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The insanity defence without mental illness? Some considerations

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ABSTRACT

In this paper we aim to offer a balanced argument to motivate (re)thinking about the mental illness clause within the insanity defence. This is the clause that states that mental illness should have a relevant causal or explanatory role for the presence of the incapacities or limited capacities that are covered by this defence. We offer three main considerations showing the important legal and epistemological roles that the mental illness clause plays in the evaluation of legal responsibility. Although we acknowledge that these advantages could be preserved without having this clause explicitly stated in the law, we resist proposals that deny the importance of mental illness in exculpation. We argue, thus, that any attempt at removing the mental illness clause from legal formulations of the insanity defence should offer alternative ways of keeping in place these advantages.

1. Introduction

According to the law, punishing people who are not responsible for their crimes is unfair. The insanity defence is aimed at preventing such injustices in the case of individuals who are not responsible due to a mental illness. The insanity defence is one of the most intensely debated elements of the criminal law (Meynen, 2016). In many countries of the Western world the legal formulations of the insanity defence contain two main requirements (Simon & Ahn-Redding, 2006). One concerns the presence of certain mental incapacities at the moment of committing the act. Let us call this requirement the *incapacity clause*. The other is the requirement that these incapacities should be attributable to a mental illness (or disorder or disease, expressions that in this paper we use interchangeably). Let us call this the *mental illness clause*. These two clauses appear, for instance, in the influential *M'Naghten rule* - formulated in England in 1843 and still in use today in many jurisdictions. According to this rule, a defendant is insane if:

> at the time of the committing of the act, the party accused was labouring under such a defect of reason, from *disease* of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong. (M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843), emphasis added).

The incapacity clause is here instantiated by the requirement that the agent was, at the moment of committing the act, incapable of knowing the nature of the act and its wrongness. The mental illness clause is expressed by requiring that the relevant incapacities derive from a defect of reason that results from a disease of the mind.

Several issues are debated in relation to the insanity defence. The principal ones are whether and, eventually, how the insanity defence can be justified (Meynen, 2016). From a legal perspective, it has been argued that the defences predicated on mental illness lead to discrimination and should be replaced by already existing types of legal defences (Slobogin, 2000, 2006, 2010) or revisions of them (Hogg, 2015) that do not refer to the cognitive and volitional incapacities covered by the insanity defence. The *Convention on the Rights of Persons with Disability* (CRPD) (United Nations, 2006), that affirms the right to equal treatment of people with mental disabilities and, thus, protects them from discrimination, has given an impetus to proposals of this type (Craigie, 2015; Minkowitz, 2014; Slobogin, 2015; Wondemaghen, 2018).

Less revisionary proposals, however, question whether the mental illness clause should appear as a formal predicate in the formulations of the insanity defence (Matthews, 2004; Meynen, 2016; Vincent, 2008). From a philosophical perspective, it has been argued that it is not mental illness that reduces responsibility, it is the incapacity to conduct oneself in accordance with the law, regardless of the cause. Accordingly, the claim is that the mental illness clause can or should be replaced by the incapacity clause (e.g. Matthews, 2004; Vincent, 2008).

In this paper, we aim to offer a balanced argument to motivate (re) thinking about the mental illness clause within the insanity defence.

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Our approach being conceptual rather than legal, we leave aside the proposals for substantive legal reform associated with CRPD. However, our discussion is premised, at least in part, by their worries concerning the discrimination and stigmatisation towards people with mental disorders, also in the context of unaccountability defences. Our main conclusion is that we should not take for granted the mental illness clause as a *formal predicate* within the formulation of the insanity defence. Nonetheless, mental illness, without being necessarily a formal criterion in the legal formulation of a defence, should be brought to bear on certain exculpating legal decisions as *relevant evidence*. In addition, we argue that any attempt at removing the mental illness clause from legal formulations of the insanity defence should offer alternative ways of keeping in place the advantages that, according to our analysis, follow from the inclusion of the mental illness clause in current formulations of the insanity defence.

