

# **Moral Competence and the Psychopath**

Matthew Tieu

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School of Humanities/Discipline of Philosophy  
The University of Adelaide  
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## ***Abstract***

Various theories of moral judgment have been proposed in light of recent empirical research in cognitive neuroscience and moral psychology. Some of the evidence is thought to indicate that emotional and intuitive processes are primarily responsible for moral judgement. There is also evidence to suggest that conscious deliberative reasoning can influence those emotional and intuitive processes and thus determine the content of moral judgment. Whilst empirical research helps to identify important capacities that underpin moral judgment, it is uncertain which of those capacities are necessary and sufficient for moral *competence* as distinguished from moral *performance* (a distinction that is central to the cognitive sciences).

The analysis of moral competence must also take into consideration the way in which we conceptualize moral judgement. Morality is traditionally understood as a normative enterprise based on moral reasoning and moral justification. Given that moral judgments are concerned with prescribing action, it is therefore conceived of as a form of practical reasoning. Central to the theory of moral judgment as practical reason is the implication that only rational agents are able to make morally relevant judgments. This implies that those who lack rational agency are incapable of making moral judgments.

In this thesis I argue that the practical reason requirement incorrectly excludes people (such as children, and those with particular neuropsychological deficits), whom we would normally grant as having a minimal capacity to form moral judgments. I also argue that this incorrectly excludes moral judgments and relevant moral knowledge that can be expressed independently of rational agency. Therefore I propose a theory of moral competence which accommodates all morally relevant

capacities and situates them within either categories of moral competence or moral performance. I then apply this theory to the analysis of the moral deficits associated with psychopathy and to the assessment of moral/legal responsibility of psychopaths.

### ***Statement of Originality***

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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Matthew Tieu (31<sup>st</sup> August 2012)

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I feel that I have been most fortunate to have been taught by so many great teachers during my time as an undergraduate student and as a graduate student in the Discipline of Philosophy. They all possess great knowledge, expertise and a passion for philosophy which inspired me to continue studying beyond my undergraduate years. I am most grateful to have been afforded the opportunity to undertake further study at graduate level.

## **Introduction and Aims**

### **Background**

Empirical research in cognitive neuroscience and moral psychology in recent years have advanced our understanding of the cognitive/affective processes associated with moral judgment. Subsequently there have been a number of theories proposed about the nature of moral judgment and moral development. Of particular interest and controversy are those theories which posit a primary role for emotional function.<sup>1</sup>  
<sup>2 3 4</sup> Some have subsequently argued that emotions are necessary and sufficient for moral judgment and that therefore the empirical evidence supports a Humean sentimentalist view of moral judgments as sentiments of disapprobation/approbation.<sup>5</sup>  
<sup>6</sup> Others have proposed that moral judgments express a form of intuitive moral knowledge that is contained in a dedicated cognitive faculty and independent of emotional function.<sup>7 8</sup>

What these theories have in common is the controversial claim that the content of our moral judgments are not determined by conscious deliberative reasoning but instead are determined by cognitive/affective processes that are fast, automatic, unconscious

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<sup>1</sup> Haidt, J. (2001) The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, Vol. 108; Pp: 814–834

<sup>2</sup> Greene, J. and Haidt, J (2002) How (and where) does moral judgment work? *Trends in Cognitive Sciences*, Vol. 6; Pp: 517–23

<sup>3</sup> Prinz, J. J. (2008) *The emotional construction of morals*. Oxford University Press

<sup>4</sup> Blair, R. J. R (2009) Neuro-Cognitive Systems Involved in Moral Reasoning. In Verplaetse, J. *et al.* (Eds) *The Moral Brain: Essays on the Evolutionary and Neuroscientific Aspects of Morality*. Springer Publishers

<sup>5</sup> Haidt, J. (2001) The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, Vol. 108; 814–834

<sup>6</sup> Prinz, J.J. (2006) The emotional basis of moral judgments. *Philosophical Explorations*, Vol. 9(1); Pp: 29–43

<sup>7</sup> Hauser, M. (2006) *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong*. Harper Collins: New York, NY

<sup>8</sup> Hauser, M., Young, L. and Cushman, F. (2008) Reviving Rawls's Linguistic Analogy: Operative Principles and the Causal Structure of Moral Actions. In W. Sinnott-Armstrong (Ed.), *Moral Psychology*, Vol. 2: *The Cognitive Science of Morality: Intuition and Diversity*. Cambridge, MA: MIT Press; Pg. 109

and unaffected by reasoning. They posit that the role that conscious deliberative reasoning plays is primarily to offer *ex post facto/post hoc* rationalisations of what are essentially intuitive moral judgments.<sup>9 10 11</sup>

However, we understand morality as a normative or prescriptive enterprise, the aim of which is to specify how one ought to behave. It is unclear how emotions or intuitions alone can offer us any moral prescriptions that can help to resolve moral conflict and guide appropriate moral behaviour. Therefore a prevailing view (traditionally endorsed by moral philosophers) is that genuine moral judgments are made on the basis of moral reasoning and therefore the requirements of morality are requirements of reason or rationality.<sup>12 13 14 15</sup> As Christine Korsgaard states:

*Morality so regarded is one manifestation of the human capacity for what I am calling “normative self-government.” Normative self-government is our capacity to assess the potential grounds of our beliefs and actions, to ask whether they constitute good reasons, and to regulate our beliefs and actions accordingly. (Korsgaard, C. M. 2010; Pg. 8)*

This presupposes that we are rational and have the capacity to utilize moral reasoning to form moral judgments and essentially to justify those moral judgments

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<sup>9</sup> Haidt, J. (2001) The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, Vol. 108; Pp: 814–834

<sup>10</sup> Greene, J. D. (2008) The Secret Joke of Kant’s Soul. In W. Sinnott-Armstrong (Ed.), *Moral Psychology Volume 3: The Neuroscience of Morality: Emotion, Brain Disorders, and Development*. MIT Press; Pp: 35-79

<sup>11</sup> Hauser, M., Cushman, F., Young, L., Jin, K-X. and Mikhail, J. (2007) A Dissociation Between Moral Judgments and Justifications. *Mind & Language*, Vol. 22(1); Pp: 1-21

<sup>12</sup> Nagel, T. (1970) *The Possibility of Altruism*, Princeton, NJ: Princeton University Press

<sup>13</sup> Smith, M. (1994) *The Moral Problem*, Oxford: Blackwell

<sup>14</sup> Korsgaard, C. M. (1986) Skepticism about practical reason. *Journal of Philosophy*, Vol. 83(1); Pp: 5-25

<sup>15</sup> Korsgaard, C. M. (2010) Reflections on the evolution of morality. Amherst Lecture in Philosophy. The Department of Philosophy at Amherst College. <http://www.amherstlecture.org/korsgaard2010>



even if they are made by emotions or intuition (I refer to this view as “moral rationalism”).<sup>16</sup>

Some moral rationalists also argue that because morality is essentially concerned with prescribing action, moral judgments are thus conceived of as judgments of “practical rationality” or “practical reason”.<sup>17</sup> <sup>18</sup> This presupposes that we have the capacity to be receptive to reasons and have them guide action as part of a coherent autobiography, i.e. rational agency.<sup>19</sup> <sup>20</sup> <sup>21</sup> <sup>22</sup>

Furthermore, rational agency also implies that one is capable of perceiving themselves as a temporally extended being (what I shall call “diachronic agency”) capable of transcending immediate desires or inclinations so as to be able to reconcile conflicting goals and thus exist with some degree of autobiographical unity which some may refer to as “narrative agency”.<sup>23</sup> <sup>24</sup> Only then can practical reason become normative and guide action accordingly.<sup>25</sup> <sup>26</sup> This is why moral judgements that are expressions of practical reason are said to be “diachronic”, whereas those

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<sup>16</sup> Richard Joyce’s distinctions between “Justificatory Rationalism”, “Psychological rationalism” and “Conceptual Rationalist” help to clarify the different uses of the term “moral rationalism”. See Joyce, R. (2008) What neuroscience can (and cannot) contribute to metaethics. In W. Sinnott-Armstrong (Ed.), *Moral Psychology Volume 3: The Neuroscience of Morality: Emotion, Brain Disorders, and Development*. MIT Press; Pp: 371-394

<sup>17</sup> Korsgaard, C. (1986) Skepticism about practical reason. *Journal of Philosophy*, Vol. 83(1); Pp: 5-25

<sup>18</sup> Wallace, R. J. (1990) How to Argue about Practical Reason. *Mind*, Vol. 99(395); Pp: 355-385

<sup>19</sup> Korsgaard, C. M. (1988) Personal Identity and the Unity of Agency: A Kantian Response to Parfit. *Philosophy and Public Affairs*, Vol. 18; Pp: 101–32

<sup>20</sup> Wallace, R. J. (1994) Responsibility and the Moral Sentiments. *Harvard University Press*; Pg. 2

<sup>21</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 77-96

<sup>22</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pg. 585

<sup>23</sup> Atkins, K. and Mackenzie, C. (2008) *Practical Identity and Narrative Agency*, Routledge:New York

<sup>24</sup> Kennett, J. and Matthews, S. (2007) Normative Agency. In Atkins, K. and MacKenzie, C. (Eds) *Practical Identity and Narrative Agency*, Routledge: New York

<sup>25</sup> Korsgaard, C. M. (2010) Reflections on the evolution of morality. Amherst Lecture in Philosophy. The Department of Philosophy at Amherst College. <http://www.amherstlecture.org/korsgaard2010>

<sup>26</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 602

that are made independently of the temporal/narrative dimension are said to be merely “synchronic”.<sup>27</sup>

There is empirical evidence that conscious deliberative reasoning can play a role in determining and/or overriding pre-potent emotional/intuitive responses.<sup>28</sup> If this is correct then conscious deliberative reasoning can indeed determine the content of our moral judgments which would vindicate moral rationalism and perhaps practical reason as some have argued.<sup>29 30</sup>

However, most of the empirical investigations of the cognitive capacities underpinning moral judgment have been framed in terms of the “dual process theory” of cognition, which posits that human cognition consists of two kinds of processes – “System 1” processes which are fast, automatic and unconscious (underpinning sentimentalist and intuitionist theories); and “System 2” processes which are slow, conscious, and deliberative (underpinning moral rationalism).<sup>31 32</sup> This framework excludes considerations of the role of rational agency and therefore implicitly assumes that moral judgment is a synchronic process. Therefore, the dual process framework cannot accommodate the theory of moral judgment as practical reason.<sup>33</sup>

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<sup>27</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pg. 585

<sup>28</sup> Fine, C. (2006) Is the Emotional Dog Wagging its Rational Tail, or Chasing it? Reason in Moral Judgment. *Philosophical Explorations*, Vol. 9(1); Pp: 83-98

<sup>29</sup> Kennett, J. (2006) Do Psychopaths Threaten Moral Rationalism? *Philosophical Explorations*, Vol. 9(1); Pp: 69-82

<sup>30</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 77-96

<sup>31</sup> Evans, J. St. B. T. (2002) Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition. *Annu. Rev. Psychol*, Vol. 59; Pp: 255–78

<sup>32</sup> Evans, J. St. B. T. and Frankish, K. (2009) *In Two Minds: Dual Processes and Beyond*. Oxford University Press

<sup>33</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 585-614

## Aims

The general aim of this thesis is to accommodate all of the relevant theories of moral judgment and cognitive capacities into a broader cognitive framework that is based on distinguishing those capacities that contribute to moral *competence* from those capacities that contribute to moral *performance*. From this framework I propose a theory of moral competence that identifies capacities that are necessary and sufficient for moral judgment.

Because morality is a normative enterprise, primacy ought to be conferred upon the capacity for conscious deliberative reasoning (if indeed it can be shown to play a determining role in moral judgments). However, because the capacity for conscious deliberative reasoning independent of diachronic agency is a synchronic capacity, it is inconsistent with the theory of practical reason which posits that diachronic agency is necessary for moral judgment. This is why some proponents of practical reason argue that synchronic moral judgments cannot be thought of as “genuine” forms of moral judgments.<sup>34 35</sup>

If this is correct then moral judgment which is independent of, or irrelevant to, one’s diachronic agency is irrelevant to moral competence. But this presents us with some dilemmas. For example, we are forced to conceive of those who are only capable of moral reasoning in the synchronic sense, because they lack diachronic agency, as morally incompetent (e.g. amnesics and children).

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<sup>34</sup> Kennett, J. (2006) Do Psychopaths Threaten Moral Rationalism? *Philosophical Explorations*, Vol. 9(1); Pp: 69-82

<sup>35</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 77-96

However, despite lacking an intact autobiographical narrative, amnesics are able to use conscious deliberative reasoning (based on information from memory that is still present) to make important practical decisions. They can also make preference based judgments that derive from emotional or intuitive function.<sup>36</sup> Despite only having a limited autobiographical narrative, a child is able to make fundamental moral distinctions, such as distinguishing between moral and conventional norms, and authority dependent and independent norms.<sup>37 38 39</sup>

There are also morally relevant situations where moral judgments and moral knowledge can function independently of one's diachronic agency. I have in mind the kind of judgments expressed by a magistrate or a courtroom judge, and the kind of moral knowledge referred to as propositional, abstract or verbalistic knowledge, which a moral teacher or a social anthropologist might possess.

Some proponents of practical reason argue that because such knowledge is not necessarily assented to, but instead merely expresses a kind of knowledge that is verbalistic/abstract, it is therefore distinct from the "deeper" kind of moral knowledge that they argue is required for moral competence.

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<sup>36</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 587

<sup>37</sup> According to the moral/conventional distinction, moral norms are held to have an objective, prescriptive force. They are not dependent on the authority of any individual or institution. They are taken to hold generally, not just locally (i.e. both geographically and temporally). Violations of moral norms generally involve a victim who has been harmed, whose rights have been violated, or who has been subject to an injustice. Violations of moral norms are typically more serious than violations of conventional rules which have the opposite cluster of properties, i.e. they do not have objective, prescriptive force. Rather they are viewed as arbitrary or situation-dependent, and can be suspended or changed by an appropriate authoritative individual or institution. Conventional rules are often geographically and temporally local. Violations of conventional rules do not involve a victim who has been harmed. These violations are typically less serious than violations of moral rule. For a review of this literature see Nado, J. Kelly, D. and Stich, S. (2009) Moral Judgment. In Symons, J. and Calvo, P. (Eds) *Routledge Companion to the Philosophy of Psychology 4<sup>th</sup> edition*

<sup>38</sup> Turiel, E. (1983) *The Development of Social Knowledge*. Cambridge: Cambridge University Press

<sup>39</sup> Smetana, J. and Braeges, J. (1990) The Development of Toddlers' Moral and Conventional Judgements. *Merrill-Palmer Quarterly*, Vol. 36; Pp: 329-346

How are we to conceive of those who have moral knowledge but do not exercise it within the context of their diachronic self because they are operating as a purely synchronic system? Is abstract/verbalistic moral knowledge relevant to moral competence? What is “deep” moral knowledge and “genuine” moral judgment?

The specific aim of my thesis is to address these questions and offer a way forward. I argue that we need to make a functional distinction between moral judgment and moral agency in order to accommodate the view that those lacking in diachronic agency (i.e. amnesics and children) can make morally relevant judgments and express morally relevant knowledge (likewise those for whom morally relevant knowledge functions and is expressed independently of their diachronic selves).

I also argue that this distinction also exists as a cognitive distinction that is consistent with an important paradigm in the cognitive sciences, i.e. the distinction between “performance” and “competence”.<sup>40</sup> I apply this distinction to the analysis of moral judgment and subsequently offer a theory of moral competence in terms of cognitive capacities necessary for morally relevant knowledge and judgment, as distinct from capacities associated with moral performance. This will also provide a more accurate and nuanced standard for the assessment of deficits associated with morally aberrant behaviour, particularly those of the psychopath, which I also discuss.

## **Chapter Structure**

I begin in chapter 1 by discussing some of the relevant empirical research in moral cognition and philosophical perspectives on moral judgment. I then present a broad

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<sup>40</sup> Pylyshyn, Z. W. (1973) The Role of Competence Theories in Cognitive Psychology. *Journal of Psycholinguistic Research*, Vol. 2(1); Pg. 22

framework that describes all of the relevant cognitive capacities that the empirical evidence and philosophical accounts suggests contributes to our capacity for moral judgment. Within this framework we can conceive of specific categories of moral competence that are constituted by relevant cognitive capacities (i.e. intuitive competence, emotional competence, reasoning competence, and diachronic agency). I argue for the primacy of moral reasoning.

In chapter 2 I address the question of which capacities are necessary and sufficient for moral competence by applying the performance/competence distinction to the analysis of moral judgment. I argue that this distinction implies that we should conceive of the cognitive processes that underpin synchronic conscious deliberative reasoning as constituting moral competence, and the cognitive processes that underpin practical reason (diachronic agency in particular) as associated with moral performance.

Therefore, whilst diachronic agency and intuitive/emotional dimensions may play an important role in moral judgment and perhaps a necessary role in moral development, I argue that conscious deliberative reasoning (i.e. synchronic moral reasoning) is necessary and sufficient for moral competence. This allows us to make sense of what appear to be dissociations between moral judgment and diachronic agency and therefore enables us to better characterise the capacities of amnesics and children, and the capacities and function of courtroom judges, moral teachers and social anthropologists.

In chapter 3 I turn to a discussion of psychopathy. The psychopath's moral deficit has been described as a lack of a "deep" moral knowledge or an inability to make "genuine" moral judgments. Hence their moral knowledge is described as merely

abstract/verbalistic knowledge, akin to the knowledge a social anthropologist might have of a community's moral customs. According to some, it is due to their emotional deficit. According to others it is due to deficits of diachronic and thus rational agency.

However, I argue that because psychopaths have relevant abstract/verbalistic knowledge and the capacity to apply this knowledge to their actions, they are morally competent in the sense that I have proposed. I also argue that many psychopaths (particularly criminal psychopaths) do not demonstrate behaviour that would indicate deficits of rational or diachronic agency. This is because there is evidence to indicate that they are able to consciously plan and guide their actions in accordance with their longer term goals. Therefore I also argue that many psychopaths qualify as diachronic and rational agents and are therefore competent with regard to practical reason.

This allows us to make sense of the view that psychopaths are responsible for their actions even though they may have deficits associated with emotional responding, inhibitory control, and/or rational agency, which I argue are more appropriately conceptualized as performance deficits.

In chapter 4 I consider the implications that such an assessment of psychopathy might have for matters of legal responsibility. I argue that the theory of moral competence that I develop can form the basis for a minimal set of criteria for moral and legal responsibility. Therefore on my analysis psychopaths are morally/legally responsible for their actions though their performance deficits (i.e. lack of emotions and/or diachronic agency) may constitute grounds for mitigation, diminished responsibility and perhaps exculpation in extreme cases.

## **Chapter 1 – Dimensions of Moral Cognition**

### **1.1 Emotional/Intuitive Dimensions of Moral Cognition**

Throughout history we have generally accepted that humans have the capacity to reason and reflect on beliefs, values, experiences and expectations to guide our judgments and actions. We therefore assume that moral judgments are likewise the product of our capacity for moral reasoning, from which emerges the concepts of “moral reasons” and “moral justification”. This has been the case since Plato, Aquinas, Descartes, Leibniz and Kant.

To the contrary, David Hume had famously argued for the view that reason alone was insufficient to motivate action, that a desire or a conative state was required<sup>41</sup>, and that moral judgments were not derived from reason but were in fact merely expressions of sentiments of disapprobation (what I refer to as “Humean sentimentalism”).<sup>42</sup>

*Since morals, therefore, have an influence on the actions and affections, it follows, that they cannot be deriv'd from reason; and that because reason alone, as we have already prov'd, can never have any such influence. Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality, therefore, are not conclusions of our reason... when you pronounce any action or character to be vicious, you*

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<sup>41</sup> This view was recently echoed by Bernard Williams who argued that having a reason to perform a particular action depends on the contents of an agent's antecedent desires (what William's referred to as an agent's "subjective motivational set"). Therefore all reasons for action are grounded in an agent's antecedent desires. See Williams, B (1980) Internal and External Reasons. In Williams, B. (1981) *Moral Luck*. Cambridge University Press; Pp: 101–102

<sup>42</sup> Hume, D. (1740) *A Treatise of Human Nature*, bk. 3, pt. 1, sec. 1; and *An Inquiry Concerning the Principles of Morality* (1751), app. 1. Excerpt In Rachels, J. (2007) *The Right Thing To Do*. McGraw Hill; Pp: 66-67



*mean nothing, but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it. (Excerpted from “A Treatise of Human Nature”, in Rachels, J. 2007; Pg. 66-67)*

Similarly, Freudian psychology emphasized the role of unconscious motives, and behavioural psychology posited no role for moral reasoning in moral behaviour. However, with the cognitive revolution came a return to theories of moral reasoning. Of particular importance were the theories of Lawrence Kohlberg and Jean Piaget which focused on the reasons people offer for ethical behaviour and how they justify their actions. According to their theories there are specific developmental stages that a person progresses through. Each stage represents a greater sophistication in moral reasoning and a greater capacity for moral judgment.<sup>43 44</sup>

In recent years there has been much focus on determining the neuro-cognitive processes that underpin moral judgment. We know from research in cognitive neuroscience that there are a number of regions of the brain that are associated with moral judgment and moral decision making. Though what has come to attention in recent years is evidence which suggests that emotions and intuitive processes may play an important role in moral judgment and moral decision making.

