms as if they were conventional norms.⁴⁴ Fine and Kennett appeal to these results to suggest that psychopaths lack moral concepts and competence. This would tend to show that psychopaths lack the competence necessary for moral responsibility. If, as Fine and Kennett allege, criminal responsibility requires moral cognitive competence, then these results would also tend to show that psychopaths lack the competence necessary for criminal responsibility.

However, there are several places in this argument to express skepticism. For one thing, we have already questioned the assumption that criminal responsibility requires moral competence. If Fine and Kennett were right that psychopaths lack moral concepts and competence, this would help show that they were not morally responsible, which is itself an interesting and important conclusion. But this wouldn't show that psychopaths weren't criminally responsible. After all, on most jurisprudential views, there is an important conventional element in the law, because laws depend on the relevant kind of social and institutional enactment. So, even if psychopaths treated moral norms as if they were conventional norms, this would not interfere with their ability to recognize legal norms, which are conventional in character.

Also, one might question the philosophical presuppositions of Turiel's work. The MCT seems to presuppose a sharp distinction between moral norms, which are historically and culturally invariant and authority-independent, and conventional norms, which are historically and cultur-

ally variable and authority-dependent. But some metaethical views might question this contrast. Some moral conventionalists or constructivists believe that moral requirements are the product of an agreement and can be culturally variable.⁴⁵ Others see some, if not all, moral demands as demands that agents make on each other, rendering these demands in some sense authority-dependent.⁴⁶ Though I am not especially sympathetic to these metaethical views,⁴⁷ we should be wary of empirical work if it depends on contested metaethical commitments. Whether Turiel's work does so depend is not clear. It requires distinguishing norms of etiquette that can depend on quite local and arbitrary authorities, with the result that the normative valence of conduct can be changed by fiat, and moral norms that are not similarly dependent and variable. One might well accept this contrast even if one thought moral norms were conventional or authority-dependent at some more fundamental level and in some less arbitrary way. For this reason, I think it is unclear if Turiel's MCT is philosophically problematic.

The bigger worry, I think, is not Turiel's distinction, but Blair's use of it.⁴⁸ In Blair's studies, psychopaths failed to distinguish moral and conventional norms along three of the four dimensions the MCT identified. Psychopaths did cite authorities in explaining why violations of moral and conventional norms are wrong (roughly, both are wrong just because they violate rules), whereas normals cited harm and rights-violations as the reasons that moral transgressions are wrong. But otherwise they scored moral and conventional transgressions similarly, saying both were impermissible and serious wrongs. A more natural interpretation of these findings is that psychopaths treated conventional norms as if they were moral norms. In other words, it is not so much that psychopaths assimilate moral norms to conventional ones as that they assimilate conventional norms to moral ones. Blair defended his interpretation of the results as fitting his hypothesis that psychopaths lack moral concepts by claiming that the reason they treated conventional norms so seriously is that they wanted to manipulate experimenters by telling them what the psychopaths thought they wanted to hear. In recent experiments designed to eliminate incentives for insincere reports, psychopathic offenders were not found to be any worse at distinguishing moral and conventional norms than non-psychopathic offenders.⁴⁹ Moreover, in related experiments, psychopaths were shown to track normal comparisons of the seriousness of offenses ranging from cruel murders, to simple theft, to prostitution, to dishonesty.⁵⁰ These experiments suggest that psychopaths have normal abilities to recognize moral wrongdoing and to grade offenses for their seriousness.

The claim that psychopaths lack moral concepts and, hence, moral competence, because they treat moral norms as if they were conventional

norms does not hold up well to closer inspection. The original studies do not support the conclusion that psychopaths have an impoverished conception of morality, rather than an inflated conception of conventional norms. Further experiments designed to distinguish these two interpretations show that psychopaths can distinguish moral and conventional requirements as well as non-psychopaths. In fact, these studies cast considerable doubt on the proposition that psychopaths lack moral concepts and moral competence. But then the literature on psychopathy and the moral/conventional distinction does not support a finding of cognitive incompetence that would provide a M'Naghten-style excuse for psychopaths.