In the rest of the paper, we proceed as follows. In the second section, we review important reasons indicating that the insanity defence is in several respects crucial in administering justice. The grounds for introducing the insanity defence is to provide a legal mechanism that distinguishes between culpable and nonculpable offenders based on their decision-making abilities. This assumption constrains our discussion of the role of the mental illness clause. In the third section, we offer three main considerations that show the important legal and epistemological roles that the mental illness clause plays in the evaluation of legal responsibility.

The first argument is conceptual and concerns our exculpatory practices. We maintain that explaining the presence of decision-making incapacities of cognition or control within the context of a mental illness offers a specific reason for concluding that these incapacities are responsibility-undermining. In fact, other explanations of these incapacities that refer to the extraordinary external circumstances of the agent (such as group pressure) or her previous accountable choices (e.g. deciding to drink before driving) do not ground exculpation in the same way or might not even grant it.

The second line of reasoning is epistemological and practical. We argue that the mental illness clause enables reference to types of disorders that can assist in establishing whether the agent at the time of the act had relevant incapacities.

Our final and related argument addresses the general issue of the relation between legal practice and medical/psychological/scientific advancements in the study of human behaviour. The mental illness clause enables an interactive relationship between the legal practice and its conceptual apparatus, on the one hand, with clinical advancements and its scientific conceptual apparatus, on the other. We motivate this reasoning by referring to the current advances in the scientific study of decision-making mechanisms.

In the fourth section, we examine several objections to the inclusion of the mental illness clause in the formulation of the insanity defence. We focus on those criticisms that we take to be motivated by serious worries. While we address these underlying worries, we argue that these criticisms are, at least partly, off-target in attacking the mental illness clause. The overall result is not that the mental illness clause should not be removed, but that several arguments advanced for this conclusion are not satisfactory. In addition, we show how advantages of the illness clause could be kept without having it explicitly stated in the law.

2. The insanity defence and mental incapacities

The presence of mitigating or exculpatory factors due to insanity is common in the Western jurisprudence (Robinson, 1996). The law in Western countries typically conceives persons as agents capable of acting for reasons, that is, forming intentions based on their motivations, values, and beliefs (Morse, 2000, 2007). In fact, the very 'logic' of the law requires agents to be capable of understanding and using legal prescriptions as reasons for action, and thus controlling their actions in light of them (Morse, 2007; Robinson, 2000). Therefore, agents who cannot grasp the requirements of the law or control their actions accordingly cannot be, as *a matter of fac*t, the addressees of the law and the targets of sanctions. This implicit, basic and generic requirement has historically been explicated differently. These differences concern the capacities that the law requires for accountability (e.g., appreciating that the act is wrong) and the legitimate ways of establishing their presence (e.g., by psychiatric evaluation and testimony). However, besides the fact that the very nature of law and legal practice requires that legal subjects have certain capacities, there are also moral considerations that normatively justify such a requirement.

According to Richard Bonnie, "The insanity defense, in short, is essential to the moral integrity of the criminal law" (Bonnie, 1983, p. 194). The argument may be stated in terms of fairness (see also Morse & Bonnie, 2013, 2019; Yaffe, 2019). It is not fair to hold responsible individuals who violate legal norms as a result of psychological, behavioural, or environmental factors that they cannot control. Put differently, they do not *deserve* to be punished because the violating behaviour was not based on their capacity for acting on reasons.

Additionally, a more consequentialist argument for the insanity defence can be offered (see Sinnott-Armstrong & Levy, 2011). The most important aims of punishment involve deterrence, reformation of the offender, and the protection of society. If the prospect of punishment does not deter a person due to a mental illness from performing illegal acts, then the purpose of punishment is not accomplished. For instance, if a person delusionally believes that God wants her to perform certain criminal acts, then punishment may not have any effects on her actions because God's commands override all threats of punishment. Similarly, if punishment is not effective for rehabilitative purposes, in the sense of modifying the offender's behaviour, then there does not seem much point in administering it. Returning to the previous example, if a delusional person is sent to prison the delusion may remain untreated and the risk for future offences may increase.

