The Mentally Vulnerable Defendant in the Criminal Justice System of England and Wales: a Critical Investigation into Issues of Moral Agency, Criminal Responsibility and Effective Participation

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Abstract

This thesis, submitted for the award of Doctor of Philosophy by Completed Work, represents the collation and synopsis of eight publications, all relating to the protection of mentally vulnerable defendants within the criminal justice system in England and Wales, but with particular emphasis on moral agency, unfitness to plead and effective participation at trial. Following an investigation into moral agency and an examination of the proper attribution of criminal responsibility in relation to the offence/defence of infanticide and the partial defence of diminished responsibility, the focus moves on to unfitness to plead and the aspiration that only defendants who are capable of effective participation should have to stand trial. To otherwise require an unfit defendant to stand trial might result in a trial being unfair. The need for a defendant to be able to participate in a moral conversation in this context is highlighted. Engagement in a moral conversation is necessary in order for a defendant to be able to take responsibility for his criminal actions. Particular scrutiny is then paid to the untenable position of mentally vulnerable defendants being tried in the magistrates' courts, given the absence of a corresponding procedure to the trial of facts hearing in the Crown Court. Throughout the thesis, a critical examination of possible law reform is conducted, while the final two publications address the need for policy changes as an alternative to reform.

This collation and synopsis of publications advance existing knowledge by:

- examining the theoretical underpinning of the relevant mental condition defences and consistently requiring a defendant to be a moral agent in order to properly attribute criminal responsibility;
- responding to the Law Commission consultation process on unfitness to plead;
- adopting a different view to the Law Commission in recommending that any reform of the test for effective participation should be linked to a recognised medical condition;

- examining the legal aid system, the law relating to effective participation in the magistrates' courts and the views of a small number of legal professionals in order to recommend that policy changes should take priority over law reform;
- addressing the NHS Liaison and Diversion Service as a key, crucial factor in supporting the mentally vulnerable defendant who is unable to effectively participate in his trial;
- developing a networking group for practitioners working with vulnerable defendants in the North East of England.

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A huge thank you to my supervisor and friend, Dr Cath Crosby, who thought I should have done this a long time ago. I could not have done this without you! Thanks are also due to Professor Ray Arthur for his invaluable words of encouragement.

There are many others owed a debt of gratitude. Professor Alan Reed started me (and, no doubt, many others) on this journey. Mike Bowen generously agreed to allow our co-authored paper to be included in this thesis. Dr Anne Lodge and Heather Armstrong are sources of constant inspiration and moral support. Angela King's motto of 'say yes, panic later' has stood me in good stead on countless occasions. Jonathan Lilleker's attention to detail and enthusiasm helped me over the final hurdle.

Finally, I am indebted, as always, to Joe Howard, Deputy Head of North Yorkshire PDU, for relentlessly challenging me and driving me to do better. Thanks also to Charlotte Howard for her meticulous proof reading (as far as page 16), interspersed with stimulating academic debate, and to Bailey Howard for turning out so well despite our best efforts!

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Chapter One: Introduction

Publications

The following thesis represents the author's submission toward the degree of Doctor of Philosophy by Completed Work at Teesside University. The publications included for consideration cover a period spanning 11 years. Where appropriate, updates on these areas will be addressed in the relevant section. Published works to be included as part of this submission are:

Publication 1: 'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 194.

Publication 2: 'Unfitness to Plead and the Overlap with *Doli Incapax*: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 380.

Publication 3: 'Unfitness to Plead and the Trial of Facts: A Critical Review of the Law Commission's Proposals and the Decision in R v MB' (2012) 76 *Journal of Criminal Law* 421.

Publication 4: 'Diminished Responsibility, Culpability and Moral Agency' in *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine*, eds. B. Livings, A. Reed and N. Wake (2015, Cambridge Scholars Publishing) 318.

Publication 5: 'Lack of Capacity: Reforming the Law on Unfitness to Plead' (2016) 80 *Journal of Criminal Law* 428.

Publication 6: ‘The offence/defence of infanticide: a view from two perspectives' (2018) 82 *Journal of Criminal Law* 470.

Publication 7: ‘Effective participation of mentally vulnerable defendants in the Magistrates’ Courts in England and Wales – the ‘front line’ from a legal perspective’ (2021) 85 *Journal of Criminal Law* 3.

Publication 8: ‘Effective Participation of Mentally Vulnerable Defendants in the English Magistrates’ Courts – the Crucial Role of Liaison and Diversion’ (2022) *Howard Journal of Crime and Justice* https://doi.org/10.1111/hojo.12470

Only publication 2 is co-authored. The co-author’s consent to the publication being included for submission for this body of research is contained in Appendix 7. The sections addressed by each author within this publication are discreet and will be elaborated on further below.

All of the above publications are concerned with the protection of mentally vulnerable defendants within the criminal justice system, and involve either a jurisprudential examination of moral agency, a doctrinal investigation into criminal responsibility within some of the mental condition defences or a qualitative analysis of both legal and Liaison and Diversion (L&D) practitioners who work with mentally vulnerable defendants on a regular basis.

The term mentally vulnerable defendant requires definition. In the absence of a ‘comprehensive definition of vulnerabilities’,[1] for the purpose of this thesis mentally vulnerable defendants are defined in the broadest sense to include suspects or defendants suffering from any mental disorder, personality disorder, autism spectrum disorder or learning difficulty which might compromise their ability to stand trial or bring into question

[1] Revolving Doors Agency and Centre for Mental Health *In Ten Years’ Time: Improving outcomes for people with mental ill-health, learning disability, developmental disorders or neuro-diverse conditions in the criminal justice system* (Revolving Doors Agency, 2019) 25.

whether they should be held criminally responsible for their actions. This definition reflects the inclusive approach of the JUSTICE Report towards defining mental vulnerability.[2] Also, throughout this thesis, gendered use of singular pronouns will alternate between 'he', 'she' and 'they'.

The mental condition defences covered within this thesis are: diminished responsibility, infanticide and unfitness to plead. Unfitness to plead and effective participation at trial will be the central focus. The publications related to diminished responsibility and infanticide (publications 4 and 6) develop the need for a principled approach to the attribution of criminal responsibility where the defendant has experienced or is experiencing a sufficiently compromising form of mental vulnerability. These publications build on two earlier articles which originated from a degree of Master of Jurisprudence at Durham University,[3] and which initiated the author's examination into moral agency as being a prerequisite of criminal responsibility. This principled approach to criminal responsibility is developed in publications 4 and 6. Additionally, publication 6, which addresses the offence/defence of infanticide, entrenches the stance that there should be a causal link between the mental vulnerability and the criminal act, a claim that is echoed in relation to criticisms of the Law Commission's proposed test for unfitness to plead.[4] A link between some form of mental vulnerability and all mental condition defences is essential to promote consistency within the law, and equality of access to justice.

The main body of this research focusses on the test for unfitness to plead and the ability of a mentally vulnerable defendant to effectively participate in a trial. This test, available only in the Crown Court, enables a mentally vulnerable defendant to avoid standing trial.[5] Some of the unfitness to plead publications (publications 1, 2 and 3) contributed to a law reform

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[2] JUSTICE, *Mental Health and Fair Trial* (2017) at https://justice.org.uk/mental-health-fair-trial/, 15-16 (accessed 19 April 2021).
[3] H. Howard, 'The Confinement of Personality Disordered Individuals: Questions of Justice and Safety' (2001) 65 *Journal of Criminal Law* 161; and H. Howard, 'Reform of the Insanity Defence: Theoretical Issues for Consideration' (2003) 67 *Journal of Criminal Law* 51. See Appendix 4. The defence of insanity was examined within the degree of Master of Jurisprudence; for this reason, the defence will be omitted from this thesis.
[4] Law Commission, *Unfitness to Plead, Vol. 2: Draft Legislation* (Law Com. No. 364, 2016).
[5] Pritchard (1836) 7 C & P 303; M (John) [2003] EWCA Crim 3452.

consultation process on unfitness to plead carried out by the Law Commission.[6] In addition to these publications, written comments were also submitted to the Law Commission as part of the consultation process.[7] This was followed by attendance at a symposium in June 2014 and subsequent participation in a working group at the Ministry of Justice in October 2014. The consultation process was completed in 2016, resulting in publication 5, which comments on the proposed reforms.

While no successful reforms were implemented, in an effort to maintain the profile of this area of law, publication 7 involves an examination into whether any new test for effective participation would be practicable in the magistrates' courts. The move towards a more socio-legal and qualitative investigation of this area aims to test the hypothesis that both the current test for unfitness to plead and any new test proposed by the Law Commission would be unworkable in the magistrates' courts, and that policy changes might achieve better results in supporting and diverting mentally vulnerable defendants out of the criminal justice system. Publication 8 continues the investigation into the need for policy changes rather than legal reform. In this respect, by combining the different methodological approaches and rejecting law reform in favour of policy changes, the final two publications offer the strongest original contribution to knowledge. Appendix 3 contains a sample of transcribed anonymised interviews with coding and thematic analysis.

The Coherent Threads and Context

The coherent threads within this thesis aim to demonstrate where each of the publications fits in relation to existing knowledge. The impetus behind each of the publications is the need to critically examine if, and how, the criminal law supports and protects mentally vulnerable defendants, at the same time as balancing the need for protection of the public. If it is correct to say that some of the most vulnerable people in society are being protected

[6] Law Commission Consultation Paper, *Unfitness to Plead* (Law Com. CP No. 197, 2010).
[7] See Appendix 2.

from a criminal prosecution, then the criminal justice system is functioning properly.[8] If this statement is incorrect, then some of the most vulnerable people in society are being failed by the criminal justice system. It is unsurprising to note that the latter statement is currently a more accurate description of the criminal justice system in England and Wales.[9]

Throughout this thesis, the position taken is that any principled development of the criminal law can only be achieved by focusing on the need for the defendant to be a rational moral agent and, consequently, on the proper attribution of culpability.[10] Investigating the support and protection of mentally vulnerable defendants therefore necessitates an examination of moral agency. Accordingly, each of the following threads run through two or more of the publications: moral agency and the attribution of full/partial criminal responsibility; moral agency and the need for a causal link/diagnostic threshold between the defendant's mental condition and his actions; moral agency and the trial as a moral conversation. These investigations subsequently underpin a principled and practical approach to effective participation. A matrix identifying the key themes, originality and contribution to knowledge is set out in Appendix 5.

The publications are grouped together and form part of a coherent whole as follows:

- Part One. The 'moral agency' publications[11] share a similar approach to one another. The diminished responsibility publication advances the argument that mental condition defences require a principled underpinning. This publication provides a theoretical examination of moral agency which is also considered in the

[8] H. Howard, 'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 194, 194.
[9] See, for example, H. Howard, 'Effective participation of mentally vulnerable defendants in the Magistrates' Courts in England and Wales – the 'front line' from a legal perspective' (2021) 85 *Journal of Criminal Law* 3.
[10] H. Howard, 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 380, 387-389; H. Howard, 'Diminished Responsibility, Culpability and Moral Agency' in *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine*, eds. B. Livings, A. Reed and N. Wake (Cambridge Scholars Publishing, 2015) 318.
[11] H. Howard, 'Diminished Responsibility, Culpability and Moral Agency' (2015) ('the diminished responsibility publication') and H. Howard, 'The Offence/Defence of Infanticide: A View from Two Perspectives' (2018) ('the infanticide publication').

first publication on unfitness to plead[12] and to which a return is made in subsequent publications. Moral agency is further examined in the infanticide publication. This publication is additionally relevant to the test for unfitness to plead given that this offence/defence lacks a causal link between any mental condition experienced by the defendant and her act/omission. Such a causal link is also absent in the current test for unfitness to plead and would continue to be missing from the Law Commission's proposal[13] for a reformed test for effective participation, an issue which publication 5 addresses. Both publications also comment on the scope for a partial attribution of criminal responsibility and examine the difficulty in providing a theoretical rationale to justify doing so.

- Part Two. The 'unfitness to plead' publications,[14] which form the central part of the thesis, trace the research journey from an initial response to the Law Commission consultation process, through to its conclusion and beyond.

- Part Three. The magistrates' courts publications[15] mark a transition from a jurisprudential/doctrinal approach to criminal responsibility in favour of a qualitative/socio-legal approach. At this stage in the research process, a deviation is made from advocating and critiquing legal reform towards a more pragmatic, policy-based approach.

[12] Howard, n.8.
[13] Law Commission, n.4.
[14] H. Howard, 'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011); H. Howard and M. Bowen, 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011); H. Howard, 'Unfitness to Plead and the Trial of Facts: A Critical Review of the Law Commission's Proposals and the Decision in R v MB' (2012); H. Howard, 'Lack of Capacity: Reforming the Law on Unfitness to Plead' (2016).
[15] H. Howard, 'Effective participation of mentally vulnerable defendants in the Magistrates' Courts in England and Wales – the 'front line' from a legal perspective' (2021); H. Howard, 'Effective Participation of Mentally Vulnerable Defendants in the English Magistrates' Courts – the Crucial Role of Liaison and Diversion' (2021).

Originality and Contribution to Knowledge

There are six aspects to the originality and contribution to knowledge made by this thesis.

Firstly, these publications combine a development of existing theories of culpability in order to apply this theoretical underpinning to the relevant mental condition defences with the consistent requirement for a defendant to be a moral agent in order to properly attribute criminal responsibility or engage in a moral conversation. While moral agency has been examined in many contexts,[16] this theoretical underpinning has not focussed in depth on the law relating to unfitness to plead and on the need for a defendant to be capable of holding a moral conversation.

Secondly, the responses made to the Law Commission throughout its consultation on unfitness to plead, which form a basis of the 'unfitness to plead' publications, provide an original voice as to how this area of law might be developed.[17] The third original insight is the adoption of a different view to the Law Commission in recommending that any reform of the test for effective participation should be linked to a recognised medical condition. This requirement that there should be a causal link to a diagnostic threshold is echoed in the 'moral agency' papers.

Fourthly, examination of the legal aid system, alongside the law in relation to effective participation in the magistrates' courts and the views of legal professionals, provides an original insight into the need for policy changes to take priority over law reform. The fifth element of originality is the development of this insight in the final publication, by addressing the NHS Liaison and Diversion Service as a key, crucial factor in supporting the mentally vulnerable defendant.

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[16] See, for example, Law Commission Discussion Paper, *Criminal Liability: Insanity and Automatism* (Law Com. DP, 2013) A.4.

[17] This can be demonstrated further by reference to responses to and comments cited in: Law Commission, *Unfitness to Plead, Vol. 1: Final Report* (Law Com. No. 364, 2016); Law Commission, *Unfitness to Plead: An Issues Publication* (2014); Law Commission, *Unfitness to Plead - Analysis of Responses* (2013); Law Commission Discussion Paper, *Criminal Liability: Insanity and Automatism* (Law Com. DP, 2013).

Finally, as a direct response to interviews conducted with legal professionals and Liaison and Diversion teams, a networking community was developed for practitioners working with vulnerable defendants in the North East of England and has generated interest and support from magistrates, Liaison and Diversion teams, legal professionals, the police, the NHS and Lord Bradley, author of the Bradley Report.[18]

Critical Reflection and Professional Development

According to Bassot, reflective writing should be expressed in the first person and should focus on 'experiences, thoughts, feelings and assumptions'.[19] In order to assess the context of the publications, their strengths and weaknesses, as well as my professional development, this will be the approach adopted under this heading throughout the thesis.

Researching, writing and refining work for publication has enabled me to develop a skillset that has undoubtedly enhanced my 'confidence, career and personal development'.[20] In terms of research skills, I have had the benefit of 'communicating and collaborating with peers',[21] not only academics, but also a wide range of practitioners such as barristers, solicitors, psychologists, medical practitioners, Liaison and Diversion personnel and magistrates. These experiences have given me the confidence to take a more strategic approach to my research, for example, in thinking how to create impact and in planning several articles ahead. Some of my earlier publications,[22] while reflecting my interest in the mental condition defences, did not develop as a consequence of a planned programme of research. My experience of producing the set of 'unfitness to plead' publications provided insight into how a research interest can allow for the development of expertise in a topic. Rather than each publication being self-contained and discreet, it was possible to build on

[18] K. Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, 2009).
[19] B. Bassot, *Reflective Journal* (Palgrave Macmillan, 2016) 16.
[20] S. Smith, *PhD by Published Work* (Palgrave Research Skills, 2015) 10.
[21] Ibid.
[22] N.3.

the knowledge acquired and develop ideas from each preceding publication. This skill was honed further in the 'magistrates' courts' publications. These publications challenged me to embark on a more focussed and socio-legal method of research. Without the earlier success of the 'unfitness to plead' publications, I would not have had the confidence to move into alternative research methods. These reflections will be developed further below.

My professional development as a consequence of these publications was not limited to research, but also extended into my teaching. I enhanced my ability to share knowledge with enthusiasm, providing anecdotes from some of my experiences, and I hope that I inspired some students, while creating a more rewarding learning experience for others. Jasper's 'experience-reflection-action' (ERA) cycle[23] will be employed under this heading within Chapters Three and Four. Within the first step of this cycle, 'experience' will be defined as the '*accumulation of knowledge and skills* over time', as well as the '*processes* you go through when you do something'.[24] Within the next step of reflection, I will focus on 'describing' and '[a]nalyzing the experience'[25] before detailing how I undertook any action I decided upon as a consequence.[26]

Critical reflection of the publications has been an essential tool to making improvements in my academic writing and in developing as a professional. Parts I, II and III of Chapter Three will address some of the following potential criticisms which also affect the body of research as a whole:

- I submitted most of my articles for publication in the *Journal of Criminal Law*. Without wishing to undermine the importance of this journal, this narrow focus has resulted in me missing out on a wider range of feedback, as well as opportunities to develop my confidence and networking potential. I have started to rectify this criticism with publication 8, which is published in the *Howard Journal of Crime and Justice*.

