

Responsibility, Dysfunction and Capacity

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Abstract The way in which we characterize the structural and functional differences between psychopath and normal brains – either as biological disorders or as mere biological differences – can influence our judgments about psychopaths’ responsibility for criminal misconduct. However, Marga Reimer (*Neuroethics* 1(2):14, 2008) points out that whether our characterization of these differences should be allowed to affect our judgments in this manner “is a difficult and important question that really needs to be addressed before policies regarding responsibility... can be implemented with any confidence”. This paper is an attempt to address Reimer’s difficult and important question; I argue that irrespective of which of these two characterizations is chosen, our judgments about psychopaths’ responsibility should not be affected, because responsibility hinges not on whether a particular difference is (referred to as) a disorder or not, but on how that difference affects the mental capacities required for moral agency

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The brains of psychopaths are structurally and functionally different to the brains of normals (e.g. see [29]). However Marga Reimer points out that these differences can be characterized¹ in at least two ways, and that each characterization impacts differently on how we assess the psychopath’s responsibility for criminal misconduct. On the one hand, when these differences are characterized as “biological disorders”—i.e. as deficits, pathologies, malfunctions, impairments or diseases (e.g. see [4])—we tend to view psychopaths as *less than fully blameworthy* for the crimes which they commit, perhaps because their actions tend to be viewed as symptoms of their brain’s malfunction or disease rather than as expressions of their genuine characters or selves. But, on the other hand, when these differences are characterized as *mere* biological differences, though not ones that involve a deficit, disorder, malfunction, pathology or disease, then we may even tend to view psychopaths as *more morally blameworthy*, since now we will tend to view their actions not as symptoms of a pathology or disease, but as expressions of their personality or self which, as the brain scans starkly reveal, is rotten at its most basic implementation level [30].

¹ Sometimes Reimer talks about how these differences are *conceptualised* rather than how they are *characterized*, though given that the focus of her paper is meant to be on “the language used to characterize the empirical facts of psychopathy” ([30]:3), and nothing in her argument seems to hang on which of these terms is used, I will use the term “characterize” throughout this paper.

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That the “language of deficit” favours *exculpatory* judgments while the language of “mere difference” maybe even favours *greater condemnation* of psychopaths ([30]:1, 12), is one kind of claim—I take it to be an empirical observation on how our responsibility assessments tend to be affected by the way that we characterize differences between psychopath and normal brains. However, instead of looking for further evidence either for or against this empirical claim,² in this paper I want to focus on a different issue which

² As an empirical observation this claim seems warranted, since the language of disorder is pervasive in many contexts, and it often performs this exculpatory function. For instance, *disease of the mind*, mental *impairment*, *deficit*, *pathology* or *malfunction* (and other similar deficit concepts) is supposed to be the basis of diminished responsibility in the American Law Institute’s Model Penal Code 1962 ([32]:1790), the Australian Criminal Code Act 1995 ([24]:187–193), in Israeli criminal law [31], in the Durham test, the “irresistible impulse” test, and in the famous McNaghten rule ([20]:417, quoting *Regina v. McNaghten*, 1843; [32]:1789–1790). Eigen provides a detailed and fascinating historical account of how the notion of insanity has played an increasingly important role in determinations of responsibility within the law [10]. More recently, descriptions of psychological deficits have been given a neuroscientific rendering – for instance, various bodies including the American Psychological Association [2] submitted documents to support the respondent in *Roper v. Simmons* [8] which cited neurological deficits in adolescents’ developing brains [5, 15] as the causes of their reduced responsibility. The idea that neurological deficits exculpate adolescents from responsibility has even been embraced within the commercial sector – for instance a recent advertisement by the Allstate Insurance Company reads “Even bright, mature teenagers sometimes do things that are ‘stupid.’ But when that happens, it’s not really their fault. It’s because their brain hasn’t finished developing” [1]. (I thank an anonymous reviewer for a pointer to Allstate’s advertisement.) In the popular press, the case of the “middle-aged Virginian man with no history of any misdemeanour [who] began to stash child pornography and sexually molest his 8-year-old step-daughter” ([7]:42), and whose personality changes and “powerful sex addiction w[ere] caused by an egg-sized tumor in his brain”, is also discussed in terms of the notions of disease, damage, illness and abnormality, all of which are seen as exculpating him of responsibility (e.g. [27]). Even those who are critical of what they see as the over-use of modern neuroimaging techniques within the courtroom (e.g. [33]) caution that although genuine diseases of the mind do exist, we must be careful to look for these and not merely for the presence of brain activity when examining neuroimaging scans in the courtroom; however this is after all nothing less than tacit acceptance of the claim that the presence of mental *disorder*, but not of mere difference (or simply of biological causation), is an exculpatory condition.

