

## Editorial

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The genesis and impetus for the works presented in this special edition of the *Northern Ireland Legal Quarterly* lie in the Mental Disorder and Criminal Justice conference convened by the guest editors and jointly supported by Northumbria University's Centre for Evidence and Criminal Justice Studies and the University of Sunderland. Whilst the works themselves stand as the contributions of the individual scholars, they have been influenced by and represent some of the views put forward at this conference, which was held at Northumbria University in Newcastle in October 2013.

The criminal law has long struggled to find a way to accommodate the mentally disordered defendant, both according to its substantive doctrinal strictures and in a broader procedural sense. It is telling that the M'Naghten Rules still stand as the leading authority when it comes to the defence of insanity in England and Wales, in spite of widespread criticism from practitioners and scholars. The publication of this special edition comes at a time of potential reform, however; in recent years, the Law Commission has undertaken extensive reviews of the current law on 'unfitness to plead' and 'insanity and automatism'. Previously, the Law Commission provided comprehensive reports on the partial defences to murder which fed into amendments made to that area under ss 52–56 of the Coroners and Justice Act (CJA) 2009.

The case law generated post the 2009 Act reforms has highlighted that it is essential this area of law reform is informed by an understanding drawn from a wide knowledge base and the collection of essays presented herein offers a range of perspectives on the place of mental disorder within the criminal justice system. This edition brings together scholarship from a number of jurisdictions, all of which, in their different ways, have sought to develop criminal justice responses to this intractable area of the criminal law.

The collection commences with a contribution from Thom Brooks. Whilst Brooks does not specifically engage with mental disorder, his work offers a way of looking at criminal responsibility that may provide a platform on which to structure and critique the response of the criminal law to mental disorder. 'What is wrong about the "criminal mind"?' asserts that those who ascribe to the retributivist model and justification for the criminal law argue for a strong link between a criminal's mindset at the time of an offence and the community's response through punishment. This is a claim about desert, where the retributivist claims that the deserving should be punished to the degree deserved. For Brooks, any judgment about desert requires consideration of factors concerning 'the

criminal mind', where mitigating and aggravating factors may change the available penal options because of a criminal's mindset. Brooks argues that this retributivist link has been widely influential and sentencing policy in England and Wales reflects it, but that it is based on a mistake. The retributivist link presupposes that a criminal possesses some degree of moral responsibility, explaining why mitigating factors may decrease possible penalties as these factors may be evidence for diminished moral responsibility. This is a problem because the absence of moral responsibility is no defence to most criminal offences, such as strict liability offences. Moreover, offences requiring intent are often set at such a low threshold as to elude the higher standard of moral responsibility that is appealed to by retributivists. Thus, it is not a crime's threat or harm to morals that is most salient, but instead its threat or harm to rights, grounded in autonomy. Brooks contends that a more fruitful approach to desert and sentencing practices would be rights-based; wrongs are in fact not found in the criminal mindset, but rather the potential and actual infringement of rights.

In 'The insanity defence in operation', Ronnie Mackay reflects upon his engagement with, and involvement in, law reform in successive projects, including the most recent attempts of the Law Commission. As a leading contributor to the reform agenda, Mackay brings a historical perspective, assessing the impact of successive legislation upon the use and success of the insanity plea in the courts of England and Wales. Mackay points out that little is known about how the M'Naghten Rules operate in practice; his paper is designed to redress this gap in knowledge by exploring available data on successful pleas of insanity over several decades. In so doing, he assesses the value of empirical studies and what they may bring to the reform agenda.

The joint contribution of John Child and Alan Reed, 'Automatism is never a defence', challenges the accepted view of the law of automatism as a defence. Child and Reed argue that automatism be viewed as relating to the requirements of a *prima facie* offence. They explain that, where the defendant is not at fault for her lack of voluntariness, the term 'automatism' is simply a shorthand explanation that the defendant does not satisfy an essential element of every offence; namely voluntary conduct. Where the defendant is at fault for his or her lack of voluntariness, the automatism rules (within the current law) become an inculpatory tool through which to substitute the missing offence elements and construct liability. Having recognised that automatism plays an inculpatory role within the law, Child and Reed analyse this role and conclude that it is defective, as prior fault automatism lacks the equivalent blameworthiness necessary to fairly substitute for even missing basic intent offence elements. From here, Child and Reed discuss the possibility of a new automatism offence, to recognise the criminal blameworthiness of the defendant's conduct in certain cases, but to do so in a coherent manner that appropriately criminalises and labels the defendant.