[23] M. Jasper, *Beginning Reflective Practice* (Cengage Textbooks, 2013) 9.
[24] Ibid., 10, emphasis in original.
[25] Ibid., 13.
[26] Ibid., 25.

- A publication relating to the defence of automatism might have consolidated my examination of the mental condition defences in the context of moral agency. While this defence amounts more accurately to an absence of *actus reus*,[27] as opposed to *mens rea*, this is something I hope to rectify in the future.
- The empirical research undertaken in publications 7 and 8 is small. While it does not form the main substance of either paper, a larger number of participants might have generated more robust conclusions.
- The 11 year timespan between publications 1 and 8 might indicate that some material is out of date. Given that publication 1 represents the start of a law reform consultation, and subsequent papers updated both the law and the Law Commission's position, this 11 year journey seems justified.

[27] Bratty v Attorney-General for Northern Ireland [1963] AC 386, 409.

Chapter Two: Methodology and Literature Review

Methodology

The prevailing methodology for publications 1 to 6 is a qualitative review of the mental condition defences from both jurisprudential and doctrinal perspectives. The aim for these publications was to provide a theoretical analysis as to the circumstances under which an individual should be held blameworthy,[28] followed by a critical examination of existing law to test whether there was symmetry.

Van Hoeke[29] describes the development of legal theory in the nineteenth century as 'a search for legal concepts, legal rules and legal principles that the whole of mankind would share'. The publications contained within this thesis will repeatedly assert that theory, and the search for legal principles, should underpin any reform of the law so that it can develop in a principled manner. The Law Commission subscribes to this view in its *Discussion Paper on Insanity and Automatism*,[30] stating that the 'concept of responsibility is a philosophical question' and, accordingly, concepts of culpability should 'inform our proposals for reform.'[31] Theoretical considerations are predominant in the 'moral agency' publications, but the need for a trial to be a moral conversation is a recurring theme throughout all of the remaining publications.

A doctrinal analysis of the 'black letter law'[32] is apparent throughout the 'unfitness to plead' publications. This relates to the test for unfitness to plead,[33] the trial of facts (section 4A)

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[28] In contrast to Moore's view that the terms culpability and blameworthy should carry distinct 'stipulative definitions' (M. S. Moore, 'Four Friendly Critics: A Response' (2012) 18 *Legal Theory* 491), this thesis will treat the terms synonymously.
[29] M. Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing Plc., 2013) 2.
[30] Law Commission, n.16.
[31] Ibid., A.4.
[32] K. S. Cristobal, 'From Law in Blackletter to Blackletter Law' (2016) 108 *Law Libr. J.* 181-216.
[33] R v M (John) [2003] EWCA Crim 3452; [2004] MHLR 86, developing the criteria set out in R v Pritchard (1836) 7 C & P 303.

hearing[34] and the age of criminal responsibility.[35] This is the most common type of legal research, black-letter law having 'dominated legal studies for many decades, if not centuries'.[36] As Van Hoecke states,[37] '[d]escription of the law is closely linked to its interpretation' and 'the core business of legal doctrine is interpretation'.[38] This hermeneutic approach to legal research means that 'texts and documents are the main research object and their interpretation, according to standard methods, is the main activity of the researcher.'[39] The interpretation of the law relating to the current test for unfitness to plead, the Law Commission's proposed test, and the trial of facts hearing all fit within this methodological approach.

For publications 7 and 8, a more socio-legal methodology was employed, with a small empirical component. The move towards a socio-legal discussion was necessary in order to inform a discussion of the legal aid system and its 'real world'[40] application in the magistrates' courts. This move was also required to investigate whether potential proposals for unfitness were workable in the magistrates' courts and, if not, to consider alternatives to law reform. The term 'socio-legal' can be used to describe 'a broad social science perspective on law that is not limited to the 'sociology of law' in the narrow sense, but may also extend to anthropology, psychology and even some criminology.'[41] It involves examination of 'social, political and economic influences'[42] on the law and, in the case of this thesis, the criminal justice system. By analysing the application of the law within the criminal justice system, the magistrates' courts publications mixed[43] doctrinal and socio-legal approaches. This has essentially facilitated 'the opportunity to challenge the

[34] Criminal Procedure (Insanity) Act 1964, s 4 and s 4A, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.
[35] Crime and Disorder Act 1998, s 34.
[36] S. Parmentier 'A tale of two worlds: a (very) select overview of socio-legal studies in Belgium' (2016) 12 *Int. J.L.C.*, 81, 83.
[37] Van Hoecke, n.29, 17.
[38] Ibid., 4.
[39] Ibid.
[40] C. Robson and K. McCartan, *Real World Research* (John Wiley & Sons, 2015) 11.
[41] Parmentier, n.35, 82.
[42] M. M. Siems and D. M. Sithigh, 'Mapping legal research' (2012) 71 *Cambridge Law Journal* 651, 662.
[43] Ibid., 668.

usefulness of court decisions and pieces of legislation from an external and…empirical perspective'.[44]

The qualitative empirical element of publications 7 and 8 allowed for a 'real world'[45] perspective of the impact of any legal reform being implemented in the magistrates' courts. Relevant ethical approvals for the small empirical element within publications 7 and 8 are contained in Appendix 6. Given that Liaison and Diversion teams operate within the NHS, an IRAS application[46] was required, as well as approval by the Teesside University Ethics Committee. These processes provided valuable insights into an alternative methodological approach to legal research, which has been gaining momentum in recent years.[47] Qualitative methods training was completed in order to undertake this previously unfamiliar research method. This facilitated the decision to conduct semi-structured interviews, and allowed for thematic analysis to provide integrity to the process, while recognising that qualitative research can never be truly objective.[48] In total, across the two 'magistrates' courts' publications, 15 participants were interviewed; this small sample cannot be representative of either the legal profession or the Liaison and Diversion (L&D) service, nor was this ever the intention. While the small number of participants is a weakness within the empirical aspect of the two papers, when combined with the reviews of relevant literature relating to the relevant law, the legal aid system and evaluations of the L&D service, the motive was to enrich the academic commentary within each publication, rather than to supplant it.

Tyler[49] suggests that empirical research is enhanced when combined with social science theories. The empirical research within this thesis is underpinned and enhanced by earlier research into theories of culpability. This theoretical analysis provides a principled foundation, allowing for stronger, more defensible recommendations which are not based

[44] Ibid., 665.
[45] Robson and McCartan, n.40, 11.
[46] Integrated Research Application System (myresearchproject.org.uk) (last visited 19 April 2021).
[47] T.R. Tyler, 'Methodology in Legal Research' (2017) 13 *Utrecht Law Review* 130, 130.
[48] A. Bryman, *Social Research Methods* (5th Edition, Oxford University Press, 2016), 570.
[49] Tyler, n.47, 131.

solely on the small amounts of empirical data; rather, the empirical data complements the jurisprudential and doctrinal analyses. The view that 'research should have an impact on society and not sit in isolation'[50] underpins the approach taken in the 'magistrates' courts' publications. By moving from the theoretical to consultations with the Law Commission, then to observations of practitioners, this 'impact on society' is enhanced.

Part of the originality within this collation of publications stems from the blending of doctrinal, jurisprudential, socio-legal and empirical methodologies to arrive at a conclusion in publications 7 and 8 that better protection of mentally vulnerable defendants within the magistrates' courts might not be achievable by principled legal reform, but that the implementation of properly resourced policy changes might bring about more immediate and effective improvements to the protection and support of mentally vulnerable defendants.

Literature Review

'Building your research on and relating it to existing knowledge is the building block of all academic research activities, regardless of discipline.'[51] The research undertaken for each of the publications submitted for consideration in this thesis relied predominantly on these 'building blocks' of existing knowledge.

Primary sources of law were used in order to establish the doctrinal aspects of the publications. Acts of Parliament were accessed, as well as legal judgments and practice directions. Key statutes utilised in the unfitness to plead publications were the Criminal Procedure (Insanity) Act 1964, section 5, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004. The Homicide Act 1957, as amended by the Coroners and Justice Act 2009, was key to the first of the moral agency papers in relation to the partial defence of diminished

[50] Robson and McCartan, n.40, 11.
[51] H. Snyder, 'Literature review as a research methodology: An overview and guidelines' (2019) 104 *Journal of Business Research* 339, 333.

responsibility. Section 6 of the Human Rights Act 1998 makes it unlawful for a public body to act in a way which is incompatible with an individual's human rights. Its relevance with regard to the unfitness to plead publications is to enshrine Article 6 of the European Convention on Human Rights, which sets out the right to a fair trial, into domestic law. The Mental Capacity Act 2005 was useful as a comparison with the proposed Law Commission reform for a new test for unfitness to plead, given that this Act was used as a starting point in the consultation process. Various Infanticide Acts[52] were employed in the second of the 'moral agency' publications in relation to the offence/defence of infanticide, in particular section 1(1) of the Infanticide Act 1938 which provides the most recent statutory definition of infanticide for England and Wales.

Legal judgments of particular note included *Pritchard*[53] and *(John) M*[54] in the infanticide publications, both of which establish and develop the current test for unfitness to plead. The case of *Moyle*[55] was the judgment responsible for sparking an interest in this area of law. A significant judgment within the magistrates' courts publications is the House of Lords judgment in *Horseferry Road Magistrates' Court ex parte Bennett*[56] in which their Lordships recommended that the power of magistrates to find an abuse of process 'should be strictly confined to matters directly affecting the fairness of the trial of the particular accused'.[57] The judgment's significance is to limit one of the few options available to vulnerable defendants who are unfit to plead in the magistrates' courts.

Law Commission Consultation Papers,[58] Discussion Papers[59] and Reports[60] were used throughout the publications, but particularly in relation to the 'unfitness to plead'

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[52] Infanticide Act 1922; Infanticide Act 1938; Infanticide Act 1949 (Ireland).
[53] (1836) 7 C & P 303.
[54] R v M (John) [2003] EWCA Crim 3452.
[55] R v Moyle [2008] EWCA Crim 3059, discussed below.
[56] R v Horseferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42.
[57] Ibid., 64, per Lord Griffiths CJ.
[58] See, for example, Law Commission Consultation Paper, *Murder, Manslaughter and Infanticide* (Law Com. CP No. 304, 2006); Law Commission Consultation Paper, *Unfitness to Plead* (Law Com. CP No. 197, 2010)
[59] Law Commission, n.16.
[60] Law Commission, *A New Homicide Act for England and Wales* (Law Com. No.177, 2005); Law Commission, *Partial Defences to Murder* (Law Com. No.173, 2003); Law Commission, *Unfitness to Plead*, *Vol. 1: Final Report* (Law Com. No. 364, 2016).

publications. Interim Law Commission papers were also accessed.[61] These provided valuable insights into the development of the proposals pertaining to unfitness to plead. Further to this, some of the above papers provide evidence of impact and contribution to knowledge by demonstrating a contribution to the consultation process.[62]

Crown Prosecution Service publications and Ministry of Justice Papers[63] were particularly useful to the research undertaken for the magistrates' courts publications. A Scottish Law Commission Paper[64] was also consulted, as were Scottish higher court judgments,[65] Royal Commission Command Papers[66] and a Criminal Law Revision Committee Paper.[67] The final magistrates' courts publication utilised some evaluations of the Liaison and Diversion Service in England and Wales.[68]

Journal articles formed the largest part of the secondary sources consulted, with textbooks, edited collections and monologues also being consulted. Key journals were the *Criminal Law Review* and the *Journal of Criminal Law*. Articles were accessed primarily

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[61] See e.g. Law Commission, *Unfitness to Plead: An Issues Paper* (2014); Law Commission, *Unfitness to Plead—Analysis of Responses* (2013).
[62] See e.g. Law Commission, *Unfitness to Plead, Volume 1: Final Report* (Law Com. No. 364, 2016), para.1.120; para. 3.65; para. 3.79; para. 3.87; para. 3.126.
[63] See e.g. Crown Prosecution Service, *Mental Health Conditions and Disorders: Draft Prosecution Guidance* (2019) https://www.cps.gov.uk/publication/mental-health-conditions-and-disorders-draft-prosecution-guidance (a response to this draft guidance can be seen in App. 2) Ministry of Justice & Legal Aid Agency, *Legal Aid Statistics quarterly England and Wales, October to December 2018* (March 2019) at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789886/legal-aid-statistics-bulletin-oct-dec-2018.pdf>;
Ministry of Justice (2010) *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185936/breaking-the-cycle.pdf; Ministry of Justice, HM Inspectorate of Prisons and the Rt. Hon. Robert Buckland QC MP (2020) *Fairer justice system for neurodivergent people to reduce crime* at: https://www.gov.uk/government/news/fairer-justice-system-for-neurodivergent-people-to-reduce-crime.
[64] For example, Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, SE/2004/92.
[65] HM Advocate v Blake 1986 SLT 661; HM Advocate v Kerr [2011] HCJAC 17.
[66] *Report of Royal Commission on Capital Punishment* (Cmnd. 8932, 1953); *Report of the Committee on Mentally Abnormal Offenders* (Cmnd. 6244 1975).
[67] Criminal Law Revision Committee, *Fourteenth Report, Offences against the Person* (Cmnd. 7844, 1980).
[68] K. Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, 2009); RAND Europe, *Evaluation of the Offender Liaison and Diversion Services* (2016); RAND Europe, *Outcome Evaluation of the National Model for Liaison and Diversion* (2021); Revolving Doors Agency and Centre for Mental Health, *In Ten Years' Time: Improving outcomes for people with mental ill-health, learning disability, developmental disorders or neuro-diverse conditions in the criminal justice system* (Revolving Doors Agency, 2019).

through electronic databases, LEXIS, Westlaw and Hein Online. Among some of the key authors for the moral agency publications were Bayles,[69] Arenella,[70] Moore[71] and Hart,[72] the former two favouring character theory in attributing moral agency, while the latter two advocate choice/capacity theory. Leading academics in the field of unfitness to plead include Loughnan,[73] Duff[74] and Grubin,[75] while no examination of the mental condition defences would be complete without the renowned works of Professor R. D. Mackay.[76] The most significant textbook frequently consulted was *Smith and Hogan's Criminal Law*.[77] Here, the comments made by de Blacam seem apposite: '[a] good textbook - like a good judgment - is one which deploys reasons which are clear, comprehensive and, above all, convincing.'[78] The above textbook achieves all of this and more.

[69] See e.g. M D Bayles, 'Character, Purpose, and Criminal Responsibility' (1982*) Law and Philosophy* 1, 5-20; M D Bayles, 'Hume on Blame and Excuse' (1976) 2 *Hume Studies* 17.
[70] P. Arenella, 'Character, Choice and Moral Agency: the relevance of character to our moral culpability judgments', in *Crime, Culpability, and Remedy*, eds. E. F. Paul, F. D. Miller, Jr., and J. Paul (Blackwell, 1990).
[71] M. S. Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge University Press, 1984).
[72] H. L. A. Hart, *Punishment and Responsibility* (Oxford University Press, 1968).
[73] A. Loughnan, 'Between Fairness and "Dangerousness": Reforming the Law on Unfitness to Plead' [2016] *Crim LR* 451.
[74] R. A. Duff, 'Fitness to Plead and Fair Trials: (1) A Challenge' [1994] *Crim LR* 419.
[75] D. Grubin, 'What Constitutes Fitness to Plead?' [1993] *Crim LR* 748.
[76] See e.g. R. D. Mackay, 'On Being Insane in Jersey: Part 3—The Case of Attorney General v O'Driscoll' [2004] *Crim LR* 219.
[77] D. Ormerod and K. Laird, *Smith & Hogan's Criminal Law* (14th edn., Oxford University Press, 2015), and earlier editions.
[78] M. de Blacam, 'In defence of the textbook' (2018) 41 *Dublin University Law Journal* 175, 196.

Chapter Three: The Publications

Part I: Publications 4 and 6 – Moral Agency, Diminished Responsibility and Infanticide (the 'moral agency' publications, App 9)

- 'Diminished Responsibility, Culpability and Moral Agency' in *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine*, eds. Livings, Reed and Wake (2015, Cambridge Scholars Publishing) 318 (the 'diminished responsibility' publication)
- 'The offence/defence of infanticide: A view from two perspectives' (2018) 82 *Journal of Criminal Law* 470 (the 'infanticide' publication').

Introduction

As discussed above,[79] theoretical, or philosophical, principles relating to responsibility should be the foundation of any principled development of the law. The need for a sound theoretical rationale underpins all the research undertaken. The meaning of moral agency and the need for a defendant to be a moral agent are recurring themes within this body of research. The critical examination of the partial defences of diminished responsibility and infanticide builds on two earlier articles which were written while undertaking a Master of Jurisprudence degree at Durham University.[80] These earlier articles are included in Appendix 4 in order to demonstrate the origins, breadth and development of this body of research, particularly in the context of moral agency, but they are not intended to be assessed as part of this thesis, having previously formed part of an assessment elsewhere. While links are made in publications 4 and 6 between moral agency and the defence of diminished responsibility, as well as the offence/defence of infanticide, the need for moral agency in the context of a defendant being able to conduct a moral conversation also features to some degree in each of the other publications.

[79] Above, p.15.
[80] N.3.