For example, in an experiment by Greene *et al* (2001), subjects were administered fMRI brain scans while they were asked to make judgments about the permissibility of actions in response to the so called “trolley” and “footbridge” dilemmas (and other variations). These dilemmas present situations where utilitarian outcomes can be achieved but the actions performed to achieve it also conflict with other beliefs and/or

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<sup>43</sup> Kohlberg, L. (1973) The Claim to Moral Adequacy of a Highest Stage of Moral Judgment. *Journal of Philosophy*, Vol. 70(18); Pp: 630–646

<sup>44</sup> Piaget, J. (1932) *The Moral Judgment of the Child*. Kegan, Paul, Trench, Trubner and Co: London

they require the endorsement of emotionally aversive actions. For example, the footbridge dilemma is one of these dilemmas and is referred to as a “personal” dilemma (pushing a person off the footbridge and killing them to save five others). In contrast, the trolley dilemma is not as emotionally aversive, and is referred to as an “impersonal” dilemma (flicking a switch to save five lives at the expense of one). The data revealed that brain areas implicated in emotional processing showed increased activation during assessment of “personal” moral dilemmas.<sup>45</sup>

The moral dilemmas can also conflict in either “low difficulty” or “high difficult” ways. Data from a subsequent fMRI study indicated that both cognitive and emotional processes may play a mutually competitive role in utilitarian moral judgments with regard to high conflict (high difficulty) forms of personal moral dilemmas (i.e. smothering your crying baby in order save many other lives). This kind of moral judgment, which requires reconciling two conflicting goals (your own baby’s life or saving the lives of everyone else) is correlated with activity in brain regions associated with abstract reasoning processes, (the anterior dorsolateral prefrontal cortex - DLPFC) and cognitive conflict resolution (anterior cingulate cortex).<sup>46</sup>

Greene has suggested that whilst abstract reasoning can play an important role in moral judgments, there are situations where such reasoned considerations may conflict with pre-potent emotional responses. The moral judgment that prevails reflects the overriding of one system over the other (or the prevailing of one system in the absence of the other). Greene therefore postulates that moral judgment is

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<sup>45</sup> Greene, J. D. C., Sommerville, R. B., Nystrom, L. E., Darley, J. M. and Cohen, J. D. (2001) An fMRI investigation of emotional engagement in moral judgment. *Science*, Vol. 293; Pp: 2105-2108

<sup>46</sup> Greene, J. D. C., Nystrom, L. E., Engell, A. D., Darley, J. M. and Cohen, J. D. (2004) The neural bases of cognitive conflict and control in moral judgment. *Neuron*, Vol. 44(2); Pp: 389-400

accomplished by both an emotional system as well as a controlled cognitive/abstract reasoning system.<sup>47 48</sup>

Research into neuropsychological deficits also helps us to identify brain regions that might be necessary for moral judgment and decision making. The famous case of Phineas Gage is an example. He was a rail construction worker who was involved in an accident which caused major damage to his prefrontal cortex. Whilst his basic faculties of memory, speech, intelligence and motor skills remained intact, he became short tempered, unsociable, profane, unable to persevere with long term plans and ultimately unable to satisfactorily perform his work duties.<sup>49</sup> Similarly, patients with damage to their prefrontal cortex also have a tendency to act on impulse and are unable to learn from negative experiences. As a result they often exhibit antisocial behaviour and are referred to as “acquired sociopaths”.<sup>50 51 52 53</sup> The association between the impulsive and high risk behaviour of adolescents and their immature prefrontal cortices is also evidence for the role of the prefrontal cortex in guiding behaviour and decision making.<sup>54 55</sup>

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<sup>47</sup> Greene, J. D. C., Nystrom, L. E., Engell, A. D., Darley, J. M. and Cohen, J. D. (2004) The neural bases of cognitive conflict and control in moral judgment. *Neuron*, Vol. 44(2); 389-400

<sup>48</sup> Greene, J.D. C. (2007) Why are VMPFC patients more utilitarian?: A dual-process theory of moral judgment explains. *Trends in Cognitive Sciences*, Vol. 11(8); Pp: 322-323

<sup>49</sup> Damasio, H., Grabowski, T., Frank, R., Galaburda, A. M., Damasio, A. R. (1994) The return of Phineas Gage: clues about the brain from the skull of a famous patient. *Science*, Vol. 264(5162); Pp: 1102-5

<sup>50</sup> This was a term coined by Damasio to describe patients with deficits of the prefrontal cortex whose behaviour was consistent with what the DSM-3 defines as “Sociopathic Disorder”. See Damasio, A. R., Tranel, D. and Damasio, H. (1990) Individuals with sociopathic behavior caused by frontal damage fail to respond autonomically to social stimuli. *Behav Brain Res*, Vol. 41; Pp: 81–94

<sup>51</sup> Blumer, D. and Benson, D. F. (1975) Personality changes with frontal and temporal lobe lesions. In Benson, D. F. and Blumer, D. (Eds.), *Psychiatric aspects of neurological disease*. Grune & Stratton: New York; Pp: 151–170

<sup>52</sup> Bechara, A., Damasio, A. R., Damasio, H. and Anderson, S. (1994) Insensitivity to future consequences following damage to human prefrontal cortex. *Cognition*, Vol. 50; Pp: 7–15

<sup>53</sup> Bechara, A., Damasio, H., Damasio, A. and Lee, G. P. (1999) Differential Contributions of the Human Amygdala and Ventromedial Prefrontal Cortex to Human Decision-Making. *The Journal of Neuroscience*, Vol. 19; Pp: 5473-5481

<sup>54</sup> Chambers, R. A., Taylor, J. R. and Potenza, M. N. (2003) Developmental neurocircuitry of motivation in adolescence: a critical period of addiction vulnerability. *Am. J. Psychiatry*, Vol. 160; Pp: 1041-1052

Of particular importance to moral judgment and behaviour is the role of the ventromedial prefrontal cortex (VMPFC). Patients with damage to the ventromedial prefrontal cortex (I refer to them as “ventromedial patients”)<sup>56 57</sup>, and psychopaths (who have reduced activity in the VMPFC)<sup>58</sup> display highly antisocial behaviour, a lack of empathy, a tendency to act on impulse, and an inability to learn from negative experiences.<sup>59 60 61 62</sup>

Antonio Damasio has proposed that the function of the VMPFC is to regulate and guide affectively driven prudential decision making and behaviour. According to his “Somatic Marker Hypothesis” specific classes of stimuli are said to be “somatically marked” during development and learning, meaning that those stimuli become coupled with the representations of affectively valenced body states which unconsciously disposes a person towards or away from a particular action or decision. The VMPFC which is linked to the amygdala is thought to be responsible for generating somatic markers. Hence deficits in the VMPFC are thought to give rise

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<sup>55</sup> Giedd, J. N. (2008) The Teen Brain: Insights from Neuroimaging. *Journal of Adolescent Health*, Vol. 42(4); Pp: 335-343

<sup>56</sup> Damasio, A. R., Tranel, D. and Damasio, H. (1990) Individuals with sociopathic behavior caused by frontal damage fail to respond autonomically to social stimuli. *Behav Brain Res*, Vol. 41; Pp: 81–94

<sup>57</sup> Bechara, A, Tranel, D, and Damasio, H. (2000) Characterization of the decision-making deficit of patients with ventromedial prefrontal cortex lesions. *Brain*, Vol. 123(11); Pp: 2189-2202

<sup>58</sup> Blair, R. J. R. (2008) The amygdala and ventromedial prefrontal cortex in morality and psychopathy. *Trends in Cognitive Sciences*, Vol. 11(9); Pp: 388-392

<sup>59</sup> Damasio, A. R. (1994) *Descartes' Error: Emotion, Reason and the Human Brain*. NY: Avon; Pg. 178

<sup>60</sup> Bechara, A., Damasio, A. R., Damasio, H. and Anderson, S. (1994) Insensitivity to future consequences following damage to human prefrontal cortex. *Cognition*, Vol. 50; Pp: 7–15

<sup>61</sup> Bechara, A., Damasio, H., Damasio, A. and Lee, G.P. (1999) Differential Contributions of the Human Amygdala and Ventromedial Prefrontal Cortex to Human Decision-Making. *The Journal of Neuroscience*, Vol. 19; Pp: 5473-5481

<sup>62</sup> Kiehl, K. A., Smith, A. M., Hare, R. D., Mendrek, A., Forster, B. B., Brink, J. and Liddle, P. F. (2001) Limbic abnormalities in affective processing by criminal psychopaths as revealed by functional magnetic resonance imaging. *Biological Psychiatry*, Vol. 50(9); Pp: 677-84

to deficits associated with the generation of appropriate emotional responses that guide prudential decision making and behaviour.<sup>63 64</sup>

James Blair has proposed a model of moral judgment and behaviour which he calls the “Integrated Emotion Systems” (IES). It functions by eliciting an autonomic response that leads to the inhibition of violent or distressing behaviour, when one is confronted with behavioural cues associated with submission (such as fearful or sad facial expressions).<sup>65 66</sup> The neural systems thought to be involved in the IES are primarily an emotional learning system (underpinned by amygdala function) and a system that predicts whether the outcomes of particular actions will produce reward or aversion (underpinned by VMPFC function).<sup>67</sup> Blair hypothesizes that the moral and behavioural deficits associated with psychopathy are largely due to the abnormal function of the IES circuitry.<sup>68 69 70</sup>

## 1.2 Sentimentalist/Intuitionist Theories

Jonathan Haidt’s famous “Social Intuitionist Model” of moral judgment posits that intuitive processes are primarily responsible for generating moral judgements. Whilst Haidt posits that reasoning can play a causal role in moral judgments, he claims that

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<sup>63</sup> Damasio, A. R., Tranel, D. and Damasio, H. (1990) Individuals with sociopathic behavior caused by frontal damage fail to respond autonomically to social stimuli. *Behav Brain Res*, Vol. 41; Pp: 81–94

<sup>64</sup> Damasio, A. (1994) *Descartes’ Error: Emotion, Reason and the Human Brain*. NY: Avon; Pg. 216

<sup>65</sup> Blair, R. J. R. (1995) A cognitive developmental approach to mortality: investigating the psychopath. *Cognition*, Vol. 57; Pp: 1-29

<sup>66</sup> Blair, R. J. R., Jones, L., Clark, S. and Smith, M. (1997) The psychopathic individual: A lack of responsiveness to distress cues? *Psychophysiology*, Vol. 34; Pp: 192-198

<sup>67</sup> Blair, R. J. R. (2009) Neuro-Cognitive Systems Involved in Moral Reasoning. In Verplaetse, J. *et al.* (Eds) *The Moral Brain: Essays on the Evolutionary and Neuroscientific Aspects of Morality*. Springer Publishers

<sup>68</sup> Blair, R. J. R. (1995) A cognitive developmental approach to mortality: investigating the psychopath. *Cognition*, Vol. 57; Pp: 1 -29

<sup>69</sup> Blair, R. J. R., Jones, L., Clark, S. and Smith, M. (1997) The psychopathic individual: A lack of responsiveness to distress cues? *Psychophysiology*, Vol. 34; Pp: 192-198

<sup>70</sup> Blair, R. J. R. (2009) Neuro-Cognitive Systems Involved in Moral Reasoning. In Verplaetse, J. *et al.* (Eds) *The Moral Brain: Essays on the Evolutionary and Neuroscientific Aspects of Morality*. Springer Publishers

they generally do so only through influencing other people's intuitions and that it is rare that reasoning alone can give rise to the content of moral judgments. Therefore he posits that the role of reasoning is primarily to provide *ex post facto/post hoc* justification of moral intuitions.<sup>71</sup> The moral intuitions themselves are partly innate and partly determined by culture.

*The social intuitionist model... proposes that morality, like language, is a major evolutionary adaptation for an intensely social species, built into multiple regions of the brain and body, which is better described as emergent than as learned, yet which requires input and shaping from a particular culture. Moral intuitions are therefore both innate and enculturated. (Haidt, J. 2001; Pg. 826)*

The evidence that Haidt cites to support his intuitionist claim comes from a wide variety of empirical research. For example Haidt claims that research in social cognition indicates that most of our behaviours and judgments are in fact made automatically rather than as a process of deliberation and reflection. In so far as people offer reasons, they often do so in a biased fashion for the purposes of, for example, upholding a sense of solidarity they have with a particular social group, or to affirm an idealised view of themselves (what Haidt refers to as "relatedness" and "coherence motives"). If moral judgments were grounded on reason and rational justification then one might expect more convergence of moral beliefs. However, the lack of responsiveness and consensus with regard to arguments about controversial moral issues (such as abortion, euthanasia, etc.) is also taken as evidence that moral judgments are not determined or influenced by reasoning.

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<sup>71</sup> Haidt, J. (2001) The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, Vol. 108; Pp: 814-34

The fact that moral action may co-vary with emotive responses more than with moral reasoning, according to Haidt, also demonstrates the primacy of intuitive processes and the subordinate role of moral reasoning. An experiment where participants were hypnotized to feel disgust when they encountered emotionally neutral words (i.e. the words “often” and “take”) is cited as evidence that emotions play a causal role in moral judgment. In this experiment the participants were given a set of vignettes that described moral transgressions and were asked to assess them. The participants found moral transgressions to be more disgusting and more morally wrong when their hypnotic disgust word was present in the vignettes than when it was absent.<sup>72 73</sup>

There are also the so called “moral dumbfounding” experiments where respondents were asked to provide rational justifications for their moral judgments about particular morally relevant vignettes, such as an act of incest between a brother and a sister (in this example, the scenario avoided problems such as the possibility of conception, sexually transmitted disease, and lack of consent, etc.). Their inability to rationally justify their moral disapproval is taken to be evidence that intuitive processes are primarily responsible for generating moral judgments rather than conscious explicit reasoning.<sup>74</sup>

Haidt concludes his analysis with what would seem to appear as an endorsement of Humean Sentimentalism:

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<sup>72</sup> Haidt, J. (2001) The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, Vol. 108; Pg. 825

<sup>73</sup> Wheatley, T. and Haidt, J. (2005) Hypnotically induced disgust makes moral judgments more severe. *Psychological Science*, Vol. 16: Pp: 780–784

<sup>74</sup> Haidt, J. (2001) The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, Vol. 108; Pg. 817

*The time may be right, therefore, to take another look at Hume's perverse thesis: that moral emotions and intuitions drive moral reasoning, just as surely as a dog wags its tail. (Haidt, J. 2001; Pg. 830)*

Jesse Prinz explicitly endorses Humean sentimentalism on the basis of the same empirical evidence.<sup>75</sup> He states that:

*...to harbor a moral belief is to have a sentiment of approbation or disapprobation... Emotions co-occur with moral judgments, influence moral judgments, are sufficient for moral judgments, and are necessary for moral judgments... (Prinz, J. J. 2006; Pg. 36)*

Prinz has offered his own sentimentalist theory which posits that moral judgments are a particular kind of perceptual response. According to Prinz, moral judgment consists of emotions which function as “perceptually based detectors of moral properties”.<sup>76</sup> Moral judgement is therefore the act of perceiving what are thought of as observable moral properties or objects, e.g. “an insult, a glare, an intrusion on personal space, a physical attack and so on”. Those properties or objects are represented or embodied in a somatosensory state.<sup>77</sup>

In Marc Hauser’s book *Moral Minds*, he proposes the theory that our moral judgments are derived from unconscious intuitive processes that arise from an innate neurobiological faculty, i.e. a “moral organ” or “moral module”. According to Hauser those intuitive processes constitute the fundamental moral principles that are operative in our moral judgments and behaviour.<sup>78</sup> Therefore one can abstract from

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<sup>75</sup> Prinz, J. J. (2006) The emotional basis of moral judgments. *Philosophical Explorations*, Vol. 9(1); Pp: 29–43

<sup>76</sup> Prinz, J. J. (2008) *The emotional construction of morals*. Oxford University Press; Pg. 94

<sup>77</sup> Prinz, J. J. (2004) *Gut Reactions*. Oxford University Press; Pg. 266

<sup>78</sup> Hauser, M. (2006) *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong*. Harper Collins: New York, NY



moral judgment and behaviour the fundamental operative principles which constitute an agent's moral competence.

The precedent for Hauser's theory and methodology comes from Noam Chomsky's pioneering work in the field of generative grammar<sup>79 80</sup>, and the work in the heuristics and biases research program that has shaped the contemporary debate on human reasoning ("the rationality debate").<sup>81 82</sup> In fact, Hauser's empirical investigation is undertaken in much the same way that human reasoning competence has been investigated through the use of reasoning tasks. That is, to determine whether there are systematic and covariate responses with regard to judgments about thought experiments and moral dilemmas<sup>83 84</sup>, and to infer from this a set of universally shared moral intuitions, i.e. a "universal moral grammar".<sup>85 86 87 88</sup>

For example, in one experiment Hauser *et al* (2007) utilized data from the "Moral Sense Test" website<sup>89</sup>. Subjects were asked to respond to a selection of moral dilemmas (of the trolley scenario type) which were designed to target the "principle of the double effect". The pattern of responses was consistent with the principle of double effect irrespective of variables such as gender, age, educational, ethnicity,

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<sup>79</sup> Chomsky, N. (1959) Review of Skinner's Verbal Behavior. *Language*, Vol. 35; Pp: 26-58

<sup>80</sup> Chomsky, N. (1965) *Aspects of the Theory of Syntax*, Cambridge, MA: MIT Press

<sup>81</sup> Stein, E. (1996) *Without good reason. The rationality debate in cognitive science*. Oxford, UK: Clarendon Press

<sup>82</sup> Stanovich, K. (1999) *Who is rational?* Mahwah, NJ: Erlbau; Pp: 124-126

<sup>83</sup> Cushman, F., Young, L. and Hauser, M. (2006) The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm. *Psychological Science*, Vol. 17(12); Pp: 1082-89

<sup>84</sup> Hauser, M. D., Cushman, F., Young, L., Jin, R. K.-X. and Mikhail, J. (2007) A dissociation between moral judgment and justification. *Mind & Language*, Vol. 22(1); Pp: 1-21

<sup>85</sup> Mikhail, J., Sorrentino, C. and Spelke, E. (1998) Toward a universal moral grammar. In Proceedings of the Twentieth Annual Conference of the Cognitive Science Society (Gernsbacher, M.A. and Derry, S. J., Eds), Lawrence Erlbaum Associates

<sup>86</sup> Mikhail, J. (2007) Universal moral grammar: theory, evidence and the future. *Trends in Cognitive Sciences* Vol. 11(4); Pp: 143-52

<sup>87</sup> Cushman, F., Young, L. and Hauser, M. (2006) The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm. *Psychological Science*, Vol. 17(12); Pp: 1082-89

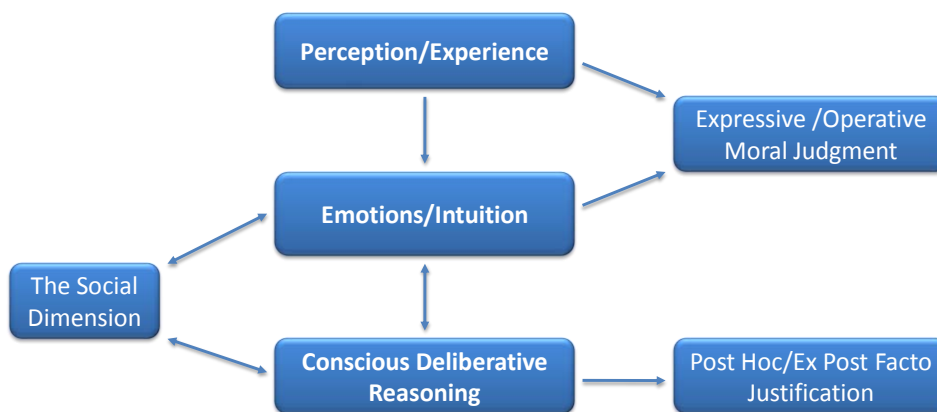
<sup>88</sup> Hauser, M. D., Cushman, F., Young, L., Jin, R. K.-X. and Mikhail, J. (2007) A dissociation between moral judgment and justification. *Mind & Language*, Vol. 22(1); Pp: 1-21

<sup>89</sup> The Moral Sense Test <http://moral.wjh.harvard.edu/>

religion or nationality. Furthermore, the majority of subjects failed to provide justifications that could account for their judgments, i.e. they were unable to articulate the principle of double effect (or the gist of the principle). Hauser *et al* conclude that such results indicate that the principle of the double effect is operative in our moral judgments but we do not consciously apply the principle as a part of moral reasoning or as a rational justification for our moral judgments.<sup>90</sup>

The following schematic describes the theories of moral judgment discussed thus far in terms of the relevant dimensions of moral cognition and their outputs.

**Figure 1. Sentimentalist/Intuitionist Dimensions of Moral Cognition**



### 1.3 Rationalist Dimensions of Moral Cognition

If it turns out that emotional/intuitive processes are necessary and sufficient for moral judgments, then we are mistaken in our moral rationalist presumption that moral

<sup>90</sup> Hauser, M. D., Cushman, F., Young, L., Jin, R. K.-X. and Mikhail, J. (2007) A dissociation between moral judgment and justification. *Mind & Language*, Vol. 22(1); Pp: 1–21

judgments and actions can be derived from reason. If this were the case then moral rationalism is rendered an unachievable ideal of the normative concept of morality.

In Cordelia Fine's (2006) critique of Haidt's "Social Intuitionist Model", she cites numerous examples of experiments that demonstrate how automatic intuitive judgements are susceptible to conscious control and/or also derived from prior conscious control. For example biases in judgment caused by emotional responses can be corrected if attention is drawn to a person's mood as a possible source of bias. If they are motivated to be unbiased in their judgments then they will effortfully override their emotionally/intuitively based judgments.

Similar experiments relating to control of prejudice (such as prejudice against homosexuality) have also been performed demonstrating that if participants are aware that their emotional responses to homosexuality were morally irrelevant to the dilemma at hand, they would not allow those responses to dictate their moral judgment<sup>91 92</sup>. Fine also cites the work of Margo Monteith who is developing a model of how automatic processes (such as racial prejudice responses) can be controlled and changed via self regulatory mechanisms that allow a person to provide non-prejudiced responses.<sup>93 94 95</sup>

With regard to Haidt's emotional priming experiment Kennett and Fine (2009) have argued that those participants who were excluded because they were still aware of

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<sup>91</sup> Gabriel, U., Banse, R. and Hug, F. (2007) Predicting private and public helping behaviour by implicit attitudes and the motivation to control prejudiced reactions. *Br J Soc Psychol*, Vol. 46; Pp: 365–382

<sup>92</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 89-90

<sup>93</sup> Fine, C. (2006) Is the Emotional Dog Wagging its Rational Tail, or Chasing it? Reason in Moral Judgment. *Philosophical Explorations*, Vol. 9(1); Pp: 83-98

<sup>94</sup> Monteith, M. J. and Mark, A. Y. (2005) Changing one's prejudice ways: Awareness, affect, and self-regulation. *European Review of Social Psychology*, Vol. 16; Pp: 113-154

<sup>95</sup> Czopp, A. M., Monteith, M. J. and Mark, A. Y. (2006) Standing up for a change: Reducing bias through interpersonal confrontation. *Journal of Personality and Social Psychology*, Vol. 90; Pp: 784-803

the source of their disgust (induced by hypnotism), would likely be aware that their feelings of disgust were morally irrelevant and may therefore have discounted its influence.<sup>96</sup>

While Haidt does acknowledge that a person can resist intuitions or “flashes of negative feeling” towards stigmatized groups because of one’s other values, he argues that this does not necessarily demonstrate that moral reasoning is playing the role of resisting those intuitions because those other values that cause one to resist prejudiced intuitions could also be the product of other intuitions<sup>97</sup>. Furthermore, he argues that it is rare to see people “reason their way to a judgement by sheer force of logic overriding their initial intuition”. Conflicts between a reasoned judgment and an intuitive judgment can therefore arise, but Haidt holds that most people (with the exception of some, e.g. trained philosophers and critical thinkers) will be moved by their intuitive judgments. Therefore according to Haidt, emotions and intuition still maintain primacy in people’s moral judgments.<sup>98</sup>

Where Kennett and Fine disagree with Haidt is on the criteria required for the resisting or overriding of intuitions. They cite the work of Keith Payne whose research indicates that automatic intuitions can be preconsciously controlled so as to accord with an egalitarian goal (e.g. racial tolerance).<sup>99 100 101</sup>

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<sup>96</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pg. 89

<sup>97</sup> Haidt, J. and Bjorkland, F. (2007) Social intuitionists answer six questions about moral psychology. In: Sinnott-Armstrong, W. (Ed.) *Moral psychology, Vol. 2: The cognitive science of morality: Intuition and diversity*. MIT Press; Pg. 218

<sup>98</sup> Haidt, J. and Bjorkland, F. (2007) Social intuitionists answer six questions about moral psychology. In: Sinnott-Armstrong, W. (Ed) *Moral psychology, Vol. 2: The cognitive science of morality: Intuition and diversity*. MIT Press; Pp: 193–194

<sup>99</sup> Payne, K. (2005) Conceptualizing control in social cognition: how executive functioning modulates the expression of automatic stereotyping. *J Pers Soc Psychol*, Vol. 89; Pp: 488–503

*We may effortfully override judgments based on moral intuitions, discount moral emotions that we believe to be irrelevant or misplaced, and exert preconscious control such that the activated associations of our moral intuitions do not interfere with the processing of more relevant information. We have argued that this is best conceptualised as the preconscious influence of prior moral reasoning on the intuitive judgment link. (Kennett, J. and Fine, C., 2009; Pg. 93)*

Furthermore, the notion of preconscious control is consistent with the phenomenon of skills acquisition. A skill is an instance of procedural knowledge that manifests as an automatic intuitive process. For example the model of skills acquisition proposed by Fitts (1954) begins with the conscious recognition of what the skill is composed of. This involves the deconstruction of the activity into smaller tasks and the arrangement of those tasks into a schema. The subsequent development of the skill requires consistent repetition (i.e. “proceduralization”) of complex activities over and over again until the relevant neural systems are able to store the skill in procedural memory and thus produce the activity in an automatic fashion.<sup>102</sup> Whilst a skill itself may be largely an automatic and intuitive process, the acquisition and development of the skill is a result of conscious deliberative processes.