Reimer raises towards the end of her paper where she asks: “*Should* how we conceptualise psychopathy (as a biological or merely normative disorder) influence our attitudes toward *practical* issues, such as... responsibility?” ([30]:14, original emphasis). I will argue that our assessments of psychopaths’ responsibility should *not* be affected by how these brain differences are characterized (or even by what is the correct way of characterizing these differences)—i.e. as biological disorders or as mere biological differences—because neurological conditions do not undermine responsibility simply in virtue of being disorders, but rather they do so in virtue of the effect which they have on our mental capacities—capacities which are required for moral agency.

Disorder is neither necessary nor sufficient for reduced responsibility

Should our characterization of psychopaths’ brains, as either disordered or as merely different, affect our judgments concerning their responsibility? A positive answer to this question would entail that *disorder* but not *mere difference* reduces responsibility, or put another way, that disorder is sufficient or necessary for reduced responsibility.³ However there are at least two reasons to reject the claim that disorder is sufficient or necessary for reduced responsibility.

First, that disorder is *not sufficient* for reduced responsibility is evidenced by the fact that people suffering from *hypomania* may sometimes even be more rather than less responsible. Hypomania, one of two alternating mood fluctuations of Bipolar II Disorder, is characterized by the following symptoms: “elevated (euphoric) and/or irritable mood, plus at least three of the following symptoms (four if mood is only irritable): grandiosity, decreased need for sleep, increased talking, racing thoughts, distractibility, overactivity (an increase in goal-directed activity), psychomotor agitation and excessive involvement in risky activities” ([3]:727). These symptoms can be distressing and harmful to those afflicted by them since they may lead them to take unreasonable risks, to take on more projects than

³ This follows from the claim that we tend to see brain differences as exculpatory when we think of them as *disorders*, but not when we view them as *mere* differences.

what they can handle, or to act in ways which make them seem brash, dismissive and unfriendly. And although the precise causes are still not known, a growing body of literature now suggests that Bipolar II Disorder (and thus hypomania) has a neurological basis (e.g. [6, 19, 28, 26]).

Given these symptoms and their apparent neurological basis, hypomania can probably be legitimately viewed as a disorder,⁴ and so if the presence of disorder were a sufficient condition for reduced responsibility, then hypomanic individuals should be less responsible on account of their hypomania. However, as Stephen Morse points out, “a business-person with hypomania who is especially energetic and sharp in some stages of his illness” may actually be more rather than less responsible—because of their heightened senses and increased acuity of thought, they may for instance be “hyper-responsible” and “undoubtedly competent to contract in this state [despite their] abnormality” ([25]:40). Thus, the mere fact that someone is suffering from a disorder *per se* need not entail that their responsibility will necessarily be reduced—i.e. disorder is *not sufficient* for reduced responsibility.