The ‘diminished responsibility’ publication addresses when full responsibility should be ascribed to a defendant for murder and when all criminal responsibility should be removed, questioning whether it is ever acceptable for an individual to be found partially responsible for a crime. The suggestion made in this publication is that an individual’s mental capacity should determine whether they are a moral agent and, consequently, criminally responsible. Once criminal responsibility is established, then their culpability by reason of their reduced mental capacity should be determined. It is further suggested that the defence should be relabelled to a defence of diminished culpability, which would more accurately address a robust theoretical underpinning to the defence and which would better reflect the position of the defendant. This publication also addresses the distinction between culpability and responsibility, the latter having a lower threshold than the former in order for a defendant to be a rational moral agent. The ‘diminished responsibility’ publication was developed from a conference paper delivered at Northumbria University in 2013. The conference paper was well received but the comments of one practitioner gave cause for reflection. The practitioner noted that academics were in a fortunate position to be able to undertake research into a purely theoretical topic. This comment played at least a small part in influencing the decision in more recent years to make a transition towards a more practitioner based, empirical form of research. Most of the research towards the ‘diminished responsibility’ publication was undertaken in advance of the conference paper. This made for an easier experience of converting the presentation into a more academic format although the experience of converting a presentation into an academic written piece of work was significantly harder than planning a written academic piece from the outset. There were no requirements during the editorial process to make any significant alterations to the draft chapter, and the editors were very supportive. This positive experience led to a willingness to contribute a chapter to an edited collection marking the centenary of the first Infanticide Act in England and Wales.[81]

[81] *100 Years of the Infanticide Act: Legacy and Impact.* Proposed editors: K. Brennan and E. Milne.

The ‘infanticide’ publication asks whether the time is right for abolition of the offence/defence of infanticide, taking a bilateral approach, examining infanticide initially as an offence, and then as a defence. In considering the *offence* of infanticide, the concept of the 'infanticidal mother’ is examined, as well as the status of infants below the age of 12 months. In considering the *defence* of infanticide, examination is made of the exclusive nature of the defence and of the scope for an individual to be a ‘partial’ moral agent, returning again to the theme originally raised in the diminished responsibility chapter. This publication sets out the need for a theoretical rationale for the offence/defence and suggests that women who kill their children while suffering from the effects of childbirth should be, depending on the severity of mental disorder, either fully competent and therefore criminally responsible (although perhaps entitled to a lesser sentence due to a reduction in culpability) or fully incompetent, therefore incurring no criminal responsibility at all. This publication additionally considers the need for a causal link between the killing and a recognised medical condition, a theme which is echoed in the unfitness to plead publications.

The ‘infanticide’ publication was embarked upon for two reasons. First, the unfitness to plead consultation process had ended, and there did not appear to be any scope for further publications in this area, although this view later proved to be incorrect. Second, a contemporary case on infanticide seemed worthy of comment.[82] The Court of Appeal in *Tunstill*[83] quashed the mother’s murder conviction, ordering a retrial. The original murder conviction was unusual, given that most women who kill their infants under 12 months succeed on a defence of infanticide.[84] This decision, as well as being current, involved one of the remaining mental condition defences yet to be covered by this body of research. The similarity of some of the theoretical issues to the partial defence of diminished responsibility were another reason for undertaking this research, which resulted in another publication in the *Journal of Criminal Law*.

[82] R v Tunstill [2018] EWCA Crim 1696.
[83] Ibid.
[84] Law Commission Consultation Paper, *Murder, Manslaughter and Infanticide* (Law Com. CP No. 304, 2006), paras. D.6-D20.

The Coherent Threads and Context

Moral Agency

These two publications have the most theoretical approach towards the development of the law, and set out the stance that theory should underpin the law and that only rational moral agents should be found criminally responsible. The term 'moral agent' is used by the Law Commission when it states 'a human being must have some awareness of him or herself as a being that can reflect and act in order to be a moral agent'[85] and by Moore, who adds in the additional descriptor of rationality: '[o]ne is a moral agent only if one is a rational agent.'[86] The 'diminished responsibility' publication sets out the two leading theories of criminal responsibility: choice/capacity theory and character theory. In the infanticide publication, consideration of moral agency is narrowed down to capacity theory alone.

Partial Responsibility

A theme running between the two moral agency publications is that of the attribution of partial responsibility. Diminished responsibility applies only to a charge of murder, and offers a partial defence, reducing a charge of murder to manslaughter.[87] As with diminished responsibility, infanticide is another partial defence to a charge of murder.[88] This latter defence is available to only a very narrow group of women, but its hybrid nature also allows the prosecution to charge infanticide as an offence, rather than charging murder or manslaughter. The concept of partial responsibility seems incongruous; an individual cannot be partially responsible for a crime. If a defendant is a moral agent, she can be fully responsible for her actions, but her level of culpability might be reduced. If she is not a moral agent, then she should not be held criminally responsible to any degree.

[85] Law Commission, n.16, A.39.
[86] Moore, n.71, 244.
[87] Homicide Act 1957, s 2(1), as amended by Coroners and Justice Act 2009, s 52(1).
[88] Infanticide Act 1938, s 1(1).

This issue is explored in greater depth in these ‘moral agency’ publications and in the critical reflection below.

Causal Link

The need for a causal link between the defendant’s actions and any recognised medical condition is explored in the ‘infanticide’ publication. With the offence/defence of infanticide, there is no requirement that a defendant should demonstrate she was suffering from an identifiable mental disorder, nor that the imbalance caused her to kill. This publication suggests the absence of a causal link means that the law will develop in an unprincipled manner, with defendants being convicted or acquitted according to the sympathy they engender in a jury. The same position is taken in relation to the ‘unfitness to plead publications’, discussed below.

Originality and Contribution to Knowledge

All of the publications are original in their application of and contribution to existing knowledge.[89] The ‘diminished responsibility’ publication contributes to knowledge insofar as it has been cited by Gibson in ‘Pragmatism preserved? The challenges of accommodating mercy killers in the reformed diminished responsibility plea’[90] and by Hallett in ‘Psychiatric evidence in diminished responsibility’.[91] The ‘infanticide’ publication generated an invitation to contribute a book chapter in an edited collection *100 Years of the Infanticide Act: Legacy and Impact.*[92] At the time of writing, the book proposal has been accepted for publication by Hart Publishing. The chapter, submitted to the book’s

[89] Smith, n.20, 11.
[90] M. Gibson, ‘Pragmatism preserved? The challenges of accommodating mercy killers in the reformed diminished responsibility plea’ (2017) 81 *Journal of Criminal Law* 177, 196: ‘Whilst the 2009 Act may have formally conceptualised the plea around the idea of mental capacity, the ongoing need to reflect moral responsibility reinforces Howard's view that, "the defence is still torn between the two concepts of culpability and responsibility"'.
[91] N. Hallett, ‘Psychiatric evidence in diminished responsibility’ (2018) 82 *Journal of Criminal Law* 442, 444 and 451-2.
[92] Proposed editors: K. Brennan and E. Milne.

editors in April 2022, is entitled ‘Myths and Moral Agency: A Principled Approach to Infanticide Law’.

Critical Reflection and Professional Development

Employing Jasper’s ‘experience-reflection-action’ cycle,[93] I gained experience of delivering a conference paper in preparation for the diminished responsibility publication. I felt inexperienced in comparison to most of the other delegates but, on reflection, the quality of my presentation was comparable to some of the others, and I could have spent a lot less time worrying about it. Writing the chapter involved collaboration with the book editors, preparing a short biography and editing drafts, as well as writing a piece of research ‘on demand’, which involved meeting deadlines, adopting a ‘house style’ and writing to a specified word count. This overall positive experience built my confidence and influenced my decision to present a paper at an ‘Infanticide Event’ on 10th September 2021 and to agree to write a chapter in the edited collection, mentioned above.[94]

On a more critical note, in terms of the quality of writing in the diminished responsibility publication, I used the terms choice theory and capacity theory almost interchangeably within this publication. While Hart’s capacity theory is a version of choice theory, given that it attributes criminal responsibility for the defendant’s choices, some academics[95] prefer the two theories to be treated distinctly, so as not to ‘dilute…the focus on actual choice’.[96] In retrospect, I agree with this stance and will adopt the term ‘capacity theory’ henceforth.

In commenting on reflective learning, Dyke states that ‘knowledge is socially constructed; it is contingent, open to change in the light of new experience.’[97] On reflection, and in the

[93] Jasper, n.23, 9.
[94] N.81. Prospective authors presented and answered questions on their proposed book chapters.
[95] J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 *Law and Philosophy* 193, 198–9. Cited by C. Crosby ‘Culpability, Kingston and the Law Commission’ (2010) 74 *Journal of Criminal Law* 434, 437.
[96] Crosby, n.95, 437.
[97] M. Dyke ‘The role of the ‘Other’ in reflection, knowledge formation and action in a late modernity’ (2006) 25 *International Journal of Lifelong Education* 105, 121.

light of theoretical principles underpinning all of my research, both of the moral agency publications could have examined the leading theories of moral agency in more depth. Although both capacity and character theories are examined in the diminished responsibility publication, I could have reflected more deeply on my reasons for favouring capacity theory, and for rejecting character theory, rather than simply adopting the view of the Law Commission.[98] Consequently, some additional comments on capacity theory are considered below.

Capacity Theory Expanded

As Lacey states: '[a]t the start of the twenty-first century, it is generally agreed among theorists of criminal responsibility in England (as indeed in other common law systems) that responsibility for crime is founded in a certain set of capacities.'[99] Capacity theory, propounded by Hart, is the leading theory on when criminal responsibility should be attributed. Within capacity theory, a moral agent is an individual who chooses to act in a particular way, having the capacity and fair opportunity to avoid doing otherwise.[100] Setting out the reasoning for these requirements, Hart states:

> *a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.*[101]

While other legal philosophers have considered alternative approaches to the attribution of responsibility,[102] Hart's capacity theory is endorsed here, as is his view that 'no one should

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[98] Law Commission, n.16, A.18: 'we are content to adopt the wealth of academic support expressed for this approach'.
[99] N. Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 *The Journal of Political Philosophy* 249, 255. Referred to by the Law Commission, n.16, A.8: 'there is a consensus amongst writers on the subject that lack of capacity of some kind justifies treating some people as non-responsible.'
[100] Hart, n.72, 160.
[101] Ibid., 181.
[102] See Crosby, n.95, for a detailed analysis of the competing character theory. See also Law Commission, n.16, A.33-A.38 for an exposition of a pure version choice theory (in the absence of capacity).

be punished who could not help doing what he did.'[103] Such punishment is 'wasteful' and causes suffering 'to the accused who is punished in circumstances where it could do no good.'[104] Expanding on Hart's capacity theory, Lacey describes the capacities required for the attribution of responsibility, namely, 'capacities for knowledge, awareness, reflection, deliberation, and choice'[105] and points out that this

> *conception of criminal responsibility therefore makes a strong assumption about what it is that we are responsible for: we are responsible not for our selves, for who we are, or for our social status, but…for the specific acts which we (choose to) do or (in limited circumstances) refrain from doing.*[106]

If we are responsible for our acts, there does not need to be any inquiry into what traits of character drove us to behave in a particular way.

In defining capacity, the Law Commission summarised: 'discussions of capacity come back to the same two fundamental capacities: of rationality, and of control over one's actions.'[107] Either of these capacities might be absent in a mentally vulnerable defendant. The diminished responsibility publication examines rationality,[108] and Morse's view that absence of control should fall within a definition of rationality[109] is endorsed here.

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[103] Hart, n.72, 39.
[104] Ibid., 41.
[105] Lacey, n.99, 255.
[106] Ibid., 255.
[107] Law Commission, n.16, A.40, citing N. Lacey, 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) 4 *Criminal Law and Philosophy* 109, 117 and S. J. Morse, 'Excusing the Crazy: The Insanity Defence Reconsidered' (1985) 58 *Southern California Law Review* 777, 783.
[108] H. Howard, 'Diminished Responsibility, Culpability and Moral Agency' in *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine*, eds. B. Livings, A. Reed and N. Wake, 328.
[109] S. J. Morse, 'Crazy Behavior, Morals and Science: An Analysis of Mental Health Law', (1978) 51 *Southern California Law Review* 527, 584, cited in Howard, 'Reform of the Insanity Defence: Theoretical Issues for Consideration' (2003) 67 *Journal of Criminal Law* 51, 57.

By comparison, character theory focuses on 'acts that demonstrate undesirable character traits'.[110] The Law Commission sets out a 'modern version'[111] of character theory described by Tadros:

> *An agent is responsible for an action … insofar as that action reflects on the agent qua agent. In relation to action performed for a reason, [the action will only reflect on the agent qua agent] insofar as the desire that motivated the action is appropriately connected to the system of values of the agent … and that value of the agent is accepted [by the agent] in the light of the agent's system of values.*

In focusing on punishing the actor for bad character traits, this theory allows for a moral agent to have an ability to be self-critical, and develop morally.[112] This is an attractive aspect of the theory – requiring an actor to show some insight into moral reasoning would allow a trial to form part of a deeper moral conversation[113] than is currently required. With capacity theory, the ability to develop morally is irrelevant, so long as it can be shown that the actor has sufficient capacity to choose her actions. Such capacity might only involve her possessing an understanding that a *mala in se* offence is legally wrong, but without a deeper understanding as to *why* it is morally wrong. Capacity theory is also unable to explain how an actor develops from infancy to become a rational moral agent, nor the fact that not all actors are capable of developing into moral agents. As Crosby asserts:[114]

> *If these positive attributes are not automatically developed and an individual has not been helped to develop them, by having good role models, experience, education, religious moral instruction, to what extent can we blame agents for acting immorally?*

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[110] Howard, n.108, 327.
[111] Law Commission, n.16, A.19, citing V. Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 44.
[112] S. Pillsbury, 'The Meaning of Deserved Punishment: An Essay on Choice, Character and Responsibility' (1992) 67 *Indiana Law Journal* 719, 734.
[113] Howard, n.8, 196.
[114] Crosby, n.95, 456.

While character theory can explain that a mental disorder does not reflect an actor's character, it 'is limited as an explanation of why mental disorder should exculpate a person.'[115] Crosby's explanation assists in this regard: '[a]s the mentally disordered individual is incapable of engaging in a critical discussion of his conduct or his underlying motives for acting, such a person cannot be held morally responsible or criminally liable as this is reserved only for rational agents.'[116] Despite this explanation, the following flaws of character theory are too significant to disregard.

First, a theory that punishes for bad character traits must be capable of defining which particular character traits should be punishable. Duff describes character traits as 'stable patterns of thought, emotion, and action',[117] while Arenella suggests that punishable character traits should demonstrate a lack of 'capacity to care for the interests of other human beings.'[118] Clearly, only bad character traits should be punishable, but a theory that punishes for these must also recognise the extent to which actors might be unable to address these traits, as well as the extent to which an actor's character can change over time. Thus:

> *character-based theory of responsibility…assumes a fixed sense of a person's character. Even if it is accepted that a fifty-year-old does have a character settled in all relevant respects, which is disputable, it is even less certain that an eleven-year-old's character is fixed.*[119]

Secondly, 'out of character' behaviour further undermines the suitability of character theory. If an actor of previous good character commits a *mala in se* offence, there are two possibilities: either he should not be punished for his actions because they do not represent his bad character, in which case he should be entitled to a defence; or he only

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[115] Law Commission, n.16, A.25.
[116] Crosby, n.95, 454.
[117] R. A. Duff, *Criminal Attempts*, (Clarendon Press, 1996) 178.
[118] P. Arenella, 'Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability' (1992) 39 *UCLA Law Review* 1511, 1525.
[119] Law Commission, n.16, A.23, citing J. Horder, *Excusing Crime* (Oxford University Press, 2004) 122-123.

appeared to be of good character and possessed previously hidden bad character traits. Neither of these possibilities satisfactorily explains the attribution or removal of criminal responsibility because ‘any theory which exempts liability for serious harm on the basis that the conduct was uncharacteristic of the defendant's normal disposition is clearly controversial’.[120] Equally, to punish an actor for his hidden character flaws dilutes the meaning of character to such an extent that it ceases to be the relevant reason for punishment. Out of character behaviour remains a significant flaw within the theory.[121]

Thirdly, arguably the most contentious issue with character theory, is the risk that dangerous severely personality disordered (DSPD) individuals might be exempt from criminal liability because they lack the capacity for moral empathy. It is crucial, for the protection of the public, that DSPD individuals should remain blameworthy within the criminal law:

> *Despite DSPD individuals being unable to engage in a moral dialogue, they can recognise legal rules and are able to choose whether or not to obey them. To require the characteristic of moral empathy with others may be to exclude too many groups from a system of criminal law which must apply to the majority of society.*[122]

On deeper examination, Hart’s capacity theory[123] explains and underpins the manner in which the criminal law holds an individual accountable for her actions, and ‘[i]t should suffice for moral agency that a defendant appreciates his conduct is perceived as morally wrong, even if this is not his own perception.’[124] Further, capacity theory ‘ensure[s] the protection of the public from dangerous severely personality disordered individuals’.[125] While such individuals might be unable to understand the morality of their actions, they can nevertheless understand that criminal behaviour carries a sanction. In short, they can

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[120] Crosby, n.95, 450.
[121] Law Commission, n.16, A.21.
[122] H. Howard, ‘The Confinement of Personality Disordered Individuals: Questions of Justice and Safety’ (2001) 65 *Journal of Criminal Law* 161, 171.
[123] Hart, n.72, 181.
[124] Howard, n.122, 167, referring to Moore, n.70, 49.
[125] Howard, n.108, 327.

choose to act, having the capacity to make this decision and the fair opportunity to do otherwise. Having adopted capacity theory as the preferred theory of culpability, this is expanded in relation to the offence/defence infanticide below.

Infanticide Expanded

Reflecting on the 'infanticide' publication, while the structure and balance seem appropriate, there could have been a more thorough examination of moral agency in the specific context of infanticide. This omission is addressed in 'Myths and Moral Agency: A Principled Approach to Infanticide Law', submitted for publication in the edited collection *100 Years of the Infanticide Act: Legacy and Impact* and developed further below.