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<sup>100</sup> Bargh, J. A., Gollwitzer, P.M., Lee-Chai, A., Barndollar, K. and Trötschel, R. (2001) The automated will: nonconscious activation and pursuit of behavioral goals. *J Pers Soc Psychol*, Vol. 81; Pp: 1014–1027

<sup>101</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 91-93

<sup>102</sup> Fitts, P. M. (1954) The information capacity of the human motor system in controlling the amplitude of movement. *Journal of Experimental Psychology*, Vol. 47; Pp: 381-391

## 1.4 Moral Rationalism and Practical Reason

As a normative theory, moral rationalism posits that moral judgment ought to be derived from reason and grounded in human rationality. However, because “ought implies can”, an important question is whether we can indeed utilize reason to justify our moral judgments and guide our actions. This is an empirical question which the evidence that I have cited above would seem to affirm. Therefore, I believe that moral rationalism as a conceptual ideal of morality is achievable and thus vindicated.

Given that the nature of moral judgments is to prescribe particular actions, there is a practical dimension associated with moral reasoning. This is why the concept of moral rationalism is also connected with the concept of ourselves as rational agents, i.e. persons capable of responding to reasons and having them guide our actions.<sup>103</sup>

<sup>104</sup> <sup>105</sup> Therefore moral rationalists tend to regard moral judgment or moral reasoning as a kind of practical reasoning that only rational agents are capable of.<sup>106</sup> <sup>107</sup> <sup>108</sup>

Given that practical reason is predicated on rational agency, this also implies that moral judgements are thus necessarily conceptualized as expressions of rational agency. Kennett and Fine’s explication of what they call the “real” moral judgment recapitulates this view.<sup>109</sup>

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<sup>103</sup> Nagel, T. (1970) *The Possibility of Altruism*, Princeton, NJ: Princeton University Press.

<sup>104</sup> Smith, M. (1994) *The Moral Problem*, Oxford: Blackwell

<sup>105</sup> Korsgaard, C. M. (1986) Skepticism about practical reason. *Journal of Philosophy*, Vol. 83(1); Pp: 5-25

<sup>106</sup> Korsgaard, C. M. (2010) Reflections on the evolution of morality. Amherst Lecture in Philosophy. The Department of Philosophy at Amherst College. <http://www.amherstlecture.org/korsgaard2010>

<sup>107</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 77-96

<sup>108</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 585-614

<sup>109</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 77-96

*The moral judgment made intuitively in a distracted or tired moment does not deserve normative authority if it diverges from the judgment the agent would have made in a more reflective or cognitively resourced situation. The real moral judgment is ultimately the one that the agent can reflectively endorse.*  
(Kennett, J. and Fine, C. 2009; Pg. 91)

The requirement of rational agency is also a requirement that we demonstrate throughout our lives some degree of consistency, coherence and unity between our beliefs, desires and actions (i.e. an autobiographical narrative). This requires that we have a temporally extended sense of self, i.e. a *diachronic* self, or what I will henceforth refer to as “diachronic agency”.<sup>110 111 112</sup>

Therefore we can distinguish two kinds of moral reasoning capacity:

- i). Conscious deliberative reasoning as a “synchronic” reasoning capacity which underpins the capacity for moral rationalism.
- ii). Practical reasoning capacity as a “diachronic” reasoning capacity which underpins rational agency (in which diachronic agency is a necessary requirement).<sup>113 114</sup>

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<sup>110</sup> Atkins, K. and Mackenzie, C. (2008) *Practical Identity and Narrative Agency*, Routledge, New York

<sup>111</sup> Kennett, J. and Matthews, S. (2007) Normative Agency. In Atkins, K. and MacKenzie, C. (Eds) *Practical Identity and Narrative Agency*, Routledge: New York

<sup>112</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pg. 585

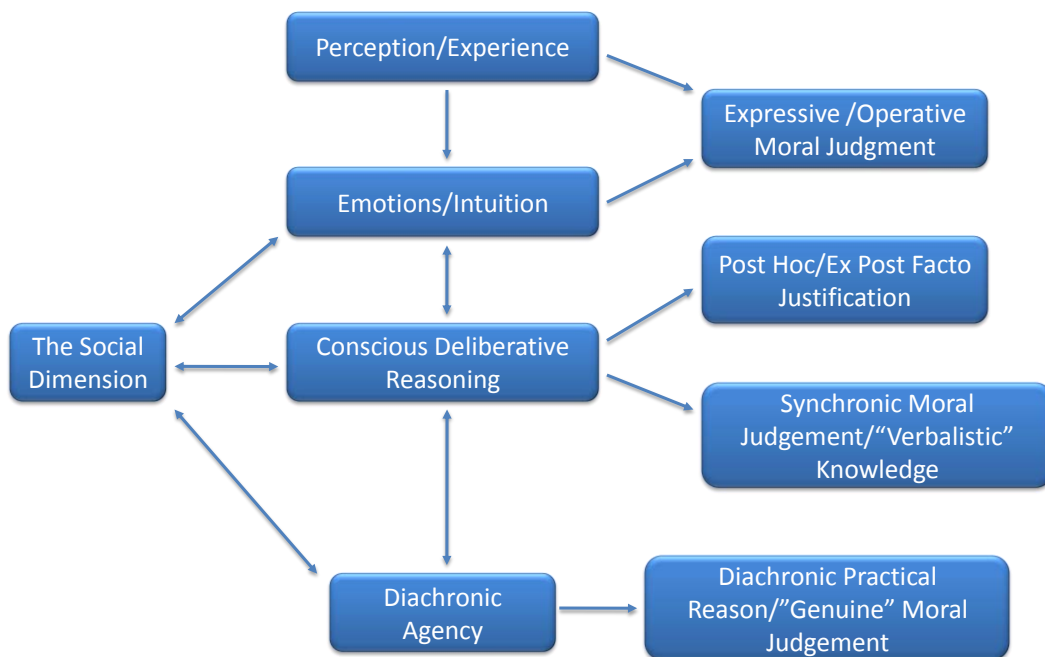
<sup>113</sup> This distinction is discussed in Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 585-614

<sup>114</sup> Note, that this is a different distinction to the one Joyce makes with regard to “psychological rationalism”. See Joyce, R. (2008) What neuroscience can (and cannot) contribute to metaethics. In W. Sinnott-Armstrong (Ed.), *Moral Psychology Volume 3: The Neuroscience of Morality: Emotion, Brain Disorders, and Development*. MIT Press; Pp: 371-394

## 1.5 Summary

We can therefore summarize all of the theories of moral judgment discussed thus far in terms of the relevant dimensions of moral cognition and their outputs, which are depicted in the schematic.

**Figure 2. The Dimensions of Moral Cognition**



According to Haidt's Social intuitionist theory, moral judgment is primarily determined by the dimension I have called "emotions/intuition". Moral judgments are therefore *expressions* of those emotions/intuitions, which serve as inputs for conscious deliberative reasoning processes which in turn produce *post hoc/ex post facto* justifications of those emotions/intuitions. Relevant inputs come from the "perception/experience" dimension and the "social dimension". The relevant contrast



with Prinz's theory is that Prinz conceptualizes the dimension of "perception/experience" as essentially akin to "emotions/intuition".<sup>115</sup>

On Hauser's theory, moral judgments accord with intuitive principles that are the functional output of a dedicated cognitive faculty which constitute our moral competence. Those principles are *operative* in our moral judgments and actions. In many cases those principles are opaque to conscious introspection. Therefore moral reasoning plays no role in the moral judgments, but insofar as it does it is primarily *ex post facto/post hoc*. For Hauser, emotions play no role in moral judgment. Instead he posits that they function to motivate moral action.

The evidence that one can use conscious cognitive control to influence or override the expression of emotions and intuitive processes (as signified by the double arrow), suggests that moral judgments can be made on the basis of conscious explicit reasoning. In this sense the emotional/intuitive and social dimensions serve as inputs for our conscious deliberative reasoning capacity. Given that this capacity can function independently of agency, it is therefore a synchronic reasoning capacity. One typically utilizes this capacity to acquire and infer particular moral judgments at a particular point in time, which can be expressed as propositional knowledge (which I refer to as "abstract/verbalistic knowledge").

Whilst this might vindicate the moral rationalist assumption about our capacity for moral reasoning, it is not sufficient for a theory of moral competence as practical reason. This is because proponents of practical reason posit that having moral reasons guide relevant moral action requires that one's judgments and actions are

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<sup>115</sup> Note that Prinz rejects an expressivist interpretation of his theory. See Prinz, J (2006) The emotional basis of moral judgments. *Philosophical Explorations*, Vol. 9(1); Pp: 34–35

part of a temporally extended autobiographical narrative. This is what the dimension of “diachronic agency” refers to.

The following table summarizes these theories and the domains and outputs involved.

**Table 1. Summary of Theories of Moral Judgment and Relevant Dimensions**

<b>Theory of Moral Judgment</b>	<b>Input Dimensions</b>	<b>Judgment Dimensions</b>	<b>Judgment Outputs</b>
Haidt	Perception/experience; Social dimension; Conscious Deliberative Reasoning	Emotions/Intuitions; Conscious Deliberative Reasoning	Expressive Moral Judgement; Post Hoc/Ex Post Facto Justification
Prinz	Perception/experience	Perception/Emotions	Expressive Moral Judgement; Post Hoc/Ex Post Facto Justification
Hauser	Perception/Experience	Cognitive Intuitions	Operative Moral Judgement; Occasional Post Hoc/Ex Post Facto Justification
Moral Rationalism	Perception/Experience; Social dimension; Emotions/Intuition	Conscious Deliberative Reasoning	Synchronic Moral Judgment; Verbalistic/Abstract Knowledge
Practical Reason	Perception/Experience; Social dimension; Emotions/Intuition	Conscious Deliberative Reasoning; Diachronic Agency	Diachronic Practical Reason; "Genuine" Moral Judgment

Conscious deliberative reasoning that occurs independently of diachronic agency denotes a synchronic capacity. This is why some proponents of practical reason regard only the output of “conscious deliberative reasoning” that is expressed in the context of diachronic agency (i.e. “diachronic practical reason”) as “genuine” moral judgment.

Furthermore, what is implicit in sentimentalist, intuitionist and moral rationalist theories is a conceptual distinction between moral judgment and diachronic agency. As Gerrans and Kennett (2010) point out, those theories are framed within a “dual process theory” of cognition, a framework that describes human cognition broadly, but excludes considerations of agency.<sup>116</sup>

The dual process theory of human cognition was originally proposed by Wason and Evans to account for the results of the Wason selection task.<sup>117 118</sup> The theory was developed further and reformulated by Evans and Over as:

*...two distinct cognitive systems: implicit processes which are computationally powerful, context-dependent and not limited by working memory capacity; and explicit processes which permit general purpose reasoning but are slow, sequential and constrained by working memory capacity. (Evans and Over, 1996)*

Many other researchers have since articulated the theory in various ways, applied it to different domains of investigation, and offered their own accounts of the underlying cognitive architecture<sup>119</sup>. Though not all dual process theories are related or compatible in terms of how they describe the distinguishing features of the two systems, a general dual process theory of human cognition can be inferred based on which features of the two systems tend to form clusters. For example Evans (2002) has proposed a general dual process theory of human cognition that consists of

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<sup>116</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 585-614

<sup>117</sup> It was suggested that the non-normative responses offered by subjects to the Wason selection task (a test of deductive reasoning) were the result of an unconscious “matching bias” and that the verbal justifications for their choices were due to conscious rationalizations that constitute a different kind of thinking. See Wason, P. C. (1966) "Reasoning" in Foss, B. M. (Ed) *New horizons in psychology*. Harmondsworth: Penguin

<sup>118</sup> Evans, J. St. B. T. and Over, D. E. (1996) *Rationality and Reasoning*. Hove, UK: Psychological Press

<sup>119</sup> Evans, J. St. B. T. (2002) The influence of prior belief on scientific thinking. In Carruthers, P., Stich, S. and Siegal, M. (Eds) *The Cognitive Basis of Science*. Cambridge University Press; Pp: 193-210

processes that are fast, automatic, unconscious (referred to as System 1 processes), and those that are conscious, slow, and deliberative (referred to as System 2 processes). Furthermore, many of the System 1 processes are thought to be evolutionarily ancient, whereas many System 2 processes evolved more recently and may be unique to human animals.<sup>120 121</sup>

However, the requirement of diachronic reasoning for “genuine” moral judgment and for a theory of moral competence as practical reason raises a number of dilemmas. There are cases of morally relevant synchronic moral judgments and verbalistic/abstract moral knowledge that ought to be considered in a theory of moral competence. I address this in the next chapter and argue that in order to make sense of the capacity to make relevant synchronic moral judgements and infer verbalistic/abstract knowledge we need to make a functional distinction between moral competence and rational agency (in particular, the requirement of diachronic agency in practical reason).

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<sup>120</sup> Evans, J. St. B. T. (2002) Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition. *Annu. Rev. Psychol.*, Vol. 59; Pp: 255–78

<sup>121</sup> Evans, J. St. B. T. and Frankish, K. (2009) *In Two Minds: Dual Processes and Beyond*. Oxford University Press

## ***Chapter 2 - Distinguishing Moral Competence from Moral Agency***

### **2.1 Introduction**

The question of which of those dimensions discussed in the previous chapter, are necessary and sufficient for moral competence is a contentious one. Sentimentalists such as Prinz and perhaps Haidt may argue that the emotional/intuitive dimensions ought to be regarded as necessary and sufficient for moral judgment. However, because morality is conceived of as a normative enterprise it would be highly counter-intuitive to concede that our moral prescriptions ought to be derived purely from those emotions/intuitions. Instead we strive for the rationalist ideal of having our judgments and actions determined and justified by moral reasoning.

In the previous chapter I argued that because the empirical evidence demonstrates that conscious deliberative reasoning processes can play a role in determining the content of moral judgment, this serves to vindicate moral rationalism (which I defined as the capacity to justify moral judgments on the basis of conscious deliberative reasoning). Therefore we ought to give primacy to this dimension in a theory of moral competence.

However, the theory of practical reason posits that moral judgments are only morally relevant if they are expressions of rational agency, which requires that one's reasoned judgments and actions are part of a temporally extended autobiographical narrative, i.e. diachronic agency. This implies that moral knowledge and moral judgment that is irrelevant to one's autobiographical narrative or expressed independently of it, is irrelevant to a theory of moral competence as practical reason.

This presents us with some dilemmas - How are we to conceive of those who have moral knowledge but do not exercise it within the context of a diachronic self because they are operating as a purely synchronic system? Is abstract/verbalistic moral knowledge relevant to moral competence? What is “deep” moral knowledge and “genuine” moral judgment?

I address these questions in this chapter by applying the performance/competence distinction to the analysis of moral judgment. The way in which this distinction is applied in other domains of investigation demonstrates how informative this distinction is.<sup>122 123 124</sup> The distinction was first championed by Noam Chomsky with regard to what he tried to capture with his linguistic theory, i.e. a person’s underlying knowledge of language.<sup>125</sup> I discuss this in more detail later in this chapter.

The study of human cognition in general must begin with a theoretical/conceptual consensus on what feature of human cognition is being described. This requires one to specify a theory of “competence” of that aspect of human cognition which refers to the knowledge that underpins a particular domain of cognitive function (such as the rules of grammar relevant to the domain of language). Performance refers to how people make use of this knowledge given the presence of cognitive limitations and interfering factors.

I argue that the performance/competence distinction implies a functional distinction between moral judgment and diachronic agency - where the capacity for synchronic moral judgment (i.e. conscious deliberative reasoning) constitutes moral

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<sup>122</sup> Gerrans, P. (2001) Delusions as performance failures. *Cognitive Neuropsychiatry*, Vol. 6 (3); Pp: 161–173

<sup>123</sup> Stein, E. (1996) *Without good reason. The rationality debate in cognitive science*. Oxford, UK: Clarendon Press.

<sup>124</sup> Stanovich, K. E. (1999) *Who is rational? Studies of individual differences in reasoning*. Erlbaum.

<sup>125</sup> Chomsky, N. (1965) *Aspects of the Theory of Syntax*. Cambridge, MA: MIT Press

competence, and the capacities necessary for practical reason (i.e. diachronic agency and rational agency) are capacities associated with moral performance.

This allows us to conceive of dissociations between moral judgment and diachronic agency and therefore enables us to make better sense of the moral capacities of persons such as amnesics, children and other synchronic systems. That is, we can conceive of their verbalistic/abstract knowledge of morality as morally relevant, and their moral judgements as “genuine” moral judgments, whilst also allowing that they may still retain some moral deficits/underdevelopment.

## **2.2 Practical Reason and the Requirement of Diachronic Agency**

Immanuel Kant had argued that morally relevant actions are only those actions that are guided by free choice, autonomy and reason (in Kantian terms, the *will*). The *will* must not be physically or psychologically forced, e.g. by the *will* of another person, or by obsessions, mental disorders, or any other force that is purely the product of natural laws of biology, physics or psychology. The *will* must be governed by the capacity for reason. If we did not possess such a capacity then we would be merely at the mercy of our whims. We would be motivated purely by desires or impulses, or what Immanuel Kant refers to as “inclination”. An action that is motivated solely by inclination is what Kant refers to as merely “arbitrium brutum” (meaning animal choice).<sup>126</sup> Hence there would be no essential distinction between us and the rest of the animal kingdom.

Furthermore, our *wills* are not expressed through our actions but rather they are expressed through our maxims (the subjective principles that arbitrate over one’s

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<sup>126</sup> Kant, I. *Metaphysics of Morals*, 6: 213-4

actions). For Kant, moral duty is a demand on our *will* and we apply this demand by virtue of the maxims we adopt to pursue some ends by some means. Therefore, the capacity for practical reason can be understood as the capacity for conscious subjective *willing*, i.e. adopting a maxim. Kant had famously proposed that one should act only according to a maxim by which one can at the same time *will* that it should be a universal law. This is Kant's famous "Formula of Universal Law", the first formulation of the Categorical Imperative.<sup>127</sup>

We can see how contemporary theories of practical reason closely relate to Kantian moral theory, in particular the relationship between moral judgment and rational agency. For Kant, there is an equivalence between free choice, rational choice and moral choice. As discussed previously, we could not regard ourselves as rational agents if we could not freely choose our actions. Neither could we be morally obliged to act if we were not free to act. Actions that directly result from desires or inclinations do not count as free choice because according to Kant such actions a part of the causally determined structure of the universe. Neither can free choice come from acting capriciously in nonconformity with natural laws. Rather, free action must be intelligible, rational and conform to moral law.<sup>128</sup>

*Since the conception of causality involves that of laws, according to which, by something that we call cause, something else, namely the effect, must be produced; hence, although freedom is not a property of the will depending on physical laws, yet it is not for that reason lawless; on the contrary it must be a causality acting according to immutable laws, but of a peculiar kind; otherwise*

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<sup>127</sup> Foundations of the Metaphysics of Morals. Translated by Lewis White Beck. Library of Liberal Arts, 1956, in Korsgaard, C. M. (1985) Kant's formula of universal law. *Pacific Philosophical Quarterly*, Vol. 66(1-2); Pg. 24

<sup>128</sup> Kant, *Fundamental Principles of the Metaphysic of Morals* by Immanuel Kant. Translated by Thomas Kingsmill Abbott.



*a free will would be an absurdity. Physical necessity is a heteronomy of the efficient causes, for every effect is possible only according to this law, that something else determines the efficient cause to exert its causality. What else then can freedom of the will be but autonomy, that is, the property of the will to be a law to itself? (Kant, Fundamental Principles of the Metaphysic of Morals)*

Thus for Kant what determines the *will* is the moral law and the only morally worthy action is that which is done out of respect for the moral law. With this we have an objective criterion for morality that is universally applicable and a subjective criterion for moral motivation. Hence for Kant and contemporary proponents of practical reason, there is a conceptual connection between rationality, agency and morality. It follows that only rational agents can make what proponents of practical reason regard as “genuine” moral judgments.<sup>129 130</sup>

The theory of practical reason posits that moral judgment is not merely dependent on the operation of conscious deliberative reasoning alone, but that it also requires it to operate over a temporally extended self, i.e. a diachronic agent. A diachronic agent is a temporally extended entity, capable of considering future contingencies and imagining scenarios at the level of conscious reflection. A person is a rational and moral agent insofar as they are able to apply their capacity for practical reason to shape their lives in accordance with their beliefs, desires and longer term goals. This requires that one is capable of transcending one’s immediate desires, inclinations, or other stimulus bound responses so that one can exist with some degree of

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<sup>129</sup> Kennett, J. (2006) Do Psychopaths Threaten Moral Rationalism? *Philosophical Explorations*, Vol. 9(1); Pp: 69-82

<sup>130</sup> Kennett, J. and Fine, C. (2009) Will the real moral judgment please stand up? The implications of social intuitionist models of cognition for meta-ethics and moral psychology. *Ethical Theory & Moral Practice*, Vol. 12; Pp: 77-96

autobiographical unity.<sup>131</sup> <sup>132</sup> Only then can a moral judgement become normative and guide action accordingly.<sup>133</sup> <sup>134</sup> Therefore proponents of practical reason conceive of moral judgments in a diachronic and practical sense, whereby they cohere to form an autobiographical narrative.

However, if we accept that synchronic moral reasoning is sufficient for moral judgements and if we wish to retain the view that amnesics and young children are not rational agents (because of their lack of diachronic agency), then we are faced with the notion that moral judgment and rational agency are independent of each other. This is contrary to the conception of moral judgment as practical reason which requires rational agency. It also forces us to accept the view that those lacking diachronic agency (i.e. non-rational agents) can indeed make “genuine” moral judgements.