In 'A new partial defence for the mercy killer: revisiting loss of control', Ben Livings assesses the extent to which recent revisions to the partial defences of diminished responsibility and provocation (now loss of control) may provide a potential defence to the mercy killer. Despite its *de jure* classification as murder, mercy killing is rarely prosecuted as such, and it has become linked to mental disorder by virtue of a 'benign conspiracy', which allowed for its accommodation under the auspices of diminished responsibility. This approach may obviate the injustice that would undoubtedly be caused in the event of a murder conviction, but lacks transparency and may hinder the development of a better response through open debate. The inception of the CJA 2009 brings the possibility of change, as it seeks to narrow the applicability of the partial defences and bring clarity to their operation. The prevailing view appears to be that the

CJA 2009 has indeed narrowed the applicability of the partial defences, and that this may restrict the availability to mercy killers of an increasingly medicalised diminished responsibility plea. In the face of such a possibility, Livings contends that the move from provocation to loss of control, also ushered in by the CJA 2009, may have resulted in a plea that is broader in application, and which may avail the mercy killer. He argues that a view of the narrowing of the plea is based in assumptions of legislative intent and the baggage of history, neither of which have necessarily made it into the law in its new form. If loss of control is to apply, Livings suggests that it may prove a more appropriate avenue than that offered by the benign conspiracy.

The work James Chalmers presents in 'Insanity and automatism: notes from over the border and across the boundary' is comparative in nature, and looks to the Scottish experience of reform to the law of insanity and automatism, undertaken a few years before the Law Commission's recent discussion paper on the same subject. Chalmers examines statutory reform of the Scottish law of insanity, which replaced the common law plea with a new defence. Against this background, his work provides an account of the Scottish law of insanity and automatism, before discussing the recent statutory reforms, and offering contrasts with the proposals now suggested for English law. It concludes by discussing the area where the two reform projects diverge most significantly: the boundary between automatism and the reformed defences of (in Scotland) mental disorder excluding criminal responsibility and (in the Law Commission's proposals) 'not criminally responsible by reason of recognised medical condition'.

Offering another international and comparative perspective is Warren Brookbanks, whose contribution looks to a novel procedural aspect of mental disorder within the criminal justice system of New Zealand. In "'Special hearings" under New Zealand's Criminal Procedure (Mentally Impaired Persons) Act 2003', Brookbanks examines a particular aspect of the decade-long operation of legislation that made broad changes to the procedural treatment of the mentally disordered defendant. His particular aim within this legislation is to look at s9, an ostensibly straightforward provision that tests 'evidential sufficiency' prior to a determination of unfitness to stand trial. The 'evidential sufficiency hearing' was designed to determine whether the offender had 'caused' the acts or omissions constituting the *actus reus* elements of the offence he or she was charged with, before they were at risk of a finding of unfitness to stand trial. The apparent statutory purpose of the s9 hearing was to divert mentally impaired offenders from the criminal justice system where the evidence was insufficient to sustain a criminal charge. Brookbanks contends that, in practice, its drafting has led to its becoming a highly contentious and intensely litigated provision. For Brookbanks, this points to a failure on the part of the legislation, which has not fulfilled expectations.

Paul Robinson provides a US perspective and examines the various ways in which an offender's mental illness can have an effect on liability and offence grading under American criminal law. This is not a straightforward task, as the 52 American jurisdictions have adopted a variety of different formulations of the insanity defence. A similar diversity of views is seen in the way in which different states deal with mental illness that negates an offence culpability requirement, a bare majority of which limit a defendant's ability to introduce mental illness for this purpose. Beyond this, Robinson also looks to the modern successor of the common law provocation defence, which now allows certain forms of mental illness to mitigate murder to a lesser form of murder or to manslaughter.

Stephen Morse also writes from a US perspective, and his concern is with the effect of neuroscience on normative questions that arise within the criminal law. Morse points to the basis of the criminal law's ideas of culpability in 'folk-psychological' concepts such as

desire, belief and intention, which means that 'the law treats persons generally as intentional creatures and not simply as mechanistic forces of nature'. Given that the criminal law is unlikely to accept a radical overhaul of its base concepts, Morse asserts that the adoption of science must be undertaken with great care, whether this comprises an externalising (the use of scientific or clinical experts to come to decisions) or internalising (deferring to scientific criteria as comprising legal criteria) approach. In light of this, he is sceptical of the utility and influence of neuroscience, and particularly where grand claims are made as to the possibilities it offers for providing answers to the normative questions that lie at the heart of the criminal law. Although he argues that 'neurolaw' presents limited possibilities and does not pose a genuinely radical challenge to the law's concepts of the person and responsibility, Morse goes on to make a case for 'cautious optimism about the contribution that neuroscience may make to law in the near and intermediate term', but emphasises that this must involve translation of the science into the folk-psychological framework and criteria of the criminal law.

The diversity of the articles presented here demonstrates the multiplicity of challenges that mental disorder, in its many varied forms, presents for the criminal justice system.