The infanticide publication states: '[a]n exculpatory defence should arise due to a total lack of moral agency. A partial defence should arise where the woman is a moral agent, and therefore criminally responsible, but there are factors which reduce her level of culpability.'[126] Examining only capacity theory, the position taken in this publication is that a woman who kills her infant 'may lack the capacity to choose due to the 'effects of childbirth' and, as such, ought not to be viewed as a moral agent',[127] however 'the effects of childbirth per se are not a sufficiently sound rationale for depriving a woman of moral agency. A link should be required to a recognised medical condition.'[128] The key issues to develop here are whether the attribution of partial criminal responsibility is ever appropriate and whether a causal link to a recognised medical condition is necessary.

Addressing the attribution of partial criminal responsibility in relation to the defence of infanticide, the 'infanticide' publication submits that, like the diminished responsibility defence, partial criminal responsibility is a misnomer.[129] The diminished responsibility publication distinguishes the terms responsibility and culpability:

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[126] H. Howard, 'The offence/defence of infanticide: A view from two perspectives' (2018) 82 *Journal of Criminal Law* 470, 478.
[127] Ibid., 479.
[128] Ibid.
[129] Howard, n.108, 320.

> *'[r]esponsibility', for the purposes of this discussion, will be taken to mean attribution for the act, while 'culpability' will be taken to indicate the individual's level of blameworthiness.*[130]

Further to this, with regard to criminal responsibility:

> *clearly more is required than mere attribution for the act. Criminal responsibility will generally require a link to moral blameworthiness/culpability, especially when considering mala in se crimes such as murder/manslaughter.*[131] *Moral blameworthiness, in addition, presupposes that D is a rational moral agent who has sufficient understanding of his acts and deserves moral blame.*[132] *Therefore, without moral agency there can be no culpability; without culpability there should be no criminal responsibility.*[133]

Applying these terms to the defence of infanticide, a woman who kills her infant will be 'responsible' for her act, but not necessarily criminally so. To be '*criminally* responsible', she must additionally be a rational moral agent. If she is not a rational moral agent, she should not be held criminally responsible. Accordingly, it is inappropriate and unjust to punish, even to a lesser degree, mothers who kill their infants when they are not rational moral agents. Where a mother lacks the capacity to choose not to kill her infant, attributing partial criminal responsibility seems wholly inappropriate.

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[130] Ibid.
[131] Arenella, n.118, 1513.
[132] Moore, n.71, 244.
[133] Howard, n.108, 321.

A mother who kills her infant might lack either of the 'two fundamental capacities',[134] rationality and control. Rather than these capacities being viewed as distinct, absence of control should fall within a definition of rationality.[135] This is because:[136]

> *where the compulsion is internal, Morse suggests it is too difficult to measure,*[137] *and it is also unclear whether the fear of dysphoria can ever be sufficient to excuse an individual from criminal conduct except where the behaviour can only be explained as a lack of rationality.*[138]

In considering the minimum level of rationality for moral agency, Morse's definition is apposite, in describing rationality as 'the sensibleness of the actor's goals and the logic of the means chosen to achieve them'.[139] By way of example, a mother who suffers from puerperal psychosis and kills, believing her infant to be possessed by evil forces, might act logically according to her false beliefs, but her goal would not be viewed as sensible and therefore she ought not to be viewed as rational.

As the partial defence of diminished responsibility[140] and proposals for the reform of the insanity defence[141] both contain references to rationality, and rationality is crucial for moral agency, the same requirement should be applied to any reformed defence of infanticide, if the defence is to survive another century.

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[134] Law Commission, n.16, A.40.
[135] Morse, n.109, 584, cited in H. Howard, 'Reform of the Insanity Defence: Theoretical Issues for Consideration' (2003) 67 *Journal of Criminal Law* 51, 57.
[136] Ibid., 57.
[137] Morse, n.109, 584.
[138] Ibid.
[139] S. J. Morse, 'Excusing the Crazy: the Insanity Defense Reconsidered' [1985] *Southern California Law Review* 779, 783.
[140] Coroners and Justice Act 2009, s 52(1), inserts into the Homicide Act 1957, s 2, '(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which: (a) arose from a recognised medical condition, (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A) […(b)to form a rational judgment…] and (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.'
[141] Law Commission, n.16, 4.160: D must wholly lack capacity, *inter alia*, (i) rationally to form a judgment about the relevant conduct…as a result of a qualifying recognised medical condition.

Where a minimum level of rationality is established, and the woman is a moral agent, the *potential* exists for her to be held criminally responsible. Given the range of mental disorders that can be suffered by a woman after giving birth, as with diminished responsibility,[142] it is clear that there is a sliding scale of rationality,

> *above the minimum threshold for rationality, which ought to have the effect of reducing culpability. Where only a minimal degree of rationality will suffice for moral agency, it is possible to conceive of a scenario in which a reduced degree of rationality, albeit it a sufficient amount to establish moral agency, has the effect of reducing an individual's level of culpability.*[143]

For example, a severely depressed mother who kills her infant, believing that life is futile, will not be as rational as the ordinary individual, but might be sufficiently rational to be treated as a moral agent. It is under these circumstances that a partial defence might be justified, not because her criminal responsibility is reduced; rather, her culpability is diminished.

To deprive a mentally vulnerable defendant of moral agency, there ought not only to be a recognised medical condition, but also a causal link between the defendant's actions and the condition. This is because the recognised medical condition would provide evidence for the defendant's lack of moral agency and 'would promote consistency and predictability across the mental condition defences.'[144]

A causal link exists for the current insanity defence, in the form of defect of reason attributable to a disease of the mind.[145] Similarly, the Law Commission's proposed reform

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[142] Howard, n.108, 330.
[143] Ibid. Morse has suggested that there will be degrees of rationality along a continuum. S. Morse, 'Diminished Capacity' in *Action and Value in Criminal Law*, eds. S. Shute, J. Gardner and J. Horder (Oxford University Press, 1993), 248-249.
[144] Howard, 'Lack of Capacity: Reforming the Law on Unfitness to Plead' (2016) 80 *Journal of Criminal Law* 428, 433.
[145] M'Naghten (1843) 10 Cl & Fin 200.

to the insanity defence recommends a link to a recognised medical condition,[146] as does the partial defence of diminished responsibility.[147] These themes are examined in more detail in the book chapter, ‘Myths and Moral Agency: A Principled Approach to Infanticide Law’.

Summary

The ‘moral agency’ publications scrutinise the circumstances under which an individual should be viewed as a moral agent and held criminally responsible. Both challenge the wording of ‘partial responsibility’, preferring ‘reduced culpability’ as a more accurate description. The ‘infanticide’ publication also addresses the need for a causal link between a recognised medical condition and the defendant’s lack of moral agency. The ‘unfitness to plead’ publications continue this theme of moral agency, highlighting the need for a defendant to have the capacity to take part in a moral conversation.

[146] Law Commission, n.16, paras. 86–114.
[147] Homicide Act 1957, s 2(1), as amended by the Coroners and Justice Act 2009, s 52.

Part II: Publications 1, 2, 3 and 5 – Unfitness to Plead and the Mentally Vulnerable Defendant (the 'unfitness to plead' publications, App 10)

'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 194.
'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 380.
'Unfitness to Plead and the Trial of Facts: A Critical Review of the Law Commission's Proposals and the Decision in R v MB' (2012) 76 *Journal of Criminal Law* 421.
'Lack of Capacity: Reforming the Law on Unfitness to Plead' (2016) 80 *Journal of Criminal Law* 428.

Introduction

Unfitness to plead permits mentally vulnerable defendants, who would not be able to withstand the rigours of a trial in the Crown Court, to be exempt from standing trial. As an alternative to a full trial, there will be a trial of facts (section 4A) hearing, in order for a jury to decide on the evidence whether the defendant 'did the act or made the omission charged against him as the offence'.[148]

Publication 1 examines the current test for unfitness to plead, critiquing the *Pritchard/(John) M*[149] criteria, before moving on to consider the Law Commission's proposals[150] for a new test, which almost replicate the test for decision-making capacity contained within the Mental Capacity Act 2005.[151] This publication gives particular focus to the meaning of capacity, along with the scope and limitations of the current law on unfitness to plead. Among the many issues covered by the Law Commission were: an examination of the current test for unfitness to plead which is narrower than the test for

[148] Criminal Procedure (Insanity) Act 1964, s 4A, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.
[149] R v Pritchard (1836) 7 C & P 303; R v M (John) [2003] EWCA Crim 3452.
[150] Law Commission, n.6.
[151] Mental Capacity Act 2005, s 3.

capacity under the Mental Capacity Act 2005; the scope of the trial of facts; and whether accident, mistake or self-defence could be raised as part of the defence in the context of unfitness to plead.

This interest in unfitness to plead was triggered by the judgment in *Moyle*[152] which appeared manifestly unfair in its application of the test for unfitness to plead. Publication 1 sets out the following position:[153]

> *The decision by the Court of Appeal in Moyle that 'delusions as to the court's powers of sentence, or as to the objectivity of the court, or as to the evil influences which are thought to be present in the proceedings, do not necessarily require a finding that a person is unable to give instructions and to understand the proceedings'[154] runs so contrary to the notion of a fair trial as to be absurd.*

It is difficult to imagine how a defendant who thought he was being tried for witchcraft would be able to volunteer the necessary information to his legal representatives, let alone give evidence in court in front of a judge and jury. It is similarly inexplicable how a trial can be described as fair under these circumstances.

Publication 2 considers whether the proposals for a new test would assist young defendants who might otherwise be convicted owing to the woefully low age of criminal responsibility, focussing on the relationship between the proposed capacity test and the absence of a defence of *doli incapax* for children aged 10 or above. This publication was conceived and written in order to explore whether the Law Commission proposals would benefit children over the age of 10. The age of criminal responsibility in England and Wales is one of the lowest in Europe[155] and continues to be criticised by academics.[156] The conclusion reached in publication 2 is that children might not benefit from reform of the

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[152] R v Moyle [2008] EWCA Crim 3059; [2009] Crim LR 586.
[153] Howard, n.8, 197.
[154] R v Moyle [2008] EWCA Crim 3059, [38].
[155] Howard, n.10, 390.
[156] See, for example, comments made in this regard by the Law Commission, n.6, paras. 8.59-8.60.

test for unfitness to plead, given that, at this stage in the consultation process, the Law Commission was considering a necessary link to a psychiatric test, although in publication 5 a solution is mooted that would incorporate into the Bill a clause linking the lack of capacity to developmental immaturity.[157] The co-author, Mike Bowen, wrote the discreet sections of the publication pertinent to *doli incapax*. The co-author's consent to use of publication 2 in this thesis is contained in Appendix 7.

The trigger for publication 3 was the Court of Appeal decision in *MB,*[158] a case concerning the trial of facts hearing which was decided after the publication of the Law Commission Consultation Paper.[159] Consequently, this publication takes a more procedural stance by examining some of the issues surrounding the trial of facts hearing, as well as the Law Commission proposals in this regard. One of the key issues with the trial of facts hearing, is the difficulty in restricting the hearing to the *actus reus* of an offence, while omitting an examination of any mental element. In many offences, the *actus reus* and *mens rea* can be neatly separated, however issues arise where the division between these elements of a crime is less clear, or where a defence might negate liability, if consideration of *mens rea* were to be allowed. One such problematic example was *MB*[160] in which the defendant was charged with voyeurism contrary to section 67(1) of the Sexual Offences Act 2003. The defendant was found unfit to plead and the relevant act for the purpose of a trial of facts hearing was 'that of deliberate observation of another doing a private act where the observer does so for the specific purpose of the observer obtaining sexual gratification'.[161] While the sexual gratification element of this offence clearly involves a mental element, the Court of Appeal held that it could not be separated from the *actus reus* of the offence and, as such, had to be proved by the prosecution in a trial of facts hearing.[162]

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[157] Howard, n.144, 434.
[158] R v MB [2012] EWCA Crim 770, [2012] 2 Cr App R 15.
[159] Law Commission, n.6.
[160] R v MB [2012] EWCA Crim 770, [2012] 2 Cr App R 15.
[161] [2012] EWCA Crim 770, [2012] 2 Cr App R 15 [65].
[162] Ibid., [65].

The Court of Appeal in *MB*[163] followed the leading judgment of *Antoine,*[164] which is also addressed in publication 3. In *Antoine*, the House of Lords confirmed that only the *actus reus* of a crime needs to be shown at a trial of facts hearing and would not allow diminished responsibility to be raised as a defence.[165] *Antoine* has been criticised by the Law Commission in its consultation process, recommending that the House of Lords judgment be reversed.[166] Publication 3 supports these criticisms: '[c]ontinuing with the current s. 4A hearing risks uncertainty within the law and that the unfit accused could be treated less fairly than his fit counterpart'.[167] The preferred route chosen by the Law Commission is advocated, subject to concerns of properly balancing the need to protect both the vulnerable defendant from an unfair hearing and the public from the dangerous individual.

Since publication 3 was published, the Court of Appeal judgment in *Wells, Masud, Hone and Kail*[168] addressed the House of Lords decision in *Antoine*. This case concerned four conjoined appeals, centring around two issues: distinguishing *mens rea* from *actus reus* in certain offences, and the extent to which objective evidence could be used in the trial of facts hearing. All defendants had been found unfit to plead.[169] At first instance, Wells was unable to rely on a statement he made about acting in self-defence as it was made while he was suffering from the mental condition that rendered him unfit to plead.[170] In considering what could be meant by objective evidence for the purpose of a trial of facts hearing, the Court of Appeal was prepared to consider 'the background to the incident' and 'the antecedents of the complainants'[171] but as there was no objective evidence of self-

[163] Ibid., [67].
[164] R v Antoine [2001] 1 AC 340.
[165] Ibid., 351: '[A]s the only question arising under section 4A(2) is whether the jury is satisfied that the defendant has done the act charged against him as murder, no question of diminished responsibility could arise' (per Lord Bingham of Cornhill CJ). The same will also be likely apply to the defence of loss of self-control: R v Grant (Heather) [2002] QB 1030.
[166] Law Commission, n.6, para. 6.23.
[167] H. Howard, 'Unfitness to Plead and the Trial of Facts: A Critical Review of the Law Commission's Proposals and the Decision in R v MB' (2012) 76 Journal of Criminal Law 421, 430.
[168] [2015] EWCA Crim 2
[169] Ibid., [1].
[170] Ibid., [31].
[171] Ibid., [17].

defence, Wells's appeal was dismissed.[172] Masud's appeal failed in excluding evidence of a previous sexual assault as similar fact evidence, the Court agreeing that 'the judge was correct to conclude that the bad character evidence which he admitted clearly showed a propensity given its unusual circumstances.'[173] Hone was charged with two counts of sexual assault;[174] it was held not to be necessary for an inquiry to be made into her knowledge or state of mind, merely her acts of participation.[175] Kail's reasonable belief in the complainant's consent to sexual touching did not have to be shown in a trial of facts hearing,[176] following *Antoine*.[177]

While the Court of Appeal in the above judgment followed *Antoine*, there was acknowledgement of 'instances where it is difficult to distinguish between the actus reus of an offence and its mens rea',[178] with the judgment possibly suggesting 'a more flexible approach to the notion of objective evidence and expand[ing] the circumstances in which the accused's own account may be adduced'.[179] This appears to be only a limited recognition of the problems encountered in the trial of facts hearing, and does not go as far as the Law Commission would recommend by overruling *Antoine*.[180]

Publication 5 examines and critiques the new tests proposed for effective participation at trial and ability to plead guilty set out in the Law Commission Report and contained in the Criminal Procedure (Lack of Capacity) Bill.[181] The two new tests aim to replace the current criteria on unfitness to plead developed in *(John) M*[182] and originating from *Pritchard*.[183] While the tests are commendable, particular focus is given to the absence of a diagnostic

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[172] Ibid., [40].
[173] Ibid., [46].
[174] Ibid., [49].
[175] Ibid., [61].
[176] Ibid., [68].
[177] Ibid.
[178] Ibid.
[179] K. Kerrigan, N. Wortley, 'Unfitness to Plead: Expanding the Scope of 'Objective Evidence' on the 'Trial of the Facts': *R v Wells, Masud, Hone and Kail* [2015] EWCA Crim 2' (2015) 79 *Journal of Criminal Law* 160, 164.
[180] Law Commission, n.6, para. 6.23.
[181] Law Commission, n.4, 10.
[182] R v M (John) [2003] EWCA Crim 3452.
[183] R v Pritchard (1836) 7 C & P 303.

threshold, which detracts from the quality of otherwise scrupulously drafted proposals. The trigger for this publication was to provide a response to the Law Commission Report and Criminal Procedure (Lack of Capacity) Bill.[184] Having participated in a working party for the Law Commission at the Ministry of Justice, this was an opportunity to summarise and critique the proposals for a new test of effective participation, in particular the decision of the Law Commission to omit a link to a diagnostic threshold. The omission of such a link provided the opportunity to argue against what are otherwise an excellent set of proposals for reform.

Since publication 5, the judgment in *Orr*[185] raised issues relating to the test for unfitness to plead, the timing of the trial of facts hearing and the overlap with section 35 of the Criminal Justice and Public Order Act 1994.[186] In this case, the defendant was convicted of being concerned in a money laundering arrangement.[187] At his trial, he gave his evidence-in-chief but became unwell at the start of being cross-examined. The trial judge found that he was unfit to be cross-examined, however the trial was allowed to proceed and the defendant was convicted.[188] Allowing his appeal, the Court of Appeal found that unfitness to be cross-examined should have meant that the defendant was wholly unfit to plead, with Lady Justice Macur commenting that fitness to plead should be more aptly:[189]

> *identified as 'fitness to participate in the trial process', since "the supposed disability" can be determined at any stage up to "verdict of acquittal", cannot be determined by reference to part only of the trial process. The capacity to be cross examined is part and parcel of the defendant's ability to give evidence in his own defence.*

[184] Law Commission, n.4, 10.
[185] R v Orr [2016] EWCA Crim 889.
[186] A. Owusu-Bempah and N. Wortley, 'Unfit to Plead or Unfit to Testify? *R v Orr* [2016] EWCA Crim 889' (2016) 80 *Journal of Criminal Law* 391.
[187] R v Orr [2016] EWCA Crim 889 [2].
[188] Ibid., [19].
[189] Ibid., [23].

