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## The Terrain of Mental Incapacity in Criminal Law

This book offers a study of the terrain of mental incapacity in criminal law. I am particularly interested in the relationship between legal doctrines, practices, and knowledge about mental incapacity. I suggest that the terrain of mental incapacity in criminal law is traversed by a set of mental incapacity doctrines, and marked out by particular legal practices concerning evidence and proof, which themselves rest on different types of knowledges of mental incapacity. I argue that this terrain has a distinctive character, which I analyse under the label ‘manifest madness’. And by introducing the concept of ‘manifest madness’, I invite scholars to engage in a rethinking of this area of criminal law.

My study of mental incapacity is based on the criminal law of England and Wales. It advances our understanding of mental incapacity in three main ways. First, I develop a theorized account of the scope of the mental incapacity terrain, based on a rethinking of what it is that particular criminal law doctrines share, and on what basis they are connected. Second, the book provides a careful socio-historical study of each of the legal doctrines classed as mental incapacity doctrines on my account. In doing this, I focus on a particular mental incapacity doctrine, its attendant practices of evidence and proof, and the different types of knowledge enlisted in those practices. Last, based on my close and systematic study of each doctrine, and with a view to the mental incapacity terrain as a whole, I offer an analysis of the deep structures of the terrain, presented as ‘manifest madness’.

### Why Examine Mental Incapacity?

Mental incapacity has come to occupy a prominent place in the contemporary criminal law. From the question of the age below which a child cannot be held liable for any offending behaviour, to the attribution of criminal responsibility to defendants with mental illnesses, mental incapacity raises concerns for legal actors, policy makers and legislators. Individuals’ claims based on mental incapacity raise fundamental issues—concerning criminal responsibility and subjectivity—which go to the core of criminal law. When mental incapacity is raised at trial—whether for the purposes of exculpation, or for some other reason, such as to prevent a normal trial proceeding—it is often assumed to raise distinctive (and difficult)

issues of evidence and proof. The point of intersection between crime and mental incapacity attracts a high degree of social and political interest. In short, mental incapacity has a symbolic significance in the criminal law that stretches beyond its role in particular cases.

In broad brush strokes, and at the risk of caricature, the usual story told about this area proceeds along the following lines: mental incapacity in criminal law is a rag-bag area of criminal law, featuring intricate legal constructs (such as ‘disease of the mind’) and unusual rules of evidence and procedure (such as the reverse burden of proof). The development of mental incapacity doctrines—typically labelled mental incapacity defences—was and continues to be characterized by conflict, either explicit or implicit, between expert medical and legal knowledges. It is this conflict that has resulted in the creation of what is generally understood as an uneasy middle ground between legal and medical norms when it comes to mental incapacity in the criminal law. Medical and legal types of expert knowledge are usually regarded as mutually exclusive and thought to together cover the field of knowledge practices related to mental incapacity in criminal law. In terms of their operation, however, individual mental incapacity doctrines are typically considered practically functional even if theoretically confused.

While there is no question about the value of much of the literature on mental incapacity, there are reasons to think that a close analysis may tell a different story. In this story, mental incapacity has a greater significance than hitherto realized. For instance, as it articulates with criminal non-responsibility, the development of principles and practices concerning mental incapacity is connected to the historical existence of the exculpatory criminal trial—whereby defendants were in effect presumed guilty and required to prove their innocence. This connection meant that claims to exculpation based on incapacity were crucial in the formalization of criminal law defences, and in the cleaving apart of defences and factors in mitigation, as well as in the development of the particular rules of evidence and procedure that accompanied this movement. Later, the rise to prominence of a professional body of ‘alienists’ and a discipline of psychiatry made criminal trials about insanity prominent *fora* for discussion about the meaning, significance, and means of identifying abnormal mental states. The deployment of the criminal law as an instrument of moralization in the late Victorian era provoked what has turned out to be sustained social and political anxiety about individuals who seek to ‘get off’ on claims of incapacity. The different types of knowledge now covering the field of mental incapacity in criminal law interrelate with each other and are mediated through legal institutions such as the jury and the trial. Expert knowledges must be seen to share the field with lay or non-expert knowledge of mental incapacity, an unsystematized body of knowledge that encompasses attitudes and beliefs held by non-experts. Even these brief points suggest that a careful study of the development of the law on mental incapacity seems likely to reveal the interest of this topic for criminal law more generally.