Second, that disorder is *not necessary* for reduced responsibility either, is plain when we consider young children—a group whose responsibility is reduced despite the absence of neurological disorder.⁵ We do not typically think that young children (e.g. 5 year olds) are fully responsible for the things that they do. For instance, when a young child runs through a room and accidentally knocks a cup off a table, we do not typically think that they are as blameworthy for doing this as an adult would have been had they done exactly the same thing, and the reason for this is that children do not yet realize that certain behaviour is dangerous—i.e. they lack the wisdom, foresight and

the capacity to steer away from certain risky conduct.⁶ Similarly, the very reason why we employ baby sitters to take care of young children when we go out at night, rather than leaving them at home by themselves, is because we know that they lack the capacity to look after themselves properly. Admittedly, recent studies suggest that the human brain takes years to fully mature (e.g. [5, 15]), and so it is plausible that the reason why children fail to have certain capacities is indeed because their brains have not yet fully matured. However, despite the fact that there are undeniably some neurological reasons why children fail to have certain capacities and why they act like they do, it stretches the meaning of the term to claim that this brain immaturity is an instance of some kind of a disorder, and hence that the reason why children are not fully responsible is because they suffer from this disorder—it is simply another stage in the normal process of human development—since the simple reason why we normally claim that children are not fully responsible is not because we suppose that they suffer from some neurological disorder, deficit, malfunction or illness, but simply because their immature brains lack the capacities which a person must have to be a fully responsible agent.⁷ Children’s responsibility is reduced despite the fact that they do not suffer from any disorder, and so disorder is *not necessary* for reduced responsibility either.

Given that disorder is neither sufficient nor necessary for reduced responsibility—responsibility can plausibly be enhanced by some disorders, and it can also be reduced even in the absence of any disorder—I therefore submit that simply labelling psychopathy as a disorder should not affect our judgments about their responsibility.

⁴ Reimer cites three reasons which “mitigate against the idea that both [schizophrenia and psychopathy] are disorders”: (i) “schizophrenia is associated with genuine neurological impairment”, (ii) “schizophrenics often seek treatment for their condition”, and (iii) schizophrenia is harmful and disadvantageous ([30]:10), emphasis and internal quotation marks removed). These features are present in hypomania, which provides some reason to think of it as a disorder.

⁵ Contra the previously-cited claims supporting the respondent in the Supreme Court of the United States case *Roper v. Simmons* (at note 2 above).

⁶ Naturally, we may still speak firmly to them and chastise them for being careless, but our assessment of their blameworthiness would be calibrated to their lower capacities, and even if we do treat them a bit more harshly than what they would otherwise deserve given their reduced capacities, this is probably done to morally educate them (I thank an anonymous review for this point) and, in the shorter term, to ensure that they do not do it again.

⁷ Walter Glannon also suggests that the way to think about children’s reduced responsibility is not by claiming that they suffer from a disorder, but that due to their brains not yet being fully mature they lack certain mental capacities that are important for moral agency ([13]:74).

Responsibility hinges on capacities

The above discussion hopefully shows that whether someone's responsibility is reduced or not depends not on whether their neurological condition is a disorder *per se*, but rather that it depends on how that neurological condition affects the mental capacities which are required for moral agency—i.e. that capacity and not disorder is what determines responsibility.⁸ However this point requires further clarification.

Firstly, what determines whether someone is responsible for their actions (or for the outcomes of those actions) is not just what capacities they actually had, but also whether they are responsible for their lack of those capacities. After all, an intoxicated person will indeed lack the capacity to drive safely, but should they cause a car accident due to their drunken state then we would not want to deduce from the mere fact that they actually lacked the capacity to drive safely on that occasion that they are not responsible for that accident. Similarly, a person who has gambled away all of their money will indeed be unable to repay their debts, but again we would not want to deduce from the mere fact that they now actually lack the capacity to repay their debts, that they are therefore not to blame when they default on their loan. In both of these cases, despite the fact that the said parties lacked their respective capacities, we might still be justified in attributing responsibility to them if they are responsible for the fact that they lacked those capacities.⁹

⁸ Heidi Maibom's recent discussion [18] suggests that this *capacity-theoretic* conception of responsibility is fairly prevalent in the philosophical literature on responsibility – for instance, Walter Glannon explicitly defends a “capacity-theoretic conception of ... responsibility” ([13]:71) – and H. L. A. Hart's discussion of responsibility (e.g. [17]:218, 227) suggests that something like the concept of “capacity responsibility” plays a crucial role in legal reasoning about responsibility. See Nicole Vincent's discussion ([34]:105–108, especially points (ii.a) and (ii.b) on p. 108) for an elaboration of the role which this *capacity responsibility* plays in legal reasoning about people's responsibility.