Section 35 of the Criminal Justice and Public Order Act 1994 applies where D's physical or mental condition make it undesirable for him to give evidence and prohibits adverse inference from being drawn with regard to D's silence.[190] In *Orr*, the Court of Appeal drew a distinction between when 'the physical or mental condition of the accused makes it undesirable for him to give evidence' for the purpose of section 35 and when a defendant might be found unfit to plead.[191] In this case the Court held that section 35 of the Criminal Justice and Public Order Act 1994 would not have assisted the trial judge, given that he:[192]

> *was presented with something of a moving feast in terms of the different, and sometimes mutually inconsistent, submissions made by the appellant's trial counsel as to whether and by what means the trial should proceed, nor the failure of the prosecution submissions to address the nature and extent of the disability or invite him to make specific findings on the same.*

One problematic issue with this judgment is that while the Court recognised a distinction between the terms 'undesirable to give evidence' and 'unfit to plead', the Court failed to provide a determination as to where this distinction should lie.[193] This judgment appears to provide clarity insofar as 'fitness to plead' rightly incorporates notions of 'fitness to participate', but leaves the question unanswered: when does 'undesirable' become 'unfit'?

All of the publications discussed above were accepted for publication in the *Journal of Criminal Law* without the need for any revisions.

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[190] S.35(1)(b).
[191] R v Orr [2016] EWCA Crim 889 [24].
[192] Ibid., [27].
[193] Owusu-Bempah and Wortley, n.186, 395.

The Coherent Threads and Context

Unfitness to Plead and Effective Participation

The unfitness to plead publications start an investigation into the test for unfitness to plead and some procedural aspects of the trial of facts hearing that is continued in the magistrates' courts' publications. Each of these publications add a voice to the inadequacy of the current process and critically examine recommendations for legal reform.

Moral Conversation

Moral agency should not be restricted to merely ascribing criminal responsibility for the crime committed, but should extend to the defendant's ability to hold a moral conversation throughout the trial process. In the absence of this moral conversation, the criminal justice system loses its integrity. This view is echoed by Duff when he describes a trial 'as a formal, legal analogue of the informal, moral process of calling another to answer for an alleged wrong'.[194]

Accordingly, if a defendant is 'not competent to answer to the charge, he cannot be called to answer to it.'[195] Theoretically, a defendant's competence to stand trial should be linked to capacities:

> *of understanding, reasoning and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made*[196]

The unfitness publications seek to apply this concept to an ability to participate effectively in a trial. In other words, the moral agent must be capable of having a moral conversation.

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[194] R. A. Duff, 'Blame, moral standing and the legitimacy of the criminal trial' (2010) 23(2) *Ratio* 123, 130.
[195] Ibid., 131.
[196] Law Commission, n.16, A.66, referring to Hart, n.71, 227.

It follows that an individual who is not a moral agent cannot be capable of engaging in such a conversation. Working on this premise, it is submitted that, contained within the concept of moral agency must be the right to engage in a moral conversation. Finding a defendant to lack moral agency effectively deprives them of the right to engage in a moral conversation. This occurs when a defendant (D) is found unfit to plead. It should follow that:[197]

> *depriving D of moral agency is not a decision to be taken lightly, especially since D will be deprived of his fundamental right to a fair trial. If we are to deprive an individual of moral agency, then we must be sure of our reasons for doing so.*

Lacey describes[198]

> *[the] serious questions … about whether the relatively crude institution of a criminal court is capable, on the basis of applying general rules of law and on the basis of the sorts of evidence which it can process, of making finetuned judgments of capacity, let alone judgments about whether the accused could genuinely have done, or had a fair opportunity to do, otherwise than she did.*

Not only should these fine-tuned judgments be made in relation to the defendant at the time of the alleged offence, but it is submitted that they should be equally applicable to the defendant's ability to participate in a moral conversation at the time of the trial. Gardner stresses that 'all rational beings want to assert their basic responsibility.'[199] Consequently, a criminal trial should not only be viewed as an obligation, but as a right which ought only to be deprived from a defendant for good reason. A causal link between a defendant's unfitness and her medical condition would support and strengthen the justification for depriving her of this moral conversation. When Gardner asserts 'we should think of the court-room struggle as a site of intrinsic as well as instrumental value',[200] used 'to put

[197] Howard, n.144, 433.
[198] Lacey, n.99, 264.
[199] J. Gardner, 'The Mark of Responsibility' (2003) 23(2) Oxford Journal of Legal Studies 157,169.
[200] Ibid., 168.

people under extra instrumental pressure to give decent public accounts of themselves',[201] it becomes more crucial for a defendant to be sufficiently able to withstand this pressure in order to effectively participate in this process.

Causal Link

With the above in mind, there needs to be a strong rationale for failing to recognise a person as a moral agent, since doing so deprives her of the right to participate in a moral conversation as part of her trial. Given that the right to a fair trial underpins the English and Welsh criminal justice system,[202] an individual should only be recognised as lacking moral agency where there is a causal link between the defendant's lack of capacity and a relevant recognised medical condition. In other words, the defendant should lack moral agency, and therefore the ability to conduct a moral conversation, as a consequence of a relevant condition. This reflects the theme in the infanticide publication, and is returned to in Publications 1, 2 and 5.

Originality and Contribution to Knowledge

All the unfitness to plead publications represent an original contribution to existing knowledge,[203] insomuch as they either highlight the need for theory to underpin practice where this appears to be absent and/or they contribute to the Law Commission consultation process. Publications 1, 2 and 3 contributed to critical debates during the Law Commission consultation process. Publication 1 formed the basis of a response to the Law Commission Consultation Paper on Unfitness to Plead. This response was cited by Law Commission, in *Unfitness to Plead - Analysis of Responses*,[204] and again in *Unfitness to Plead: An Issues Publication*.[205] Publication 2 is cited by Wake in 'Recognising acute

[201] Ibid.
[202] Human Rights Act 1998, s 6; European Convention on Human Rights, Article 6.
[203] Smith, n.20, 11.
[204] (2013).
[205] (2014).

intoxication as diminished responsibility? A comparative analysis'[206] Publications 1 and 2 were cited by Arthur in 'Giving effect to young people's right to participate effectively in criminal proceedings'.[207] In 2014 I attended a symposium at the School of Law, University of Leeds. The event was attended by over 100 experts in the field, including members of the judiciary, legal profession, academics, psychiatrists, psychologists, specialist nurses, intermediaries and representatives from government departments and interest groups. As a direct result of my participation in the symposium, responses to previous consultations, and academic and non-academic interest in my research, later that year I was invited by the Law Commission to contribute to its Working Party on Unfitness to Plead. The Working Party brought together both academic and non-academic contributors, including Law Commissioner Professor David Ormerod, and other legal scholars and practitioners. The discussions that took place within this Working Party influenced the content of the Law Commission's Final Report and Draft Bill, published in 2016.[208]

Critical Reflection and Professional Development

The unfitness to plead publications offered me a unique experience to participate in a law reform process and witness first-hand discussions between leading academics and practitioners. On reflection, publication 2 only provided a superficial examination of the predicament of vulnerable children who offend. When conceiving and writing publications 7 and 8, I chose to omit an examination of the youth courts, focusing on adults in the magistrates' courts. There is scope for further research into the effective participation of children at trial, an area I have identified for further development at a later date.

The discussion at the Working Party was fast paced, broad ranging and constructive. I was overruled on the suggestion that there should be a link to a diagnostic threshold, but I was

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[206] N. Wake, 'Recognising acute intoxication as diminished responsibility? A comparative analysis' (2012) 76 *Journal of Criminal Law* 71, 72.
[207] R. Arthur, 'Giving effect to young people's right to participate effectively in criminal proceedings' [2016] *Child and Family Law Quarterly* 223, 223.
[208] Law Commission, *Unfitness to Plead, Vol. 1: Final Report* (Law Com No 364, 2016); Law Commission, *Unfitness to Plead, Vol. 2: Draft Legislation* (Law Com. No. 364, 2016).

not the only person to have this view, and, at the time, I was satisfied that I had been able to argue my case. The rationale behind omitting the need for a causal link was to ensure that the test became as broad as possible. On reflection, I think I could have articulated my view more persuasively. This is something I believe I addressed in publication 6, but only when the consultation process was complete and I was no longer able to influence its direction. My membership of this small Working Party has given me the confidence to believe that I have original ideas and I should be prepared to voice them.

Summary

The ‘unfitness to plead’ publications and my involvement in the Law Commission consultation process gave me the confidence to undertake a more ‘socio-legal’ type of research when moving on to examine the absence of a comparable procedure for unfitness to plead in the magistrates’ courts. The choice to explore this topic empirically stemmed from a desire to put the theoretical and doctrinal approaches into a ‘real life’ context.

Part III: Publications 7 and 8 – Effective Participation in the Magistrates' Courts (the 'magistrates' courts' publications, App 11)

'Effective participation of mentally vulnerable defendants in the Magistrates' Courts in England and Wales – the 'front line' from a legal perspective' (2021) *Journal of Criminal Law* 3 (the 'legal perspective' publication)

'Effective Participation of Mentally Vulnerable Defendants in the English Magistrates' Courts – the Crucial Role of Liaison and Diversion' (2022) *Howard Journal of Crime and Justice* https://doi.org/10.1111/hojo.12470 (the 'L&D' publication)

Introduction

The theoretical underpinning developed in publications 1 to 6 provided a springboard into a new approach to research. Publication 7 is based partly on a doctrinal analysis of the law, as well as empirical research, which includes qualitative analysis of interviews with members of the legal profession. It is intended that this is the first of a series of publications containing views 'from the front line'. This publication considers, in the absence of any successful reform of the law relating to unfitness to plead, what policy changes could protect the mentally vulnerable defendant in the magistrates' courts. The magistrates' courts were chosen as a specific focus because, while the Crown court has a procedure for unfitness to plead, the magistrates' court has none.

While maintaining an interest in, and hoping to raise the profile of, the law relating to unfitness to plead, publication 7 involves an examination into whether any new test for effective participation would be practicable in the magistrates' courts. The Law Commission, in its final report,[209] recommended that any newly reformed test for unfitness to plead should be equally applicable here. This recommendation is because there is no equivalent unfitness to plead process for mentally vulnerable

[209] Law Commission, *Unfitness to Plead, Volume 1: Final Report* (Law Com No 364, 2016), Chapter 7.

defendants who struggle to effectively participate in their trial in the magistrates' courts. The move towards a more socio-legal investigation of this area aimed to test the hypothesis that both the current test for unfitness to plead and any new test proposed by the Law Commission would be unworkable in the magistrates' courts, and that policy changes would achieve better results in supporting and diverting mentally vulnerable defendants out of the criminal justice system. On closer examination of the law and, having interviewed a small number of legal practitioners, it became evident that the legal aid system would be unable to sustain reforms of this nature in the magistrates' courts. Given that the standard fee paid to solicitors or legal representatives in the magistrates' courts is insufficient to cover the cost of medical expertise[210] and that there is 'a disincentive to the legal professional to request a non-standard fee'[211] the proposed solution is that improvements in policy are of greater importance than legal reform, being more likely to meet the needs of mentally vulnerable defendants. The most significant improvement in policy would be the funding of Liaison and Diversion (L&D) teams in all magistrates' courts.[212]

The trigger for publication 7 resulted from the unfitness papers being identified within Teesside University as a potential impact case study for REF 2021. To maintain the profile of the need for reform of unfitness to plead and strengthen this case study, an alternative approach to previous publications was adopted by focussing on the situation for mentally vulnerable defendants in the magistrates' courts. Having admired Quick's research on prosecutorial discretion and expert evidence in relation to gross negligence manslaughter which combined both empirical and doctrinal research,[213] a decision was made to interview various stakeholders within the magistrates' courts who might have contact with mentally vulnerable defendants on a regular basis. A university ethics application was submitted to this effect, with the first group of participants identified as legal representatives. It was clear when interviewing these participants that the L&D service plays a crucial role in supporting

[210] Howard, n.9, 10.
[211] Ibid.
[212] H. Howard, 'Effective Participation of Mentally Vulnerable Defendants in the English Magistrates' Courts – the Crucial Role of Liaison and Diversion' (2022) *Howard Journal of Crime and Justice* https://doi.org/10.1111/hojo.12470.
[213] O. Quick, 'Prosecuting 'Gross' Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 *Journal of Law and Society* 421; O. Quick, 'Expert Evidence and Medical Manslaughter: Vagueness in Action' (2011) 38 *Journal of Law and Society* 496.

such defendants, and that a follow up article examining the remit and limitations of the L&D service would be worthwhile. This necessitated a lengthy Integrated Research Application System (IRAS) application, given that the L&D service is NHS funded. Following IRAS approval, interviews of L&D participants concluded in March 2020, shortly before the country went into the first COVID lockdown. This period of forced isolation allowed ample time for writing up publication 8 and submitting it to various journals (consecutively) for publication. Regrettably, the lockdown also resulted in the cancellation of a networking event for practitioners from various criminal justice agencies which had been planned as a direct consequence of this empirical research. The *North East Connecting Vulnerability* network, available on MS Teams, was established as an alternative to this event. It is hoped that this site will act as a repository for relevant information, and that a networking event will possible in the future.

Conscious of the fact that this research differs from typical legal research, and of the need to seek publication in a more diverse range of journals, the article was submitted for publication with the *European Journal of Crime, Criminal Law and Criminal Justice*, whose response was that the subject matter fell outside its scope, recommending publication within a domestic criminal law journal. The *Journal of Law and Society* also rejected this publication on the principal ground that it was more suited to a specialist criminal justice journal. Subsequent to this, the article was submitted for consideration by the *Journal of Criminal Law*, where it was accepted without requiring any revisions.

Publication 8 continues the investigation into the need for policy changes rather than, or in addition to, legal reform and focusses on the support available from L&D teams in England. This publication highlights that, in addition to police custody suites, a permanent presence of L&D teams within all English magistrates' courts is crucial to the protection of vulnerable defendants who are unable to effectively participate in their trial and who have not been identified at an earlier stage of the criminal justice process. Moreover, the presence of L&D teams within all magistrates' courts might provide a more pragmatic and compassionate solution than legal reforms to those vulnerable defendants who are unable to understand the trial process. It is

suggested that this improvement is achievable given the cost efficiencies highlighted by the RAND Europe Outcome Evaluation, published in 2021.[214]

The Coherent Threads and Context

Unfitness to Plead and Effective Participation

While the 'unfitness to plead' publications start an investigation into the test for unfitness to plead and effective participation, the magistrates' courts publications continue this journey with the focus being on the inadequacy of any process for unfitness to plead in the magistrates' courts, alongside the unsuitability of proposed legal reforms. These publications offer a more focussed insight into issues surrounding the effective participation of mentally vulnerable defendants in the magistrates' courts.

Putting the Moral Conversation into Context

The 'magistrates' courts' publications enable the theoretical discussion surrounding the trial as a moral conversation to be placed into a practical context. Even within the magistrates' courts 'the moral conversation at the heart of the criminal justice process cannot occur where a defendant lacks the capacity to engage in such an exchange'.[215] This conversation is as necessary in the magistrates' courts, where the majority of criminal cases are heard,[216] as in the Crown court. Legal professionals, who were interviewed for publication 7, described a 'gut instinct'[217] for identifying mentally vulnerable defendants. All interviewees confirmed that they had come across defendants who did not understand what was happening during their trial in the magistrates' courts,[218] so it seems reasonable to suggest that the 'moral conversation' is sometimes non-existent.

[214] RAND Europe, *Outcome evaluation of the national model for liaison and diversion* (2021), Available at: https://www.rand.org/pubs/research_reports/RRA1271-1.html (Accessed 14 April 2021).
[215] Howard, n.9, 15.
[216] Ibid.
[217] Ibid., 8.
[218] Ibid.

In critically examining the L&D service, the view of Duff is endorsed: '[a] defendant who is unable to engage in any meaningful moral conversation ought to be diverted and dealt with outside of the criminal justice system'.[219] Even though assessing a defendant's fitness to plead falls outside of the remit of the L&D service, these practitioners remain the best hope for mentally vulnerable defendants. The empirical research undertaken for publication 8 highlighted the empathy and commitment to support these defendants demonstrated by L&D practitioners on a regular basis.

Originality and Contribution to Knowledge

The suggestion that reforms proposed by the Law Commission to extend the test for unfitness to plead into the magistrates' courts will be unworkable provides one original contribution to knowledge. The recommendation of policy changes in preference to legal reform provides an additional original contribution. The small empirical element in publications 7 and 8 offers perhaps the strongest and most original contribution to knowledge.[220] The qualitative empirical element of publications 7 and 8 allowed for a 'real world' perspective of the impact of any legal reform being implemented in the magistrates' courts. This 'real world' perspective also resulted in a necessary examination of the legal aid system in the magistrates' courts. Interviewing legal professionals for publication 7 and L&D practitioners from the Tees, Esk and Wear Valley NHS Trust for publication 8 gives an insight into what is happening in the magistrates' courts in the North East of England and into what changes might be implemented on the front line. Research of this kind on effective participation in the magistrates' courts and the suitability of the Law Commission's proposals for reform has not been undertaken elsewhere.

Originality within these publications also stems from the blending of doctrinal, jurisprudential, socio-legal and empirical methodologies to arrive at a conclusion in publications 7 and 8 that the better protection of mentally vulnerable defendants within the magistrates' courts might not be achievable by principled legal reform, but that the implementation of properly resourced policy changes might bring about more

[219] R. A. Duff, 'Fitness to Plead and Fair Trials: (1) A Challenge' [1994] *Criminal Law Review* 419, 420 in Howard, n.212.
[220] Smith, n.20, 11.

immediate and effective improvements to the protection and support of mentally vulnerable defendants.