8. Affective Deficits

Fine and Kennett also appeal to well documented affective deficits in psychopaths — involving empathy, fear, and situational anxiety — in support of their cognitive incompetence. One might wonder how an emotional deficit would establish a cognitive deficit. But one might well claim that empathy for victims and fear of sanctions for noncompliance are essential to learning moral norms and to detecting when they apply. In this way affective deficits might be a source of cognitive incompetence.

Consider empathy first. The most important norms of morality and law are concerned with harm prevention, and empathy is a normal way for us to detect when our behavior is harmful and wrong and a normal way for us to be motivated not to harm others. The first fact about empathy represents it as having a role *upstream* from normative cognition and so potentially relevant to cognitive capacity, whereas the second fact about empathy represents it as having a role *downstream* from normative cognition and so potentially relevant to volitional capacity. Insofar as we are here concerned with the effect of psychopathy on cognitive competence, we are interested in this first epistemic role of empathy.

Do empathy deficits fund a M'Naghten-style excuse for cognitive incapacity? It is plausible to suppose that empathy can be an epistemically useful resource in moral recognition. But it doesn't follow from this fact alone that empathy is necessary for moral concepts or making moral discriminations. There could be other modes of access to moral knowledge and recognition of wrongdoing. It seems I could know that causing death or bodily injury is harmful and, hence, wrong even if I didn't experience these facts empathetically. I could come to know these facts propositionally, rather than empathetically, and I could accept the authority of other members of my community about what actions were right and wrong, whether or not I had empathetic understanding of the harms caused to others by my wrongdoing. So, if the question is whether

I have the capacity to recognize moral wrongdoing, empathy might be useful, but it does not seem necessary. If so, the psychopath's empathy deficits do not yet provide an excuse.

Cognitive capacity is sometimes analogized to a perceptual capacity, and, as we have seen, some are willing to count psychopathy as a form of moral or criminal blindness. We might explore the value of these metaphors by thinking about colorblindness. Colorblind people, let us assume, are unable to distinguish between red and green. We might ask whether their incapacity provides them with an excuse for failing to obey traffic laws requiring them to stop their vehicles at red lights. It is true that the colorblind cannot experience the difference between red and green and so cannot rely on these normal visual cues to recognize vehicular wrongdoing. But there are other ways of recognizing when the traffic light is red. The red light is the top light in a vertical display, whereas the green light is the bottom light (in a horizontal display, the red is leftmost and the green is rightmost), and colorblindness does not interfere with this sort of positional recognition. But this suggests that colorblindness would not excuse vehicular wrongdoing, because even if it deprives an agent of one familiar form of epistemic access to the facts in question, it leaves available other modes of access. Similarly, we might think that a systematic lack of empathy might deprive psychopaths of one familiar form of epistemic access to the harmful and wrongful nature of their actions, but it wouldn't thereby deprive them of other forms of access to this information. One could learn that murder and rape were harmful and wrong without needing to identify them as wrong empathetically.⁵¹

One might argue that empathy doesn't have to be necessary for moral knowledge for empathy deficits to excuse. If empathy is for normal agents a reliable way of acquiring moral knowledge, then lack of empathy might make the task of acquiring moral knowledge *harder*, even if it does not make it impossible. As Joseph Newman describes it,

Whereas most people automatically anticipate the consequences of their actions, automatically feel shame for unkind deeds, automatically understand why they should persist in the face of frustration, automatically distrust propositions that are too good to be true, and are automatically aware of their commitments to others, psychopaths may only become aware of such factors with effort.⁵²

If so, empathy deficits might still seem to excuse. But a deficit can make the acquisition of moral knowledge harder than it would otherwise be without making it hard (simpliciter), and even if the empathy deficit makes the

acquisition of moral knowledge hard (and not just harder), it is not clear that it makes it so hard as to deprive the psychopath of the fair opportunity to avoid wrongdoing. After all, if the psychopath has these other sources of moral knowledge, that might be opportunity enough. Not everyone finds it equally easy to avoid wrongdoing for a variety of reasons. Some situations pose more hardship for everyone than other situations, and some people experience more hardship in some situations than other people do. Many comparative difficulties don't rise to the level as to undermine the fair opportunity to avoid wrongdoing and, hence, don't serve as the basis for excuse. Unless empathy deficits substantially interfere with the ability of psychopaths to make normative discriminations, it is hard to see how such deficits could fund a M'Naghten-style excuse.