⁹ Whether we are justified in attributing responsibility to the alcoholic and to the spendthrift for their respective lack of the relevant capacities is a complex issue which I shall not discuss here; my point is only that *if* they are indeed responsible for their lack of those capacities then the mere fact that they now actually lack those capacities will not exculpate them of their responsibility.

Secondly, although I have suggested that assessments of responsibility depend in part on what capacities a person has, I have said little about *precisely* which capacities people must have in order to be responsible agents, and there are two broad reasons for this omission. First, it is because the capacities which a person must have in order to be a responsible agent will differ from context to context: for instance, although a person who accepts the role of being a surf life saver is expected to have one set of capacities (e.g. ability to swim, bravery, etc), a person who accepts the role of being a baby sitter is expected to have a different set of capacities (e.g. patience, knowledge that children can get up to terrible strife without proper supervision); and thus although it might be unreasonable for us to expect the next door neighbour's daughter to save our child from drowning once the child has fallen into the deep end of our swimming pool (and thus to blame her when she fails to save our drowning child), it would presumably still be reasonable for us to expect her to look after our son properly if that is what she agreed to do and to ensure that he does not accidentally fall into the swimming pool in the first place.¹⁰ Second, although the law has typically assumed that people must reach a certain threshold of *rationality* before they will be treated as responsible agents—for instance, Stephen Morse argues that “[t]he capacity for rationality is the touchstone of responsibility” within the law ([25]:38)—recent studies suggest that rationality is not the only capacity which a person must have to be a responsible moral agent since our affective/emotional capacities also play a role in securing moral agency.¹¹

¹⁰ Thus, to be responsible an agent needs the skills required by the roles they consent to play (I thank an anonymous reviewer for helping me put this point more clearly), but also the more general skills required to determine whether they should consent to playing this or that role. After all, if we suspect that our next door neighbour's daughter is highly unreliable, then in the first instance *we* would be failing in *our duties* as parents by asking her to baby sit our child (which may place some of the responsibility for the drowning tragedy onto us), and in the second instance it may even be unreasonable to expect her to be a reliable judge of her own abilities (which may conceivably reduce her responsibility). Stephen Morse also recognizes this context-dependence of the capacities which are required for moral agency when he points out that “[t]he requirements for competence to contract and for criminal responsibility are not identical” ([25]:38).

¹¹ This seems to be the developing consensus within the new field of *moral cognition* (e.g. see [16]; or the collection of articles introduced by [12]).

Thus, although it is plausible that there might be a certain common core of mental capacities which *any* person must have in order to be a responsible or *competent moral agent*—for instance, the capacity to perceive the world as it actually is rather than to suffer from persistent and intractable delusions, to not be too susceptible to irrationality, and to have the right set of affective responses to morally-laden scenarios (e.g. see [20]), as well as perhaps the more general “capacity to recognize and react to moral reasons” [14] which fits under the broader umbrella heading of acting from a mechanism that is *responsive to reasons* in John Martin Fischer and Mark Ravizza’s sense¹²—beyond these *general* comments a more detailed answer to the question of what capacities are required for moral responsibility must take into account both the fact that different capacities will be required within different contexts (i.e. different roles may require different sets of mental and other capacities—see note 10 above), and that future neuroscience may reveal a range of capacities that we were not even aware of but which never the less are actually used by competent moral agents within their various respective contexts.

Finally, my claim is not just that our responsibility judgments should not be affected by how we *think or talk* about the differences between psychopath and normal brains, but it is rather that even if there were some *fact of the matter* about how these differences ought to be conceptualised or characterized, then this would still make no difference to what we ought to say about the psychopath’s responsibility, because whether someone is responsible for something or not depends on their capacities (though note the aforementioned qualifications), and not on whether their condition is *per se* a disorder. Irrespective of whether someone actually/really has a malfunction in their brain or not, their responsibility will only be diminished if that malfunction decreases the relevant capacities, and their responsibility will only be enhanced if that malfunction increases the relevant capacities. Thus, differences in the brain have little if any significance for responsibility *qua* disorder, deficit, malfunction, disease or whatever else, but

¹² For a concise exposition of Fischer and Ravizza’s account see Fischer [11], or one of Michael McKenna’s excellent summaries (and critiques) [21–23]. Also see Antony Duff ([9]:249) for comments on the link between Glannon’s and Fischer & Ravizza’s account.

only in virtue of the effect which they have on those people’s capacities.