Refining the focus to consideration of effective participation in only the magistrates' courts offers a further aspect of originality. One referee from the Howard Journal of Crime and Justice described publication 8 as 'an important contribution to the literature on mentally vulnerable suspects and defendants'.[221]

Critical Reflection and Professional Development

On reflection, rather than submitting publication 7 to the *Journal of Criminal Law*, I should have sent it first to the *Criminal Law Review*. My decision not to submit to the *Criminal Law Review* was sheer lack of confidence. Having approached the *Modern Law Review*, and been rejected, for publication 8, I will not hesitate to aim for the most appropriate journal, regardless of editors, in future.

The youth courts are excluded from examination alongside the magistrates' courts. This makes the examination of unfitness to plead and effective participation incomplete. I took the decision to omit the youth courts as I think they require separate treatment and I could not do justice to them by examining them alongside the treatment of vulnerable adult defendants in the magistrates' courts. The 'innate vulnerability of children',[222] their 'neurodevelopmental immaturity',[223] and lack of insight into the consequences of their actions[224] means that children are a unique type of vulnerable defendant. I considered the availability of unfitness to plead as a means of children avoiding criminal responsibility in publication 2, but concede that this publication only provides a superficial view of the scale of problems encountered within the youth courts.

Given the length of publication 8, it was initially sent to the *Modern Law Review*, where it was rejected owing to there being insufficient legal content. The *Howard*

[221] Appendix 8.
[222] N. Wake, R. Arthur, *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) *Public Law* 145, 148.
[223] Ibid., 148.
[224] Ibid.

Journal of Crime and Justice was recommended by the desk reviewer of the *Modern Law Review*. Following a rewrite with Harvard referencing, the *Howard Journal* returned the publication for minor revisions. These included: adding references to Fairclough's and Owusu-Bempah's work;[225] strengthening or omitting the theme of effective participation and refocussing solely on the L&D service; and adding some research directly relating to the magistrates' court and its system of 'conveyor-belt' justice.[226] An extract of the recommended revisions and responses is contained in Appendix 8. Most of the recommended revisions, which were found to be extremely constructive, were added to the publication. The link to the theme of effective participation was strengthened, rather than omitted. It was important to acknowledge that while the L&D service were not required to comment on a defendant's fitness to stand trial, their role in diverting some mentally vulnerable defendants away from the criminal justice system has this exact effect.

All but one of the reviewers complimented publications 7 and 8 for being well written. It was difficult receiving rejections and critical comments, but most referees were constructive.

Summary

As a consequence of the 'magistrates' courts' publications, I identified a need to bring together practitioners with experience of mentally vulnerable defendants in the criminal justice system, to share their experiences and to open up new channels of communication. The *North East Connecting Vulnerability* network is something I hope to grow in the future, with the support of like-minded colleagues, by expanding its membership and holding networking events, including a conference on vulnerability in the criminal justice system. The experience of transitioning from

[225] S. Fairclough, ''It doesn't happen…and I've never thought it was necessary for it to happen': Barriers to vulnerable defendants giving evidence by live link in Crown Court trials' (2017) 21 *International Journal of Evidence & Proof* 209; A. Owusu-Bempah, 'The interpretation and application of the right to effective participation' (2018) 22 *International Journal of Evidence & Proof* 321; A. Owusu-Bempah, 'Understanding the barriers to defendant participation in criminal proceedings in England and Wales' (2020) 40 *Legal Studies* 609.
[226] Transform Justice, 'Defendants on video – conveyor belt justice or a revolution in access?' (2017) at https://www.magistrates-association.org.uk/Portals/0/Files/Public/defendants-on-video-23-10-17.pdf (Accessed 11/8/21).

jurisprudential/doctrinal research into a socio-legal/empirical methodology has given a unique insight into what the law should aspire to be, and where its limitations lie.

Chapter Four: Conclusion

The Coherent Threads and Context

One substantial thread, namely ‘unfitness to plead and effective participation’, contributed to the Law Commission’s recommended reform of the law relating to unfitness to plead. Some of the theoretical threads add to the jurisprudential debates which ought to underpin the development of all of the criminal law. These threads examine moral agency, the attribution of partial responsibility, the need for a causal link between a recognised medical condition and the defendant’s exemption from moral agency, and the trial as a moral conversation. Putting the moral conversation into context in publications 7 and 8 adds to a criminal justice commentary on the protection of mentally vulnerable defendants in the magistrates’ courts.

The ‘moral agency’ publications (publications 4 and 6) set out the stance taken regarding the principled attribution of criminal responsibility. Theory should underpin the law and only moral agents should be found criminally responsible. While the diminished responsibility publication sets out the two leading theories of criminal responsibility: choice/capacity theory and character theory, the infanticide publication narrows consideration of moral agency to the preferred capacity theory. The moral agency publications also address the issue of attributing partial responsibility to an individual, concluding that an individual cannot be partially responsible for a crime. If a defendant is a moral agent, she can be fully responsible for her actions, but her level of culpability might be reduced. If she is not a moral agent, then she should not be held criminally responsible to any degree.

Moral agency should not be restricted to merely ascribing criminal responsibility for the crime committed, but should extend to the defendant’s moral agency and their ability to hold a moral conversation throughout the trial process. The ‘unfitness to plead’ publications seek to apply this concept to an ability to participate effectively in a trial.

Only a moral agent can participate in a moral conversation. If a defendant is not a moral agent, she cannot engage in such a conversation by participating in her trial.

Depriving an individual of the right to hold a moral conversation ought only to be done where there is a causal link between the defendant's actions and any recognised medical condition. This theme is explored in the infanticide publication and is examined again with regard to unfitness to plead. A lack of moral agency deprives the defendant of the ability to conduct a moral conversation, but this should only occur as a consequence of a recognised medical condition.

The 'unfitness to plead' publications add a voice to the inadequacy of the current process and critically examine recommendations for legal reform. The 'magistrates' courts' publications uniquely focus on the inadequacy of any process for unfitness to plead in the magistrates' courts, alongside the unsuitability of proposed legal reforms. These publications offer a more focussed and original insight into issues surrounding effective participation of mentally vulnerable defendants in the magistrates' courts.

The culmination of this body of research is to put the trial as a moral conversation into context. The 'magistrates' courts' publications allow for the theoretical discussion surrounding the trial as a moral conversation to be placed into a practical context, whether by interviewing legal professionals and L&D practitioners, or examining the legal aid system and national L&D service.

Originality and Contribution to Knowledge

All of the publications are original in their application of, and contribution to, existing knowledge. Originality within this body of work also stems from the blending of doctrinal, jurisprudential, socio-legal and empirical methodologies in the context of mentally vulnerable defendants in the magistrates' courts.

Other evidence of originality lies in the different view taken to the Law Commission in recommending that any reform of a test for effective participation should be linked to a recognised medical condition. Further originality is demonstrated in the suggestion that reforms proposed by the Law Commission to extend the test for unfitness to plead into the magistrates' courts will be unworkable. The small empirical element in

publications 7 and 8 offers a 'real world' perspective, placing the trial as a moral conversation into context, and providing further evidence of originality. As stated above, research of this kind relating to effective participation in the magistrates' courts has not been undertaken elsewhere.

The 'diminished responsibility' publication contributes to knowledge insofar as it has been cited by Gibson[227] in 'Pragmatism preserved? The challenges of accommodating mercy killers in the reformed diminished responsibility plea' and by Hallet[228] in 'Psychiatric evidence in diminished responsibility'. Publications 1, 2 and 3 contributed to critical debates during the Law Commission consultation process. Publication 2 is cited by Wake[229] in 'Recognising acute intoxication as diminished responsibility? A comparative analysis', while publications 1 and 2 were cited by Arthur[230] in 'Giving effect to young people's right to participate effectively in criminal proceedings'. Participation in a Law Commission Working Party which influenced the content of the Law Commission's Final Report and Draft Bill demonstrates a further contribution to knowledge. It is hoped that the original approach taken in publications 7 and 8 will generate interest, provide a valuable contribution to knowledge for academics, legal professionals and practitioners involved in supporting mentally vulnerable defendants in the magistrates' courts and might lead to influencing policy changes in the future.

Critical Reflection and Professional Development

The experience of researching, writing and refining work for publication has enhanced my written work, my communication skills and my confidence. I have not only communicated and collaborated with peers,[231] but I have also met people who share common values and work towards improving the lives of some of the most vulnerable members of our society. These encounters have strengthened my resolve to grow as a researcher, an educator and a person. My experiences in writing and

[227] Gibson, n.90, 196.
[228] Hallett, n.91, 444 and 451-2.
[229] Wake, n.206, 72.
[230] Arthur, n.207, 223.
[231] Smith, n.20, 10.

publishing this body of research have given me the confidence to take a more strategic approach to my studies, for example, by planning several articles ahead.

Critically reflecting on the publications has been an essential tool to making improvements in my academic writing and in developing as a professional. I have gained more confidence in my voice and, wherever possible, I will put my view across more strongly. I will choose the most appropriate journals for my future research, rather than relying on the familiar. I will accept invitations to network. If I undertake more empirical research, I will aim to increase the number of participants. If I write about theories of culpability, I will focus on capacity theory, as distinct from choice theory.

Future Plans

A book chapter on infanticide[232] is awaiting editors' comments with a view to publication. This marks a return to moral agency and more a theoretical discussion. The defence of automatism deserves some attention, since it is the only mental condition defence I have yet to cover. Given that this defence might be narrowed if any proposed reforms of the insanity defence are implemented, it is possible that this topic will become current in the future. I have submitted an abstract for a proposed book chapter, to be co-authored on the subject of children and effective participation. As stated above, I hope to grow the *North East Connecting Vulnerability* network. Beyond this, I would like to interview magistrates along similar lines to publications 7 and 8 and to develop this area of expertise. A conference on vulnerability in the criminal justice system and possible funding bid are also under consideration, all time permitting.

[232] 'Myths and Moral Agency: A Principled Approach to Infanticide Law' in *100 Years of the Infanticide Act: Legacy and Impact.* Proposed editors: K. Brennan and E. Milne.

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App 2 Consultations

Law Commission Consultation Paper No 197: Unfitness to Plead
Response to Provisional Proposals by Helen Howard, Senior Lecturer in Law, Teesside University, 14/2/11

Provisional Proposal 1
The new proposals are undoubtedly an improvement on the current law. Paragraphs (1), (2) and (4) do not appear to deviate as far from the current law as paragraph (3). In its current form, the third paragraph seems to be very broad, and open to interpretation. In the context of mental illness, this flexibility offered by this paragraph should mean that the test is open to many more mentally ill defendants, and that unfair trials should be avoided to a much greater degree.

However, could paragraph (3) be open to abuse? Is there a danger that a defendant who has no recognised mental illness will try to claim an inability to use or weigh information as part of a decision making process? Might such a provision allow an individual claiming stress, crippling shyness, overwhelming tiredness, nervousness, or poor social background to escape a full trial? It may be that the proposal needs to be linked to some kind of identifiable mental illness. The proposed psychiatric test may remedy this issue to some degree. However, it may be worth adding the phrase to the legal test "an individual will lack decision-making capacity if, due to mental or physical illness, whether temporary or permanent, he is unable..."

Provisional Proposal 2
It is accepted that a decision need not be rational or wise. So long as irrational decisions are able to trigger a need for assessment, then this provision will recognise the individual's right to self-determination. No one can say that a decision which appears rational to one person is necessarily a good decision in the eyes of another.

Provisional Proposals 3 and 4
While it makes sense to assess an accused against the whole range of activities in which he may be required to participate during a trial, clearly some trials will be more straightforward than others (para. 3.83). The difficulty here lies in measuring where the threshold for capacity should be set. If the threshold is too high, then some individuals may unfairly escape the criminal justice system. If it is too low, then some will be unfairly drawn into trials, where special measures do not compensate for the lack of capacity. It seems that much will hinge on how the proposed psychiatric test is drafted and applied.

Provisional Proposal 5
With regard to the use of special measures forming part of the decision-making capacity test, there is merit in the argument that this would avoid special measures being overlooked at trial (para. 4.20). However, there could be a danger that an accused who lacks capacity may be 'pushed' into a trial, in which he is dependent on the special measures being adequately resourced. It is suggested that the special measures should be separate from the legal and psychiatric tests.

Provisional Proposals 6 and 7
There is currently no set psychiatric test (para. 5.2) and existing psychiatric tests are criticised (para. 5.3). The proposal that the test should assess decision-making capacity is concerning. The ultimate decision should lie with the court. Will a judge allow for the consideration of factors outside of the, as yet unwritten and untested, psychiatric test, or will he be exclusively guided by it? The danger here is that too much weight may be attached to the opinion of psychiatrists who will make the final decision as to whether an individual has the capacity to enter the criminal justice system. The potential to admit evidence that falls outside of the experience of experts in line with the proposed Scottish model (paras. 5.24-5.28) seems to be rejected on the grounds that "the majority of cases...concern conditions in relation to which psychiatric opinion is relevant" (para. 5.36). While it is accepted that the opinions of two medical practitioners are necessary, it is hoped that this will not exclude the possibility of evidence outside of the psychiatric remit where this would be useful. It may be helpful, for example, where an accused is being educated in a school which caters for special educational needs, for a teacher to provide evidence. Equally, where social services are involved in supporting the accused, the opinion of a social worker could be pertinent. The psychiatric test should merely "assist in measuring the capacity of the accused" (para. 5.39) and not usurp the position of the legal test.

Summary
In terms of the proposed capacity test, the proposals go a substantial way towards remedying the problems connected to the current law on unfitness to plead. With the caveat that the legal test should contain a reference to temporary or permanent physical or mental illness, and that there should be caution in creating an over-dependence on the psychiatric test, the proposed reforms deserve support. Most importantly, the paranoid schizophrenic who is hindered by his own psychosis from presenting and challenging evidence will be recognised as lacking the decision making capacity to stand trial. In the writer's opinion, such a test is a positive step towards the protection of vulnerable adults.

Unfitness to Plead Consultation Response, 7/7/14

Helen Howard, Teesside University

Following on from the Symposium which took place on 11th June 2014 at Leeds University, I would like to make additional comments with particular focus on the proposals for a new test.

Further Question 1: Do consultees agree that a reformed legal test for fitness to plead should incorporate a consideration of both decision-making capacity and the capacity for effective participation?

I can see how cognitive ability (discussed in the Further Issues Paper) as an alternative element to decision-making capacity would make for a more explicit test,

although it seems likely that an individual lacking in the ability, for example, to understand the charges against him, would be unable to use or weigh information as a consequence.

I think effective participation is implicit within the test. If it is thought necessary, perhaps it could be incorporated along the lines of the Scottish test (D must be incapable 'of participating effectively in a trial') or *O'Driscoll* (D must lack the capacity 'to participate effectively in the proceedings').

An adapted test based on *M (John)* [2003] EWCA Crim 3452 could incorporate effective participation as follows:

The jury may find unfitness to plead if the defence could establish on a balance of probabilities that D is *unable to participate effectively in a trial due to a lack of capacity in any one of following*...

Further Question 2: Do consultees consider that an effective participation test, framed around the John M criteria with an additional decision-making capacity limb, represents the most appropriate formulation for such a combined legal test?

This seems to reflect to some extent the test which is set out in *O'Driscoll*.

The advantage of the *John M* criteria above that of *O'Driscoll* is reference to the specific requirement to understand the charges (as opposed to the *proceedings*). The advantage of the *John M* criteria above the Scottish test appears to be inclusion of the capacity to give evidence in his own defence.

The most significant omission in the *John M* criteria in comparison with the other tests is clearly the lack of reference to decision-making capacity. An addition of this criterion does seem to represent the most appropriate formulation for a combined legal test.

Substitution of one criterion (exercising the right to challenge jurors) for one of decision-making capacity along the lines of *O'Driscoll* seems appropriate. Thus, I would be prepared to support the introduction of a test along the following lines:

The jury may find unfitness to plead if the defence could establish on a balance of probabilities that D is unable to participate effectively in a trial due to a lack of capacity in any one of following:

(1) understanding the charges;
(2) deciding whether to plead guilty or not;
(3) instructing solicitors and counsel;
(4) following the course of the proceedings;
(5) giving evidence in his own defence.

(6) making rational decisions in relation to his participation in the proceedings which reflect true and informed choices on his part.

Further Question 5: Do consultees agree that a diagnostic threshold would be unlikely to assist in maintaining the threshold of unfitness at a suitable level?

No, although I understand the need to keep the test as broad as possible. The Scottish and *O'Driscoll* tests require a link to a medical condition (mental or physical condition/unsoundness of mind or inability to communicate respectively). What is notable with the proposals is the omission of any need for a link to a recognised medical condition. This is required for the diminished responsibility defence and is set out in proposals for a new insanity defence of not criminally responsible by reason of recognised medical condition (Para 1.93 Law Commission Discussion Paper, *Criminal Liability: Insanity and Automatism*, 2013). If a recognised medical condition is required for these mental condition defences, then it is unclear to me why we should not require it for unfitness. Conversely, if it is not needed for unfitness, then do we need to ask why is it required for insanity and diminished responsibility?