Nonetheless, it should be noted that legal insanity and the applied measures need not have a one-to-one relationship. For instance, in the Netherlands, a defendant who is considered legally insane may or may not be admitted to a mental hospital (Kooijmans & Meynen, 2017). The decision about appropriate measures is primarily based on considerations of the risk of recidivism. If a defendant was psychotic at the time of the crime but has since fully recovered and has been stable over a period of, e.g., more than one year, then, depending on the jurisdiction, the person may be set free. In this regard, depending on the legal system and the nature of the condition warranting legal insanity, the consequentialist arguments are probably less relevant compared to the desert-based ones.

It is a matter of debate whether the insanity defence should include the mental illness clause, specific incapacities or both (Meynen, 2016). To our knowledge, the latter is the case in most jurisdictions (see Simon & Ahn-Redding, 2006). Until recently in Norway, the only requirement was the presence of psychosis, with any other criteria left unspecified (Melle, 2013). This means that, in principle, the presence of a psychotic disorder is both *required* and *sufficient* for legal insanity. Accordingly, the presence of psychosis, or a lack thereof, was crucial in the Breivik case (Bortolotti, Broome, & Mameli, 2014; Moore, 2015).

We think that relevant exculpatory incapacities should be a formal component of the formulation of the insanity defence. The specific articulation of the relevant epistemic and volitional incapacities will be different across legal contexts (Yannoulidis, 2012; for a cross-cultural review, see Simon & Ahn-Redding, 2006). Nonetheless, often this incapacity-type of defence states that an agent should be exculpated for a crime if the person, at the moment of committing it, was incapable of *understanding* the nature/wrongfulness of his or her actions or of *controlling* his or her behaviour.

The generally shared assumption here is that the relevant incapacities are those underlying the practical rationality of the agent (Morse, 2000, 2006; Reznek, 1997). Roughly, this kind of rationality is

based on the ability to evaluate different options for action, representing the means for accomplishing them, and combining these cognitive representations and evaluations to make decisions, execute them in action, and regulate actions in light of them (see also Parmigiani, Mandarelli, Meynen, Carabellese, & Ferracuti, 2019). Clearly, incapacities in these areas could undermine the accountability of the agent in the moral and legal sense (Fischer & Ravizza, 2000; Moore, 2015). Thus, the epistemic and control capacities appear to be, at least, necessary requirements for forms of responsibility that are embodied in many legal systems.

The legitimacy of the insanity defence is not universally accepted. *The Convention on the Rights of People with Disability* (United Nations, 2006) has recently motivated criticism to the defence. Although the CRPD does not mention the insanity defence, based on its principles, the High Commissioner for Human Rights as well as the Convention's Committee "have called for a replacement of the insanity defence with a disability-neutral doctrine" (Wondemaghen, 2018, p. 1). Several authors have argued that the insanity defence is conducive to discrimination and that mental disabilities should not be used as grounds for reducing criminal responsibility (for discussion, see Craigie, 2015; Minkowitz, 2014; Slobogin, 2015; Wondemaghen, 2018).[1] Taken to the extreme, these considerations might be understood as indicating that a defence based on mental incapacities cannot be used for deciding whether a person should be treated as legally responsible. This might lead to punishing individuals who should not be held responsible for their wrongdoings. Therefore, proposals to abolish the insanity defence are under the burden of avoiding this injustice without relying on some form of legal insanity.

Christopher Slobogin (2000, 2006, 2015) offers a position that aims at meeting the challenge of removing the insanity defence without prompting injustice. He argues that mental disorders should not be used as legal predicates. However, they can be used as evidence for evaluating a person's responsibility in defences that are based on other, non-discriminatory legal mechanisms. Among these defences are *mens rea*, duress, and self-defence. The basic idea is that mental disorder can be used for assessing culpability "only if it supports an excusing condition at the time of the offense that would be available to a non-mentally ill person" (Brookbanks, 2008, p. 174). This approach purports to avoid discrimination against mentally disabled persons, while at the same time allowing that the mental incapacities leading to reduced responsibility might be used in legal proceedings, if they can be integrated within the existing non-discriminatory legal mechanisms.