Conclusion

In conclusion, Reimer is probably right in her claim that the differences between psychopath and normal brains can be characterized either as biological disorders or as mere differences, or at least that a strong case can be made out in favour of either of these characterizations.¹³ She is also probably right that the way in which we characterize the differences between normal and psychopath brains tends to bias our judgments about their responsibility for criminal misconduct—that when we think of these differences as biological disorders then we are more inclined to excuse them, and that when we think of these differences as mere differences but not as biological disorders then we are more inclined to not excuse them.

However, if this paper’s arguments are right then Reimer’s two observations should be taken not as reasons to conduct further empirical research or conceptual analysis to determine how various neurological conditions—and specifically how the differences between psychopath and normal brains—should be characterized, but as reasons (i) to pay closer attention to how the language that we use to describe various conditions may without our knowing it later bias our assessments of responsibility, (ii) to use neutral language whenever possible to describe the biological bases of various conditions, and

¹³ My apparent reservation here and in these last two paragraphs – i.e. my use of the word “probably” – reflects not my lingering doubts about Reimer’s claims, but simply the fact that the focus of my paper has not been the same as Reimer’s focus; while her discussion addressed the question of whether there is any reason to prefer characterizing the raw scientific data about the differences between the brains of psychopaths and normals using the language of deficit or the language of mere difference, I have focussed on addressing what she called the “difficult and important question” of whether our choice of either one of these characterizations should be allowed to affect how we view the psychopath’s responsibility. Since I have added nothing further, either by way of additional support for the points which Reimer was trying to make, or by analyzing her arguments for those points (other than the examples cited in note 2 above, which support her claim that the language of disorder does indeed seem to play a pervasive exculpatory role in various contexts), I therefore prefer to abstain from endorsing her particular conclusions.

importantly (iii) to conduct further empirical research into how various conditions affect our mental capacities, since it is such facts about people's mental capacities (along with assessments of what capacities different contexts require of us, as well as of what it is reasonable to expect of whom under various circumstances and why) which should ultimately inform our assessments of people's responsibility.