The starting point of this book is the distinctiveness of a part of criminal law that I call the mental incapacity terrain. It is this terrain that forms the focus of this book. As I discuss in Chapter 2, this terrain includes, but is not limited to, what are usually called mental incapacity defences. In Chapter 3, I argue that this terrain has

a particular character, which I analyse under the label ‘manifest madness’. With the label ‘manifest madness’, I refer to the specific character of ‘madness’ at the point of intersection with crime. I argue that it has two formal features, one ontological and one epistemological (according to which, ‘madness’ is constructed as both dispositional and ‘readable’). Together, these features constitute the topography of the mental incapacity terrain. Turning to examine individual parts of this terrain—particular mental incapacity doctrines—in the remaining chapters of this book, I subject each to a close socio-historical assessment. These assessments reveal the dynamic nature of the topic of mental incapacity, with reconfiguration of the merciful space marked out by mental incapacity over time. As I discuss at different junctures in the book, the terrain of mental incapacity is marked out by *both* expert and non-expert knowledges, and their interaction constitutes a distinctive dimension of this area of criminal law.

Part of what makes mental incapacity an intriguing topic is that, although it is often treated as if it were straightforward, it is complex. One reason why mental incapacity is complex is that it is a disciplinary hybrid. As the Royal Commission on Capital Punishment stated about insanity, it is ‘usually regarded by lawyers as a medical term and by doctors as a legal, or at any rate a medico-legal term’.<sup>1</sup> Although it is a legal term, in that it is a term vested with meaning in legal discourse, it has a close connection to what in the current era might be thought to be a medical referent, an individual’s non-normal mental condition.<sup>2</sup> When considered alongside the way in which legal doctrines are organized across the mental incapacity terrain—almost wholly around disability—it is clear that these criminal law doctrines invoke a non-legal body of knowledge. This body of knowledge is a type of medical knowledge, epitomized by psychiatric and psychological knowledge (knowledges which have been labelled ‘psy-knowledge’<sup>3</sup>). The part played by psy-knowledge in the criminal law domain marks this area out from other areas, and the notions associated with psy-knowledge—such as objectivity, victimhood, amorality, and non-responsibility—have particular significance in legal practices of evaluation and adjudication.

Another reason why mental incapacity is intriguing is that it refers to something abstract, albeit in a way that we might feel confident to say we know to what it refers. Although it might be thought to describe a condition or set of conditions, strictly speaking, mental incapacity refers to the *consequences* of certain conditions. It is for this reason that mental incapacity has been analysed

<sup>1</sup> See United Kingdom Royal Commission on Capital Punishment 1949–1953 Report (Cmd 8932, 1953) para 212.

<sup>2</sup> In terms of medical language referents, the term mental incapacity encompasses mental disorder, mental illness, intellectual disability, and physical disorders that have an effect on mental functioning. For discussion of the meaning of some of these terms, see United Kingdom *Report of the Committee on Mentally Abnormal Offenders* (Cmd 6244, 1975) (‘Butler Report’) para 1.12. Examples of physical illnesses that have an effect on mental functioning include hyperglycaemia (*R v Hennessy* [1989] 1 WLR 287) and psychomotor epilepsy (referred to in *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 403).

<sup>3</sup> I use the term ‘psy knowledge’ following Nikolas Rose. For further discussion, see N Rose *Inventing Our Selves: Psychology, Power and Personhood* (Cambridge: CUP, 1996).

by criminal law scholars in terms of its effects, that is, as an absence of, or impairment in, the moral, cognitive, and volitional capacities both assumed and required by the law.<sup>4</sup> As the reference to such capacities suggests, mental incapacity is intimately related to the foundational concepts of subjectivity and individual responsibility in criminal law, and to processes, such as the criminal trial, dependent on such subjectivity and tasked with evaluating responsibility. This connection to the foundational concepts of criminal law and core criminal processes suggests the place of mental incapacity at the heart of criminal law.