Gerrans and Kennett use the examples of amnesics and ventromedial patients to illustrate this controversy. Amnesics have deficits in episodic memory, but they retain a basic capacity for conscious deliberative reasoning. They also retain the capacity to make preference based judgments by virtue of tacit emotional processes<sup>135</sup>. Ventromedial patients are, at least according to one theory, unable to utilize tacit emotional responses in decision making and instead they rely primarily on conscious reasoning alone.<sup>136</sup> According to Gerrans and Kennett, the amnesic and ventromedial patient’s deficit is essentially a deficit of diachronic agency, due to

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<sup>131</sup> Atkins, K. and Mackenzie, C. (2008) *Practical Identity and Narrative Agency*, Routledge, New York

<sup>132</sup> Kennett, J. and Matthews, S. (2007) Normative Agency. In Atkins, K. and MacKenzie, C. (Eds) *Practical Identity and Narrative Agency*, Routledge: New York

<sup>133</sup> Korsgaard, C. M. (2010) Reflections on the evolution of morality. *Amherst Lecture in Philosophy*. The Department of Philosophy at Amherst College. <http://www.amherstlecture.org/korsgaard2010>

<sup>134</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 602

<sup>135</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 587

<sup>136</sup> Damasio, A (1994) *Descartes’ Error: Emotion, Reason and the Human Brain*. NY: Avon; Pg. 216

impairments in mental time travel, memory, imagination and executive control<sup>137</sup>. Similarly, young children (though may possess the capacity for conscious reasoning) are diminished in their capacity for diachronic agency due to their immature development.

So here we have examples of persons who are lacking or diminished in diachronic agency, but are able to apply their capacity for conscious reasoning to particular cases from moment to moment, i.e. they make *synchronic* judgments<sup>138</sup>. Hence a conflict arises if we accept that diachronic agency is required for moral competence and that “genuine” moral judgment is necessarily an expression of diachronic agency. We are forced to either deny that their synchronic judgments are “genuine” moral judgments, or grant that they do make “genuine” moral judgments which by definition would imply that they are diachronic agents and thus full moral agents.

The latter is a highly counter intuitive position to take. Moral agency requires more than just knowledge or expression of moral rules and the volitional capacity to apply them. Children may learn moral rules very early in their development and be able to apply them in basic moral judgments, but their ability to consciously reflect and consider future contingencies and possible scenarios is limited. Amnesics have an attenuated sense of their temporal self and therefore are limited in what they can draw from past experiences in order to plan for the future contingencies. Similarly, ventromedial patients are renowned for their impulsivity and lack of foresight and therefore are unable to plan ahead in light of future possible scenarios. All of these

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<sup>137</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pg. 604-5

<sup>138</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pg. 586-87

subjects lack an intact diachronic self. As Gerrans and Kennett state, they are merely “a bundle of habits linked to a reasoning system”.<sup>139</sup>

Because proponents of practical reason regard diachronic agency as necessary for rational agency and thus moral judgment, they would argue that those who are only capable of making synchronic moral judgments cannot be said to make “genuine” moral judgments. In other words “genuine” moral judgments are expressions of one’s rational agency and therefore only those moral judgments made by diachronic agents can qualify as practical reason and thus regarded as “genuine” moral judgments.

### **2.3 What is “Genuine” Moral Judgment and “Deep” Moral Knowledge?**

It has been argued that moral judgments which express “verbalistic/abstract” knowledge do not qualify as “genuine” moral judgments. For example, Fine and Kennett (2004) state that moral understanding requires more than just the “mere capacity to recite a moral rule”.<sup>140</sup> and similarly, Jay Wallace (1994) states that it requires more than the ability to “parrot moral discourse”.<sup>141</sup>

Rather, there is a requirement of a “deeper” knowledge of the relevant moral norms to express “genuine” moral judgment.

*The first is a merely verbalistic sense and refers to the kind of knowledge one might be said to gain through rote learning. The second sense requires a deeper understanding of the moral significance of one’s act. (Fine, C. and Kennett, J. 2004; Pg. 427)*

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<sup>139</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 596

<sup>140</sup> Fine, C and Kennett, J (2004) Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment. *International Journal of Law and Psychiatry*, Vol. 27; Pg. 425-43

<sup>141</sup> Wallace, R. J. (1994) *Responsibility and the Moral Sentiments*. Harvard University Press; Pg. 178

However, one thing to note first of all is that it would be a mistake to regard the verbalistic/abstract sense of knowledge as equivalent to the kind of knowledge gained via rote learning without any idea about the context in which that knowledge is used. A very young child or parrot can rote learn a particular rule or phrase in a purely syntactic manner without inference, and without any idea as to what it may mean or the kind of context in which that knowledge can be applied.

There is a semantic element present in verbalistic/abstract knowledge and an inferential dimension that underpins the acquisition of such knowledge. Hence I assume that the term “verbalistic knowledge” is not intended to capture what might be thought of as rote learning or “parroting moral discourse”, but that it refers to the kind of knowledge that has been labelled “propositional knowledge” or “declarative knowledge” (i.e. what we understand as “knowing of” or “knowing that”).<sup>142 143</sup>

The debate about what constitutes “deeper” moral knowledge reflects the competing theories of moral judgment (some of which were discussed in chapter 1). For example, in accordance with sentimentalist theories of moral judgment, some have argued that “deeper” knowledge of morality can only be conferred when there is an appropriate emotional state such as empathy, disgust and guilt.<sup>144 145 146 147 148</sup>

Others have suggested that the requirement for “deeper” moral knowledge or “genuine” moral judgment can be understood in terms of the ability to distinguish

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<sup>142</sup> Ryle, G. (1949) *The Concept of the Mind*. Hutchinson

<sup>143</sup> Stillings, N. A., Weisler, S.W., Chase, C. H., Feinstein, M. H., Garfield, J. L. and Rissland, E. L. (1995) *Cognitive Science: An Introduction* (2nd Edition), MIT Press; Pg. 369

<sup>144</sup> Glannon, W. (2008) Moral Responsibility and the Psychopath. *Neuroethics*, Vol. 1; Pp: 158–166

<sup>145</sup> Morse, S. J. (2008) Psychopathy and Criminal Responsibility. *Neuroethics*, Vol. 1; Pp: 205-212

<sup>146</sup> Prinz, J. J. (2006) The Emotional Basis of Moral Judgements. *Philosophical Explorations*, Vol. 9(1); Pg. 38

<sup>147</sup> Haji, I. (2010) Psychopathy, Ethical Perception, and Moral Culpability. *Neuroethics*, Vol. 3; Pg. 145

<sup>148</sup> Prinz, J. J. (2008) *The emotional construction of morals*. Oxford University Press

between moral and conventional transgressions.<sup>149 150 151</sup> Others have proposed that what distinguishes “deep” moral knowledge and “genuine” moral judgment is based on whether one assents to (or believes in) the moral norm that verbalistic/abstract knowledge describes (though I will have more to say about these criteria in the next chapter where I apply this discussion to the analysis of psychopaths).

However, Kennett argues that emotional responses (such empathy) do not always result in altruistic behaviour and in some cases could result in a lower probability of altruistic behaviour.<sup>152</sup> Her strongest critique of the role of emotions in moral judgment comes from her discussion of autism.

When we consider that a defining feature of autistic people is also their lack of empathy, one may expect that they manifest morally deviant behaviour or the kind of antisocial behaviour that is typically observed in psychopaths. However, autistic people (high functioning) retain a sense of moral duty and moral conscience and thus behave accordingly. This suggests that even if empathy was relevant, it cannot be the complete explanation of the psychopath’s moral failings.<sup>153</sup>

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<sup>149</sup> Moral norms are held to have an objective, prescriptive force, not dependent on the authority of any individual or institution. They are taken to hold generally, not just locally (i.e. both geographically and temporally). Violations of moral norms generally involve a victim who has been harmed, whose rights have been violated, or who has been subject to an injustice. Violations of moral norms are typically more serious than violations of conventional rules which have the opposite cluster of properties. That is, they do not have objective, prescriptive force. Rather they are viewed as arbitrary or situation-dependent, and can be suspended or changed by an appropriate authoritative individual or institution. Conventional rules are often geographically and temporally local. Violations of conventional rules do not involve a victim who has been harmed. These violations are typically less serious than violations of moral rule. See Turiel, E. (1983) *The Development of Social Knowledge*. Cambridge: *Cambridge University Press*; and Nado, J. Kelly, D. and Stich, S. (2009) *Moral Judgment*. In Symons, J. and Calvo, P. (Eds) *Routledge Companion to the Philosophy of Psychology* 4<sup>th</sup> edition.

<sup>150</sup> Nichols, S. (2002) How Psychopaths Threaten Moral Rationalism: Is it Irrational to Be Amoral? *The Monist*, Vol. 85(20); Pp: 285-303

<sup>151</sup> Fine, C. and Kennett, J. (2004) Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment. *International Journal of Law and Psychiatry*, Vol. 27; Pg. 425-43

<sup>152</sup> Kennett, J. (2002) Autism, Empathy and Moral Agency, *The Philosophical Quarterly*, Vol. 52(208); Pp: 340-57

<sup>153</sup> Kennett, J. (2002) Autism, Empathy and Moral Agency, *The Philosophical Quarterly*, Vol. 52(208); Pp: 340-57

According to Kennett (high functioning) autistic people take a “Kantian” approach to moral thinking in the sense that they are disposed to be very meticulous with following rules, routines and order.

Thus for Kennett, the issue of what is required for “genuine” moral judgment is the capacity to be receptive to reasons so as to practice normative self-government, i.e. rational agency.<sup>154</sup>

*...it seems clear that a person who could not deliberate in the ordinary ways,...who could not reflect upon whether or not his desires provided reasons for action, whose desires were unresponsive to such reflection, or who could not be guided by the results of his deliberations, through exercises of planning and self-control, would not count as a rational agent. (Kennett, J. 2006; Pg. 76)*

The point is that practical requirements can only be normative for those who are capable of acting independently of immediate stimulus bound responses. In order to be receptive to the normative requirements of morality one must be capable of perceiving themselves as temporally extended beings.<sup>155</sup> That is, one must be a diachronic agent. Thus for Kennett, what is required to have a genuine grasp of relevant moral concepts, and thus a “deeper” sense of moral knowledge, is the capacity for practical reason, for which diachronic agency is a necessary requirement.

Therefore, the requirement of diachronic agency with regard to moral judgment and moral knowledge implies that expressions of verbalistic/abstract moral knowledge

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<sup>154</sup> Kennett, J. (2006) Do Psychopaths Really Threaten Moral Rationalism. *Philosophical Explorations*, Vol. 9(1); Pg. 76

<sup>155</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pg. 602

and synchronic moral judgments are not sufficient for “genuine” moral judgment and thus are irrelevant to a theory of moral competence. I believe this is mistaken. Synchronic theories of moral judgment and verbalistic/abstract knowledge identify important dimensions of our moral cognitive capacity. Presumably the synchronic moral judgments of amnesics and children retain some moral relevance and moral import. Amnesics are able to use conscious deliberative reasoning (based on information from memory that is still intact) and also make preference based judgments that derive from emotional or intuitive function.<sup>156</sup> Children are able to make fundamental moral distinctions, such as distinguishing between moral and conventional norms, and authority dependent and independent norms.<sup>157 158 159</sup>

Furthermore, synchronic moral judgments are not only exclusively made by those with deficits in diachronic agency, but such judgments are often made in contexts that do not involve any recourse to one’s diachronic agency and are thus inherently independent of diachronic agency. For example, a magistrate presiding over a particular case may pass judgement and hand down an appropriate sentence. Insofar as the law is congruent with our moral norms, the magistrate’s legal judgments essentially reflect a set of moral judgments. However, those judgments are essentially abstract or verbalistic expressions of law and exist independently of the magistrate’s diachronic agency.<sup>160</sup>

More generally, the act of moral teaching, whether it is from a teacher, a parent, a social anthropologist, a religious figure, etc., is one that involves conferring morally

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<sup>156</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pp: 587

<sup>157</sup> Nado, J. Kelly, D. and Stich, S. (2009) Moral Judgment. In Symons, J. and Calvo, P. (Eds) *Routledge Companion to the Philosophy of Psychology* 4<sup>th</sup> edition.

<sup>158</sup> Turiel, E. (1983) *The Development of Social Knowledge*. Cambridge: Cambridge University Press.

<sup>159</sup> Smetana, J. and Braeges, J. (1990) The Development of Toddlers’ Moral and Conventional Judgements. *Merrill-Palmer Quarterly*, Vol. 36; Pp: 329-346

<sup>160</sup> A magistrate’s diachronic self may be implicated in the judgment process insofar as he is required to use his own discretion. However, I presume that in at least some cases this is not the norm nor is it the ideal of law.



relevant knowledge (even if it is regarded as merely verbalistic/abstract knowledge). This can proceed independently of their personal moral narrative and therefore demonstrates that there are contexts where relevant moral knowledge or judgements are expressed independently of diachronic agency. It would appear that this contention also arises because some proponents of practical reason conceive of morality and thus morally relevant knowledge as practical in its issue.<sup>161</sup> Therefore, a theory of moral competence as practical reason offers no scope for verbalistic/abstract knowledge.

However, verbalistic/abstract knowledge can indeed be practically relevant as it can be applied in the right contexts to guide morally appropriate action. For example, it has been argued by some that knowing that other people have interests that are analogous to one's own interests (such as welfare and happiness) combined with the capacity to reason analogically demands that we act impartially towards others.<sup>162 163</sup> This kind of moral reasoning does not appear to require diachronic agency.<sup>164</sup>

Therefore, in the following section, I argue that we need to conceptualize synchronic reasoned judgments and verbalistic/abstract knowledge as relevant aspects of moral competence that are independent of diachronic agency. I will argue that distinguishing between diachronic agency and moral competence in this way is

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<sup>161</sup> Some have argued that there is a conceptual connection between moral knowledge/judgment and moral action. See Dancy, J. (1993) *Moral Reasons*. Blackwell; Pg. 32; Davidson, D. (1980) *Essays on Actions and Events*. Oxford: Oxford University Press; Pp: 85-86; Nagel, T. (1970) *The Possibility of Altruism*, Princeton, NJ: Princeton University Press; Smith, M. (1994) *The Moral Problem*, Oxford: Blackwell; and Wallace, R. J. (1990) How to Argue about Practical Reason. *Mind*, Vol. 99(395); Pp: 355-385

<sup>162</sup> Singer, P. (1995) *How are we to live?: Ethics in an age of self-interest*. Prometheus Books: Amherst, NY

<sup>163</sup> This is a form of rationalism that Joyce refers to as "Justificatory Rationalism". See Joyce, R. (2008) What neuroscience can (and cannot) contribute to metaethics. In W. Sinnott-Armstrong (Ed.), *Moral Psychology Volume 3: The Neuroscience of Morality: Emotion, Brain Disorders, and Development*. MIT Press; Pg. 388-89

<sup>164</sup> Otherwise the implication is that having propositional knowledge, of say another person's love for their child, from which one could reason analogically that depriving them of their child will cause harm and suffering, would be insufficient for moral competence. Such an implication arises because the requirement of diachronic agency conflates moral knowledge with moral action.

consistent with an important paradigm in the cognitive sciences, i.e. the performance/competence distinction.

## 2.4 Distinguishing Between Moral Competence and Moral Performance

The distinction between performance and competence was first championed by Noam Chomsky with regard to what he tried to capture with his linguistic theory, i.e. a person's underlying knowledge of language.<sup>165</sup>

*Linguistic theory is concerned primarily with an ideal speaker-listener, in a completely homogeneous speech-communication, who know its (the speech community's) language perfectly and is unaffected by such grammatically irrelevant conditions as memory limitations, distractions, shifts of attention and interest, and errors (random or characteristic) in applying his knowledge of this language in actual performance. (Chomsky, N. 1965; Pg. 3)*

Generally speaking, competence refers to the knowledge that we have for a particular domain (such as the rules of grammar relevant to the domain of language). Performance refers to how people make use of this knowledge given the presence of cognitive limitations and interfering factors. As Zenon Pylyshyn (1972) states, the distinction allows one to delineate between theories that attempt to characterize how conceptual systems are represented in the mind and those theories which attempt to account for actual observed behaviour.<sup>166</sup> Once the distinction is made the theory can then be developed further, expanded upon and integrated with other theories that are relevant to that feature of human cognition.

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<sup>165</sup> Chomsky, N. (1965) *Aspects of the Theory of Syntax*. Cambridge, MA: MIT Press

<sup>166</sup> Pylyshyn, Z. W. (1972) The Role of Competence Theories in Cognitive Psychology. *Journal of Psycholinguistic Research*, Vol. 2(1); Pg. 22

Therefore, Chomsky makes a distinction between a person's underlying knowledge of language from a person's capacity to utilize their knowledge of language in practice. For in practice, language may be affected by memory limitations and distractions, all of which are distinct capacities from the underlying knowledge of language. Therefore Chomsky views a theory of language as a theory of *competence*, from which eventually a theory of *performance* can also be accommodated once we know what other cognitive abilities are involved.

To illustrate this distinction further, consider a person who has suffered a stroke and as a result of this is unable to speak. Their linguistic *performance* is affected but not their *competence*. They can still understand and communicate language but perhaps have lost the volitional capacities to verbalize language and instead may have to rely on other forms of linguistic expression. On the other hand, consider the disorder known as aphasia. It is a language disorder that renders sufferers impaired in producing or comprehending written or spoken language. It occurs as a result of damage to parts of the brain that are responsible for language (i.e. Broca's area and Wernicke's area). Damage is usually due to a number of causes such stroke, trauma, brain tumours or dementia.<sup>167</sup> Aphasia is considered to be an impairment of linguistic competence because in an idealized scenario where all possibility of performance failure is excluded, language ability would presumably still be impaired.

Now consider the role that rational agency plays in moral judgment and moral action. Rational agency is the capacity of a person or entity to act in the world in a rational way by virtue of compliance with what we judge we have reason to do. What is required for rational agency is the capacity to use reason to guide action that is directed towards achieving both short term and long term practical/moral goals. This

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<sup>167</sup> <http://en.wikipedia.org/wiki/Aphasia>

requires the possession of relevant knowledge (i.e. norms of morality) and the capacities necessary to operationalize or express the knowledge in the context of one's autobiographical narrative.

However, as discussed above with regard to language, it is not necessarily the case that lack of capacity to operationalize or express linguistic knowledge would count as linguistic incompetence. For example, conversing intelligibly demonstrates that one possesses knowledge of the rules of grammar as well as the capacity to express those rules of grammar in practice (e.g. speech). Therefore the failure to express language due to deficits associated with speech for example is a performance failure rather than a competence failure. Linguistic competence exists independently of its expression.

Consider for example, Hauser's theory of moral competence. He posits that there are intuitive principles (operative in moral judgement and behaviour) that a person needs to possess in order to qualify as possessing moral competence. The role that emotions play in Hauser's theory is primarily concerned with motivation. Therefore it is conceivable that emotional deficits will result in a failure to operationalize intuitive moral principles in one's behaviour due to lack of motivation. This would constitute a performance failure, rather than a failure of moral competence. Like language, moral competence in Hauser's sense is a cognitive capacity that exists independently of its expression.<sup>168</sup>

The examples of language and moral cognitive intuitions demonstrate how a person can possess the relevant principles (thus possessing competence) yet

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<sup>168</sup> It is not clear whether Hauser's theory of moral competence assumes a functional distinction between moral judgment and moral action from which one might abstract tacit intuitive moral principles. Presumably one might be able to infer such principles from either moral judgment or action.

simultaneously not possess the capacity to operationalize or express that knowledge (a deficit of performance). Therefore if we take the concept of competence as used in cognitive science and apply it to practical reason, it seems we must conceptualize a lack of capacity to express moral knowledge/moral reasoning along a temporally extended dimension as a performance deficit rather than a deficit of competence. The capacity for diachronic agency and rational agency enables one's judgments to be expressed as part of a coherent autobiographical narrative but the capacity for moral judgment itself can in this sense function independently of this kind of expression (i.e. as a synchronic capacity).

Therefore, the capacity for synchronic moral reasoning (i.e. conscious deliberative reasoning) and possession of verbalistic/abstract knowledge can be conceived of as constituting moral competence, and diachronic practical reason associated with moral performance. This allows us to make sense of how a person could have all the moral knowledge in the world, but because they lack diachronic agency (e.g. amnesics and children), are unable to express it as diachronically as practical reason, without dismissing their knowledge and capacities as insufficient for moral competence.

The performance/competence distinction can also be applied to the psychopath's moral judgments and behaviour. Consider, for example, how one might know (in the verbalistic/abstract sense) that a particular action is criminally or morally wrong. Having this kind of knowledge of a particular moral/legal norm implies an awareness of not only the existence of those norms but also the meaning of those norms, the general context in which those norms exist and the consequences of transgressing those norms. Such verbalistic/abstract knowledge is practically relevant and morally relevant as it can be applied in the right contexts to guide morally appropriate action.

It is conceivable that one may not be able to apply verbalistic/abstract knowledge due to say a physical impairment (in the same way that one cannot apply grammatical knowledge in speech due to muteness). Obviously motivational deficits may also prevent one from expressing one's moral knowledge in the same way that lack of motivation can prevent one from speaking or writing with correct grammar.<sup>169</sup> Likewise a lack of assent to a particular moral or legal norm may conceivably make it harder to act in accordance with that norm (such that an observer might wonder whether they were even aware of the norm itself). However, if we are to apply the performance/competence distinction in a manner that is consistent with its application in other domains of investigation, such deficits would be regarded as paradigmatic performance deficits rather than deficits of competence.

The application of the performance/competence distinction enables us to distinguish between actual deficits of knowledge (possessing relevant verbalistic/abstract knowledge) from other deficits that leave knowledge intact, including deficits associated with lack of motivation, lack of assent or lack of capacity to operationalize that knowledge.

## **2.5 Conclusion**

Chomsky's the theory of linguistic competence serves as an example of the importance of distinguishing between competence and performance. In the case of Hauser's theory of moral competence, it is directly applicable. If we wish to describe the possession of intuitive moral principles in the same way that we describe the

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<sup>169</sup> Because sentimentalists identify competence with the emotions which are themselves motivational states, motivational deficits due to emotions are therefore deficits of competence.

possession of principles of grammar, we need to distinguish what it is to possess that knowledge and what it is to operationalize or express that knowledge in relevant contexts.

Likewise, if we wish to describe competence in moral reasoning we need to distinguish between what it is to possess that capacity and what it is to operationalize or express it in relevant contexts (including the context of one's autobiographical narrative). Given that practical reason posits that moral judgments are an expression of rational agency, those who lack diachronic agency, who make moral judgments in the synchronic sense (i.e. not as expressions of rational agency) cannot be regarded as making "genuine" moral judgments. Therefore a theory of moral competence as practical reason would regard such persons as amnesics and children as morally incompetent, which I have argued is a highly counter-intuitive view.<sup>170</sup>

I have argued that instead of conceiving of moral competence as practical reason, we ought to distinguish moral judgment from rational agency and conceive of the capacity for synchronic moral judgment as constituting moral competence and the capacities underpinning rational agency (i.e. diachronic agency) as associated with moral performance. This enables us to make sense of the moral judgments that amnesics and children are capable of making and the role that verbalistic/abstract moral knowledge plays independently one's personal moral narrative.

In the next chapter, I turn to the discussion of the psychopath's moral deficit. I address the question of whether they possess the capacities necessary for moral competence and whether they can be regarded as rational agents

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<sup>170</sup> Furthermore (as discussed in section 2.3), synchronic judgments made by magistrates, judgments based on propositional knowledge and judgments that derive from analogical reasoning, are not regarded as "genuine" moral judgments according to such a theory of moral competence.