References

- Allstate. 2007. Why do most 16-year-olds drive like they're missing a part of their brain? Because they are. Retrieved 20080706, from <http://www.allstate.com/content/refresh-attachments/Brain-Ad.pdf>.
- APA. 2004. *Brief for the American Psychological Association, and the Missouri Psychological Association as amici curiae supporting respondent i-xii*: 1–30. Washington: American Psychological Association.
- Benazzi, F. 2007. Bipolar II disorder: Epidemiology, diagnosis and management. *CNS Drugs* 219: 727–740.
- Blair, R.J.R. 2007. Aggression, psychopathy and free will from a cognitive neuroscience perspective. *Behavioral Sciences and the Law* 25: 321–331.
- Blakemore, S.-J., and S. Choudhury. 2006. Brain development during puberty: state of the science. *Developmental Science* 91: 11–14.
- Blumberg, H.P., H.-C. Leung et al. 2003. A functional magnetic resonance imaging study of bipolar disorder. *Archives of General Psychiatry* 60: 601–609.
- Churchland, P.S. 2006. The big questions: Do we have free will? *New Scientist* 2578: 42–45. (18-Nov).
- Donald P. Roper. 2005. Superintendent, Potosi Correctional Center, Petitioner v. Christopher Simmons, Supreme Court of the United States.
- Duff, R.A. 2003. Book review: The mental basis of responsibility by Walter Glannon. *Australian Journal of Legal Philosophy* 28: 248–251.
- Eigen, J.P. 2004. Delusion's odyssey: Charting the course of Victorian forensic psychiatry. *International Journal of Law and Psychiatry* 275: 395–412.
- Fischer, J.M. 2005. Reply: The free will revolution. *Philosophical Explorations* 82: 145–156.
- Gerrans, P., and J. Kennett. 2006. Introduction: Is cognitive penetrability the mark of the moral? *Philosophical Explorations* 91: 3–12.
- Glannon, W. 2005. Neurobiology, neuroimaging, and free will. *Midwest Studies in Philosophy* 29: 68–82.
- Glannon, W. 2008. Moral responsibility and the psychopath. *Neuroethics* doi:10.1007/s12152-008-9012-x.
- Gogtay, N., J.N. Giedd et al. 2004. Dynamic mapping of human cortical development during childhood through early adulthood. *Proceedings of the National Academy of Sciences of the United States of America* 10121: 8174–8179.
- Greene, J., and J. Haidt. 2002. How (and where) does moral judgment work? *Trends in Cognitive Sciences* 612: 517–523.
- Hart, H.L.A. 1968. *IX. Postscript: Responsibility and Retribution. Punishment and Responsibility*. 210–237. Oxford: Clarendon.
- Maibom, H.L. 2008. The mad, the bad, and the psychopath. *Neuroethics* doi:10.1007/s12152-008-9013-9.
- Malhi, G.S., B. Ivanovski et al. 2007. Neuropsychological deficits and functional impairment in bipolar depression, hypomania and euthymia. *Bipolar Disorders* 9: 114–125.
- Matthews, S. 2004. Failed agency and the insanity defence. *International Journal of Law and Psychiatry*: 413–424.
- McKenna, M. 2000. Assessing reasons-responsive compatibilism. *International Journal of Philosophical Studies* 81: 89–124.
- McKenna, M. 2001. Book review: Fischer and Ravizza's "Responsibility and Control". *The Journal of Philosophy*.
- McKenna, M. 2005. Reasons reactivity and incompatibilist intuitions. *Philosophical Explorations* 82: 131–143.
- McSherry, B. 1997. The reformulated defence of insanity in the Australian Criminal Code Act 1995 (Cth). *International Journal of Law and Psychiatry* 202: 183–197.
- Morse, S.J. 2006. Moral and legal responsibility and the new neuroscience. In *Neuroethics: defining the issues in theory, practice, and policy*, ed. Judy Illes, 33–50. Oxford: Oxford University Press.
- Peterson, C.K., and E. Harmon-Jones. 2008. Proneness to hypomania predicts EEG coherence between left motor cortex and left prefrontal cortex. *Biological Psychology* 78: 216–219.
- Pinto, C. 2003. Putting the brain on trial. Media General News Service. Retrieved 20080706, from <http://www.rifters.com/real/articles/brainontrial.htm>.
- Putman, P., S. Saevarsson et al. 2007. Hypomanic trait is associated with a hypovigilant automatic attentional response to social cues of danger. *Bipolar Disorders* 9: 779–783.
- Raine, A., and Y. Yang. 2006. Neural foundations to moral reasoning and antisocial behavior. *Social Cognitive and Affective Neuroscience* 13: 203–213.
- Reimer, M. 2008. Psychopathy without (the Language of) Disorder. *Neuroethics* doi:10.1007/s12152-008-9017-5.
- Roe, D., Y. Ronen et al. 2005. Reduced punishment in Israel in the case of murder: Bridging the medico-legal gap. *International Journal of Law and Psychiatry* 28: 222–230.
- Sapolsky, R.M. 2004. The frontal cortex and the criminal justice system. *Philosophical Transactions of the Royal Society of London* 359: 1787–1796.
- Tallis, R. 2007. Why blame me? It was all my brain's fault—The dubious rise of 'neurolaw'. Retrieved 20080706, from http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article2726643.ece.
- Vincent, N. 2006. Responsibility, Compensation and Accident Law Reform. Discipline of Philosophy, Faculty of Humanities and Social Sciences. Adelaide, University of Adelaide. Doctor of Philosophy. Retrieved 20080706, from <http://digital.library.adelaide.edu.au/dspace/handle/2440/39507>.