Although this type of integrationist proposal offers an interesting alternative to the insanity defence, it still needs to be investigated whether it would be legally acceptable and feasible across different legal traditions and systems. This includes investigating whether this proposal can encompass the types of cases that are currently covered by the insanity defence, and if it can guarantee the same level of medical and scientific expertise to inform the court or jury. For instance, there is a reason to think that *mens rea* cannot fully absorb the incapacity-based defences because the negation of *mens rea* is not epistemically or morally equivalent to the insanity defence. This is indicated in the amicus briefs related to a recent US Supreme Court case (Kalher v. Kansas) where some legal scholars maintain that negating *mens rea* by mental disorder is not a viable alternative to the insanity defence (Morse & Bonnie, 2019; see also Yaffe, 2019). In particular, in their amicus brief, signed in total by 290 criminal law and mental health law professors, Morse and Bonnie argue that "A mentally disordered defendant's irrationally distorted beliefs, perceptions or desires typically and paradoxically give him the motivation to form the *mens rea* required by the charged offense "(Morse & Bonnie, 2019, p. 13). This point can be illustrated by considering a hypothetical case.

Imagine a mother who, under the influence of a religious delusion, tragically kills her daughter in her sleep while being convinced that the girl would immediately go to heaven where she could meet her deceased grandmother, whom the girl loved dearly. Intuitively, the mother, despite possessing *mens rea*, does not seem responsible for her act due to internal conditions that negatively affect her decision-making capacities. These deficits constrained her opportunities to think about alternative courses of action and thus, disallowed her to conduct herself in accordance with the law. Moreover, it seems that such an act cannot be excused as a response to duress or an instance of self-defence. The mother is acting under the guise of doing good and thus from her subjective perspective she is not externally compelled to do it. For the same reason, her act cannot be described as self-defence. By thinking that she is doing good to her child, she is not defending her against some apparent threat. Thus, at least on a conceptual level, it seems that a specific incapacity-based defence (such as the insanity defence) outstrips the ability of already available other defences to observe the *dictum* that unaccountable persons should not be punished.

The considerations above are certainly not meant to be the final say on Slobogin's and similar proposals to abolish the insanity defence. We refer to them to motivate rethinking about the formal position of mental disorder within legal frameworks that adopt incapacity-based defences. Additionally, we feel that the incentive against discrimination, that is integral to these accounts, should be taken very seriously, and we return to it later.

In the next section, we consider the general normative and epistemic roles that the mental illness clause plays across different formulations of the legal insanity defence. Our main line of argument will be that, although mental illness may not be necessary as a formal requirement, it plays important roles within the criminal law which an adequate formulation or revision of the insanity defence should be able to accommodate.

3. A closer look into the rationale for the mental illness clause

The mental illness clause in the insanity defence has a fundamental *normative* role. It characterises very *specific* circumstances in which someone's responsibility is undermined. The notion of illness is relevant for the insanity defence insofar it is an *internal* condition that results in relevant cognitive and volitional incapacities. A core component of the notion of mental illness that is relevant here is that it *happens to* the individual, as opposed to something that she chooses and can be held accountable for. In this regard, mental disease captures a special kind of internal condition that can undermine the person's legal responsibility, differing from other internal conditions which do not undermine responsibility. For instance, a person's intense passion, despite being an internal condition, is not responsibility-undermining as it does not (sufficiently) affect the capacities required for responsibility.

In addition, the mental illness clause has a fundamental *epistemic* role. It offers a clear indication on how to establish the existence of these specific exculpatory circumstances by linking the law to psychiatry and other relevant sciences of mind and behaviour. This clause implies that these sciences can or should offer a *special kind* of explanation that otherwise would not be available to the court. Such an explanation must show that (i) there are internal states relevant for the explanation of the criminal act (ii) which are not something the agent is responsible for. Given that the incapacities relevant for the insanity defence are knowledge/appreciation of the nature of the act and control, the kind of explanations relevant for determining (i) and (ii) concern decision-making mechanisms (Morse, 2000). The focus of psychiatry is, at least in part, exactly on impairments of decision

[1] There have been stronger and weaker interpretations of this call (Craigie, 2015). Minkowitz offers an example of a stronger position. She argues, among others, that "…in the case of the insanity defence, the law presumes to exercise meta-judgment – judgment that the person is or is not a fit candidate for judgment as a moral equal – that is overlaid on the judgment about the act itself constituting a crime for which criminal responsibility would ordinarily lie if not for the negation of the person as a moral actor" (Minkowitz, 2014, p. 437).

making, thus conferring this discipline a privileged position (Meynen, 2009). Let us elaborate these points further.