Mental incapacity is also intriguing because it is something of an umbrella term—it enjoys a wide reach. It is possible to gain a sense of this by slicing mental incapacity in different ways. If it is sliced according to medical referents, it includes difficulties of communication as well as comprehension (under unfitness to plead) and also affective conditions such as depression (under diminished responsibility). Although several parts of the terrain of mental incapacity in criminal law continue to reflect a bias toward cognitive capacities, taken as a whole, the reach of mental incapacity extends far beyond this. If we slice mental incapacity according to less technical descriptors of the type of incapacitation covered, it includes moderate or severe, temporary or permanent, externally-induced or endogenous incapacitation. For instance, as I discuss in Chapter 2, the law on intoxicated offending may be included within the scope of mental incapacity in criminal law. The reach of mental incapacity indicates the diversity of conditions criminal law doctrines cover, and also suggests that much more is captured by mental incapacity than it might be taken to suggest on its face.

These different dimensions of mental incapacity hint at the particular meanings that mental incapacity generates in criminal law. I make the case for taking seriously the specific kind of difference encoded in criminal law doctrines—which I call abnormality—as this is a feature of each of the doctrines that make up the mental incapacity terrain (in Chapter 2). The particular ways in which the mentally incapacitated subject is imagined as abnormal is the flipside of the legal construction of the ‘normal’ individual, a capacitous subject, and one to whom ordinary principles of responsibility, liability, and punishment apply. Having made a case about the significance of the kind of difference encoded in mental incapacity doctrines, I expand the viewpoint, beyond legal doctrines, to encompass legal practices concerning evidence and proof of mental incapacity. Adopting a multi-dimensional approach to the terrain of mental incapacity (taking into account evidence and proof as well as legal doctrines) prompts me to adopt the term ‘madness’ in my analysis because there is something more complex and multi-layered that I seek to capture under my ‘manifest madness’ label (in Chapter 3). The meanings produced in and through criminal law doctrines and practices concerning mental incapacity are what make this area an exciting subject of study.

<sup>4</sup> Antony Duff argues that mental disorder is best understood in terms of ‘an impairment of the capacities for rational thought, emotion and action that constitute responsible agency’: see R A Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007) 286. See also V Tadros *Criminal Responsibility* (Oxford: OUP, 2005).

## Carving Out a Useful Approach to Mental Incapacity in Criminal Law

As a result of its connection to criminal responsibility, scholars have analysed mental incapacity principally as a basis for exculpation. Broadly, scholarship on mental incapacity in criminal law falls into one of two camps—philosophical studies (which typically adopt broad frames of reference and examine the connections between legal and extra-legal norms and practices) and doctrinal studies (which typically adopt narrow frames of reference and examine legal doctrines and practices).<sup>5</sup> However, both these types of studies share a focus on mental incapacity as a basis for exculpation, where exculpation is understood in a non-technical way to mean not holding a person liable for an offence. This shared focus dovetails with the significance of individual responsibility in the late modern era and reflects its profile in the academic realm. Individual responsibility for crime has come to act as a lynchpin in criminal law in the late modern era.<sup>6</sup> Where mental incapacity forms the basis for exculpation or partial exculpation, it grounds findings of non- or partial responsibility, and is implicated in constructing ‘a barrier beyond which responsibility could not go in the case of those who were not rational’, as Alan Norrie puts it in relation to the law of insanity.<sup>7</sup>

Perhaps in part because of the rather incoherent nature of the criminal law corpus in the common law world, and because of the connection between moral norms and legal norms (wrongs, harms, justifications etc), philosophical analyses of criminal law precepts and concepts have been popular and philosophical approaches make up a significant slice of the criminal law academic domain. In relation to mental incapacity, the bulk of the relevant philosophical works offer a conceptual analysis of responsibility (and thus, by default, non-responsibility, which I would suggest is only part of mental incapacity).<sup>8</sup> Thus, the focus is on what Lindsay Farmer refers to as the ‘abstract structure of responsibility’, and the conditions necessary for an individual to be held accountable for his or her actions under the criminal law.<sup>9</sup> Here, the preoccupation with the role of mental incapacity

<sup>5</sup> By way of philosophical studies, see eg, Tadros *Criminal Responsibility* and J Horder *Excusing Crime* (Oxford: OUP, 2004). By way of doctrinal studies, see, eg, R D Mackay *Mental Condition Defences in the Criminal Law* (Oxford: Clarendon Press, 1995).