Given that DSM 5 and ICD 10 are very broad, all of the examples provided in the Consultation Paper appear to fall within a recognised medical condition as follows:

Example 3A (F70 Mild mental retardation (International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10) Version for 2010))

A suffered head injuries and sustained lasting brain damage. As a result, he has the mental age of a five-year-old and a very low cognitive ability. He does not understand much of what is said to him and finds unfamiliar surroundings frightening. (para. 3.15)

Example 3B (F32 Major depressive disorder, single episode)

A is suffering from severe depression. He has no interest in interacting with other people and says that he does not care what happens to him. He has a disturbed sleep pattern, poor concentration and is unable to remember things. He has difficulty focusing on specific matters and has a poor ability to express himself verbally. (para. 3.16)

Example 3C (F90 Attention-deficit hyperactivity disorder)

A is a 13-year-old male who suffers from severe Attention-Deficit Hyperactivity Disorder (ADHD). This is at its worst when he is anxious. He cannot focus and is impulsive. He finds it almost impossible to remember any new information

he is given. (3.17)

Example 3D (F20.0 Paranoid schizophrenia)

A suffers from paranoid schizophrenia. He understands the charge but indicates to the court that he wants to plead guilty because “there is no point” pleading not guilty as everyone in the court including the judge and the jury are out to “get him”. He is convinced that his counsel and his solicitor are part of this conspiracy and he believes they are making the evidence up to make his predicament worse than it is. He has no insight into his condition. (3.18)

Example 3E (F42 Obsessive-compulsive disorder)

A suffers from obsessive compulsive disorder which is at its worst whenever he is stressed or anxious. Whenever he is asked a question, he feels compelled to consider the question from all angles and ruminates obsessively about the underlying meaning of the words or phrases in the question. He finds it impossible to come to a clear conclusion and make a decision. (3.19)

Example 3F (F84.0 Autistic disorder)

A is autistic and is unable to communicate with others. He can understand information and process lots of it, but does not acknowledge others and tends to “live in his own world”. (3.20)

Example 3G (F70)

A has a very low IQ. He cannot read and write because of his learning difficulties. He understands, however, that he is accused of assault, which he states he did not do. With assistance, A may be able to understand the trial process. His working memory is poor, however, and so he has difficulty answering questions and understanding the purpose of those questions. These difficulties mean that he can appear suggestible. (3.43)

At the forefront of our concerns should be that a trial needs to represent a two-way moral conversation between the defendant and the court. This cannot occur where the defendant is found unfit to plead and so, ideally, as many defendants as possible should be afforded this right.

If a trial represents a moral conversation between the court and the defendant, then D must be a moral agent in order to have this conversation. D might not be a moral agent due to a lack of capacity or fair opportunity (according to the capacity version of choice theory). Lack of capacity should be linked to a recognised medical condition, since failure to do so could set the threshold too low. Depriving D of moral agency is not a decision to be taken too lightly. If we are going to deprive someone of moral agency, then we should be sure of our reasons for doing so. Use of a

recognised medical condition would strengthen and support our reasons in this respect, and would provide consistency with the mental condition defences.

The main issue I can see here is that developmental immaturity is not considered a recognised medical condition. Developmental immaturity in children does not appear to feature on its own under DSM 5 or ICD 10. As such, unless the immaturity can be linked to conditions on the autism spectrum or due to mild mental retardation, then the developmentally immature 10 year old, who may be unable to effectively participate in a trial, could fail to satisfy the test.

Although I can see that this is an argument for keeping the test broad, my suggestion is that reform of *doli incapax* should be the preferred route for such children. It may also be that Special Measures are adequate in these circumstances. Alternatively, developmental immaturity could also be added as a separate condition.

Thus, I would recommend incorporating into the test a diagnostic threshold as follows:

The jury may find unfitness to plead if the defence could establish on a balance of probabilities that D, *by reason of a recognised medical condition,* is unable to participate effectively in a trial due to a lack of capacity in any one of following:

(1) understanding the charges;
(2) deciding whether to plead guilty or not;
(3) instructing solicitors and counsel;
(4) following the course of the proceedings;
(5) giving evidence in his own defence.
(6) making rational decisions in relation to his participation in the proceedings which reflect true and informed choices on his part.

Further Question 9: Do consultees consider that making the test one of capacity for effective participation "in determination of the allegation(s) faced" would introduce a desirable element of context into the assessment?

Yes. This would allow for the appropriate context to be taken into account.

Response to CPS Consultation: Mental Health Conditions and Disorders: Draft Legal Guidance 2019, 21/5/19

Q1: factors to be taken into account by prosecutors at public interest stage:

- Given that the public interest stage requires prosecutors to consider the seriousness of the offence, the likelihood of reoffending and the need to safeguard the public, is it worth making an explicit distinction between indictable and summary offences?

  In respect of mentally vulnerable suspects, a prosecution should be less likely for summary offences. This distinction is borne out by the Code for Crown Prosecutors which requires an assessment of culpability and harm (4.14(b) and (c)).

- While the statement on p16 that prosecutors 'should also weigh into account any evidence of an adverse impact on the suspect's health or disability of a prosecution' is commendable, I think it should be given greater prominence. The final four bullet points on this page seem to point more towards the need for a prosecution. Dealing with each of these in turn:

  1) Should deterrence form a part of the consideration if the suspect acted as he/she did because of his/her mental disorder? Surely the focus should be on treatment and, thereby, prevention? Perhaps a distinction should be made here between the defendant who acted *despite* and the suspect who acted *because of* his/her mental vulnerability, deterrence being more relevant to the former.

  2) The shift towards sympathy for mental illness is evident in the media and in heightened public awareness – justice might not be achieved for victims by subjecting a mentally ill suspect to a trial, especially where the alleged offence is a summary one. Perhaps, in these cases, there should be a higher presumption of the need for diversion and treatment, rather than criminal proceedings.

  3) The final two bullet points on p16 rely on the upholding of public confidence and the public interest in a judicial determination of allegations. Again, I think this is less necessary in summary cases.

  4) The suspect's ability to effectively participate in his/her trial should also be taken into account at this point, particularly given the inadequate procedures available in the magistrates' court. See also my responses to Q5 in this regard.

Q2 diversion from prosecution:

- Given the financial and time pressure on magistrates' courts, if it is possible to divert the mentally vulnerable suspect, then should there be a stronger presumption in the magistrates' courts in favour of diversion out of the criminal justice system?

- At the same time, this needs to be balanced against the availability of adequate Liaison and Diversion support. Prosecutors should still be required to enquire in advance, *inter alia*, into the availability of medical evidence or evidence from social services, as well as whether the suspect is already undergoing treatment.

Q3: procedures for fitness to plead:

- In respect of the magistrates' court, the draft document does not set out the (rare) option to stay proceedings for an abuse of process (*Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42). This could be necessary where, for example,
  1) the suspect suffers from a learning disability rather than a mental disorder,
  2) the mental disorder is not one that requires treatment in a hospital, or
  3) the offence is non-imprisonable.

- Should the (non-)availability of Legal Aid funding also be taken into account here? If the issue of fitness to plead is raised in the magistrates' court, requiring written or oral medical evidence, will the costs be justified for a minor offence?

Q4: Annex A:

- Should developmental delay in respect of children be included here?

Q5: any further comments:

- Under the section at p12, 'Evidential stage: conclusion':

  I think that summary and indictable offences should be dealt with differently. In terms of the Crown Court, I agree that a 'realistic prospect of conviction' can include circumstances which might result in a Special Verdict or finding of unfitness to plead and that, to do otherwise, 'would frustrate these provisions'.

  In the magistrates' courts, there is a stronger argument that a prosecutor should take into account:

  1) That there is no suitable procedure for a finding of unfitness to plead in the magistrates' courts (i.e. the procedure under s37(3) MHA 1983 and s11(1) Power of Criminal Courts (Sentencing) Act 2000 only applies to mental disorders, not learning difficulties, and only applies to imprisonable offences); and
  2) That an insanity defence may overburden stretched resources in the magistrates' courts, given the perceived 'assembly line' approach in these courts and especially given that legal aid provision allows for only fixed fees in the magistrates' court.

- At p7, 'A suspect who lashes out in a heated confrontation…may be deemed to intend to assault'. Equally, a suspect who behaves in this way might in

reality be exhibiting symptoms of mental illness, and so a closer examination of culpability of the suspect might be required. I would prefer the term ‘mentally vulnerable’ suspects to be adopted more frequently and defined in the broadest sense to include the suspect suffering from any mental disorder/learning difficulty which might affect his/her culpability or ability to stand trial.

- Under the ‘Principles’ heading, mention is made of developmental disorders but no reference is made to them in the Annex A; rather, the focus is on learning disabilities.

App 3 Sample of Coding and Thematic analysis

How 'you get a feel for' mental vulnerability:

with experience you learn yourself how to identify people who've got issues…it's something you learn to identify I suppose, through practice more than anything else.

…virtually all criminal defence solicitors without training simply pick it up because all crim defence solicitors/barristers are acute observers of human behaviour and pick up signs. Signals.

…a lot of it is common sense. If I'm meeting a new client…and he's behaving in a strange way or if talking to him doesn't feel like talking to him should. You know when you're talking to him you get visual cues, a nod or…'yeah'. If he's not doing that then you need to…make more of an effort to ensure he's getting what I'm saying.

… I'm no psychiatrist, I don't know whether this is a symptom, a condition or what, but sometimes people who have [mental health] difficulties…develop strategies to look like they don't. What I mean by that is there'll be someone who doesn't know what day it is, he doesn't know what you're talking about, he doesn't understand the caution, he doesn't understand what he's accused of, he doesn't understand what a bench magistrate is…but if you're talking to him, on first blush, you'd think he did…but then when you say to them 'can you explain that back to me, you get a blank look.

So in terms of processing things, in terms taking things on board and understanding things, not even as a lawyer but just as a person communicating with people you get an inkling that something's not right.

I guess dealing with people who have problems, legal problems and [mental health] problems, they go hand in hand.

…you get a feeling for clients who are genuinely confused, not understanding it, can't even understand what you're saying
…something about him that I thought was similar to another client
you get a feel for people who don't seem to be understanding…
it's using your own initiative when you go and speak to people that you pick up whether or not you think someone has mental health problems
It's just going on your gut instinct…
it felt very wrong that he was on trial.
…[magistrates] don't sit every day…They haven't got that experience.
Occasionally you get the idea that this isn't right

Frequency of mental vulnerability in mags' courts:

When you take the full spectrum into account it's not rare at all
Quite rare actually, 5 or 6 in my 6 months…unusual

Except…in the majority of cases probably there's some MH issue in the background but in terms of something that's relevant to whether it's going to be a trial then that's much rarer.
Not rare at all
Almost every client I've had, with the exception of a handful certainly in the Mags court
Every day. It depends on where you place the level of vulnerability because standards have changed remarkably…since I started practising in 1980.

It's not something we tend to deal with on a daily basis. I've been doing this for 15 years. I can probably count the times I've had direct experience of this on one hand. Peterlee magistrates.

The frustration:
I think it's a huge problem from police stations through to magistrates' through to the Crown.

There [have] been times where you just stand there thinking this is ridiculous, this person shouldn't be here. It's completely not the venue to resolve these issues.

what I find **frustrating**…is because there's no proper procedure in the Magistrates' Court…
I can't put into words how **crazy** that is…that you can't even take instructions from someone. We'll take it as not guilty, we'll have the trial...then we'll decide…
it **felt very wrong** that he was on trial. Even the judge recognised it…but didn't stop the trial.
Enter a plea and then we'll assess you, see whether we think you are [fit] or not…**really winds me up** actually…
I spent the whole day…holding her hand trying to explain…**that should not be going on.**
Every single barrister I know has stood up in court at one time **banging their head against the wall** trying to get the judge or the magistrate…to realise that this person has got MH problems…
there was just this passive acceptance…it just wasn't in the public interest
I was annoyed because had I been instructed in the first appearance I would have been making representations to the CPS that the matter would be dropped
sometimes **it's like banging your head against a wall**

On fairness:

So you're not necessarily having the checks done properly at the police station … It falls short at the first hurdle in fairness…

It's something that I've seen and I've felt for a very long time that people with mental health aren't being fairly treated throughout the judicial process…

what would seem more just is if it's a medical expert deciding…
it felt very wrong that he was on trial.
[on using same test in both courts] Yes, …if you couldn't move it all to the Crown court yes it has to be the same test. …because it's not fair otherwise and …

…even when something unfair happens…a lot of clients…the way they see it, it's just another conviction in a long list…not interested can't be bothered.

[mentally vulnerable defendants are having unfair trials] constantly, all the time, every day, up and down the country
[trials are unfair] from the fact that they can't get legal aid…because it's not imprisonable e.g. drunk and disorderly. They might not turn up for their trial…
[defendants]…not taking the whole process seriously. That does tend to impact on whether it's a just trial.

…police went along with it, despite me saying 'this is completely wrong'.

On the lack of time/failings:

…in police stations, I've had cases at the police station where someone is clearly unfit to be interviewed in my opinion – I'm not a practitioner – but they've been assessed… yes, you can interview them. I've then said 'make no comment' because I'm not happy for them to say anything. [We] go through that process then they'll have [been] sectioned, so then my argument is 'you're saying he's fit for interview, but after an interview which he shouldn't have had you then section him … clearly he wasn't…happens all the time…

an FME [forensic medical examiner]...; and they see them for a couple of minutes and can find if they are being …aggressive or difficult as people with mental health problems often are, they will say they're fit

there was a district judge there…I couldn't quite believe he said it…'you all might come into my court…and this client is unwell. He's not fit to stand trial, he's not fit to plead…he might need to see the diversion team…but, you know, as far as I'm concerned…most people who come into the magistrates' court will have something wrong with them…we'll just crack through the list, see how far we can get…'

…it felt very wrong that he was on trial. Even the judge recognised it…but didn't stop the trial.
I felt just up to the point of conviction [the court] was almost wilfully blind to this chap's mental health issues which were so plain to see from his behaviour in court.

they tried to go back to the police who said 'we signed her over she's not our problem anymore'. So there was a big fight between them all day and I was ringing mental health institutions myself to try and get her sectioned… [A]t the end of the day I was left with the choice of having the hearing go ahead and her being remanded and taken to a prison, a girl of good character who's got mental health issues, or throwing her out on the street where she wasn't fit. [O]n that occasion the bench said she can't come up she's not well enough…did come down and also put a complaint about it but you're in that situation where on Friday afternoon at 4.30 you're making a choice about someone with mental health conditions where you've got to keep them safe even though if…

the amount of times [you hear] we've charged them…just get through the trial, get them some help...I'm sceptical about whether the help…that is actually offered…is

any good…There's this bizarre obsession, we've started proceedings now…get through it, get to the end…

you just know if he'd [a client in the Crown court] been in the magistrates' court they wouldn't have waited for reports. They would have just cracked on with it….rushed straight through it…even if you adjourned… but the expert can't prepare the report by 8th April, they would say no, not in the interests of justice to adjourn

It can be a good outcome – a community order with a MH treatment…but it felt like a false trial because this chap didn't understand what he was charged with. He gave me nonsense instructions that were completely different next time I saw him…
He certainly could not give evidence…but went through the trial.

[A] man who thought he was Jesus, got through the police station without it being flagged…produced in the court and he was shouting all kinds of stuff…the bench sent him back down to cells because they thought he was being...obnoxious...to think about his behaviour… and put him to back of list…then called on as last case...refused to leave cell…so they remanded him into custody. This was a man who had never been in trouble before who had been picked up… because he had been shouting in the street who ended up spending 2 weeks in prison having never been in trouble before…and being seriously unwell.
His wife had reported him as missing…she found out about our hearing because psychiatrist at prison had…
The ultimate failing for [those] 2 weeks in custody had in my view lay with that bench…who didn't pick up that he was extremely seriously ill.

So you're sometimes put in a position where there's a voice in your head saying 'well actually there's something else should be done here' but you end up going through the process and people are dealt with because they are minor offences and they're churned in and churned out and we have people who, because they don't test it, and don't go through that process get convicted when they shouldn't.

If they say yes it is [in the public interest] then it gets to court, again all you can do is either list it for trial , decide whether or not to call your client, decide whether or not to get an intermediary, but ultimately you'll be saving the prosecution…this guy's not following this – is it really in the public interest to proceed? If they've got an idea…we've got to push this forward, the answer to that is invariably yes and you have a nonsense trial.

If I had any sense for my own profit…I would have persuaded her to plead guilty.

Some solicitors will be doing this – that is going on all the time. This government [and the last] tried to turn us into legal factories….Once you create that mentalilty then people will do the least work for the most profit.

<u>On liaison & diversion:</u>

If you're in a court with a good MH team…

There have been cases where I've thought my client needs to see a MH team and it's been trickier. If there's not one in that part of the building or if they're seeing someone else…
[depends on] which diversion team you've got
I went over to the diversion team and said (and this was on the day of trial) 'please can you assess my client, you can hear her from here… I think she might be mentally ill…' The diversion team told me that they couldn't assess her because she was too unpredictable.
…sometimes you're at a court where they aren't there…
it just depends on your diversion team, on your judge…
[MH] team saw him and they said not fit to plead even though that's not the term in the magistrates' court, recommended for diversion
I'll start at the police station if I think it's appropriate with the diversion process. If it goes further, I'll go to CPS about public interest. If we're still going then it's going to be 'get it to the Crown Court where there's a proper system of dealing with it' and I'm not going to be out of pocket as well.

They'll get L&D on, they'll get the liaison and diversion team, they'll get a force medical inspector out who's trained and done all kinds of courses in this thing and they'll look at them, talk to them, ask them the questions off their list and they'll either come back and say yes we agree, in which case they've got to…decide whether it's in the public interest to proceed or do they just go ahead and say no we think he's fine in which case what I normally do…is I do what I can to get him to understand what's happening.

We went through several hearings even trying to get the thing moving, then we got mental health involved

<u>On legal aid:</u>
Bigger firms will churn [them] in, churn [them] out to make money, smaller firms are more ready to get reports, to challenge it, to prevent it going any further. When you're a duty at court you don't have that luxury, you've got to make quick decisions, and normally people just want to be dealt with and get out that day if they're in custody or they don't want to come back in case they don't get funding. So they're quite happy to be dealt with…

…the bigger firms won't always go to the extent of in every case testing and doing it properly because they've got so many clients coming through, it's the only way they can exercise, they don't do it, they should do it.