Though empathy may plausibly play an upstream role in normative cognition in normals, it does not follow that empathy is necessary for cognitive competence in a way that would excuse psychopaths by virtue of their empathy deficits. In fact, recent work on psychopathic performance on the MCT and on grading the seriousness of offenses strongly suggests that psychopaths do have normative knowledge. But what is actual must be possible. If so, psychopaths appear to be cognitively competent, at least with respect to the requirements of basic morality and the criminal law.⁵³ This does not address the downstream role of empathy in relation to normative cognition, which bears on the volitional, rather than the cognitive, dimensions of normative competence.

Another affective deficit that psychopaths possess involves fear. Because fear is thought to be an essential component of aversive learning, Fine and Kennett reason that a lack of fear would interfere with normal ways of learning the importance of legal and moral concepts. But this appeal to fear deficits to support cognitive incompetence also moves too fast. Psychopaths clearly find imprisonment disagreeable and are keen to be out of prison as soon as possible. It may be that they do not anticipate the disagreeable consequences of misconduct as much as they should or that this recognition does not operate as it should to produce impulse control. But this does not mean that they can't recognize intellectually that they risk unpleasant consequences when they engage in wrongdoing. Moreover, we should distinguish between norms, whether criminal or moral, and sanctions that might be attached for noncompliance. A failure to fear sanctions might affect one's motives for noncompliance, but there is no reason it should prevent one from recognizing the norms of conduct, especially when one sees others conforming to these norms and fearful of sanctions for noncompliance. Studies showing that psychopaths do make normative discriminations similar to normals suggest that their fear deficits

play a downstream, rather than an upstream, role in relation to normative cognition.

9. Volitional Incompetence?

Those who have treated psychopathy as excusing have tended to assume that psychopathy undermines cognitive competence. Those who have argued for this claim have appealed to alleged trouble psychopaths have distinguishing moral and conventional norms and their affective deficits, especially involving empathy and fear. But there is no good evidence that psychopaths cannot distinguish moral and conventional norms, and they seem quite reliable in grading the seriousness of offenses. Psychopaths do have affective deficits in empathy and fear. But these deficits do not prevent the formation of moral concepts and the ability to recognize moral and criminal norms. If so, we have no reason to accept a M'Naghten-style excuse for cognitive incompetence for psychopathic wrongdoing. Empirical work on the nature of psychopathy is continuing and evolving, so it would be foolish to assume that this verdict could not change as we learn more about the cognitive capacities of psychopaths. But for now I think we should be skeptical about whether psychopathy excuses on cognitive grounds. If we were to accept a purely cognitive conception of responsibility and excuse, then this verdict would settle (for now) the question of whether psychopathy should excuse.

However, the fair opportunity conception of responsibility also recognizes a volitional dimension of responsibility and, hence, excuses based on volitional impairment. The question is whether psychopathy significantly impairs an agent's ability to conform her conduct to her normative knowledge. Here, the downstream role of empathy and fear deficits might be relevant, explaining why psychopaths are not more reliably moved to care about the harm they cause or to fear sanctions for noncompliance with moral and criminal norms. It is a distinctive feature of psychopathy that psychopaths are impulsive and often impose substantial costs on others and take substantial risks themselves for insubstantial and even whimsical ends. If they are able to recognize the relevant norms, this suggests a possible volitional, rather than cognitive, impairment.⁵⁴ Failures of empathy and fear might contribute to impulsive and undisciplined transgression of moral and criminal norms.

It is reasonably plausible that psychopaths do have volitional control problems of some sort. They do not seem to care enough about what they often recognize to be wrongdoing. Moreover, their moral and criminal transgressions are often spectacularly imprudent, suggesting that they cannot even bother to care about themselves. But the crucial and difficult