The mental illness clause enables the transfer of information from relevant scientific disciplines to judicial decisions. The court will usually consult a psychiatrist or other behavioural expert to establish whether an *incapacity* was present at the time of the criminal act. In this regard, the element of mental disorder provides some, albeit imperfect, 'objectivity' to the defence as it explains the relevant incapacity at the moment of the crime in terms of psychopathology (see also Morse, 2011, pp. 895–896). Psychiatry tracks, categorizes, and treats those impairments, deficits, or incapacities labelling them as mental disorders. Accordingly, the expert witness should try to relate the specific case at hand to an existing organised and validated corpus of knowledge within the relevant science. For instance, when the psychiatrist establishes the presence of Alzheimer's disease, this may corroborate the finding that the defendant at the moment of the crime (a) did not know the nature of the act and (b) that this lack of knowledge was due to a responsibility-undermining incapacity.

Besides solving issues of communication and reliability, referring to a diagnosis might help to establish the mental state of the defendant at the time of the crime in different ways. One of the most direct ways might involve discovering that the individual has a disorder which reliably indicates, due to its typical symptomatology, that at the moment of the crime she probably had the excusing incapacities. For instance, for an agent manifesting the symptomatology of schizophrenia, there would be a reason to think that at the moment of the crime she may have been deluded, and, perhaps, as a consequence, incapable to appreciate the nature of the act and control her behaviour accordingly. However, as we further discuss in the next section, the symptomatology (i.e. the individuation of the syndrome) at the basis of mental disorders is not devised to offer grounds for exculpation. In general, we should be cautious not to immediately infer the presence of exculpating conditions from the mere fact that an offender suffers from a mental disorder (Bortolotti et al., 2014).

The mental illness clause also plays an epistemic role in rendering the law receptive to significant scientific research. There are, in fact, relevant neuropsychological advancements in the study of decision-making processes underpinning mental disorders whose integrity is relevant for the capacities presupposed by responsibility (Bechara, 2005; Kalis, Mojzisch, Schweizer, & Kaiser, 2008; Paulus, 2007). For instance, studies have found a significant dysregulation in decision-making behaviours of first-episode schizophrenia (see Candilis, Fletcher, Geppert, Lidz, & Appelbaum, 2008; Cattapan-Ludewig et al., 2008; Sevy et al., 2007). These results can make the diagnosis of schizophrenia valuable in the context of establishing the responsibility of an offender.

However, by recognising the normative and epistemic roles of the mental illness clause we do not necessarily defend its presence in the insanity defence. In the next section, we discuss several lines of reasoning why the mental illness clause might not be necessary for the insanity defence. To wit, although we rebut several objections against adopting the mental illness clause in the insanity defence, we indicate that the normative and epistemic advantages of having it might be preserved even if mental illness is not used as a formal criterion in the insanity defence.

4. Some worries raised by the mental illness clause

Even though it might seem evident that the presence of a mental illness should be a formal requirement of legal insanity, some scholars have argued for, and certain legal systems have adopted, an insanity defence without it (Hogg, 2015). According to such views, the focus of the legal formulation should be on the presence of the responsibility-affecting incapacities. The "Absence of legal responsibility due to a mental disorder and diminished responsibility" in Switzerland, for instance, is formulated as follows:

> "Art. 19.
>
> 1. If the person concerned was unable at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act, he is not liable to a penalty.
> 2. If the person concerned was only partially able at the time of the act to appreciate that his act was wrong or to act in accordance with this appreciation of the act, the court shall reduce the sentence.
> 3. Measures in accordance with Articles 59–61, 63, 64, 67, 67b and 67e may, however, be taken.
> 4. If it was possible for the person concerned to avoid his state of mental incapacity or diminished responsibility and had he done so to foresee the act that may be committed in that state, paragraphs 1–3 do not apply."[2]

Let us consider several lines of reasoning that suggest it would be better to omit the mental illness clause. Some of the reasons are based on conceptual issues and some on practical ramifications of implementing the mental illness clause. We start by discussing potential practical problems.