In the final chapter I address the question of what kind of moral knowledge and capacities are necessary for legal responsibility. I argue that the theory of moral competence, as I have defined it in this chapter, offers a basis for one to describe some minimal requirements for the possession of relevant knowledge/capacities necessary for moral/legal responsibility.



## **Chapter 3 – Analysis and Assessment of Psychopathy**

### **3.1 Introduction**

Psychopaths appear to have a sufficient understanding of moral and legal norms and an awareness of the legal consequences of their transgressions. However, their proclivity for heinous criminal violence may also incline one to speculate that there may be something abnormal in their moral constitution, as reflected in the 19<sup>th</sup> century conception of psychopathy as “insanity without delirium” by psychiatrist Phillipe Pinel.<sup>171</sup>

More recent descriptions of psychopathy attribute a kind of moral insincerity to their actions and judgments. For example, Harvey Cleckley describes psychopaths as having a “superficial charm and good ‘intelligence’”, “absence of delusions and other signs of irrational thinking”, “unreliability”, “untruthfulness and insincerity” and “lack of remorse or shame”.<sup>172</sup> Whilst Cleckley viewed psychopaths as having grave mental deficits and describes them as merely wearing a “mask of sanity”, he still believed that they were morally and legally culpable.<sup>173</sup>

Robert D. Hare (who pioneered the method for diagnosing psychopathy)<sup>174</sup> arrives at a similar conclusion stating that psychopathy ought to be considered an aggravating rather than a mitigating factor in determining criminal responsibility.<sup>175</sup>

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<sup>171</sup> Hare, R. D. (1993) *Without Conscience: The Disturbing World of the Psychopaths Among Us*. The Guildford Press: New York; Pg. 25

<sup>172</sup> Cleckley, H. (1988) *The Mask of Sanity: An Attempt to Clarify Some Issues About the So Called Psychopathic Personality* (5th ed). Emily S. Cleckley (Ed) [http://www.cassiopaea.org/cass/sanity\\_1.PdF](http://www.cassiopaea.org/cass/sanity_1.PdF); Pp: 338-39

<sup>173</sup> Cleckley, H. (1988) *The Mask of Sanity: An Attempt to Clarify Some Issues About the So Called Psychopathic Personality* (5th ed). Emily S. Cleckley (Ed) [http://www.cassiopaea.org/cass/sanity\\_1.PdF](http://www.cassiopaea.org/cass/sanity_1.PdF); Pp: 423-24

<sup>174</sup> Hare, R. D. (2004) *The Hare Psychopathy Checklist-Revised*, 2nd edition. Toronto: Mental Health Services.

This seems to be the view that currently pervades society, media, popular culture, religion and our own intuitive sense of morality, that psychopaths are “bad” rather than “mad”.

However, this view has come under question in light of some recent research into the psychological, emotional and neurological deficits associated with psychopathy. The picture that is emerging is that psychopaths may have significant deficits associated with emotional sensitivity, executive function and practical reason. Some recent empirical evidence indicates that they perform poorly on tests that are designed to evaluate emotional intelligence<sup>176</sup> and emotional responsiveness.<sup>177 178</sup> There is also evidence of deficits associated with inhibitory control and responding appropriately to punishment and reward.<sup>179 180 181</sup> They also appear to be irrational in other non moral domains<sup>182</sup> and may suffer from cognitive deficits associated with diachronic agency.<sup>183</sup>

These kinds of deficits force us reconsider whether they are significant enough to undermine the psychopath’s capacity for moral judgment and whether it may also

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<sup>175</sup> Hare, R. D. (1998) Psychopaths and their nature. In T. Millon, E. Simonsen, M. Birket-Smith and R. D. Davis (Eds) *Psychopathy: Antisocial, criminal and violent behaviour*. New York: The Guilford Press; Pg. 205

<sup>176</sup> Blair, R. J. R., Mitchell, D. R. and Blair, K. (2005) *The Psychopath: Emotion and the Brain*. Blackwell Publishing; Pp: 51-53

<sup>177</sup> Blair, R. J. R. (1999) Responsiveness to distress cues in the child with psychopathic tendencies. *Personality and Individual Differences*, Vol. 27; Pp: 135-45

<sup>178</sup> Kosson, D.S., Suchy, Y. Mayer, A. R. and Libby, J. (2002) Facial Affect Recognition in Criminal Psychopaths. *Emotion*, Vol. 2, No. 4; Pp: 398–411

<sup>179</sup> Pham, T. H., Vanderstucken, O., Philippot, P. and Vanderlinden, M. (2003) Selective Attention and Executive Functions Deficits Among Criminal Psychopaths. *Aggressive Behavior*, Vol. 29; Pp: 393–405

<sup>180</sup> Buckholz, J. W., Treadway, M. T., Cowan, R., Benning, S.D., Li, R., Ansari, M. S., Baldwin, R. M, Schwartzman, A. N, Shelby, E. S, Smith, C. E, Cole, D., Kessler, R. M. and Zald, D. H. (2010) Mesolimbic Dopamine Reward System Hypersensitivity in Individuals with Psychopathic Traits. *Nature: Neuroscience*, Vol. 13(4); Pp: 419-21

<sup>181</sup> Maibom, H. L. (2010) The Mad, the Bad, and the Psychopath. *Neuroethics*, Vol. 1; Pg. 176

<sup>182</sup> Kennett, J. (2006) Do Psychopaths Threaten Moral Rationalism? *Philosophical Explorations*, Vol. 9(1); Pp: 69-82

<sup>183</sup> Kennett, J. (2010) Reasons, Emotion, and Moral Judgement in the Psychopath. In Maletesti, L. and McMillan, J. (Eds). *Responsibility and the Psychopath: Interfacing law, psychiatry, and philosophy*, Oxford University Press; Pp: 243-259

undermine their capacity for moral/legal responsibility. However, this assessment depends on which capacities one regards as necessary for moral judgment and moral responsibility. I had argued in the previous chapter that a theory of moral competence ought to give primacy to the role of moral reasoning and include a role for relevant abstract/verbalistic moral knowledge.

In this chapter I apply this theory of moral competence to the assessment of psychopathy. I begin by summarizing some of the perspectives on the psychopath's moral deficit, though in terms of an assessment of moral competence, the most relevant deficits will be those that are associated with moral reasoning. Therefore I focus primarily on Jeanette Kennett's argument that the psychopath's deficit is one of practical irrationality due to a lack diachronic agency. If this is correct then psychopaths are not rational agents and thus according to the theory of practical reason they cannot be regarded as morally competent.

Whilst we already know that psychopaths possess abstract/verbalistic knowledge of moral/legal norms, I argue that their criminal behaviour also indicates that they possess the capacity for conscious deliberative reasoning. Furthermore, their criminal activity is often instrumental rather than reactive, meaning that their crimes are premeditated and carefully planned over an extended period of time. This would indicate that their practical irrationality is more likely to be due to deficits associated with emotional responding, inhibitory control, and reward, rather than a lack of diachronic and therefore rational agency.

Perhaps in some cases their criminality may even be grounded in a form of principled egoism. Therefore I conclude that psychopathy is more accurately conceived of as a performance deficit rather than a deficit of moral competence.

### 3.2 Perspectives on Psychopathy

In some recent studies, psychopaths were presented with hypothetical moral dilemmas (trolley dilemmas) and asked to form judgments about those dilemmas. The results indicated that the psychopaths' pattern of judgements did not differ from normal subjects with regard to judgments of those moral dilemmas.<sup>184 185 186</sup> This is a surprising result given that one might have predicted that psychopaths would respond to them in the same way that ventromedial patients do, which is to endorse utilitarian judgments (in what are regarded as high conflict/personal dilemmas).<sup>187</sup>

Hauser has argued that because psychopaths are capable of arriving at the same conclusions as normal subjects, they are morally competent (according to Hauser's conception of moral competence). Furthermore, because they often do not act on those judgments, Hauser argues that it demonstrates that they "know right from wrong but don't care".<sup>188</sup>

However, one of those studies demonstrated that the psychopaths' judgments were associated with increased activity in the dorsolateral prefrontal cortex (DLPFC) suggesting that they use controlled abstract reasoning processes to arrive at their judgements.<sup>189</sup> This indicates that psychopaths are not utilizing, or perhaps unable to utilize, the unconscious, intuitive processes that underpins "moral competence" (according to Hauser's conception of moral competence) when responding to moral

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<sup>184</sup> Cima, M., Tonnaer, F. and Hauser, M. D. (2010) Psychopaths know right from wrong but don't care. *Social Cognitive Affect Neuroscience*, Vol. 5(1); Pp: 59-67

<sup>185</sup> Glenn, A. L., Raine, A., Schrug, R. A., Young, L. and Hauser, M. D. (2009) Increased DLPFC activity during moral decision-making in psychopathy. *Molecular Psychiatry*, Vol. 14; Pp: 909-911

<sup>186</sup> Borg, J. S. and Sinnott-Armstrong, W. (forthcoming) *Moral Judgements in Psychopaths*

<sup>187</sup> Koenigs, M., Young, L., Adolphs, R., Tranel, D., Cushman, F., Hauser, M. and Damasio, A. (2007) Damage to the prefrontal cortex increases utilitarian moral judgments. *Nature*, Vol. 446(7138); Pp: 908-911

<sup>188</sup> Cima, M. Tonnaer, F. and Hauser, M. D. (2010) Psychopaths know right from wrong but don't care. *Social Cognitive Affect Neuroscience*, Vol. 5(1); Pp: 59-67

<sup>189</sup> Glenn, A. L., Raine, A., Schrug, R.A., Young, L. and Hauser, M. D. (2009) Increased DLPFC activity during moral decision-making in psychopathy. *Molecular Psychiatry*, Vol. 14; Pp: 909-911

dilemmas. Therefore, if psychopaths utilize controlled abstract reasoning processes to offer the same responses to moral dilemmas as control subjects do, then this does not prove that psychopaths are morally competent in Hauser's sense.

Experiments which involve gauging psychopath's moral responses are confounded by the fact that psychopaths (particularly those under criminal sanction) may lie about moral judgments because they are concerned that their responses may affect their treatment.<sup>190</sup> This relates to a broader question about the nature of the psychopath's moral judgments. It is known that psychopaths can make moral judgments by reciting or verbalizing moral norms. This has been described as merely making moral judgments in an "inverted commas" sense or expressing moral knowledge in the verbalistic/abstract sense.<sup>191</sup> <sup>192</sup> The contention is whether such judgements qualify as "genuine" moral judgments.

As discussed in the previous chapter, some have argued that what is necessary for moral competence is the capacity to make "genuine" moral judgments that expresses a "deeper" knowledge or understanding of morality. But what "genuine" moral judgment and "deep" moral knowledge refers to is contentious because it depends on the particular theory of moral competence that one assumes is the appropriate standard for assessment.

Given that the psychopath's emotional deficits are well documented in the literature, one could argue that this is the basis of their lack of a "deep" moral knowledge and their inability to make "genuine" moral judgments.<sup>193</sup> <sup>194</sup> <sup>195</sup> <sup>196</sup> This is why Prinz

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<sup>190</sup> Borg, J. S. and Sinnott-Armstrong, W. (forthcoming) *Moral Judgements in Psychopaths*

<sup>191</sup> Hare, R. M. (1952) *The Language of Morals*, Oxford: Oxford University Press

<sup>192</sup> Fine, C and Kennett, J (2004) Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment. *International Journal of Law and Psychiatry*, Vol. 27; Pp: 425-43

<sup>193</sup> Damasio, A. (1994) *Descartes' Error: Emotion, Reason and the Human Brain*. NY: Avon; Pg. 178

(2006) states that psychopaths merely “report on morality without making moral judgements” and that their concepts of “right” and “wrong” differ from our use of them in both sense and reference.<sup>197</sup>

*Without core negative emotions, they cannot acquire empathetic distress, remorse, or guilt. These emotional deficits seem to be the root cause in their patterns of antisocial behaviour. I think that psychopaths behave badly because they cannot make genuine moral judgements. (Prinz, J. J. 2006; Pg. 32)*

Others have suggested that the requirement for “deep” moral knowledge or “genuine” moral judgment can be understood in terms of the ability to emotionally distinguish between moral and conventional transgressions. For example, Shaun Nichols has argued that emotional responses normally infuse norms associated with harm with a special status that distinguishes them from conventional norms.<sup>198</sup>

According to Fine and Kennett (2004) moral competence requires that during moral development appropriate forms of admonishment or punishment are utilized to condition a person to have appropriate emotional responses to moral transgressions. They argue that without the development of this moral sense one cannot appreciate that moral transgressions carry a greater weight than conventional transgressions<sup>199</sup>.

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<sup>194</sup> Blair, R. J. R. (1995) A cognitive developmental approach to morality: investigating the psychopath. *Cognition*, Vol. 57; Pp: 1-29

<sup>195</sup> Blair, R. J. R., Mitchell, D. R. and Blair, K. (2005) *The psychopath: Emotion and the Brain*. Blackwell Publishing; Pg. 116

<sup>196</sup> Blair, R. J. R. (2008) The Cognitive Neuroscience of Psychopathy and Implications for Judgments of Responsibility. *Neuroethics*, Vol. 1; Pp: 149–157

<sup>197</sup> Prinz, J. J. (2006) The Emotional Basis of Moral Judgements. *Philosophical Explorations*, Vol. 9(1) Pg. 38

<sup>198</sup> Nichols, S. (2002) How Psychopaths Threaten Moral Rationalism: Is it Irrational to Be Amoral? *The Monist*, Vol. 85(20); Pp: 285-303

<sup>199</sup> Fine, C and Kennett, J. (2004) Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment. *International Journal of Law and Psychiatry*, Vol. 27; Pp: 425-43

*Thus, while psychopathic offenders certainly appear to know what acts are prohibited by society or the law (and therefore know that their transgressions are legally wrong), they do not appear to have the capacity to judge an act to be morally wrong,... We would argue that psychopathic offenders, who fail to understand the distinction between moral wrongs and conventional wrongs, cannot be considered to be moral agents. (Fine, C. and Kennett, J. 2004; Pg. 432)*

However, claims about the psychopath's inability to make the moral/conventional distinction remain controversial. Some recent experimental evidence suggests that there may be a moderate association between psychopathic personality traits and an inability to distinguish between moral versus conventional transgressions<sup>200</sup>, while other research has not demonstrated any such association.<sup>201 202</sup>

The notion of "deeper" moral knowledge has also been expressed in terms of the role in which emotions play in facilitating the grasping of moral concepts or the receptiveness to moral reasons.<sup>203 204</sup> For example Walter Glannon states that:

*...the psychopath's impaired capacity for empathy and remorse appears to make him incapable of critically reflecting on his motivational states... He may be incapable of considering reasons to do otherwise and of refraining from acting or acting differently. (Glannon, W. 2008; Pg. 162)*

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<sup>200</sup> Dolan, M. C. and Fullam, R. S. (2010) Moral/conventional transgression distinction and psychopathy in conduct disordered adolescent offenders. *Personality and Individual Differences*, Vol. 49(8); Pp: 995-1000

<sup>201</sup> Aharoni, *et al* (forthcoming) in Borg, J. S. and Sinnott-Armstrong, W. (forthcoming) *Moral Judgements in Psychopaths*

<sup>202</sup> Borg, J. S. and Sinnott-Armstrong, W. (forthcoming) *Moral Judgements in Psychopaths*

<sup>203</sup> Glannon, W. (2008) Moral Responsibility and the Psychopath. *Neuroethics*, Vol. 1; Pp: 158-166

<sup>204</sup> Morse, S. J. (2008) Psychopathy and Criminal Responsibility. *Neuroethics*, Vol. 1; Pp: 205-212

Similarly, Stephen Morse argues that empathy is what confers a deeper sense of moral understanding, as well as providing a reason for action:

*...the best reasons people have for not violating the rights of others are that the potential wrongdoer fully understands that it is wrong to do so and has the capacity to empathize with the potential pain of their possible victims and to use that as a reason for refraining. (Morse, S. J. 2008; Pg. 208)*

It is easy to understand how emotional deficits may lead to antisocial and imprudent behaviour. The psychopath's lack of empathy or guilt may mean that they are less concerned about the pain and distress they may cause to other people or the social condemnation of their actions. This may explain why it is easier for them to engage in immoral and antisocial behaviour that is focused primarily on satisfying their short term goals.

However, as I argued in the previous chapters, emotions are not necessary for moral competence but instead are associated with moral performance. This is because morality is a normative enterprise, and therefore a theory of moral competence ought to give primacy to the capacity for conscious deliberative reasoning (see chapter 1).

As discussed in the previous chapters, Kennett had argued that emotions (though necessary for moral development) were not necessary for moral judgment. On her view, moral competence is a form of practical reason for which there is a requirement of rational agency, i.e. that one is responsive to reasons and thus capable of acting independently of immediate stimulus bound responses so as to achieve normative



self-government.<sup>205</sup> This also requires the capacity to perceive oneself as a temporally extended being, i.e. diachronic agency.<sup>206</sup>

Kennett has argued that psychopaths behave the way that they do because of a lack of responsiveness to reasons which implies practical irrationality. Her argument follows in a tradition of proponents of practical reason who claim that the psychopath's deficit disqualifies them from being rational agents.<sup>207 208 209</sup> I discuss her arguments in more detail in the following sections.

### 3.3 Wantonness and Practical Irrationality

While deficits in rationality and practical reason have been well documented in Cleckley's and Hare's discussion of psychopathy<sup>210 211</sup>, this has been further elaborated upon by Kennett more recently. Based on empirical evidence and a number of anecdotal cases, Kennett argues that the psychopath's deficits generally point to a lack of diachronic agency as the basis of their practical irrationality.<sup>212 213</sup>

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<sup>205</sup> Korsgaard, C. M. (2010) Reflections on the evolution of morality. *Amherst Lecture in Philosophy*. The Department of Philosophy at Amherst College. <http://www.amherstlecture.org/korsgaard2010>

<sup>206</sup> Gerrans, P. and Kennett, J. (2010) Neurosentimentalism and Moral Agency. *Mind*, Vol. 119(475); Pg. 602

<sup>207</sup> Duff, A. (1977) Psychopathy and Moral Understanding. *American Philosophical Quarterly*, Vol. 14(3); Pp: 189-200

<sup>208</sup> Murphy, J. G. (1972) Moral Death: A Kantian Essay on Psychopathy. *Ethics*, Vol. 82(4); Pp: 284-98

<sup>209</sup> Arrington, R. L. (1979) Practical Reason, Responsibility and the Psychopath. *Journal for the Theory of Social Behaviour*, Vol. 9(1); Pp: 71-89

<sup>210</sup> Cleckley, H. (1988) *The Mask of Sanity: An Attempt to Clarify Some Issues About the So Called Psychopathic Personality* (5th ed). Emily S. Cleckley (Ed) [http://www.cassiopaea.org/cass/sanity\\_1.PdF](http://www.cassiopaea.org/cass/sanity_1.PdF)

<sup>211</sup> Hare, R. D. (1993) *Without Conscience: The Disturbing World of the psychopaths among us*. The Guildford Press: New York

<sup>212</sup> Kennett, J. (2002) Autism, Empathy and Moral Agency, *The Philosophical Quarterly*, Vol. 52(208); Pp: 340-57

<sup>213</sup> Kennett, J. (2006) Do Psychopaths really threaten moral Rationalism? *Philosophical Explorations*, Vol. 9(1); Pp: 77-79

<sup>214</sup> Kennett, J. (2010) Reasons, Emotion, and Moral Judgement in the Psychopath. In Maletesti, L. and McMillan, J. (Eds). *Responsibility and the Psychopath: Interfacing law, psychiatry, and philosophy*, Oxford University Press; Pp: 243-259

According to Kennett there is a sense in which a rational agent's life is directed towards some longer term goals and even ultimate ones. This requires that they have a temporally extended conception of their self, unified over time and amenable to normative self regulation, i.e. a diachronic agency.<sup>215</sup> It is the psychopath's lack of diachronic agency that Kennett believes underpins their lack of rational agency and practical irrationality.

*There needs to be a self to whom (Kantian) reasons can speak... Certainly lack of such a deep sense of self explains the psychopath's moral and prudential failings very well... (Kennett, J. 2002; Pg. 356)*

There are a lot of anecdotal cases to suggest that psychopaths may indeed have no long term sense of self and therefore no genuine long term goals. They would often frustrate their long term goals by acting in a manner contrary to the realisation of those goals. According to Kennett, their goals are primarily focused on short term reward motivated by impulsive desire, which is why she describes them as akin to Harry Frankfurt's definition of a "wanton".<sup>216 217</sup>

In Harry Frankfurt's seminal discussion on personhood, he distinguishes persons from non-persons on the grounds that persons are able to form what he calls "second-order desires" in which the object of those desires are other desires (first order).<sup>218</sup>

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<sup>215</sup> Kennett, J. (2002) Autism, Empathy and Moral Agency, *The Philosophical Quarterly*, Vol. 52(208); Pp: 356

<sup>216</sup> Frankfurt, H. G. (1971) Freedom of the Will and the Concept of a Person. *The Journal of Philosophy*, Vol. 68(1); Pp: 5-20

<sup>217</sup> Kennett, J. (2010) Reasons, Emotion, and Moral Judgement in the Psychopath. In Maletesti, L. and McMillan, J. (Eds). *Responsibility and the Psychopath: Interfacing law, psychiatry, and philosophy*, Oxford University Press; Pg. 252

<sup>218</sup> Frankfurt, H. G. (1971) Freedom of the Will and the Concept of a Person. *The Journal of Philosophy*, Vol. 68(1); Pp: 5-20

*Besides wanting and choosing and being moved to do this or that, men may also want to have (or not to have) certain desires and motives. They are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for what I shall call "first-order desires" or "desires of the first order," which are simply desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires. (Frankfurt, H. 1971; Pg. 7)*

As rational agents, we have the capacity to reflect on the worth of our desires, evaluate them and conclude about whether they provide any reason for action at all. We can thus translate those second order desires into action or what Frankfurt calls "second order volitions". Frankfurt considers the possibility of someone who has second order desires but lacks second order volitions and concludes that they would not qualify as a person, but rather they would be a "wanton".