question is whether their failure to conform to the relevant norms represents a genuine incapacity to conform. Is it just that they often won't conform to norms that they recognize or that they can't? To distinguish can't and won't, we need to see if psychopaths are moderately reasons-responsive. It is clear that they conform their behavior to the reasons they recognize less often than normals do. But just as occasional weakness of will in normals does not show that they lack volitional competence, the more common and significant failings of psychopaths to conform do not automatically show that they lack volitional competence. To show genuine volitional incompetence, we would have to have evidence of systemic control problems. It would not be enough to know that they failed to conform in the case in which they committed wrong or even that they failed to conform in other cases in the past. One would have to show that conformity was exceptional. But psychopaths often seem able to conform to relevant norms with new acquaintances and when they know they are being watched and evaluated. So there is reason to think that they do have some significant volitional competence. To assess this volitional rationale for excusing psychopaths we would require more empirical evidence about the decision-making histories of psychopaths and the extent and causes of their problems with impulse control. While the best prospects for an excuse for psychopathy might lie with studying the extent and nature of their volitional impairment, the present state of our knowledge about psychopathy does not provide a strong case for a volitional excuse.

10. Conclusion

The fair opportunity conception of responsibility factors responsibility into conditions of normative competence and situational control. Normative competence factors into cognitive and volitional capacities that are individually necessary and jointly sufficient for someone to count as a responsible agent. This supports a conception of insanity or incompetence that recognizes substantial impairment of either cognitive or volitional competence as excusing, provided the agent is not substantially responsible for her own incompetence. We can use this fair opportunity conception of responsibility and excuse to help frame the question whether and, if so, why psychopathy is excusing. The most common rationale for excusing psychopathy appeals to claims about cognitive incompetence. However, when this rationale is examined more closely, there are good philosophical and empirical reasons to be skeptical that psychopaths lack the relevant capacities to recognize and appreciate moral or criminal wrongdoing. There is more to be said for a volitional rationale for excuse. The crucial question here is whether the problems psychopaths have with impulse

control and conforming their behavior to the relevant moral and criminal norms are pervasive and systematic enough to demonstrate genuine volitional incompetence. The available empirical evidence, I think, should leave us (defeasibly) skeptical about the merits of this volitional rationale for excuse.

Notes

1. Presented as a Lindley lecture at the University of Kansas in April 2013. I would like to thank members of the audience, especially Ann Cudd, Dale Dorsey, Ben Eggleston, Charlie Kurth, and John Symons, for thoughtful and helpful discussion of these issues. I have also benefited from discussion with Craig Agule, Barbara Herman, Dana Nelkin, and David Shoemaker.

2. The reasons-responsive tradition of moral responsibility on which I draw is reflected in Susan Wolf, *Freedom within Reason* (New York: Oxford University Press, 1990); R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge: Harvard University Press, 1994); John Fischer and Mark Ravizza, *Responsibility and Control* (New York: Cambridge University Press, 1998); and Dana Nelkin, *Making Sense of Freedom and Responsibility* (Oxford: Clarendon Press, 2011). The fair choice literature in criminal jurisprudence on which I draw is reflected in H.L.A Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968); Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997); and Stephen Morse, "Culpability and Control" *University of Pennsylvania Law Review* 142 (1994): 1587-1660 and "Uncontrollable Urges and Irrational People" *Virginia Law Review* 88 (2002): 1025-78. A fuller presentation of the conception of responsibility as the fair opportunity to avoid wrongdoing is contained in David O. Brink and Dana K. Nelkin, "Fairness and the Architecture of Responsibility" *Oxford Studies in Agency and Responsibility* 1 (2013): 284-313.

3. Here, I draw on related ideas in Robert Nozick, *Philosophical Explanations* (Cambridge: Harvard University Press, 1981), pp. 363-66.

4. This is one of several ways in which forward-looking considerations can play a role in a conception of punishment that is constrained by backward-looking retributive concerns. Elsewhere, I describe this broadly retributive commitment as *predominant retributivism*. See, for example, David O. Brink, "Retributivism and Legal Moralism" *Ratio Juris* 25 (2012): 496-512.

5. M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

6. Cf. Al Mele, "Irresistible Desires" *Nous* 24 (1990): 455-72. A desire is conquerable when one can resist it and circumventable when one can perform an action that makes acting on the desire impossible or at least more difficult. The alcoholic who simply resists cravings conquers his impulses, whereas the alcoholic who throws out his liquor and stops associating with former drinking partners or won't meet them at places where alcohol is served circumvents his impulses. Conquerability is mostly a matter of will power, whereas circumventability is mostly a matter of foresight and strategy.