There might be a tendency in the practical *application* of the insanity defence to improperly use the mental illness clause as stating that the mere presence of an illness at the time of the crime provides sufficient grounds for such a defence (Moore, 2015). For instance, in a court someone might be judged eligible for the insanity defence just because of being depressed.

These are practical misuses that depart from acceptable formulations of the insanity defence. Even in considering the cases of psychosis that are paramount in the application of the insanity defence, it is important to be aware that the presence of a disorder is not automatically evidence of insanity (or of danger: as noted by Szmukler and Rose "people with psychosis, in the absence of substance abuse or antisocial personality, are not much more likely to be violent than the general population" (Szmukler & Rose, 2013, p. 135)). In fact, such formulations must explicate this clause as requiring that the mental illness status offers some sort of evidence for concluding that, at the moment of the crime, the agent suffered certain exculpatory incapacities (Morse, 2011). The presence of the illness, by itself, should not be exculpatory (Bortolotti et al., 2014).

In addition, worries might stem from a tendency to identify the legally relevant notion of mental illness with those contemplated and advanced in prominent classificatory systems such as the *Diagnostic Statistical Manual* (DSM) or the *International Classification of Diseases* (ICD). For instance, DSM-5 contains a cautionary statement:

> the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. (American Psychiatric Association, 2013, p. 25).

Thus, it could be argued that insofar legal criteria do not perfectly align with the criteria in the psychiatric classification systems, the mental illness clause should not play a role in the insanity defence, as this could lead to confusion. In fact, it may be wise not to identify the mental illness relevant in the insanity defence with a specific psychiatric classification system (such as ICD-10 or DSM-5) because this might exclude conditions that are relevant for this type of defence but have

[2] Swiss Criminal Code, Book One, Part One, Art. 19 3. Lawful acts and guilt/ Absence of legal responsibility due to a mental disorder and diminished responsibility. Portal of the Swiss Government: https://www.admin.ch/opc/en/classified-compilation/19370083/index.html.

not (yet) been included in the prominent diagnostic manuals. For instance, 'psychopathy' as a construct is often considered relevant in the forensic psychiatric settings (Jefferson & Sifferd, 2018). In fact, some are convinced that this is an exculpatory condition even though it is not included in the DSMs (Glenn, Raine, & Laufer, 2011; Morse, 2008).

We readily agree that mental illnesses conceptualised in the DSM or similar diagnostic manuals will not align perfectly with legal conceptions of disorders. However, it does not follow logically that mental illness as such would be irrelevant in establishing whether an offender is accountable (Turner, 2010). Instead, psychiatrists and lawyers need to be aware that the legal significance of a diagnosis based on current systems of classification must always be ascertained. As stated above, the mental illness is ultimately relevant in the insanity defence insofar it substantially affects legally relevant capacities.

Furthermore, there might be a tendency of seeing the use of the mental illness clause as giving over too much power to the experts as opposed to the judge and the jury. In practice, establishing the presence of mental illness in an actual court case can be difficult (Kooijmans & Meynen, 2017; Meynen, 2016; Slovenko, 1999), and courts may to a considerable extent rely on psychiatric expert testimony. This practice may even create an illusion that psychiatrists are the final arbiters on the responsibility status of an offender, when, in fact, it is the role of the judge or jury to adjudicate whether legally relevant capacities are impaired (for discussion, see Moore, 2015).[3]

We respond by stressing that the law is in the business of normatively specifying the relevant incapacities for exculpation as well as determining when and how the evidence establishes their presence or absence. However, if we want to keep the epistemological advantages of relating law to science and medicine, it is inevitable that experts interpret and evaluate these capacities based on their scientific and medical expertise. Specifically, experts can use operationalisations and measures of the psychological or other incapacities that are taken to be relevant for the presence of the responsibility-undermining incapacities. Accordingly, a possible solution might be to highlight the conceptual issues and the balance of power that is involved in this interface between law and science. Science is not and should not be able to define the exculpatory incapacities in a court of law. Still, medical and scientific expertise regarding psychopathology are often crucial in properly understanding how a person's capacities have been affected during the commission of a crime since lacking the prerequisite psychological capacity may imply diminished accountability.