At the police station, you will get police station reps, you won't always get a solicitor or a duty solicitor, . Police station rep will just no reply it, they want to churn it in churn it out; again, they're all about volume to get paid.

If you can't get legal aid, you're snookered because even if you get the duty, they might represent you on the first occasion. They can't then represent you on the second time, so you can't get a report. They've got to have representation.
In an ideal world you should always get representation but just because you've got MH problems it isn't necessarily enough if it's a minor offence…

The cutbacks have definitely made the situation worse.

For a summary only offence…[i]t's not a proper use of resources…to involve a forensic psychiatrist…, possibly two, if you're going in to the issue of a person's fitness…and compare that with the possible penalties – you resolve that usually by means of an appropriate plea in mitigation. It's a question of balancing one against the other. In theory, yes, you could say that the person's acquired a conviction but unfortunately we live in a world of finite resources and no more so than in the criminal law area and also mental health. So it's a question of managing it.

I do [ask for a psychiatric report in the mags] but it doesn't make commercial sense for anybody to do it [as it comes out of your fee] and the worst thing you can do is get yourself known for it … other solicitors will send their clients. So you have to be careful. You also have to weigh one thing against the other because we're dealing with summary only offences…and how many of those are there, and how serious are they? Most of them are stuff like road traffic .

If I had any sense for my own profit…I would have persuaded her [mentally ill defendant charged with public nuisance] to plead guilty. Some solicitors will be doing this – that is going on all the time. This government [and the last] tried to turn us into legal factories….Once you create that mentalilty then people will do the least work for the most profit.

I don't think it financially is [doable to have the same process as the Crown Court].

When we get a case, we get a fixed fee on that case. If we do enough work on the case then it goes into the higher category, we get more money on the case.

SO, if it's a quick trial, he punches her, she doesn't come to court you get £390. If he punches her, there's 8 defence witnesses I need to see in half an hour of time. I need to do a visit to the scene to see if it's laid out like she says it, I need to read through her interview, through his interview, and there's 10/11 hours' worth of work …and then we have a trial that takes 4/5 hours, you get into a higher category and it's not just on a fixed fee, it's like 'how long did it take?' You get £900-£1000 for that.

If you need to call experts, you're allowed to do that, but you've got to get prior authority, so you fill a form out saying I've got 2 quotes, this guy's the cheapest, we need this because we need to comment on scientifically speaking whether this force could cause this injury…

The problem there is is it necessary because if I'm getting psychiatric reports for a common assault (summary only) they're [the Legal Aid Board] going to say why do you need this? It's not going to fitness to trial because that's not an issue in the mags.

Technically you could argue it but it's not something we've done.

App 4 Master of Jurisprudence articles

‘The Confinement of Personality Disordered Individuals: Questions of Justice and Safety’ (2001)
‘Reform of the Insanity Defence: Theoretical Issues for Consideration’ (2003)

https://liveteesac-my.sharepoint.com/personal/h_a_howard_tees_ac_uk/Documents/Teesside%20Uni/RESEARCH/PhD/Articles/MJur%20Publications.pdf

App 5 The 'Coherent Threads' Matrix

Publication	Themes/Coherence	Originality	Impact/Contribution to Knowledge
From MJur: 'The Confinement of Personality Disordered Individuals: Questions of Justice and Safety' (2001)	Moral agency – ability to hold a moral conversation Civil detention over criminal punishment	Emphasising the importance of theory underpinning practice	Cited by Law Commission, 'Criminal Liability: Insanity and Automatism: A Discussion Publication' (13 July 2013)
From MJur: 'Reform of the Insanity Defence: Theoretical Issues for Consideration' (2003)	Moral agency – rationality Need for a causal link	Emphasising the importance of theory underpinning practice	Cited by Law Commission, 'Criminal Liability: Insanity and Automatism: A Discussion Publication' (13 July 2013)
1.'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011)	Moral agency – ability to hold a moral conversation Need for a causal link Unfitness to plead and effective participation	Emphasising the importance of theory underpinning practice	Formed basis of response to Law Commission Consultation Publication on Unfitness to Plead Cited by Law Commission, 'Unfitness to Plead - Analysis of Responses' (10 April 2013), and Law Commission, 'Unfitness to Plead: An Issues Publication' (2 May 2014)
2.Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011)	Moral agency – ability to hold a moral conversation Unfitness to plead and effective participation	Emphasising the importance of theory underpinning practice	
3.'Unfitness to Plead and the Trial of Facts: A Critical Review of the Law Commission's Proposals and the Decision in R v MB' (2012)	Moral agency – ability to hold a moral conversation Unfitness to plead and effective participation	Emphasising the importance of theory underpinning practice	Membership of Working Group for Law Commission on reforming the law on unfitness to plead (2014) Law Commission, 'Unfitness to Plead, Volume 1: Final Report' Law Com No 364 (12 January 2016)
4.'Diminished Responsibility, Culpability and	Moral agency – rationality Partial responsibility	Emphasising the importance of theory underpinning practice	

Moral Agency' (2015)			
5.'Lack of Capacity: Reforming the Law on Unfitness to Plead' (2016)	Moral agency – ability to hold a moral conversation Need for a causal link Unfitness to plead and effective participation	Disagreeing with Law Commission over the need for a diagnostic threshold Emphasising the importance of theory underpinning practice	
6.'The offence/defence of infanticide: A view from two perspectives' (2018)	Moral agency – rationality Partial responsibility Need for a causal link	Emphasising the importance of theory underpinning practice	Resulted in invitation to contribute a chapter in a book, *100 years of the Infanticide Act: Legacy and Impact*
7.'Effective participation of mentally vulnerable defendants in the Magistrates' Courts in England and Wales – the 'front line' from a legal perspective' (2020)	Putting the moral conversation into context Unfitness to plead and effective participation	A cross-disciplinary approach Combining doctrinal and empirical research methods Disagreeing with Law Commission proposals on effective participation in the magistrates' courts	Resulted in organising networking event in 2020/2021 (Cancelled due to COVID)
8. 'Effective Participation of Mentally Vulnerable Defendants in the English Magistrates' Courts – the Crucial Role of Liaison and Diversion' (2022)	Putting the moral conversation into context Unfitness to plead and effective participation	A cross-disciplinary approach Combining doctrinal and empirical research methods	Complementing online networking community

App 6 Ethical approvals

RE: Ethical Approval Request - Helen Howard

You replied on Tue 30/04/2019 11:46

Swainston, Katherine
To: Howard, Helen; Lodge, Anne; Prior, Scott
Mon 25/03/2019 11:08

Hi all,
Grand. Happy to approve. Scott, I'd be very grateful if the system could be updated and all documents for this application collated and filed please – many thanks!!
All the best,
Kath

Dr Katherine Swainston CPsychol AFBPsS PhD
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Dr Katherine Swainston
Senior Lecturer in Psychology
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School of Social Sciences, Humanities & Law

IRAS 265871: Confirming Capacity and Capability within Tees, Esk & Wear Valleys NHS FT

Researchanddevelopment (TEES, ESK AND WEAR VALLEYS NHS FOUNDATION TRUST) <TEWV.ResearchAndDevelopment@nhs.net>
To: Howard, Helen
+1 other
Cc: Researchanddevelopment (TEES, ESK AND WEAR VALLEYS NHS FOUNDATION TRUST) <TEWV.ResearchAndDevelopment@nhs.net>
+1 other
Mon 07/10/2019 13:14

SOP Contents Page V5.pdf

1. TEWV Start-up Report.docx

Organisational Information Document.docx

3 attachments (268 KB)

Dear Mrs Helen Howard,

Title: Effective participation of the mentally vulnerable defendant in the Magistrates' Courts – perspectives from the front line.

IRAS number: 265871
R&D reference: 0612/19

This email confirms that Tees, Esk and Wear Valleys NHS Foundation Trust has the capacity and capability to deliver the above referenced study. Please find attached the Organisation Information Document as confirmation. We agree to start this **study 7th October 2019.**

The research must be conducted in accordance with Tees, Esk and Wear Valleys NHS Foundation Trust Standard Operating Procedures, which are available to you on request (see attached index of SOPs) or through InTouch for Trust employees.

We require you to let us know when you recruit the first participant and to complete a start-up report within the first three months of the study gaining confirmation, a progress report (if required depending on study duration), and on the completion of the study which will outline the key findings for dissemination to clinicians, service users and carers as appropriate. We also encourage you to inform us of any publications which results from the project.

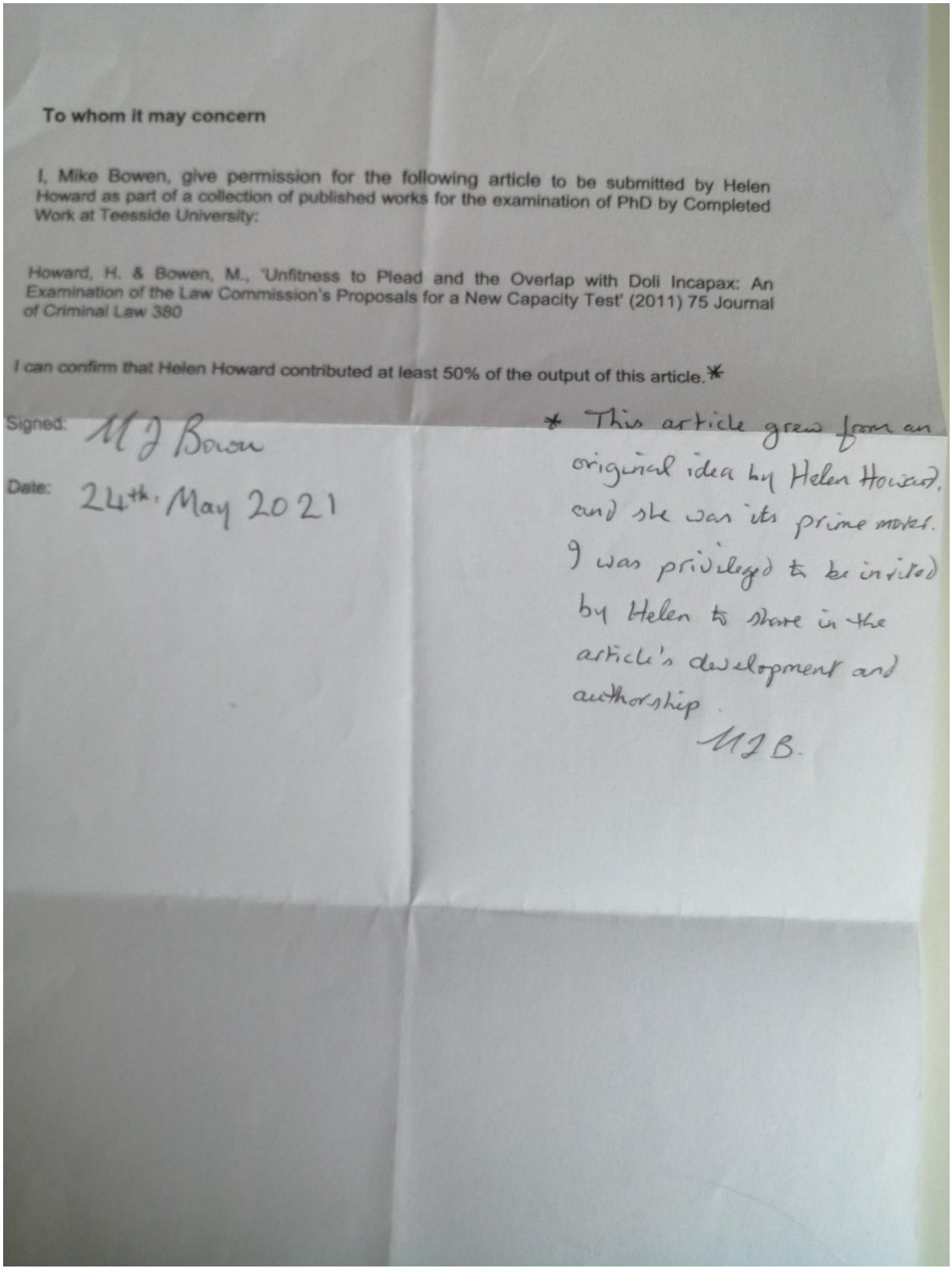
The Trusts R&D office also conducts a yearly audit of 10% of the research studies set up within the Trust, and you will be informed in advance if this study is due to be audited.

I would like to take this opportunity to wish you every success with your research. If there is any way that we can assist you in the future please do not hesitate to contact us.

Best wishes,

Maninder Kaur
Research & Development Facilitator
Research and Development, Tees, Esk and Wear Valleys NHS Foundation Trust, Flatts Lane Centre, Flatts Lane, Normanby, Middlesbrough, TS6 0SZ
☎ Tel: 01642 283501
✉ E-mail: maninder.kaur@nhs.net
Visit our projects at: www.tewv.nhs.uk/TEWVResearch

App 7 Co-author's consent



To whom it may concern

I, Mike Bowen, give permission for the following article to be submitted by Helen Howard as part of a collection of published works for the examination of PhD by Completed Work at Teesside University:

Howard, H. & Bowen, M., 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 Journal of Criminal Law 380

I can confirm that Helen Howard contributed at least 50% of the output of this article.*

Signed: MJ Bowen

Date: 24th May 2021

* This article grew from an original idea by Helen Howard, and she was its prime mover. I was privileged to be invited by Helen to share in the article's development and authorship.

MJB.

App 8 Revisions and Responses to *Howard Journal of Crime and Justice*

Assessor: 1

Comments to the Author
This is an interesting paper, which I think makes an important contribution to the literature on: mentally vulnerable suspects and defendants (specifically the latter), Liaison and Diversion, and the adjustments to the process for 'vulnerable' defendants. It is clearly written and easy to follow. The section on the law relating to vulnerable defendants is well-written, although I was surprised to see no reference to Fairclough's or Owusu-Bempah's work.

Author's Response: done.

The contribution made by this paper is particularly welcome, given (as discussed on pp15-16) the increasing digitisation of the courts. I think that this paper would make an excellent contribution to the Howard Journal.
The author(s) (on p 1) have cited Fineman re protection of the vulnerable, however, Fineman's vulnerability thesis posits that everyone is vulnerable and instead the counterpoint is resilience. I would suggest that the author(s) rethink this statement..

Author's Response: noted.

The L&D mechanism that the author(s) speak of is only available in England (through NHS England) as healthcare is devolved to Wales. Wales have criminal justice liaison services, but these are not organised in the same way than in England. I suggest: (a) making clear the scope of the discussion (i.e., confined to England), noting the different mechanism in Wales, or (b) adding discussion of Wales ((b) would undoubtedly be a more significant and time-consuming task, and I don't think it's strictly necessary, i.e., I think that this paper makes a significant enough contribution to understanding of L&D that it can be confined to part of E&W jurisdiction alone).

Author's Response: done.

How does the author(s)' definition of 'mentally vulnerable' align with how this definition is used elsewhere? Why has the definition used by the author(s) been chosen?
In the methods section, it would be helpful to note the pseudonyms that you are later using as I had to infer that Ash, Sam, Charlie, and Gene were interview participants.
I was a little confused as to why the author(s) have discussed police custody in their results; the focus of the article is the magistrates' court. I don't think that this is a huge problem, but it should be clearly flagged and the rationale clearly explained, or perhaps it is worth reframing the abstract and title to more accurately reflect that this is not simply about the mags court (obviously police custody is important and is linked with the mags court, so perhaps explaining this more clearly would make the inclusion of discussion on police custody clearly relevant – this is done well at the top of p14, but it would be good to see an

explicit discussion and rationale earlier in the paper). I did wonder whether some of the discussion from p14 could be moved to earlier in the paper.

Author's Response: done.

I would also expect to see some engagement with the literature on the magistrates' court to further underscore why it is important for there to be court diversion. I think that some sections of the paper could be further strengthened by reference to the literature on 'conveyor belt justice' (there is some old literature that is still relevant today, as well as some more contemporary literature that I think should be cited here).

Author's Response: done.

Might it also be worth highlighting some of the issues with what is recorded on NICHE (or the PNC or PND)? There is some literature on the identification of vulnerability and risk in police custody that I think would be relevant here. I also thought that it would be worth situating some of the discussion within the literature on multi-agency working. Additionally, I think it is also worth engaging (briefly) with the question of whether the legal representative is equipped to identify vulnerability in their clients.

Author's Response: not done. I felt this might dilute the focus.

There are a few minor grammatical errors and typos that can be addressed quite easily during any other revisions made. Overall, a great paper that I thoroughly enjoyed reading!

Assessor: 2

Extract from Comments to the Author
There is little empirical material in this area and so this paper is of real interest. However, there seems to be something of a disconnect between the title (and the opening sentences of the abstract) and the empirical evidence discussed in the body of the paper. The paper seems to be predominantly about the identification of mental vulnerability by L&D teams and the enabling of diversion (pre-charge and at point of sentence) rather than about effective participation.

Author's Response: I have strengthened the links to effective participation, in order to make this focus clearer.

App 9 Publications 4 and 6 – the ‘Moral Agency’ publications

https://liveteesac-my.sharepoint.com/personal/h_a_howard_tees_ac_uk/Documents/Teesside%20Uni/RESEARCH/PhD/Articles/Moral%20Agency%20Publications.pdf

App 10 Publications 1, 2, 3 and 5 – the ‘Unfitness to Plead’ publications

https://liveteesac-my.sharepoint.com/personal/h_a_howard_tees_ac_uk/Documents/Teesside%20Uni/RESEARCH/PhD/Articles/Unfitness%20to%20Plead%20Publications.pdf

App 11 Publications 7 and 8 – the ‘Magistrates’ Courts’ publications

https://liveteesac-my.sharepoint.com/personal/h_a_howard_tees_ac_uk/Documents/Teesside%20Uni/RESEARCH/PhD/Articles/Magistrates'%20Publications.pdf