7. Phineas Gage was a nineteenth century railway worker who was laying tracks in Vermont and accidentally used his tamping iron to tamp down a live

explosive charge, which detonated and shot the iron bar up and through his skull. Though he did not lose consciousness, over time his character was altered. Whereas he had been described as someone possessing an “iron will” before the accident, afterward he had considerable difficulty conforming his behavior to his own judgments about what he ought to do. The story of Phineas Gage is discussed in Antonio Damasio, *Descartes' Error: Emotion, Reasons, and the Human Brain* (New York: Putnam, 1994).

8. Here, I adapt some ideas from Fischer and Ravizza, *Responsibility and Control*, chs. 2-3. Whereas they defend an asymmetrical conception of reasons-responsiveness that requires moderate cognitive competence and only weak volitional competence, I treat these two aspects of normative competence symmetrically and require moderate responsiveness in each.

9. In specifying an agent's capacities in terms of such counterfactuals, I remain agnostic about whether capacities or counterfactuals have explanatory priority, in particular, whether capacities ground the counterfactuals or whether the capacities just consist in the truth of such counterfactuals.

10. American Law Institute, *Model Penal Code*, §2.09. The *Model Penal Code* is a model statutory text of fundamental provisions of the criminal law, first developed by the American Law Institute in 1962 and subsequently updated in 1981. The MPC was intended to serve as a model for local jurisdictions drafting and revising their criminal codes.

11. The details of duress are tricky. Some situational pressures, such as the need to choose the lesser of two evils, may actually *justify* the agent's conduct, as is recognized in *necessity* defenses. If the balance of evils is such that the evil threatened to the agent is worse than the evil involved in her wrongdoing, then compliance with the threat is justified. But in an important range of cases, coercion and duress seem not to justify conduct (remove the wrongdoing) but rather to *excuse* wrongdoing, in whole or in part. In such cases, where the evil threatened is substantial but less than that contained in the wrongdoing, the agent's wrongdoing should be excused because the threat or pressure was more than a person should be expected to resist. Whether the difference between when duress justifies and when it excuses should be settled by applying the balance of evils test depends on the moral framework in which we measure evils. The criminal law tends to assume a consequentialist version of the test, but one might instead measure the moral seriousness of evils in ways that reflect agent-centered prerogatives.

12. It is common to observe that strict liability is anomalous in the criminal law. Moreover, there is one important sense in which there are no strict liability crimes. There are, in fact, two distinct conceptions of strict liability crimes corresponding to two distinct conceptions of culpability. The criminal law conceives of wrongdoing as having two parts: *actus reus* and *mens rea*. The *actus reus* refers to the objective elements (action type, consequences, and attendant circumstances) that constitute the offense, whereas the *mens rea* refers to the mental element ingredient in the offense, such as whether the harmful act was intended or merely foreseen or was performed negligently or recklessly. Within the criminal law, culpability has two senses: in its narrow sense, culpability refers to the mental elements that are ingredient in a crime (its *mens rea*); in its broader sense, culpability refers to blameworthiness or responsibility. Because culpability has

these two distinct senses, and because strict liability crimes would be crimes in which there was liability without culpability, there are, in principle, two possible conceptions of strict liability crimes. (1) One kind of strict liability crime would be a crime that does not require any specific mental element as an ingredient in the offense. (2) Another kind of strict liability crime would be one that does not require blameworthiness or responsibility as a condition of blame and punishment. The wisdom of recognizing the first kind of strict liability crime is an interesting question, but there can be and are strict liability crimes in this sense. But there are no strict liability crimes in the second sense, because insanity and duress are perfectly general defenses, applicable to all crimes. So even crimes that would be strict liability crimes in the first sense, requiring no particular *mens rea*, admit of defenses that establish insanity or duress. While both kinds of strict liability crimes are problematic, because they are unfair, the criminal law refuses to recognize the second kind of strict liability crime.

13. See, e.g., Peter Strawson, "Freedom and Resentment" *Proceedings of the British Academy* 48 (1962): 1-25.

14. The one exception to the generalization that American criminal law does not recognize partial excuse is the provocation defense, under which intentional homicides committed with adequate provocation reduce to an offense of voluntary manslaughter. Even this is not a clear exception inasmuch as it is unclear whether provocation is best conceptualized as a partial justification or a partial excuse.