<sup>6</sup> See, eg, L Farmer *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law 1747 to the Present* (Cambridge: CUP, 1997); N Lacey ‘Responsibility and Modernity in Criminal Law’ (2001) 9(3) *Journal of Political Philosophy* 249; and A Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Butterworths, 2001). Re late modernity, see, for instance, D Garland *Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: OUP, 2002) and A Giddens *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford: Stanford University Press, 1991).

<sup>7</sup> See Norrie *Crime, Reason and History* 176.

<sup>8</sup> A prominent example of this type of scholarship is H L A Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (With an Introduction by John Gardner) (Oxford: OUP, 2008).

<sup>9</sup> Farmer *Criminal Law, Tradition and Legal Order* 181. As Nicola Lacey puts it, the conditions of criminal responsibility are thought to ‘reside in fundamental aspects of *human agency*’. See Lacey ‘Responsibility and Modernity in Criminal Law’ 255.

as a basis for exculpation is reflected in the normative tenor of this type of scholarship, and expressed in its main concern with the status of the mentally incapacitated as non- or less than full subjects of the criminal law, or improper targets of criminal sanctions. So, for instance, in relation to insanity, the focus has been on the concept of insanity, or non-responsibility, rather than on *M'Naghten* insanity per se. Insanity and other legal provisions are positioned across various classificatory schemes popular in philosophical scholarship. As I discuss in Chapter 2, in an analysis of criminal law defences by normative type, for instance, insanity and diminished responsibility may find themselves either in categories of excuse or exemption (also known as denials of responsibility), or, on a functional account of defences, they may sit together within a broader category of 'disability excuses'. Non-exculpatory mental incapacity provisions are generally marginalized in these philosophical studies.<sup>10</sup>

In doctrinal scholarship, the dominance of the idea that mental incapacity is a basis for exculpation is reflected in reliance on the category of mental incapacity or mental condition defences. The idea that the particular claims advanced by individuals with mental incapacities represent a distinct subcategory of criminal defences appears to enjoy some acceptance among legal commentators.<sup>11</sup> The 'usual suspects' found in this category are insanity, automatism, diminished responsibility, infanticide and, sometimes, intoxication (and unfitness to plead).<sup>12</sup> However, the otherwise rich vein of commentary on the operation and construction of these particular defences has not generated a robust account of the category itself—the category of mental incapacity defences has remained curiously undefined. This might be taken to suggest that this is perhaps less a category, comprising defences united in a particular, thoroughly-understood way, and more a term which is in relatively common use. Even on a straightforwardly descriptive level, it is not clear that the category of mental incapacity defences has any particular scope. For instance, is the rule about voluntary intoxication—related to the admissibility of evidence, rather than a defence per se—properly included within the category? What about procedural provisions, such as unfitness to plead, which are typically grouped alongside this category of defences and regarded as allied to the defences in some way (although their conceptual interrelations are usually assumed rather than explained)? The elasticity of the scope of this category suggests that what it is that unites mental incapacity defences *qua* mental incapacity defences is either elusive or contested.

With the emphasis on either criminal responsibility (in philosophical studies) or on criminal defences based on mental incapacity (in doctrinal studies), the scholarly

<sup>10</sup> A notable exception is R A Duff *Trials and Punishments* (Cambridge: CUP, 1986), which contains a close and persuasive discussion of unfitness to plead. See also A Duff et al *The Trial on Trial* (Vol. 3): *Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007) 179–81.