*The essential characteristic of a wanton is that he does not care about his will. His desires move him to do certain things, without its being true of him either that he wants to be moved by those desires or that he prefers to be moved by other desires. (Frankfurt, H. 1971; Pg. 11)*

In Kennett's analysis of the psychopath, she argues that psychopaths tend to be moved by whichever desire happens to be the strongest, which indicates that their capacity for responsiveness to reasons and normative self-government is lacking. Insofar as psychopaths are able to reason in a self reflective manner, they only do so for the purposes of satisfying particular short term goals from moment to moment. Those short term goals often lead them to trouble which therefore undermines their

longer term goals. For example, an enraged psychopath, who in the spur of the moment commits a violent crime, thereby undermines his own liberty and long term welfare. It is this inconsistency between short term gain and longer term welfare that is indicative of their lack of rational agency and hence their practical irrationality. This is why Kennett characterises psychopathy as a form of moral wantonness.<sup>219</sup>

A psychopath or a moral wanton may still act in a synchronic manner that is instrumental and practically rational in isolation (e.g. their goals might be to achieve vengeance or self-gratification at a particular moment in time regardless of the long term consequences).<sup>220</sup> Kennett does not deny that psychopaths have this capacity for instrumental reasoning or some limited degree of normative self-government. However, what Kennett claims is that the kind of normative self-government that is necessary for rational agency pertains to the capacity to learn from one's past mistakes, to reconcile conflicting goals (e.g. short term versus long term goals), and to live in accordance with a relatively coherent autobiographical narrative in which a person's life, as a whole, is directed towards some ultimate ends.<sup>221 222</sup> This requires that a person has a "deeper or extended conception of the self" that is responsive to practical reasoning, i.e. a diachronic self.<sup>223 224 225</sup>

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<sup>219</sup> Kennett, J. (2010) Reasons, Emotion, and Moral Judgement in the Psychopath. In Maletesti, L. and McMillan, J. (Eds). *Responsibility and the Psychopath: Interfacing law, psychiatry, and philosophy*, Oxford University Press; Pg. 252

<sup>220</sup> Psychopaths have been found to suffer from what is called "response perseveration", i.e. if a rewarding response is consistently punished, they have great difficulties learning to respond differently. This may explain why they consistently reoffend. See Maibom, H. L. (2010) The Mad, the Bad, and the Psychopath. *Neuroethics*, Vol. 1; Pg. 176

<sup>221</sup> Atkins, K. and Mackenzie, C. (2008) *Practical Identity and Narrative Agency*, Routledge, New York

<sup>222</sup> Kennett, J. and Matthews, S. (2007) Normative Agency. In Atkins, K. and MacKenzie, C. (Eds) *Practical Identity and Narrative Agency*, Routledge: New York

<sup>223</sup> Kennett, J. (2002) Autism, Empathy and Moral Agency, *The Philosophical Quarterly*, Vol. 52(208); Pp: 356

<sup>224</sup> Kennett, J. and Matthews, S. (2009) Mental Time Travel, Agency, and Responsibility. In Broome, M. R. and Bortolotti, L.,(Eds). *Psychiatry as Cognitive Neuroscience: Philosophical Perspectives*. Oxford: Oxford University Press. Chapter 16

### 3.4. Conversability and Diachronic Agency

Kennett has also adopted the view put forward by Karen Jones that rational agency requires a minimal ability to converse in a coherent manner.<sup>226 227</sup>

*A subject is conversable with a term if they would make a minimally reasonable interlocutor on topics that call for the use of the term... they have not changed the subject, nor are they using words idiosyncratically... So someone who was unable even to recognize blatant inconsistencies between a moral standard they claimed to endorse and the behaviour they engaged in might also fail the moral conversability test. (Kennett, J. 2010; Pg. 246-247)*

The point that Kennett wishes to make here is that moral conversability requires that one must grasp the role of reasons within ordinary moral discourse, the kinds of considerations that can be cited in support of a moral judgement, an understanding of the normative implications of evaluative terms and how they relate to moral prescriptions.

There are a number of anecdotal cases of psychopathic patients whom when interviewed demonstrated incoherence and inconsistency in their speech and offered baffling justifications for their transgressions. Hare had described in great detail the anomalies associated with psychopath's use of language. According to Hare, they use words without caution or an awareness of how those words may be perceived by others. They often express themselves inconsistently and incoherently. Whilst they

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<sup>225</sup> Kennett, J. (2010) Reasons, Emotion, and Moral Judgement in the Psychopath. In Maletesti, L. and McMillan, J. (Eds). *Responsibility and the Psychopath: Interfacing law, psychiatry, and philosophy*, Oxford University Press; Pg. 251-2

<sup>226</sup> Jones, K. (2006) Metaethics and emotion research: A response to Prinz. *Philosophical Explorations*, Vol. 9; Pp: 49-50

<sup>227</sup> Kennett, J. (2010) Reasons, Emotion, and Moral Judgement in the Psychopath. In Maletesti, L. and McMillan, J. (Eds). *Responsibility and the Psychopath: Interfacing law, psychiatry, and philosophy*, Oxford University Press; Pg. 246

are manipulative, crafty and capable of unashamedly lying they can also be rather poor at lying. Their sentences appear fragmentary where the component expressions are not properly integrated into a coherent whole. They go off on tangents when responding to questions and their responses are often irrelevant to the question being asked.<sup>228</sup>

*The situation is analogous to a movie in which one scene is shot under cloudy conditions and the next scene-which supposedly takes place a few minutes later-is shot in brilliant sunshine. Obviously the scenes were shot on different days, and the director failed to take this into account when putting them together. (Hare, R. D. 1993; Pg. 137)*

For example consider the following response that a male psychopath gave when asked by a female interviewer to describe an intense emotional experience.

*...I remember once-uh-I went through this red light and there was no traffic, right? So what's the big deal? This cop started to hassle me for no reason, and he really pissed me off. I didn't really go through the red light. It was probably only yellow... so what was his-uh-point? The trouble with cops is they are-uh-most are on a power trip. They act macho, right? I'm not really into macho. I'm more of a lover. What do you think? I mean, if I wasn't in prison... say we met at a party-u-and I asked you out, and, I'll bet you'd say yes, right? (Hare, R. D. 1993; Pg. 138)*

This example, amongst others, may indicate that what appears to be missing is an underlying narrative that is consistent and coherent. This was described by Hare as

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<sup>228</sup> Hare, R. D. (1993) *Without Conscience: The Disturbing World of The Psychopaths Among Us*. The Guilford Press: New York, NY.

“mental scrabble without an overall script”.<sup>229</sup> Hare speculates that because such narrative breakdowns occur more frequently and more seriously in psychopaths compared to non psychopaths, this may be indicative of an underlying condition in which the organization of mental activity is defective. Perhaps this is due to a deficit that produces a discontinuity among mental events and poor self monitoring. If this is the case then their communications may be symptomatic of the kind of narrative disunity or wantonness that Kennett attributes to them as an explanation of their general behaviour.

However, it is unclear in those apparent cases of conversability deficits whether the psychopath is being evasive or glib. Indeed Hare claims that in most cases psychopaths are able to use those words in a coherent manner but that they are disingenuous.<sup>230</sup> Furthermore, the anecdotal evidence of wantonness and conversability deficits seem to only capture a small subset of psychopaths and therefore cannot be generalized to all psychopaths.

Whilst a lack diachronic agency may result in the characteristic practical irrationality or wantonness of some psychopaths, this only demonstrates that they lack the capacity for diachronic moral reasoning that practical reason is predicated on. As I argued in the previous chapter, moral reasoning ought to be distinguished from rational agency where the former denotes a synchronic capacity and the latter denotes a diachronic capacity. Therefore, a lack of diachronic agency may result in the psychopath’s attenuated capacity for normative self-government, but it does not imply that they lack the cognitive capacities that underpin moral reasoning.

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<sup>229</sup> Hare, R. D. (1993) *Without Conscience: The Disturbing World of The Psychopaths Among Us*. The Guilford Press: New York, NY; Pp: 139-42

<sup>230</sup> Hare, R. D. (1993) *Without Conscience: The Disturbing World of The Psychopaths Among Us*. The Guilford Press: New York, NY; Pp: 131

Presumably they still retain the capacity for conscious deliberative reasoning even if it is only limited to the synchronic sense.

It may be the case that the psychopath's lack of diachronic agency prevents them from being able to achieve an adequate level of normative self-government, though this is something that they would otherwise be able to achieve through the application of conscious deliberative reasoning to a temporally extended narrative. Therefore, I would argue that their practical irrationality is more appropriately conceptualized as a performance deficit, rather than a lack of moral competence.

In the following section I argue that psychopaths are indeed morally competent in the sense that I defined in the previous chapter. This is primarily because of their characteristic traits (such as manipulativeness, superficial charm and criminal versatility) and the instrumental nature of their criminal behaviour, all of which I argue demonstrates that they possess relevant abstract/verbalistic knowledge of moral/legal norms and capacity for conscious deliberative reasoning. Furthermore, insofar as they are able to use conscious deliberative reasoning and relevant knowledge to plan and execute their crimes, this demonstrates rational agency and thus the capacity for practical reason.

### **3.5 Instrumental Aggression and Criminal Versatility**

Violent crimes of aggression perpetrated by individuals can often be a result of reactive actions of rage, despair and fear. This kind of reactive aggression is often elicited when people find themselves in an extreme emotional state as a result of a perceived threat or some other provocation. Reactive aggression is therefore



generally thought to be an impulsive emotionally laden reaction.<sup>231</sup> However, a large number of studies and anecdotal cases demonstrate that the violent crimes perpetrated by psychopaths are more likely to be instrumental than reactive, and are more likely to be motivated by specific goals such as material gain, sexual desire and increase in status.<sup>232 233 234</sup>

A study by Woodworth and Porter (2002) demonstrated that homicides committed by psychopathic offenders were significantly more instrumental than non-psychopathic homicides. Their study looked at 125 homicidal offenders, of whom, 91 were non-psychopathic and 34 were psychopathic.<sup>235</sup> They found that nearly all (93.3%) of the homicides committed by psychopaths were instrumental in nature, compared with 48.4% of the homicides by non-psychopaths.<sup>236</sup>

The instrumental nature of their crimes is obvious when we observe that psychopaths often premeditate and carry out ruthless homicides with specific goals in mind. For example, Woodworth and Porter describe one particular psychopathic offender who admitted to police that he murdered his ex-girlfriend because she was interfering with his new relationship, and murdering her would help resolve this issue. Another

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<sup>231</sup> Berkowitz, L. (1983) The experience of anger as a parallel process in the display of impulsive, "angry" aggression. In Green, R. G. and Donnerstein, E. I. (Eds.) *Aggression: Theoretical and empirical views (Vol. 1)*; New York: Academic Press; Pp: 103–134

<sup>232</sup> Cornell, D. G., Warren, J., Hawk, G., Stafford, E., Oram, G. and Pine, D. (1996) Psychopathy in instrumental and reactive violent offenders. *Journal of Consulting and Clinical Psychology*, Vol. 64; Pp: 783-90

<sup>233</sup> Porter, S., Woodworth, M., Earle, J., Drugge, J. and Boer, D. P. (2003) Characteristics of violent behavior exhibited during sexual homicides by psychopathic and nonpsychopathic murderers. *Law and Human Behavior*, Vol. 27; Pp: 459-470

<sup>234</sup> Glenn, A.L. and Raine, A. (2009) Psychopathy and instrumental aggression: Evolutionary, neurobiological, and legal perspectives. *International Journal of Law and Psychiatry*, Vol. 32; Pg. 253

<sup>235</sup> According to the PCL-R diagnostic. See Hare, R. D. (2004) *The Hare Psychopathy Checklist-Revised*, 2nd edition. Toronto: Mental Health Services.

<sup>236</sup> Woodworth, M. and Porter, S. (2002) In cold blood: Characteristics of criminal homicides as a function of psychopathy. *Journal of Abnormal Psychology*, Vol. 111(3); Pp: 436-445

psychopathic offender had carefully planned and murdered his wife because he stood to gain financially from her insurance policy.<sup>237</sup>

In order to successfully commit such crimes, psychopaths need to be capable of planning ahead, foreseeing possible outcomes, predicting the actions and beliefs of others, suspending short term ends for the sake of other longer term ends associated with the crime and executing the physical manoeuvres that are required. This indicates that not only do they have the basic capacity to apply conscious deliberative reasoning in specific contexts to serve particular ends, but that they can do this along a temporally extended dimension. Therefore the instrumental nature of their aggression demonstrates a kind of normative self-government which suggests that their basic capacity for rational agency and diachronic practical reason are not absent.

Psychopaths are also renowned for being manipulative and deceitful towards parole boards and psychiatrists.<sup>238 239 240</sup> Consider for example the infamous Australian case of Garry David, a case that is renowned for exposing at the time, the inadequacy of the criminal justice system and the mental health system in the state of Victoria.<sup>241</sup> David was described as an “aggressive psychopath”.<sup>242</sup> His actions were so extreme and unique that neither the domain of law nor psychiatry could handle the situation. He was regarded as not criminal enough to be held in prison, yet too dangerous to be institutionalized. He was articulate enough to draw attention

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<sup>237</sup> Woodworth, M. and Porter, S. (2002) In Cold Blood: Characteristics of criminal homicides as a function of psychopathy. *Journal of Abnormal Psychology*, Vol. 111(3); Pg. 442

<sup>238</sup> Maibom, H, L. (2008) The Mad, the Bad, and the Psychopath. *Neuroethics*, Vol. 1; Pg. 175

<sup>239</sup> Cleckley, H. (1988) *The Mask of Sanity: An Attempt to Clarify Some Issues About the So Called Psychopathic Personality* (5th ed). Emily S. Cleckley (Ed) [http://www.cassiopaea.org/cass/sanity\\_1.PdF](http://www.cassiopaea.org/cass/sanity_1.PdF); Pg. 62

<sup>240</sup> Hare, R. D. (1993) *Without Conscience: The Disturbing World of The Psychopaths Among Us*. The Guilford Press: New York; Pp: 141-142

<sup>241</sup> The Community Protection Act 1990 (Vic) s. 8(1)(a) and (b); and s.8(2)

<sup>242</sup> Hare, R. D. (1993) *Without Conscience: The Disturbing World of the psychopaths among us*. The Guildford Press: New York; Pg. 184

to the injustice of being imprisoned and he also mocked those who contemplated the possibility of his rehabilitation. He played on this confusion and his dual status by referring to himself as a “psychiatric prisoner”. He built a reputation for being violent and manipulative towards staff and inmates by threats of violence against them and their families, as well as threats directed toward himself (such as suicide and self-immolation). Eventually he would gain further notoriety within the prison population and in the wider community, through media coverage, for his self mutilation that included slicing off his ears, nipples and genitalia. David was able to skilfully orchestrate high levels of tension between those two institutions and revelled in the resultant discord.<sup>243</sup>

The literature is full of all kinds of accounts of extremely bizarre and grotesque serial offenders, many of whom have been depicted in popular culture and even become cult figures (famous serial killers such as Ted Bundy and John Wayne Gacey come to mind). It ought not to be all that surprising that some of them are intelligent, articulate, well educated and accomplished person. Many have a sufficient awareness of moral/legal proscriptions and are able to act accordingly so as to successfully carry out a number of crimes before they are eventually caught.

This seems to be more consistent with the way psychopaths are characterized and diagnosed (by the PCL-R), i.e. by traits such as criminal versatility, superficial charm and manipulateness, all of which presumably requires the ability to communicate and act in a coherent manner to some minimal extent.<sup>244</sup> It is also important to bear in mind that there are a very large proportion of individuals who score high on the

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<sup>243</sup> Greig, D. N. (2002) *Neither Bad Nor Mad: The Competing Discourses of Psychiatry, Law and Politics*. Jessica Kingsley Publishers: London and Philadelphia

<sup>244</sup> Hare, R. D. (2004) *The Hare Psychopathy Checklist-Revised*, 2nd edition. Toronto: Mental Health Services.

PCL-R diagnostic standard, are very successful in life, career and business. They are what some have referred to as “corporate psychopaths”.<sup>245</sup>

The evidence of the psychopath’s instrumental aggression, manipulative behaviour, criminal versatility, etc, demonstrates that many psychopaths must be sensitive to the basic principles of logic and probability theory (i.e. procedural rationality), are capable of conscious deliberative reasoning and are aware of relevant moral/legal proscriptions. I would argue therefore that this is sufficient for moral competence. Insofar as they are planned out and applied in appropriate contexts, this also demonstrates rational agency and the capacity for diachronic practical reason.

What distinguishes psychopaths from others is that they are willing to apply their capacity for practical reason towards selfish ends often without regard for the welfare of others. Some may not be very good at applying them or some may not give much consideration to the fact that those actions will thwart other goals they may have. Understandably, deficits such as lack of empathy or guilt, poor inhibitory control and lack of realistic long-term goals can often facilitate imprudent behaviour. But this alone does not qualitatively distinguish psychopaths from non psychopaths. Neither does it demonstrate that psychopaths lack the essential cognitive capacities required for moral reasoning. Rather, they are performance failures that manifest as practical irrationality.

### **3.6 Psychopathy Incorporated**

Whilst I have argued that moral competence is independent of diachronic agency, it is possible that some psychopaths may indeed have significant deficits of diachronic

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<sup>245</sup> Babiak, P. and Hare, R. D. (2006) *Snakes in Suits: When Psychopaths go to Work*. Harper Collins

agency. Such deficits may be relevant to assessments of criminal responsibility and punishment, perhaps providing grounds for mitigation or in extreme cases, exculpation.

However, wanton-like behaviour alone is not sufficient to demonstrate that psychopaths lack diachronic agency. There are other factors, both internal and external to the agent themselves, that can often contribute to practical irrationality. For example, consider a person who struggles to stay on their weight loss diet. This is often due to a diminished ability for inhibitory control combined with external cues (such as advertising) which may have the net effect of steering them away from their weight loss goals. Likewise, the psychopath's deficit may arise due to the combination of deficits of emotional responding and executive function<sup>246 247</sup>, and the influence of external cues (they are constantly surrounded by objects of reward, which include other people).

Another difficulty of explaining the psychopath's deficit as a deficit of rational agency or diachronic agency is that one might possess such capacities but still not have any ultimate goals or ambition in life. In other words it does not follow that a rational agent or diachronic agent is necessarily a person who cares about ultimate goals.

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<sup>246</sup> It is known that deficits in attentional and inhibitory control and other executive functions are associated with antisocial behaviour though it is not clear to what extent this contributes to the psychopath's behaviour. Some studies purport to demonstrate that psychopathy is associated with deficits in the DLPFC which is the brain region associated with abstract thinking, planning and inhibitory control; see Gorenstein, E. (1982) Frontal lobe functions in psychopaths. *J Abnorm Psychol*, Vol. 91; Pp: 368–379; Gorenstein, E. and Newman, J.P. (1980) Disinhibitory psychopathology: new perspective and a model for research. *Psychol Rev*, Vol. 87; Pp: 301–315; and Phamn, T. H., Vanderstukken, O., Philippot, P. and Vanderlinden, M. (2003) Selective Attention and Executive Functions Deficits Among Criminal Psychopaths. *Aggressive Behavior*, Vol. 29; Pp: 393–405

<sup>247</sup> Other studies have found no such association, see Lapierre, D., Braun, C. M. J. and Hodgins, S. (1995) Ventral frontal deficits in psychopathy: neuropsychological test findings. *Neuropsychologia*, Vol. 33; Pp: 139–151; Smith, S. S., Arnett, P. A. and Newman, J. P. (1992) Neuropsychological differentiation of psychopathic and non psychopathic criminal offenders. *Pers Individ Diff*, Vol. 13; Pp: 1233–1243; and Roussy, S. and Toupin, J. (2000) Behavioral inhibition deficits in juvenile psychopaths. *Aggressive Behavior*, Vol. 26; Pp: 413–424

An alternative explanation of the psychopath's behaviour is that they may consciously choose to live such a "wanton-like" life, as one of Hare's patients demonstrates:

*We're always being told to drive defensively, to mentally plan escape routes in case of an emergency, to look well ahead of the car just in front of us. But hey, it's the car just in front of us that's the real danger, and if we always look too far ahead we'll hit it. If I always think about tomorrow I won't be able to live today. (Hare, R. D. 1993; Pg. 59)*

In Kantian terms, the argument that Kennett is making is that psychopaths, by virtue of their lack of diachronic agency, are indifferent to normative reasons and therefore have no conception of moral duty to guide their behaviour. As such they cannot be regarded as morally autonomous agents. This can be understood as the claim that psychopaths can only act from inclination. That is, they do not have the capacity to autonomously choose (or *will*) their actions.

However, observations of their behaviour alone cannot determine this. It could be that the psychopath does indeed autonomously choose their actions. They may behave the way they do because they have perhaps adopted a maxim of principled egoism, or a maxim of *carpe diem*. Therefore, whether the psychopath is a rational agent and thus capable of practical reason depends on whether their egoism or indifference to the future is, as Arrington states, principled or unprincipled.

*If it can be shown that in general he does not act on principle, then he can be judged mentally incapacitated. If, on the contrary, he in general follows principles, then, no matter what their content, he is not a mental case. If on a particular occasion the psychopath acts from feeling or habit but would have acted otherwise had there been typically good reasons to do so, then so far as*

*that occasion is concerned, he is responsible. But if, acting from feeling or habit, he fails to do otherwise in the face of good reasons, he is for that period of time irrational or momentarily insane. And if his life is but a career of such irrational acts, then the psychopath is properly judged to be chronically insane.*  
(Arrington, R. L. 1979; Pg. 87)

As discussed in chapter 2, a person is a morally autonomous agent if their actions are the result of their *will* rather than *inclination*. A person can be said to *will* an action only insofar as their motives are incorporated into a maxim, i.e. are adopted as a reason or justification to act. Therefore, the capacity for practical reason can be understood as the capacity for conscious subjective *willing*, i.e. adopting a maxim.

If the psychopath is akin to the wanton then it means they are unable to *will* their actions and instead act only from inclination. Therefore, test of whether the psychopath qualifies as a moral agent (in this Kantian sense) depends on whether they act purely from inclination or whether they are able to adopt a maxim for their actions. Therefore, an analysis of Kantian moral agency requires an analysis of whether an agent is operating from a maxim.

Whilst there are often many competing incentives as grounds for competing maxims, morality aims to provide objective grounds that often compete with subjective desires. In being aware of this choice one is aware of alternatives that have objective grounds that override against ones subjective incentives. Therefore if one at least has some awareness that there are other considerations that are relevant to the maxim that one adopts, then this is sufficient for moral agency.

Therefore, the *will* cannot determine action based on any incentive, but rather it does so insofar as one has taken it up as a maxim for action. That is, one has made it into

a universal rule for oneself according to which one will conduct oneself. This doctrine is what Henry Allison refers to as the “Incorporation Thesis”.<sup>248</sup>

*The centrepiece for Kant’s conception of rational agency is the Incorporation Thesis, that is, the claim that an incentive (or in Wood’s terminology, “motive”) can determine the will insofar as it has been incorporated into a maxim... this means that an incentive (or motive) is denied any causal efficacy apart from the adoption of a maxim by an agent to act on that basis of that incentive. This holds whether the source of the incentive is pure reason or sensuous inclination. Moreover, as an expression of the practical spontaneity of the agent, this act of adoption or incorporation is not itself causally conditioned. Thus, insofar as we are moved by inclination, it is because we, as it were, allow ourselves to be so moved. (Allison, H. 1990; Pg. 189)*

Allison illustrates this by reference to Kant’s example of the honest shopkeeper who treats his customers honestly, either from self-interest (hypothetical imperative) or from duty (categorical imperative), stating that neither inclination (in the former) nor reason (in the latter) alone are efficacious in causing the honest behaviour. Therefore, according to the incorporation thesis, one’s motivations are derived from the adopting of a maxim to act on either inclination or reason. One could therefore argue that so long as an individual has the basic capacity to adopt a maxim, then they have the basic capacity necessary for moral agency.

It makes more sense to think that many psychopaths have decided to incorporate egoistic inclinations into their maxims and thus have allowed themselves to be motivated by self interest. When self interest conflicts with the welfare of others, the

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<sup>248</sup> Allison, H. (1990) *Kant’s theory of freedom*, New York: Cambridge University Press; Pg. 189



psychopath may be unwilling to forgo their self interests to uphold the welfare of others.