Another important family of criticisms of the insanity clause stem from legitimate worries about stigma. As Claire Hogg states the issue:

> The 'Special Verdict' ('not guilty by reason of insanity') carries a considerable degree of stigma. R.D. Mackay's research (Mackay, 1992) has indicated that defendants who could potentially plead insanity would often prefer to plead guilty and risk incarceration, rather than face the stigma of having been found to be 'criminally insane'. A striking case is Hennessy in which the diabetic defendant, having been acquitted on grounds of insanity, changed his plea to guilty and appealed against the verdict, preferring to be convicted as a criminal than labelled 'insane'. (Hogg, 2015, p. 252).

Stigma raises justified concerns so long as it leads to illegitimate forms of discrimination and is one of the major problems that people with mental illness have to deal with (Corrigan, Roe, & Tsang, 2011; Gaebel, Rössler, & Sartorius, 2017; Hinshaw, 2007). Every effort should be made to prevent and reduce it. However, we should consider whether the elimination of the illness clause or the insanity defence are acceptable means for achieving this end.

The ascription of mental illness does not by itself imply social exclusion by stigma or illegitimate discrimination. It is a societal response, that can be stronger or weaker, and that, hopefully, can be considerably diminished. Thus, we might wonder to what extent we should modify the law to accommodate the fact that people *illegitimately* stigmatise and discriminate individuals with mental illness, instead of changing people's attitudes towards these individuals (Stuart, 2016). We recognise that in certain contexts the existence of *de facto* stigmatising tendencies in the society at large might recommend more measures to reject this unjustified reaction than to modify the laws (for discussion, see Jurjako, Malatesti, & Brazil, 2019).

Furthermore, proposals aimed at removing stigma must in any event protect individuals from unjust punishment. Even if some stigma would be related to the insanity defence, one could argue that, to the extent this type of defence is indispensable for some cases of criminal unaccountability (see section 2 above), it might still be the price to pay for a fair treatment of some people who suffer from a severe mental illness. A society should do justice to the people who, because of a mental illness, cannot be held responsible for their actions. Thus, if there are no appropriate alternative measures in place, it would be unfair, and a high price to pay, to hold people responsible for their actions — even if we believe they are not blameworthy — just to avoid stigma.

Another line of argument would be that, *de facto,* insanity defences have been successfully offered without relying on the existence of a mental illness. In addition, it could be conceived that there are offenders who, although not disordered according to a psychiatric classification system, might not be held accountable given certain relevant incapacities. A useful thought experiment concerns an agent who does not fulfil the criteria of a DSM-5 disorder but has a peculiar incapacity to appreciate the moral or legal nature of his act. Psychopaths, as classified with the Psychopathy checklist-revised (Hare, 2003), or better a subclass of them, might turn out not to fulfil the criteria of any DSM-5 category. In fact, they may also turn out to be non-disordered on a more conceptual level, for instance, because psychopathy might support an adaptive, albeit deeply immoral, lifestyle (see, e.g. Jurjako, 2019). Nonetheless, it could still be, and in fact it has been argued, that psychopathy is linked to responsibility undermining incapacities (Fine & Kennett, 2004; Morse, 2008; Sifferd & Hirstein, 2013; cf. Gonzalez-Tapia, Obsuth, & Heeds, 2017; Jurjako & Malatesti, 2018). In this regard, severe forms of psychopathic personalities have been found to be correlated with poorer performance than non-psychopathic individuals on different decision-making tasks, accompanied by characteristic patterns of neural activation. For instance, psychopathic individuals show reduction in aversive conditioning, such as learning from threatening stimuli, and activation of brain areas underlying such capacities (Hoppenbrouwers, Bulten, & Brazil, 2016).