<sup>11</sup> This classification of defences features in academic monographs on the criminal law: see Mackay *Mental Condition Defences*, and N Walker *Crime and Insanity in England* (Vol. 1: *The Historical Perspective*) (Edinburgh: Edinburgh University Press, 1968).

<sup>12</sup> In the seminal work in this area, R D Mackay does not seek to account for the inclusion of these topics: see Mackay *Mental Condition Defences*.

focus to date has been consistently trained on the role of mental incapacity as a basis for exculpation. The effect of the dominance of the idea that mental incapacity is a basis for exculpation is that this role has come to be the principal one for mental incapacity in criminal law. This has marginalized other roles played by mental incapacity, with any other role being understood in relation to exculpation or indeed as derivative of exculpation. As a result, we do not have a thorough understanding of mental incapacity in criminal law. I take up this point in Chapter 2. As I suggest there, a reconstruction of the mental incapacity terrain permits a reconceptualization of the role of mental incapacity in criminal law.

Taken as a whole, the existence of both philosophical and doctrinal studies means there is a rich literature on mental incapacity in criminal law. There seem to be aspects of this area that escape these scholarly camps, however, including the dynamic relationship between legal doctrines and procedures of evidence and proof, and their broader interaction with extra-legal knowledges. Further, what seems to be an unusually sharp bifurcation between philosophical and doctrinal approaches to mental incapacity has occluded insights that might be generated by their mingling. There is room for an approach to mental incapacity in criminal law that seeks to carve out a space between these approaches, to consider the analytical insights to be gained from a close historical study of the legal provisions and the attendant practices of evidence and proof.

Socio-historical studies provide a means of buttressing the academic space that exists between doctrinal and theoretical approaches to criminal law. The relative dominance of one or other of the philosophical or doctrinal approaches should not be taken to indicate that the middle ground between the two is unoccupied terrain. Rather, it is a rich arena in which I am pitching my scholarly tent. Reflecting the long-lasting influence of legal realism, and the rise to prominence of socio-legal studies scholarship, this ground is well-traversed. Indeed, because mental incapacity in criminal law lies at the intersection of two vectors of state power—welfare and punishment—it has been of particular interest to scholars working within these traditions. Thus, there is a vibrant and growing body of socio-historical studies concerning mental incapacity, broadly conceived. On the one hand, there are texts focused on the historical operation and development of legal doctrines and practices.<sup>13</sup> On the other hand, there are social histories of the law of insanity,<sup>14</sup> which are not specifically concerned with either doctrinal analysis or in tracing the relevance of historical developments into the current era. This book draws on both of these categories of scholarship in terms of either subject matter or methodological approach, but it is distinct in that its focus is the relationship

<sup>13</sup> Examples in this category include M J Wiener *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914* (Cambridge: CUP, 1990); K J M Smith *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800–1957* (Oxford: Clarendon Press, 1998) and D Rabin *Identity, Crime and Legal Responsibility in Eighteenth Century England* (New York: Palgrave Macmillan, 2004).

<sup>14</sup> Examples include J P Eigen *Witnessing Insanity: Madness and Mad Doctors in the English Court* (New Haven: Yale University Press, 1995) and *Unconscious Crime: Mental Absence and Criminal Responsibility in Victorian London* (Baltimore: Johns Hopkins University Press, 2003).

between legal doctrines, practices, institutions, and knowledge concerning mental incapacity.

The systematic analysis of mental incapacity in criminal law that I offer in this book is based on a socio-historical approach. Such an approach situates the relevant doctrinal, evidentiary, and procedural developments within their particular social, historical, and institutional contexts.<sup>15</sup> This approach evidences a commitment to examining law as a social phenomenon, which means that the development of conceptual frameworks is itself the object of study.<sup>16</sup> As Markus Dirk Dubber suggests in advocating a historical analysis of law, this approach seeks to ‘understand principles and practices in their relation to other principles and practices’.<sup>17</sup> And as Nicola Lacey argues with respect to criminal responsibility and criminalization, the scholarly research agenda benefits from appreciation of historical and social scientific as well as legal and philosophical scholarship.<sup>18</sup>