In other words, it is not that the psychopath is incapable of caring for others or incapable of weighing up the risks and benefits of their actions, it is that they do not care for other persons or the risks associated with their actions, or the broader moral norms that society adheres to.<sup>249</sup> Not surprisingly, the psychopath's conception of morality that emerges from such egoism is one in which the norms that involve harms to other persons are merely regarded as norms of social convention.

However, according to Kant a person has a moral duty to adopt the maxim of abiding by the law. If one does not distinguish between moral and conventional norms and does not regard either as carrying any weight, it still does not exclude them from the requirement that those moral/conventional norms ought to be adopted as a maxim of action. For example, to adopt the maxim of abiding by society's laws regardless of the moral/conventional distinction is a moral duty. However, instead of this it seems that the psychopath adopts a maxim that concerns instant gratification and satisfaction of egoistic desires.

Therefore, I would argue that many psychopaths appear to have consciously and rationally incorporated egoistic incentives into their maxims for action without exercising their capacity to guide their behaviour in accordance with their own ends, other's ends and the moral duty.

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<sup>249</sup> This was according to Nietzsche, the ultimate the expression of one's freedom and autonomous agency. See Crowell, Steven, "Existentialism", The Stanford Encyclopedia of Philosophy (Winter 2010 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2010/entries/existentialism/>

### **3.7 Summary and Conclusion**

We can therefore frame the assessment of psychopathy according to the cognitive framework I proposed in the chapter 1 and make the following conclusions.

1. Based on evidence which indicates that psychopaths have deficits in emotional responding we might conclude that they are diminished or incompetent with regard to the emotional/intuitive dimension.
2. Whether psychopaths possess the kind of intuitive moral competence posited by Hauser's theory is inconclusive. I have argued in this chapter that the evidence Hauser presents does not support his conclusions.
3. Many psychopaths are competent with regard to conscious deliberative reasoning and the possession of relevant verbalistic/abstract moral knowledge. Hence they satisfy the requirements of moral competence that I discussed in the previous chapter.

Whilst psychopaths manifest behaviour that is practical irrationality, this does not necessitate a lack of diachronic agency. Therefore, unless it can be demonstrated that they have significant deficits in diachronic agency, their behaviour is more likely to be due to deficits associated with emotional responding and executive function.

4. The psychopath's deficits are primarily associated with lack of emotional responding and executive function which constitute moral performance failures and manifest as practical irrationality.

This conclusion accords with the common sense view that diachronic agency must exist along a gradient in the general human population. It is not just psychopaths who lack long term goals or lack an ultimate vision or purpose in life but presumably such traits also exist within the general human population too. We generally attribute poor behaviour to personality traits, such as impulsivity, lack of inhibitory control, weakness of will, etc. Some researchers have claimed that these are dimensional traits and the distinction between psychopaths and non psychopaths (and presumably between persons who display varying degrees of diachronic agency) is merely a quantitative one rather than a qualitative distinction.<sup>250 251</sup> This is indeed how Frankfurt himself regards wantonness.

*The class of wantons includes all nonhuman animals that have desires and all very young children. Perhaps it also includes some adult human beings as well. In any case, adult humans may be more or less wanton; they may act wantonly, in response to first-order desires concerning which they have no volitions of the second order, more or less frequently. (Frankfurt, H. 1971; Pg. 11)*

Unless we are willing to claim that those people also have deficits in diachronic agency, it seems that claims about deficits of diachronic agency in psychopaths are somewhat arbitrary.

In the next and final chapter I consider the implications that this assessment of psychopathy might have for matters of criminal responsibility. I argue that there are relevant moral capacities that are associated with the ability to judge situations

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<sup>250</sup> Edens, J. F., Marcus, D. K., Lilienfeld, S. O. and Poythress Jr, N. G. (2006) Psychopathic, not psychopath: taxometric evidence for the dimensional structure of psychopathy. *J Abnorm Psychol*, Vol. 115(1); Pp: 131-44

<sup>251</sup> Walters, G. D., Brinkley, C. A., Magaletta, P. R. and Diamond, P. M. (2008) Taxometric analysis of the Levenson Self-Report Psychopathy scale. *J Pers Assess*, Vol. 90(5); Pp: 491-8

morally which can simply be a matter of knowing of relevant moral principles or norms without requiring that this is extracted from one's personal diachronic narrative. Therefore I argue that their performance deficits can be understood as a volitional deficit rather than as a cognitive deficit, which may therefore constitute grounds for mitigation. This analysis also avoids contentions associated with ambiguous legal definitions that derive from particular theories of moral competence and what constitutes "deep" moral knowledge.

## ***Chapter 4 – Psychopathy and Criminal Responsibility***

### **4.1 Introduction**

The discussion of our moral capacities and the assessment of moral competence in psychopaths is an issue of particular relevance and importance to questions of criminal responsibility. This is a question that has been framed in terms of whether psychopaths are “mad” or “bad”. The former is understood as denoting absent or diminished capacities that are essential requirements for guilt, such as possessing relevant knowledge, having the capacity to freely choose ones actions and having a sufficient understanding of those actions and their consequences. A lack of such capacities can serve as grounds for mitigation or exculpation. It can also warrant treatment that is less concerned with punitive/retributive punishment and more concerned with rehabilitation, therapy or commitment. Conversely, the latter notion of the “bad” refers to someone who has sufficient knowledge of the relevant legal norms, has the capacity to freely choose their actions and understands the consequences of those actions. Thus they are criminally responsible and their punishments are more concerned with retribution, incarceration and condemnation.

This dichotomy is premised on the legal definition of criminal responsibility which holds that only those who are sufficiently aware of what they are doing, and of the consequences of their actions might have, that they can fairly be said to have chosen the behaviour and its consequences, are criminally responsible. However, when we further analyse this dichotomy in the legal context, there emerges a tension between a scientific/philosophical understanding of what constitutes madness or badness, and the legal requirement to make a categorical judgement about whether a person is

guilty or not guilty. The debate is a philosophical one for which our conception of moral competence bears on the analysis of moral/legal responsibility.

Psychiatry and cognitive science can provide a descriptive account of the psychopathic criminal, focusing on the neurological and psychological aspects of their deficit. However, this does not unequivocally answer the question of whether they are mad or bad. The law may look to the expertise of psychiatrists and psychologists to inform us as to whether such behaviour was due to a severe mental illness, the product of uncontrollable impulse or delusion. But the question of whether such behaviour is freely and knowingly chosen and carried out is complicated by the fact that the cognitive deficits associated with psychopathy (such as deficits in emotional processing, inhibitory control and diachronic agency) do not necessarily mean that they do not have a sufficient awareness of their actions or lack sufficient capacity to choose their behaviour. As discussed in the previous chapter, many psychopaths have an astute awareness of their actions and the legal consequences of their actions. Their aggression is often instrumental rather than reactive and their intelligence is often comparable (or greater than) the average person's.

If such an account is accurate, then the concepts of madness and badness converge and therefore present a dilemma with regard to the legal requirement of making a judgement about guilt and enforcing the appropriate kind of punishment. The conundrum is that there is something both functional and dysfunctional about the psychopath.

One might argue that whilst psychopaths know what is prescribed and proscribed by moral/legal norms (in the abstract/verbalistic sense), this is insufficient for moral responsibility and hence insufficient for legal responsibility. In order for a person to

qualify as legally responsible, what is required is perhaps a “deeper” sense of moral knowledge or an “appreciation” of moral/legal norms.

As discussed in the previous chapter, this may require that one has the appropriate emotional responses, or that one is a rational agent capable of practical reason. However, these requirements of “deep” moral knowledge or “appreciation” may lead to a conceptual slippery slope where psychopathic criminality is conceptualized as an excusable form of psychopathology, i.e. madness.

I begin this chapter by discussing the development of the criteria for the insanity defence standards. I discuss the factors that have contributed to the development of those standards and the basis upon which particular elements of certain standards rest on. I then turn to the question of the legal implications of my assessment of the deficits associated with psychopathy. With regard to whether psychopaths possess relevant moral/legal knowledge for moral/legal responsibility, I apply a minimal standard that is consistent with the requirements of moral competence that I proposed in chapter 2. I argue that the deficits associated with psychopathy may constitute grounds for mitigation and possibly exculpation in extreme cases.

## **4.2 The M’Naghten Rule**

The essence of determining criminal responsibility is to demonstrate the presence of *mens rea* (guilty mind) and *actus reus* (bad act).<sup>252</sup> The latter refers to the prohibited behaviour or conduct that constitutes the crime, while the former is usually described

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<sup>252</sup>Not all criminal offences are mens rea offenses (which involve establishing the subjective mental state), Some are “strict liability” offences where defendants will be convicted even though they may be genuinely ignorant of their actions, without proof of intention, knowledge, recklessness, or negligence. See Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pg. 158

as the intention, knowledge or recklessness of a defendant in carrying out the crime. Assuming that the *actus reus* of a psychopathic offender has been established, what remains for determining criminal liability is to establish *mens rea*.

The principle of *mens rea* states that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences their actions might have, that they can fairly be said to have chosen the behaviour and its consequences. This principle also requires that a person's criminal liability be judged on the facts as they believed them to be. The relevance of this requirement is apparent when considering, for example, cases of rape where a defendant must know that the victim is not consenting, for him to be criminally liable.<sup>253</sup> It is also worth mentioning that this principle is also based on a more general principle of autonomy and fairness – that only individuals who are autonomous (i.e. able to function within the normal range of mental and physical capabilities), are liable for criminal punishment.<sup>254</sup>

The key element of *mens rea* pertains to knowledge or understanding, i.e. whether a defendant was sufficiently aware of what they did and the consequences of their actions. This would require that the defendant was sufficiently autonomous and thus having the basic mental capacities required to function within the normal range of mental and physical capabilities. A person who has a mental disorder that interferes with relevant capacities may fail to meet such requirements and it would therefore be unfair to hold them responsible for their behaviour. Most systems of criminal law have conditions from which one can determine whether a defendant with a mental disorder should be exempt from criminal liability. The insanity defence is one such way in

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<sup>253</sup> Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pp: 83-85, 152

<sup>254</sup> Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pg. 202



which a defence lawyer can claim that a defendant lacked the basic mental capacities required for establishing *mens rea*, i.e. by arguing that at the time of the alleged offence the defendant was too mentally disordered to be held liable. A successful insanity defence aims to achieve a verdict of “not guilty by reason of insanity”, though this can still result in sanctions imposed on the liberty of the defendant (i.e. committal to mental hospital).

The grounds for the current standards for an insanity defence in most western legal jurisdictions were established after the *M’Naghten* case of 1843 in England. The defendant, Daniel M’Naghten, believed he was the target of a conspiracy involving the pope and the then British Prime Minister Robert Peel. M’Naghten tried to kill Peel but mistakenly shot and killed his secretary Edward Drummond. The defence argued that M’Naghten was suffering from delusions of persecution and subsequently lead to a breakdown of moral sense and loss of control.<sup>255</sup>

This led to public outrage and Queen Victoria established a commission to establish under what conditions mental illness could be used as a defence. (It seems the public has mixed emotions about perpetrators of heinous crimes – they feel some sort of guilt applies even if they admit the person is mentally disturbed)

Thus the M’Naghten Rule<sup>256</sup> was established:

*To establish a defence on the grounds of insanity, it must conclusively be proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the*

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<sup>255</sup> Wikipedia Entry – “Daniel M’Naghten” [http://en.wikipedia.org/wiki/Daniel\\_M%27Naghten](http://en.wikipedia.org/wiki/Daniel_M%27Naghten)

<sup>256</sup> Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pg. 205

*nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong. (Ashworth, A. 1995; Pg. 205)*

The criterion of “labouring under such a defect of reason” refers to the deprivation of reasoning power and is limited to cognitive defects. The wording of this rule therefore excludes volitional or emotional deficiencies. If a defect of the mind has been demonstrated, then it must also be demonstrated that the defendant did not “know the nature and quality of the act he was doing”. Finally, the defendant must “not know what he was doing was wrong”, which in some cases, has been interpreted equivocally as meaning either “legally wrong” or “morally wrong”.<sup>257</sup> This equivocation is an important element of the concept of wrongfulness which is acknowledged more explicitly in more recent standards of the insanity defence.

For over a hundred years the M’Naghten Rule was the only legal guide used to determine whether offenders were not guilty by reason of insanity and was gradually met with vehement criticism from some psychiatrists, jurors and legal commentators. M’Naghten was regarded by many, as too narrow or biased in only focusing only on the cognitive element of guilt (i.e. whether the defendant knew right from wrong). What the critics regarded as also an essential part of the concept of legal insanity was whether a defendant could actually control their actions - whether their actions were the product of an “irresistible impulse” (this is what some call the “volitional prong” of the insanity standards). This consideration, though no longer adopted by many of the states in the US (as I will discuss later), required that the defendant must have a significant mental illness, the defendant’s impulse must arise directly from the

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<sup>257</sup> Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pg. 206

mental illness, and there must be no evidence of planning or premeditation by the defendant before the criminal act was committed.<sup>258 259</sup>

However, the standard of irresistible impulse was also criticized in many ways. Firstly, it was argued that the standard was too narrow in that it requires a complete lack of capacity for self-control. The experience of experts in clinical settings involves treating patients who may lack self control, but their deficit is rarely a complete total lack of control.<sup>260</sup> Secondly, it has also been said that it is nearly impossible to determine which acts are uncontrollable rather than merely uncontrolled.<sup>261</sup>

To add further to this criticism, there is also the difficulty associated with the concept of an irresistible impulse – On the one hand it is unclear whether or not a person's action is to be conceived of as a pathologically strong impulse or a pathologically weak capacity to resist, and furthermore, it is unclear whether there is such a category as an impulse which is resistible, but not resisted.<sup>262</sup> This raises the concern that anyone who gives in to temptation to commit a crime could claim that when push came to shove their impulse to do it was stronger than their impulse to resist and therefore it was in effect "irresistible".

Interestingly, some stated that it did not add anything substantial to what was covered by the M'Naghten rule because some might argue that a failure of control

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<sup>258</sup> Becker, R. F. (2003) The Evolution of Insanity Standards. *Journal of Police and Criminal Psychology*, Vol. 18(2); Pg. 43

<sup>259</sup> United States Congress would abolished the irresistible impulse defence in the "Insanity Defense Reform Act (1984)"

<sup>260</sup> Becker, R. F. (2003) The Evolution of Insanity Standards. *Journal of Police and Criminal Psychology*, Vol. 18(2); Pg. 43

<sup>261</sup> Levesque, R. J. R. (2006) *The Psychology of Law and Criminal Justice Processes*. Nova Science Publishers Inc: New York; Pg. 426

<sup>262</sup> Cleckley, H. (1988) *The Mask of Sanity: An Attempt to Clarify Some Issues About the So Called Psychopathic Personality* (5<sup>th</sup> ed). Emily S. Cleckley (Ed) [http://www.cassiopaea.org/cass/sanity\\_1.Pdf](http://www.cassiopaea.org/cass/sanity_1.Pdf) Pg. 424

also implicates a failure of knowledge. This is consistent with the notion that “deep” moral knowledge confers a motivation to act accordingly (see chapter 2).<sup>263</sup>

### 4.3 The Model Penal Code

With these concerns in mind the M’Naghten Rules were re-examined in the American Law Institute’s drafting of their Model Penal Code (MPC). The MPC was developed by the American Law Institute in 1962 to assist American state legislatures to standardize their criminal law. The M’Naghten rule was found to be too narrow or too strict in regarding mental disorders as cognitive defects because it was recognised that some forms of mental disorder impaired practical reasoning and the power of control over actions (once again raising the issue of the significance of volitional incapacity).<sup>264</sup>

It was thought that the law should also regard as insane those who may know right from wrong, but yet are incapable of acting in accordance with that knowledge on the basis of impaired “volitional control” or “irresistible impulse”. Hence the MPC’s insanity defence (“Mental Disease or Defect Excluding Responsibility”)<sup>265</sup> is stated as follows:

*A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to*

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<sup>263</sup> Levesque, R. J. R. (2006) *The Psychology of Law and Criminal Justice Processes*. Nova Science Publishers Inc: New York; Pg. 426

<sup>264</sup> Though, these particular considerations are also subsumed by the “diminished responsibility” doctrine in “manslaughter”, partly because the insanity defence was perceived as providing inadequate scope for exculpation or at least mitigation. See Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pg. 207

<sup>265</sup> Model Penal Code and Commentaries (1985) *American Law Institute*. Section 4.01; Pg. 163

*appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law. (MPC; Section 4.01(1))*

The latter criterion pertaining to volitional capacities was an attempt to integrate into the MPC the principle underlying the notion of “irresistible impulse” developed in the late 19<sup>th</sup> century and eventually integrated into English Law after the case of R. V Byrne in 1960. In this case it was judged that the defendant was unable to exercise self control over his actions. The result of this judgement broadened the notion of a “defect of mind” so as to cover the ability to control physical acts, thus further expanding the notion beyond the purely cognitive.<sup>266</sup> Though, the idea of irresistible impulse had to be qualified as “lacking substantial capacity... to conform his conduct to requirements of the law” given that on some interpretations an offender could only satisfy this requirement if they would still commit the crime even if there was, so to speak, a “policeman at his elbow”. So under the MPC, this defence is not limited to instantaneous impulsive action but may also apply to actions that arise from the product of brooding and deliberation to a limited extent.<sup>267</sup> As stated in the commentary, the MPC standard “does not require a total lack of capacity, only that the capacity be insubstantial”.<sup>268</sup>

By employing the term "substantial" to qualify "incapacity," the MPC standard indicates that certainly not any incapacity is sufficient, but that "total" incapacity is also unnecessary. It is also worth noting that according to the MPC Explanatory Notes, the standard does not define “mental disease” or “mental defect” because the intention is to accommodate developing medical understanding.<sup>269</sup> Thus in the

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<sup>266</sup> Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pg. 277-78

<sup>267</sup> Emanuel, S. L. (2007) *Criminal Law* (6<sup>th</sup> ed). Aspen: New York; Pp: 82-83

<sup>268</sup> Model Penal Code and Commentaries (1985) *American Law Institute*. Section 4.01; Pg. 164

<sup>269</sup> Model Penal Code and Commentaries (1985) *American Law Institute*. Section 4.01; Pg. 164

broader context, the MPC's criteria for criminal insanity were designed to reflect advances in the field of cognitive science and psychiatry, as well as to broaden the scope or soften the perceived harshness of the M'Naghten rule.

However, the crucial aspect of the MPC standard as stated above, is that it may be possible for an offender to know what actions were right or wrong (in the legal sense), yet still be found legally insane because they lacked substantial capacity to "appreciate" the "wrongfulness" of their actions or conform his conduct to the requirements of the law. As stated in the MPC commentary (with emphasis added):

*An individual's failure to appreciate the criminality of his conduct may consist in a lack of awareness of what he is doing or a misapprehension of material circumstances, or a failure to apprehend the significance of his actions in some **deeper sense**. Wrongfulness is suggested as a possible alternative to criminality, though it is recognized that few cases are likely to arise in which the variation will be determinative. (MPC; Section 4.01 Explanatory Note; Pg. 164)*

The distinction here between "criminality" versus "wrongfulness" seems to be based on a distinction between knowing what constitutes a criminal offense versus knowing what constitutes a moral offense. Furthermore, the notion of failing to apprehend one's actions in a "deeper sense" also reflects this distinction and also suggests that "wrongfulness" is being used in a moral sense. However, it also raises the question of what constitutes a "deeper sense" of apprehending one's actions. This was addressed in chapter 2 and 3 where I discussed several perspectives about what constitutes "deeper" moral knowledge. The notion of conforming one's conduct to the law may point to capacities associated with volition, rational agency and practical

reason. Hence considerations of not only factual but also philosophical matters are relevant to the interpretation of the MPC standard.

The MPC standard was formally adopted by all federal courts in the USA as well as many state legislatures. However, it would come under scrutiny and criticism once again due to the perception that the standard was too inclusive in allowing defendants to be found insane on the basis of volitional incapacity. The MPC standard underwent further changes primarily in response to the public outrage following the acquittal of John Hinckley who was charged with the attempted assassination of then president Ronald Reagan in 1981. Hinckley was found “not guilty by reason of insanity” (NGRI).

This verdict was met with outrage and led to the enactment of The Insanity Defence Reform Act of 1984 (IDRA)<sup>270</sup> which states that:

1. *Affirmative Defense: It is an affirmative defense to 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/her acts. (U.S.C. Title 18/Section 17a)*
2. *Burden of proof: The defendant has the burden of proving the defense of insanity by clear and convincing evidence. (U.S.C. Title 18/Section 17b)*

This changed the federal law by firstly, eliminating the volitional prong of the MPC, which thus brought it back to the M’Naghten Rules, and shifting the burden of proof

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<sup>270</sup> United States Codes, Title 18 section 17

onto the defence.<sup>271</sup> Secondly, it established strict procedures for hospitalization of defendants found not guilty by way of insanity or who were unfit to stand trial. Thirdly, it also limited the scope and weight of the testimony of expert witnesses by excluding testimony to the “ultimate issue”<sup>272</sup> and also and limited the range of mental illnesses that could be exculpatory.<sup>273</sup> Whilst at the extreme end this led to some states dropping the insanity defence entirely, most abandoned the MPC standard and adopted the IDRA as their standard, thus returning to essentially the M’Naghten Rules.<sup>274 275</sup> Some states reached a compromise by enacting “Guilty But Mentally Ill” verdicts which allows for such acquittees to be civilly committed, treated, assessed for their dangerousness, and in some cases to subsequently serve their sentence if deemed appropriate.<sup>276</sup> However, the removal of the volitional prong of the MPC is regarded by some as simply due to a perceived need to narrow (or re-narrow) the scope of the insanity defence.<sup>277</sup>

#### 4.4 Psychopathy and the Insanity Defence?

What is of particular interest with regard to the question of whether the psychopath qualifies as legally insane (according to the legal standards discussed thus far), relates to the distinction between the cognitive and volitional prongs of the insanity

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<sup>271</sup> Legal commentators have argued that the main reason why Hinckley was found NGRI was because the federal law as it then stood required the prosecution to prove beyond a reasonable doubt that Hinckley was sane at the time he shot President Reagan. This was perceived to be an impossible task.

<sup>272</sup> Federal Rule of Evidence 704(b), (2004) in Buchanan, A. (2006) *Psychiatric Evidence on the Ultimate Issue*. *J Am Acad Psychiatry Law*, Vol. 34(1); Pp: 14-21

<sup>273</sup> Levesque, R. J. R. (2006) *The Psychology of Law and Criminal Justice Processes*. Nova Science Publishers Inc: New York; Pg. 428

<sup>274</sup> Becker, R. F. (2003) The Evolution of Insanity Standards. *Journal of Police and Criminal Psychology*, Vol. 18(2); Pg. 44

<sup>275</sup> Levesque, R. J. R. (2006) *The Psychology of Law and Criminal Justice Processes*. Nova Science Publishers Inc: New York; Pg. 427-428

<sup>276</sup> Huss, M. T. (2009) *Forensic psychology: research, clinical practice, and applications*. Blackwell Publishing; Pp: 161-62

<sup>277</sup> Mackay, R. D. (2003) *Mental condition defences in the criminal law*. Clarendon Press: Oxford; Pp: 115-17



standards. With regard to the M’Naghten Rules, whether a defendant “knows” the nature and quality of their actions or not, presumably, does not exclude knowledge that is based on a simple awareness of their actions that can be manifested by verbal acknowledgement (i.e. abstract/verbalistic knowledge).<sup>278</sup> The MPC and IDRA standards seem to suggest that this verbalistic/abstract sense of knowledge is insufficient, but instead requires “appreciation” of the nature and quality and “criminality” or “wrongfulness” of their actions.