15. This oversimplifies, because there have been at least five separable insanity tests in American criminal law: (1) the M'Naghten cognitive test, (2) an irresistible impulse test, which recognizes a defendant as insane if her wrongdoing is the product of irresistible impulses, (3) the Durham Product test, which recognizes a defendant as insane so long as her wrongdoing is the product of mental disease or defect, (4) the *Model Penal Code* test, which includes cognitive and volitional elements, and (5) the Federal cognitive test. Nonetheless, it is fair to focus on M'Naghten and MPC. The irresistible impulse test was meant as a supplement to M'Naghten, not as a self-standing test, and hence it is incorporated in the MPC doctrine. The Federal test represents a common understanding of M'Naghten. Hence, only the Durham Product test is a real alternative to M'Naghten and MPC, and it was widely recognized as providing a conception of excuse that was both under-inclusive and over-inclusive and, hence, was never very influential.

16. The post-Hinckley backlash was based on misunderstandings about the frequency of insanity pleas, the frequency of successful insanity pleas, and the consequences of successful insanity pleas. Though the frequency of insanity pleas and successful insanity pleas varies in different jurisdictions, the rates were always quite low and were not substantially affected by adoption of a broader conception of insanity. See, for example, Judge Rubin's dissent in *United States v. Lyons*, USCA 5th Cir., 731 F.2d 243, 739 F.2d 994 (1984). The hysteria also fed on unfounded assumptions about the consequences of a successful insanity plea. Contrary to popular belief, a person found not guilty by reason of insanity is rarely released on acquittal. Rather, insanity typically leads to civil commitment of indefinite duration until it is determined that the committed person is either no longer insane or no longer a danger to herself or others. This sort of commitment is, in many jurisdictions, automatic and does not require any independent evidence

that the person is still insane or dangerous to herself and others. Indeed, in some jurisdictions the defendant is not even allowed to present evidence that she is no longer insane or dangerous prior to commitment. Moreover, civil commitment often takes on a therapeutic aspect which, in principle, is designed to address the person's mental illness, but which also dispenses with various procedural guarantees in place in a more traditional penal result. An insanity acquittal is no picnic; those who plead insanity do not "get off scot-free," as many apparently believe.

17. See, e.g., Joshua Dressler, *Understanding Criminal Law*, 6th ed. (San Francisco: LexisNexis, 2012), pp. 343-44.

18. 18 U.S.C. §17(a) (2005).

19. James Blair, Derek Mitchell, and Karina Blair, *The Psychopath: Emotion and the Brain* (Oxford: Blackwell, 2005), pp. 49-50.

20. Immanuel Kant, *Critique of Practical Reason* [1788], trs. L.W. Beck (Indianapolis: Bobbs-Merrill, 1956) (Prussian Academy pagination), p. 30.

21. Mele's example of the agoraphobe, who will not leave his house, even for his daughter's wedding, but would leave it if it were on fire, seems coherently described as one in which someone is weakly responsive but nevertheless not responsible.

22. This principle is reflected in Blackstone's 10:1 ratio: "better that ten guilty persons go free than that one innocent party suffer." See William Blackstone, *Commentaries on the Laws of England* (London: Strahan & Woodfall, 1791), Book IV, Chapter 27, page 358. Benjamin Franklin is alleged to have thought the ratio is 100:1.

23. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 4th ed. [*DSM-IV*] (Washington: American Psychiatric Association, 1994). The fifth edition (*DSM-5*) has just appeared: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 5th ed. (Washington: American Psychiatric Association, 2013). I will refer parenthetically to sections or page numbers in these editions. The differences between *DSM-IV* and *DSM-5* are not especially significant for the sort of competence issues addressed here.

24. The fact that proponents of the now discredited product test thought that adopting its rule, according to which wrongdoing is excused on grounds of insanity if the wrongdoing is the product of mental disease or defect, was simpler than incapacity tests and by-passed issues about incapacity suggests that they conceived of mental illness as distinct from normative incapacity and easier to establish. However, the Durham product test was eventually interpreted so as to define mental disease or defect as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls (*MacDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962)). While the product test may have initiated with a clinical, rather than forensic, conception of mental disease, it eventually came closer to a forensic conception.