There are reasons to think that this methodological approach is a particularly appropriate one for the study of mental incapacity in criminal law. This approach provides a means of capturing the dynamic nature of the terrain of mental incapacity in criminal law. Even on what has been called the level of weak historical argument,<sup>19</sup> such an approach exposes the major changes in criminal law and process that have taken place over time, and it is notable that the terrain of mental incapacity is marked by significant continuities, as well as change. The durability of some component parts of this area of law—such as the *M’Naghten Rules* and the criteria for a finding of unfitness—is particularly striking. On another level, a socio-historical analysis of the criminal trial opens the way for a *historicized* account that incorporates the principles and practices of criminal law, evidence, and procedure that pertain at particular junctures. As Farmer suggests, rather than looking at the object of legal definitions, scholars should look more broadly to encompass the relations between that object and the defining process.<sup>20</sup>

A study employing a socio-historical approach to mental incapacity is more than an intellectual history of legal principles or paradigms. In relation to my particular

<sup>15</sup> According to this approach, in a particular temporal and spatial context, the colonial context of criminal justice may be relevant. For an example of a study of the operation of the criminal law in a colonial context, see M J Wiener ‘Criminal Law at the Fault Line of Imperial Authority: Interracial Homicide Trials in British India’ in M D Dubber and L Farmer (eds) *Modern Histories of Crime and Punishment* (2007) 252.

<sup>16</sup> See N Lacey ‘Philosophy, History and Criminal Law Theory’ (1998) 1 *Buffalo Criminal Law Review* 295, 311, and N Lacey ‘Philosophical Foundations of the Common Law: Social not Metaphysical’ in J Horder (ed) *Oxford Essays in Jurisprudence* (Oxford: OUP, 2001) 17, 19.

<sup>17</sup> M D Dubber ‘Historical Analysis of Law’ (1998) 16(1) *Law and History Review* 159, 160–2. See also Dubber and Farmer ‘Introduction: Regarding Criminal Law Historically’ 1.

<sup>18</sup> See N Lacey ‘Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice’ (2007) 1(2) *Criminal Law and Philosophy* 233 and ‘Historicising Criminalisation: Conceptual and Empirical Issues’ (2009) 72(6) *Modern Law Review* 936. See also M D Dubber and L Farmer ‘Introduction: Regarding Criminal Law Historically’ in M D Dubber and L Farmer (eds) *Modern Histories of Crime and Punishment* (Berkeley: Stanford University Press, 2007) 1.

<sup>19</sup> See N Lacey ‘In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory’ (2001) 64(3) *Modern Law Review* 350, 357.

<sup>20</sup> See L Farmer ‘The Obsession with Definition: The Nature of Crime and Critical Legal Theory’ (1996) 5 *Social and Legal Studies* 57.

interests in this book—the interaction of doctrines, practices, and knowledge about mental incapacity—the specific value of a socio-historical approach also lies in filling in the open-textured nature of abnormality, and understanding the significance of the different types of knowledge—lay and expert—that are brought to bear on mental incapacity in criminal law. As I discuss in Chapter 2, while the meanings generated by the legal doctrines covered in this book coalesce around a specific idea of difference—abnormality—it is a dynamic notion, taking on a different hue in different corners of the mental incapacity terrain and at different times. In relation to knowledge, persistent controversy about the place of expert medical evidence in the courtroom hints at the contingent nature of the relationship between different knowledges about incapacity. The expert knowledges governing the field of mental incapacity in criminal law interrelate with each other in a dynamic way, mediated through legal institutions such as the lay jury and the adversarial criminal trial. I take up this issue in Chapter 6, on knowing ‘madness’, and at different points throughout the book as relevant to particular mental incapacity doctrines.