However, exactly due to psychopaths' neuropsychological characteristics, their condition could play a relevant explanatory role in grounding their exculpation. For instance, it has been argued that the reduction in neurological responsiveness to threatening stimuli might explain why such individuals are not deterred from engaging in antisocial behaviour and why they cannot regulate their actions in accordance with the law (Glenn et al., 2011). Thus, although such a condition would not be classified as a mental illness in the DSM, it could, depending on the jurisdiction, still be considered a disease of the mind relevant for the legal case for which the behavioural expert testimony could play a significant role (for discussion, see Jefferson & Sifferd, 2018). According to this reasoning, the insanity defence could still be relevant for cases in which there is no disorder as classified by the DSM-5 or ICD-10, where, ultimately, the law determines what should count as disease of the mind in the legal context.

The most important reason for excluding mental illness as a formal criterion for the insanity defence is probably that nothing of moral or practical relevance would be lost without it. Even without the clause, a psychiatrist could (be allowed to) refer to the presence of a mental

[3] In the Netherlands, there have been cases where the behavioural experts, even after weeks of clinical observation of an uncooperative defendant, were unable to diagnose a mental disorder. Nevertheless, the court ruled that the defendant suffered from a mental illness, stating, among others, that it was not bound to the DSM-5 (for discussion, see Kooijmans & Meynen, 2017).

disorder in her testimony about the lack of certain legally required capacities, such as knowledge about the quality of the criminal act or the ability to control one's behaviour. For instance, a psychiatrist might explain that, because of a paranoid delusion due to schizophrenia (a *mental disorder*), the defendant was under the impression that she acted in self-defence. Therefore, the defendant did not know that what she was doing was wrong. The disorder *helps to explain and to support* the expert's conclusion that the defendant lacked the relevant capacity. However, in this case, the disorder would be assigned only an evidentiary role and would no longer be a formal criterion for insanity (Meynen, 2016). This would bring the insanity defence closer to the assessments of decision-making competency in healthcare, where the criteria do not refer to the presence of mental illness. According to the most common normative framework for patient competency, the criteria concern capacities to understand, appreciate, reason, and to express a choice – without any reference to psychopathology (Appelbaum, 2007; Meynen, 2009, 2016). The evaluator establishes the presence of these abilities to determine the patient's decision-making competency. Nonetheless, in such cases, a mental illness can well be part of the *explanation* why a patient does not fulfil the criteria for decision-making competency. For instance, due to Alzheimer's dementia, the patient has problems remembering what the doctor explained to her, understanding her condition, and the treatment options. Thus, we maintain that there is, in principle, no normative obstacle for evidentiary use of mental illness, even if the mental illness is no longer included in the legal formulation of an insanity defence.

5. Conclusion

We aimed to offer an argument to encourage (re)thinking about the mental illness clause in the insanity defence. Arguably, the most important reason for using the mental illness clause is to secure the connection between the law and the relevant sciences. The insanity defence provides the opportunity to consider that mental illnesses may influence a person's behaviour in an *uncommon* way. Common sense and common knowledge are not enough to determine such influence. The specific expertise of psychiatrists (and psychologists), which is in principle based on state-of-the-art scientific research, is required. Accordingly, we have highlighted that an incapacity defence should entail the use of the state-of-the-art medical expertise. In this regard, experts provide the court and the jury with the best information on whether and how capacities have been compromised at the time of the act. However, it is for the court/jury to finally decide about the sanity of the defendant. Thus, depending on other safeguards in a legal system, we argue, a balanced decision should be made to either include or exclude the mental illness clause.

Meanwhile, mental illness is often and unjustifiably associated with stigma and discrimination. The link between mental illness and exculpation in the court of law may reinforce this association. Some authors, thus, have suggested replacing the insanity defence with other types of defences that do not formally relate exculpation to mental illness. In this regard, we have mentioned Slobogin's important proposal for abolishing the insanity defence. However, if mental illness is excluded as a predicate in the formulation of the insanity/mental incapacity defence, this might also be helpful to diminish stigma and discrimination – but we leave this as an open empirical and normative question.

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