As stated in the MPC, the notion of “appreciating” the “wrongfulness” of one’s actions “conveys a broader sense of understanding than simple cognition”<sup>279</sup>. This indicates that the *mens rea* aspect under question here is more complex than mere abstract/verbalistic knowledge. It has been stated in the MPC that perhaps a deeper affective awareness of the wrongfulness of one’s actions is necessary.<sup>280</sup>

Therefore the use of the term “appreciate” is aimed at distinguishing mere verbalistic/abstract awareness from what the definition of *mens rea* aims to capture according to the MPC (in the context of a model jury charge):

*A person may in some sense know that what he does is wrong and still have no significant appreciation of that fact; his knowledge may be merely verbal or mechanical... a person, for example, who is so far disoriented by disease that he is incapable of any feeling for the other people in the world or of realizing their existence and importance, or of distinguishing between his own identity and theirs, such a person might be deemed to be without significant capacity*

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<sup>278</sup> Model Penal Code and Commentaries (1985) *American Law Institute*. Section 4.01; Pg. 166

<sup>279</sup> Model Penal Code and Commentaries (1985) *American Law Institute*. Section 4.01; Pg. 169

<sup>280</sup> Fischette, C. (2004) Psychopathy and Responsibility. *Virginia Law Review*, Vol. 90(5); Pp: 1445-46

*to appreciate that it is wrong to kill another man, although he says he knows that it is wrong. (MPC; Section 4.01; Appendix C; Pg. 214-15)*

Furthermore, as stated in the MPC commentary following from section 4.01:

*Insofar as a formulation centering on “knowledge” does not readily lend itself to application to emotional abnormalities, the M’Naghten test appears less than optimal as a standard of responsibility in cases involving affective disorder. (MPC; Section 4.01 Comment; Pg. 166)*

Subsequently a number of other courts had adopted the same standard and endorsed the use of “wrongfulness” in place of “criminality”<sup>281</sup>. However, what a “deeper affective awareness” or “emotional abnormalities” refers to remains vague and speculative. Sentimentalists and proponents of practical reason might see this as an opportunity to apply their theories to clarify the meaning of “appreciate” and have it applied in the legal domain. Indeed some have argued (based on those theories and assessments discussed in the previous chapters) for a revision of the assessment of the presumed culpability of psychopaths.<sup>282 283 284 285 286 287</sup>

However, the MPC explicitly exempts psychopaths from the insanity defence, as stated in Section 4.01 (2) of the MPC:

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<sup>281</sup> Wilson, 700 A.2d at 2 in Ranade, B. V. (1998) Notes and Comment: Conceptual Ambiguities in the Insanity Defense: State v. Wilson and the New Wrongfulness Standard. *Connecticut Law Review*, Vol. 30; Pp: 1384-86

<sup>282</sup> Blair, R. J. R. (2008) The cognitive neuroscience of psychopathy and implications for judgments of responsibility. *Neuroethics*, Vol. 1(3); Pp: 149-157

<sup>283</sup> Glannon, W. (2008) Moral Responsibility and the Psychopath. *Neuroethics*, Vol. 1; Pp: 158–166

<sup>284</sup> Morse, S. J. (2008) Psychopathy and Criminal Responsibility. *Neuroethics*, Vol. 1; Pp: 205–212

<sup>285</sup> Sapolsky, R. M. (2004) "The frontal cortex and the criminal justice system." *Philos Trans R Soc Lond B*, Vol. 359(1451); Pp: 1787-96

<sup>286</sup> Levy, N. (2008) The Responsibility of the Psychopath Revisited. *Philosophy, Psychiatry, & Psychology*, Vol. 14(2); Pp: 129-138

<sup>287</sup> Fine, C. and Kennett, J. (2004) Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment. *International Journal of Law and Psychiatry*, Vol. 27; Pp: 425-443

*As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. (MPC; Section 4.01(2))*

Nevertheless, one might argue that the MPC standard may still provide scope for an insanity defence by virtue of its volitional prong and the requirement that one “appreciate” the “wrongfulness” of one’s actions. Below is the MPC standard stated again with emphasis added to highlight the key terms:

*A person is not responsible for criminal conduct if at the time of such conduct as a result of 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 the law.** (MPC; Section 4.01(1))*

As mentioned previously, the replacing of the term “know” with “appreciate” is based on a view that verbalistic/abstract knowledge, or moral judgment in the “inverted commas” sense, is not sufficient for mens rea. This raises the same contention discussed in previous chapters about whether psychopaths have relevant moral knowledge and whether a “deeper” sense of moral knowledge is necessary. Therefore the contentions surrounding the assessment of legal responsibility of psychopaths parallel the contentions regarding the assessment of their moral deficits.

#### **4.5 Do Psychopaths Possess Relevant Moral/Legal Knowledge?**

One could interpret the requirement of “appreciate” in the same sense as the requirement for “deep” moral knowledge and “genuine” moral judgment (as discussed in chapters 2 and 3). It may require the relevant emotional responses

themselves or it may require the ability to distinguish between moral and conventional norms which may be underpinned by relevant emotions during development. This has also been expressed in terms of the requirement of possessing relevant moral concepts, and seems to be the basis of the argument made by Fine and Kennett (2004) that psychopaths are not morally responsible.<sup>288</sup>

*We argue that psychopathic offenders experience significant dysfunction in domains that are directly relevant to an assessment of their responsibility. We present recent evidence suggesting that psychopathic offenders fail to pass through a crucial developmental stage in early childhood. As a result, they are incapable of forming genuine moral concepts and so lack the essential prerequisites of moral life. We conclude that psychopathic offenders cannot meet the requirement of moral understanding in the criminal code. (Fine, C. and Kennett, J. 2004; pg. 427)*

The requirement of “deep” moral knowledge or “genuine” moral judgment may also imply that one has to assent to a particular moral judgment (as distinct from merely having verbalistic/abstract knowledge or making a moral judgment in the “inverted commas” sense). For example a social anthropologist may know of a particular community’s customs or moral norms without necessarily assenting to those norms. Perhaps this is why their knowledge is labelled as merely verbalistic/abstract knowledge. This may also be the same reason why it has been stated of psychopaths and “acquired sociopaths” (i.e. ventromedial patients)<sup>289</sup> that they make

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<sup>288</sup> Fine, C. and Kennett, J. (2004) Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment. *International Journal of Law and Psychiatry*, Vol. 27; Pp: 425-443

<sup>289</sup> Damasio, A. R., Tranel, D. and Damasio, H. (1990) Individuals with sociopathic behavior caused by frontal damage fail to respond autonomically to social stimuli. *Behav Brain Res*, Vol. 41; Pp: 81–94

moral judgments in an “inverted commas” sense.<sup>290 291</sup> Perhaps referring to the possibility that they can only merely recite or verbalize moral knowledge that which they never assent to.

Likewise, in Richard Joyce’s (2008) discussion, he distinguishes judgments that only express verbalistic/abstract knowledge from other “more robust” judgments as possibility denoting a kind of lack of internal “mental assent” to the moral proposition.<sup>292</sup>

*If, on the other hand, we prefer to treat moral judgment as more of a psychological event, as a kind of internal “mental assent” to an evaluative proposition, then serious doubt arises as to whether the subjects suffering from acquired sociopathy really are making moral judgments in this more robust sense. (Joyce, R. 2008; Pg. 386)*

Likewise, for Kennett, being able to make “genuine” moral judgments requires assent or endorsing the moral norm as one’s own.<sup>293</sup>

*...the anthropologist who studies another culture, or even her own, and who successfully reports on the moral standards she finds there, is not herself making a moral judgment... something more must be required for moral judgment. One must endorse or adopt the standard as one’s own. (Kennett, J. 2010; Pg. 245)*

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<sup>290</sup> Hare, R. M. (1952) *The Language of Morals*, Oxford: Oxford University Press

<sup>291</sup> Fine, C. and Kennett, J. (2004) Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment. *International Journal of Law and Psychiatry*, Vol. 27; Pp: 425-43

<sup>292</sup> Joyce, R. (2008) What neuroscience can (and cannot) contribute to metaethics. In W. Sinnott-Armstrong (Ed.), *Moral Psychology Volume 3: The Neuroscience of Morality: Emotion, Brain Disorders, and Development*. MIT Press; Pp: 371-394

<sup>293</sup> Kennett, J. (2010) Reasons, Emotion, and Moral Judgement in the Psychopath. In Maletesti, L. and McMillan, J. (Eds). *Responsibility and the Psychopath: Interfacing law, psychiatry, and philosophy*, Oxford University Press; Pp: 244-245

In a recent discussion by Cova (forthcoming), he presents two examples of how one might be ignorant of morally relevant knowledge.<sup>294</sup> He asks us to imagine that someone offers a child a peanut butter sandwich without knowing that the child is allergic to peanut butter. It turns out that this action results in the child being poisoned and thus driven to the hospital. The person may argue that they didn't know they were doing something "wrong", meaning that they didn't know their action would have such dreadful consequences for the child.

However, there is also another sense of ignorance that might be applicable, albeit one that we would find less reason to excuse. That is, if the person actually intended to kill the child by poisoning them with peanut butter and tried to escape blame by saying they didn't know that poisoning was "wrong".

The former is a case of "factual ignorance", where the person who offered the child the sandwich was ignorant of the fact that the child was allergic to peanut butter. The latter claim, that not knowing that poisoning a person is "wrong", may be a form of "legal ignorance" (i.e. not knowing that there is a law against poisoning) or perhaps a form of "moral ignorance" (which perhaps describes the psychopath's level of moral knowledge).

The claim to "legal ignorance" that not knowing that poisoning or killing a person is illegal would be rather incredible. We are generally aware that there is a moral/legal injunction against causing harm to others such as through poisoning. Therefore to state that one did not "know" that poisoning was wrong in the legal sense would amount to an implausible excuse. Furthermore, ignorance of the law is not always a

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<sup>294</sup> Cova, F. (Forthcoming) *Two Kinds of Moral Competences*.  
[http://unige.academia.edu/FlorianCova/Papers/1762616/Two\\_kinds\\_of\\_moral\\_competences](http://unige.academia.edu/FlorianCova/Papers/1762616/Two_kinds_of_moral_competences)

mitigating circumstance, given that some laws are classified as “strict liability” offenses rather than *mens rea* offenses.<sup>295</sup>

Therefore, what may remain as an excusable form of ignorance in the latter scenario (as it is in the former) is to argue for “moral ignorance”, and to claim that it denotes a form of “factual ignorance”. One might therefore argue that the psychopath’s deficit ought to be conceived of as a form of “factual ignorance” (perhaps as ignorance of the moral “fact” that poisoning a person is morally wrong). This seems to be akin to the argument that psychopaths are not morally/legally responsible due to a lack of “deep” moral knowledge.

However, there may be a sense in which the excuse of “moral ignorance” or lack of “deep” moral knowledge would seem to be as implausible an excuse as the excuse of “legal ignorance”. This is because many would insist that it is not necessary to have knowledge of the moral “fact” that poisoning is wrong because it is sufficient to know of the existence of the moral norm that poisoning is wrong.

As Cova states, the claim to “moral ignorance” as an excusable factor emerges from the view that moral responsibility and moral ignorance are incompatible (where moral ignorance is understood as a lack of “deep” moral knowledge). Or in other words, it is the view that one cannot lack “deep” moral knowledge and at the same time still be a rational agent (which for proponents of practical reason is necessary and sufficient for moral responsibility). Therefore if the psychopath is “morally ignorant” in the sense of lacking “deep” moral knowledge, then this is conceptualized as incompatible with rational agency and thus moral responsibility.

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<sup>295</sup> Not all criminal offences are *mens rea* offenses (which involve establishing the subjective mental state), Some are “strict liability” offences where defendants will be convicted even though they may be genuinely ignorant of their actions, without proof of intention, knowledge, recklessness, or negligence. This might also apply to the factual ignorance of a child being allergic to peanut butter. See Ashworth, A. (1995) *Principles of Criminal Law*, Oxford University Press; Pg. 158

But I have argued, that we need to distinguish between moral competence and rational agency (see chapter 2), and based on empirical evidence, that psychopaths are rational agents (see chapter 3). This means that we can make sense of their apparent rational agency and their “moral ignorance” or lack of “deep” moral knowledge. The confusion arises when the notion of “deep” moral knowledge is conflated with rational agency in a theory of moral competence such as that of practical reason.

In the following section I argue for a relevant sense of moral knowledge, or “appreciation” of the criminality or wrongfulness of one’s conduct, which does not require rational agency or “deep” moral knowledge (in any sense of the term discussed thus far), and which is consistent with the definition of moral competence that I offered in chapter 2 (i.e. possession of relevant verbalistic/abstract knowledge and capacity for conscious deliberative reasoning independent of diachronic agency).

#### **4.6 Moral Competence and Criminal Responsibility**

Generally speaking it is granted that psychopathic offenders have an abstract/verbalistic awareness of the “criminality” and “wrongfulness” of their conduct, which they clearly demonstrate through actions associated with avoiding criminal sanction. As discussed in the previous chapter, many of the violent crimes perpetrated by psychopaths are instrumental rather than reactive and are often motivated by specific goals such as material gain, sexual desire and increase in status.<sup>296 297</sup>

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<sup>296</sup> Cornell, D. G., Warren, J., Hawk, G., Stafford, E., Oram, G. and Pine, D. (1996) Psychopathy in instrumental and reactive violent offenders. *Journal of Consulting and Clinical Psychology*, Vol. 64; Pp: 783-790



Psychopaths need to be capable of planning ahead, foreseeing possible outcomes, predicting the actions and beliefs of others and executing the physical manoeuvres that are required, in order to successfully commit crimes. Therefore, because psychopaths are able to have their criminal desires and beliefs guide their actions, and because they possess the relevant capacities to carry out their crime, they are rational agents. They are capable of intentionally adopting egoistic maxims for action.

Therefore insofar as an “appreciation” of wrongfulness of one’s conduct and the ability to conform one’s actions to the requirements of the law refers to rational agency and practical reason, most psychopaths are thus criminally responsible.

Whilst there is evidence that psychopaths have deficits associated with diminished emotional responding and inhibitory control, I have argued in the previous chapter that this is more accurately conceptualized as a performance deficit. Furthermore, there are good arguments to suggest that emotions are not necessary for moral knowledge and moral judgment which I discussed in chapter 1.

I had also argued that Kennett’s general characterisation of psychopaths as wantons (i.e. lacking in diachronic agency) is also more accurately conceptualized as a performance deficit. Whilst it may be the case that some psychopaths do lack diachronic agency, I have argued that the anecdotal evidence of wanton-like behaviour and poor conversability are insufficient to demonstrate this. Further research is required to establish this, particularly whether psychopaths have neuro-cognitive deficits associated with diachronic agency.

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<sup>297</sup> Glenn, L. A. and Raine, A. (2009) Psychopathy and instrumental aggression: Evolutionary, neurobiological, and legal perspectives. *International Journal of Law and Psychiatry*, Vol. 32; Pg. 253

Abnormal moral development might contribute to the psychopath's condition in adult life (e.g. resulting in their inability to distinguish moral from conventional transgressions). Such deficits alongside other relevant factors may provide grounds for mitigation. However, being disposed to treating moral norms as conventional norms (or vice versa) is not in itself sufficient to mitigate or exculpate. Neither is lack of assent to a particular moral/legal norm. This is because there are laws that proscribe actions that one might regard as merely conventional transgressions that are based on norms that one might not assent to (e.g. smoking in public, loitering, parking restrictions). But we do not excuse those who transgress those laws on the basis that they do not assent to them.

These considerations seem to suggest that the requirement for "appreciating" the criminality or wrongfulness of one's actions that requires much less than what has been defined as "deep" moral knowledge or "genuine" moral judgment. For example a psychopath may know that other people value their life and well being (why would they try to escape or plead for mercy otherwise?). He might even be able to infer that because his happiness and well being is valuable to himself, another person's happiness and well being is analogously valuable to them. He may also know that moral and legal injunctions are there to protect the broader community and that there are penalties associated with criminal action. Is this knowledge not sufficient to confer a basic level of moral competence and thus moral/legal responsibility?

This is the kind of perspective Peter Singer has in mind when he states that "reason enables me to see that others have similarly subjective perspectives, and that from

“the point of view of the universe,” my perspective is no more privileged than theirs”.<sup>298</sup>

Similarly, Cova has argued that one can possess only a minimal requirement of morally relevant knowledge (i.e. that others have interests and values) and qualify as morally responsible.<sup>299</sup>

*...being a moral agent only requires understanding that others have interests and the capacity to be motivated by this understanding (that is: to act in accordance with how much I care about others). If I don't care about these interests, I have bad motives. If I care about these interests, I have good motives – but the main point is to understand that some entities have interests, and that makes them moral patients. (Cova, F. Forthcoming; Pg. 8)*

Therefore merely possessing relevant verbalistic/abstract knowledge and reasoning capacities (to infer that another person's welfare is of value to them and that there are moral/legal injunctions in place to uphold their welfare) is sufficient for one to act accordingly. It would seem that this kind of knowledge and reasoning capacity does not require diachronic agency, appropriate emotional responding, or assenting to the moral norms that prohibit harming people (though without emotional responding and assent to moral norms, this may constitute a bad motive for action).

Of course this is not to say that such elements (which are indeed often associated with our moral judgments and actions) are not helpful. For example, having an aversive response due to particular emotions such as guilt would certainly help to prevent a person from poisoning another person. Likewise being conscious of how

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<sup>298</sup> Singer, P. (1995) *How are we to live?: Ethics in an age of self-interest*. Prometheus Books: Amherst, NY; Pg. 229

<sup>299</sup> Cova, F. (Forthcoming) *Two Kinds of Moral Competences*.

[http://unige.academia.edu/FlorianCova/Papers/1762616/Two\\_kinds\\_of\\_moral\\_competences](http://unige.academia.edu/FlorianCova/Papers/1762616/Two_kinds_of_moral_competences)

one's actions cohere with one's autobiographical narrative can steer one away from moral/legal transgressions. Though rather than conceiving of deficits in such capacities as part of the cognitive prong of an insanity defence (which is implied when they are argued to be necessary for "deep" moral knowledge or "appreciation" of the law), they ought to be conceived of as part of the volitional prong of an insanity defense and possibly subsumed under diminished responsibility. This allows us to accommodate the intuition that such deficits ought to offer some scope for or mitigation.

However, the relevant issue here is whether these dimensions are necessary for moral/legal responsibility *per se*. I have argued instead for a minimal requirement of moral/legal responsibility that is consistent with the theory of moral competence I proposed in chapter 2.

#### **4.7 Summary and Conclusion**

With the development of the MPC (and IDRA) standards, the notion of *mens rea* is framed in terms of "appreciating" the "wrongfulness" of one's actions so that it "conveys a broader sense of understanding than simple cognition". Humean sentimentalists might take this notion of "appreciation" to require that abstract/verbalistic moral knowledge must be somehow linked with an appropriate emotional response. In this context a lack of empathy or relevant emotions implies a lack of "appreciation".

In contrast, the theory of practical reason posits that "appreciating" the "wrongfulness" of one's actions necessitates a capacity for rational and diachronic

agency. It follows that lack of motivation to act in accordance with abstract/verbalistic knowledge of legal/moral norms is sufficient to demonstrate lack of “appreciation” of those moral norms. However, this precludes from consideration the possibility that the psychopath may be aware of their actions and their consequences, but that they are simply too callous to care about this. In other words it risks conflating the notions of *not caring* and *incapable of caring* and creates a conceptual slippery slope where criminal psychopathy is *a priori* conceived of as a form of amorality and therefore potentially all psychopaths are exculpable.

Furthermore, the MPC’s reframing of the insanity defence accepts that there are those who may know right from wrong, but struggle to act in accordance with that knowledge due to impaired volitional control, i.e. an individual who retains moral understanding but lacks substantial capacity to “conform his conduct to the requirements of the law”. However, practical reason is not easily mapped onto this legal distinction between the cognitive and volitional prongs because it essentially regards volition as an aspect of cognition. What is more consistent with the current legal norms is the application of the performance/competence distinction to practical reason, which allows us to distinguish between reasoning competence and agency.

This allows us to retain the intuition that there may be rational agents who are capable of genuinely immoral behaviour.<sup>300</sup> I believe that many psychopaths fit this category, as do many non-psychopathic individuals. This also retains scope for those individuals (i.e. children, amnesics, ventromedial patients, and wantons) who may have sufficient volitional deficits so as to warrant mitigation or in extreme cases exculpation. It is possible that some psychopaths may fall into this category.

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<sup>300</sup> Nichols, S. (2008) Moral Rationalism and Empirical Immunity. In W. Sinnott-Armstrong (Ed.), *Moral Psychology, vol. 3: The Neuroscience of Morality: Emotion, Brain Disorders and Development*. Cambridge, MA: MIT Press; Pg. 398

The question of criminal responsibility is confounded by the use of the terminology of “appreciating” the “wrongfulness” of conduct in the legal standards. This is because such terms must be informed by the relevant theory of moral competence. The difficulty is that there is no consensus on what constitutes the moral capacities that are essential for moral competence. Rather, a number of differing theories of moral competence are implicitly assumed which gives rise to different interpretations of evidence and contentious assessments of moral/legal responsibility.

In the first chapter I discussed some of these theories and argued on conceptual, practical and empirical grounds, for the primacy of moral rationalism in a theory of moral competence. In chapter 2, I addressed the dilemmas that arose from a theory of moral competence as practical reason. I argued that we can reconcile our intuitions about the significance of synchronic moral reasoning and verbalistic/abstract moral knowledge by applying a theory of moral competence that distinguishes capacities underpinning moral judgment from capacities underpinning rational agency (particularly diachronic agency). I also argued that this distinction was consistent with the performance/competence distinction in cognitive science.

Based on this distinction, I proposed that moral competence essentially consists of the capacity for conscious deliberative reasoning which one can utilize to acquire and infer relevant verbalistic/abstract moral knowledge independently of a diachronic self. I applied this theory to the analysis of deficits associated with psychopathy in chapter 3, where I argued that not only were psychopaths morally competent, but that the evidence indicates that many satisfy the requirements of rational agency.

In this final chapter I have applied this theory of moral competence to distinguish those aspects that are relevant to assessments of legal responsibility. I have argued

that the psychopath's performance deficits can be understood in accordance with legal terminology as a "volitional" deficit rather than a "cognitive" deficit thus constituting grounds for diminished responsibility, mitigation and possibly exculpation in exceptional circumstances. However, I have argued on the basis of this theory that psychopaths are morally competent and thus generally speaking, they are morally and legally responsible for their actions.

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