My socio-historical approach, and my aim to provide a close analysis of mental incapacity, leads me to draw on particular sources in this book. The most significant of these is the *Old Bailey Proceedings (OBPs)*.<sup>21</sup> The *OBPs* record many although not all of the trials that took place at the Old Bailey Criminal Court (which was the main felony trial court in London) from 1674 to 1913. The *OBPs* database contains almost 200,000 trial records. I use these records selectively in order to back up my analysis of the development of mental incapacity doctrines over time. Unlike the State Trial reports, *State Trials*, which recorded a small number of celebrated treason trials (which had distinctive procedural features<sup>22</sup>), the records from the Old Bailey provide information about a large number of trials concerning different offences, giving a sense of the everyday processing of criminal matters. Similarly, unlike private reports, the Old Bailey records provide a series that is substantially complete from the beginning and entirely complete from 1729. As with any source material, it is necessary to be cautious in relying on the *OBPs* for evidence about criminal trials in the relevant period and, as several scholars note, these sources call for a careful and reflective approach.<sup>23</sup> Overall, even mindful of

<sup>21</sup> The *OBPs* are available at <<http://www.oldbaileyonline.org>> (last accessed on 30 November 2011). The *OBPs* are a selection of a larger collection of trials, generally known as the *Old Bailey Sessions Papers*, which have not been digitized.

<sup>22</sup> See J H Langbein *The Origins of the Adversary Criminal Trial* (Oxford: OUP, 2003) 14–15, 97–102.

<sup>23</sup> See generally Eigen *Witnessing Insanity* 7s–8; Langbein *The Origins of the Adversary Criminal Trial* 180–90 in relation to the *Old Bailey Sessions Papers*. The Old Bailey records initially targeted a popular rather than legal audience, and this meant that legal proceedings were not always recorded in detail. As a result, the records focused on the circumstances of the crime and its detection, rather than on judicial pronouncements, criminal procedure, or evidence. In addition, because the Old Bailey tried matters arising from offences that took place in and around London, the *OBPs* skew the picture they present of the criminal trial process towards the capital, affecting the type of offences prosecuted as well as their number in the records. Last, the Old Bailey records compressed some of the trials they recorded and it is not possible to know what was deleted or why. John Langbein concludes that these features of the records mean that, although negative inferences from them are hazardous, positive inferences are

their limitations, the Old Bailey records are a vital resource for my purposes because they facilitate a close examination of the ordinary operation of the practices relating to mental incapacity in a way that is not permitted by reliance on other sources. The *OBP*'s records provide a useful companion to the historical writings of criminal law theorists and reformers, such as Matthew Hale and James Fitzjames Stephens, which have been examined by a number of legal scholars.<sup>24</sup>

Having analysed this area of the law via this approach, I am able to offer a synthesized assessment of the mental incapacity terrain, drawing connections both across the doctrines that traverse this terrain and across developments over time. This approach enables me to demonstrate the ways in which mental incapacity doctrines have been and continue to be interrelated, both conceptually (evidenced by the applicability of the right/wrong test to insanity and infancy, for instance) and in practice (evidenced by the interaction of diminished responsibility and insanity, for instance), and to draw out what I understand to be the most important analytical features of this area of law.

## Overview of the Book

This book is organized into three parts. In Part I, comprising Chapters 1, 2 and 3, I look across the terrain of mental incapacity as a whole in order to provide a synthesized assessment of mental incapacity in criminal law. In Chapter 2, I mark out the boundary of mental incapacity in criminal law—determining what's in and what's out. The precise boundary I advance is not itself novel (with the exception of the inclusion of infancy or non-age within it), but making a theoretical case for it is new. In this chapter, I suggest an approach to mental incapacity in criminal law whereby the relevant substantive and procedural provisions are understood as doctrines (not defences), some of which are exculpatory. The significance of this reconstruction of the terrain of mental incapacity is that it permits a reconceptualization of the roles of mental incapacity in criminal law—to include imputation, inculpation, and a procedural role, as well as exculpation. This reconstruction introduces the conceptual tools—such as exculpatory and non-exculpatory mental incapacity doctrines—which I employ throughout this book. In addition, this chapter reveals that the scope of this book is itself an argument—for the placement of particular legal doctrines, which share certain formal features, on the terrain of mental incapacity.