25. There are two different ways of explaining this restriction on the excuse of incompetence. One view says that A is responsible for wrongdoing she commits at t2 iff either (a) she is competent at t2 or (b) her incompetence can be traced

back to her own responsible decisions at some earlier time t1. The tracing view claims that earlier responsibility funds later responsibility. By contrast, one might deny that A is competent and, hence, responsible at t2 but nonetheless hold her responsible for wrongdoing she commits at t2 if this was the reasonably foreseeable consequence of responsible decisions she took at t1. My sympathies lie with the latter explanation, but, for present purposes, I can remain agnostic between the two accounts.

26. My principal sources are Hervey Cleckley, *The Mask of Sanity* [first edition 1941] (St. Louis: C.V. Mosby, 1955); Robert Hare, *Without Conscience* (New York: Simon & Schuster, 1993); Blair et al., *The Psychopath*; and *Handbook of Psychopathy*, ed. C. Patrick (New York: Guilford Press, 2006).

27. See Cleckley, *The Mask of Sanity*, esp. pp. 380-81 and Christopher Patrick, “Back to the Future: Cleckley as Guide to the Next Generation of Psychopathy Research” in *Handbook to Psychopathy*, ed. Patrick.

28. Robert Hare, *The Hare Psychopathy Checklist — Revised*, 2d ed. [first edition 1991] (Toronto: Multi-Health Systems, 2003).

29. More recently, it has been reconceptualized as a three-factor model and, by Hare himself, as a four-factor model. The PCL-R has been adapted to a 12-item version (PCL: SV) for use in the MacArthur Risk Assessment Study and to a 20-item age-appropriate version (PCL: YV) for use with adolescents. See, e.g., Robert Hare and Craig Neumann, “The PCL-R Assessment of Psychopathy: Development, Structural Properties, and New Directions” in *Handbook for Psychopathy*, ed. Patrick.

30. Also see the *DSM-5* alternative model for ASPD (*DSM-5*, pp. 764-65).

31. See James Blair et al., *The Psychopath*.

32. See, e.g., Grant Harris and Marnie Rice, “Treatment of Psychopathy: A Review of Empirical Findings” and Michael Seto and Vernon Quinsey, “Toward the Future: Translating Basic Research into Prevention and Treatment Strategies” both in *Handbook of Psychopathy*, ed. Patrick.

33. R.D. Hare, L.N. McPherson, and A.E. Forth, “Male Psychopaths and their Criminal Careers” *Journal of Consulting and Clinical Psychology* 56 (1988): 710-14 and G.T. Harris, M.E. Rice, and C.A. Cormier, “Psychopathy and Violent Recidivism” *Law and Human Behavior* 15 (1991): 625-37.

34. A draft of *DSM-5* proposed to treat ASPD and psychopathy as coordinate labels, but the published version, like *DSM-IV*, employs only ASPD as the identifying label. Both *DSM-IV* and *DSM-5* indicate in passing that ASPD “has also been referred to as psychopathy, sociopathy, or dyssocial personality disorder” (§301.7). So psychopathy it is not an official label for any *DSM* conduct or personality disorder. As noted above, though psychopaths satisfy some CD and ASPD criteria, one can satisfy CD and ASPD without being psychopathic.

35. Gary Watson, “Responsibility and the Limits of Evil: Variations on a Strawsonian Theme” reprinted in Gary Watson, *Agency and Answerability* (Oxford: Clarendon Press, 2004).

36. Harris is reported to have expressed remorse at his execution, but this would have been unprecedented, and there is reason to question the sincerity of otherwise unattested expressions of empathy and remorse by psychopaths.

37. Gary Watson, "The Trouble with Psychopaths" in *Reasons and Recognition: Essays on the Philosophy of T.M. Scanlon*, ed. R.J. Wallace, R. Kumar, and S. Freeman (Oxford: Clarendon Press, 2011).

38. See, e.g., Hare, *Without Conscience*, pp. 75-76.

39. See, e.g., Cleckley, *The Mask of Sanity*, p. 61 and Stephen Morse, "Psychopathy and Criminal Responsibility" *Neuroethics* 1 (2008): 205-12, p. 209. Matt Talbert stipulates that psychopaths are morally blind in "Blame and Responsiveness to Moral Reasons: Are Psychopaths Blameworthy?" *Pacific Philosophical Quarterly* 89 (2008): 516-25 but argues that they are blameworthy *despite* their moral blindness.

40. See, e.g., Morse, "Psychopathy and Criminal Responsibility" and Watson, "The Trouble with Psychopaths."

41. Cordelia Fine and Jeannette Kennett, "Mental Impairment, Moral Understanding, and Criminal Responsibility: Psychopathy and the Purposes of Punishment" *International Journal of Law and Psychiatry* 27 (2004): 425-43.

42. Australian Criminal Code Act 1995 (Cth) §7.3(1).

43. Elliot Turiel, *The Development of Social Knowledge: Morality and Convention* (New York: Cambridge University Press, 1983).

44. See R.J.R. Blair, "A Cognitive Developmental Approach to Morality: Investigating the Psychopath" *Cognition* 57 (1995): 1-29 and R.J.R. Blair, L. Jones, F. Clark, and M. Smith, "Is the Psychopath Morally Insane?" *Personality and Individual Differences* 19 (1995): 741-52.

45. See, e.g., Gilbert Harman, "Moral Relativism Defended" *Philosophical Review* 84 (1975): 3-22.

46. See, e.g., Stephen Darwall, *The Second-Person Standpoint* (Cambridge: Harvard University Press, 2006).

47. See David O. Brink, *Moral Realism and the Foundations of Ethics* (New York: Cambridge University Press, 1989).

48. For a similar verdict, see David Shoemaker, "Psychopathy, Responsibility, and the Moral/Conventional Distinction" *Southern Journal of Philosophy* 49 *Spindel Supplement* (2011): 99-124.

49. See Eyal Aharoni, Walter Sinnott-Armstrong, and Kent Kiehl, "Can Psychopathic Offenders Discern Moral Wrongs? A New Look at the Moral/Conventional Distinction" *Journal of Abnormal Psychology* 121 (2012): 484-97 and Jana Schaich Borg and Walter Sinnott-Armstrong, "Do Psychopaths Make Moral Judgments?" in *The Oxford Handbook of Psychopathy and Law*, ed. K. Kiehl and W. Sinnott-Armstrong (Oxford: Clarendon Press, 2013).

50. Paul Robinson and Robert Kurzban, "Concordance and Conflict in Intuitions of Justice" *Minnesota Law Review* 91 (2007): 1829-1907 and Borg and Sinnott-Armstrong, "Do Psychopaths Make Moral Judgments?"

51. Another analogy might be helpful. Asperger's syndrome involves difficulties in social interaction and communication often traced, at least in part, to empathy deficits. People with Asperger's often have difficulty reading and responding appropriately to social cues. This makes it hard to relate to others normally. However, it is possible for some people with Asperger's to learn non-empathetically the significance of various social signals from others and the appropriate conduct in various recurrent contexts. In this way, some with Asperger's can construct a

list of best practices that they can then try to internalize and follow. See David Finch, *The Journal of Best Practices* (New York: Simon & Schuster, 2012). The result is not always socially seamless, but it can approximate normal conduct. These best practices may not be learned in the normal comparatively effortless way, but they are learnable.

52. Joseph Newman, “Psychopathic Behavior: An Information-Processing Perspective” in *Psychopathy: Theory, Research, and Implications*, ed. Cooke, Forth, and Hare (Dordrecht: Kluwer, 1998).

53. One might concede that empathy is not necessary for cognitive access to the requirements of basic morality and the criminal law but claim that it is necessary for cognitive access to the requirements of refined morality. If so, psychopathy might fund a much narrower and specifically moral excuse. This depends, I think, on the plausibility of the claim that empathy is actually part of the content of the norms of refined morality. This is an interesting claim, which I cannot assess here.

54. Cf. Maaïke Cima, Franca Tonnaer, and Marc Hauser, “Psychopaths Know Right from Wrong but Don’t Care” *SCAN* 5 (2010): 59-67.

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