Having made an argument about the scope of the terrain of mental incapacity, in Chapter 3, I turn to analyse the terrain itself. This chapter presents the argument that gives the book its title, an argument which is the outcome of my close study of the doctrines and practices that make up the terrain of mental incapacity. In this chapter, I expand the scholarly frame beyond the legal doctrines, to encompass

safe because fabrication or invention of content was unlikely: Langbein *The Origins of the Adversary Criminal Trial* 185.

<sup>24</sup> See, eg, Lacey 'In Search of the Responsible Subject'; Smith *Lawyers, Legislators and Theorists*.

attendant legal practices concerning evidence and proof, enabling me to examine the deep features of the mental incapacity terrain. Here with the label ‘manifest madness’, I refer to the specific character of ‘madness’ at the point of intersection with crime. I argue that ‘madness’ has two formal features, one ontological (whereby it is constructed as dispositional) and one epistemological (whereby it is constructed as ‘readable’). Together, these features constitute the topography of the mental incapacity terrain. As I discuss in detail in this chapter, as ‘dispositional’, ‘madness’ is regarded as subsisting and evident in conduct extending beyond the external component of the criminal offence, and, as ‘readable’, ‘madness’ can be ‘read off’ conduct by different participants in the criminal justice process. It is to capture this dual aspect of ‘madness’ for criminal law purposes that I use the adjective ‘manifest’.

Armed with the necessary conceptual tools, and having assessed the mental incapacity terrain as a whole, I turn to engage in a close socio-historical study of each of the mental incapacity doctrines. This part of the book is divided into two. In Part II, I examine the law on unfitness to plead and infancy, and the law concerning exculpatory ‘madness’ (now marked out by the doctrines of insanity and automatism). These doctrines are brought together in this part of the book on the basis that they concern either the fundamental issue of the subject of criminal law and process, on the one hand, or the paradigmatic mental incapacity doctrine, insanity, on the other.

In Chapter 4, I juxtapose two mental incapacity doctrines—unfitness to plead and infancy—that are facially quite dissimilar, but which define, by a process of exclusion, those who can be subjected to criminal law process and sanctions. Although infancy is not typically incorporated into studies of mental incapacity in criminal law, in my view, its historical, conceptual, and procedural features make it a proper inclusion. I show that infancy and unfitness to plead have both developed along a trajectory of formalization. In this chapter, I suggest that formalization was shaped by a deep dynamic of inclusion—whereby the scope of these mental incapacity doctrines was drawn broadly—but, more recently, has also come to be structured by a dynamic of exclusion, whereby the scope of the doctrines is more circumscribed. As I discuss in this chapter, the change in the dynamics structuring the process of formalization itself reflects changing concerns with matters such as dangerousness. As a result of these changing concerns, in the current era, formalization of these mental incapacity doctrines is now structured by these two dynamics of inclusion and exclusion.

In both Chapters 5 and 6, I examine insanity and automatism, now two discrete exculpatory doctrines. I examine insanity and automatism side by side in order to give play to their interdependent development in criminal law. In Chapter 5, I focus on the substantive law of insanity and automatism. Here, I suggest that, when a loose, broad, and partially moralized notion of incapacity—defined largely by extra-legal norms—pertained as a basis for exculpation, claims now falling across the bounds of insanity and automatism were accommodated within an informal insanity doctrine and under a flexible criminal process. However, gradually, as mental incapacity came to be the subject of expert medical knowledge—a change

that took place as much beyond as within criminal law—this broad notion of incapacity ossified into a narrower notion of disability, ushering in a more circumscribed approach to insanity. It was in this context that a discrete automatism doctrine appeared in the second half of the twentieth century.

In Chapter 6, I turn from the substantive law of insanity and automatism to the rules and practices of evidence and proof. This chapter provides an epistemological analogue to the discussion in the preceding chapter. Here, I analyse the way in which claims to exculpatory mental incapacity are governed. The rules of evidence and procedure relating to automatism are able to be distinguished from those relating to insanity, in a way that usefully throws each into relief. There are two main points made in this chapter. The first of these is that more than one type of knowledge informs the evidentiary practices attending exculpatory incapacity. Both expert or specialized knowledge of ‘madness’ and non-expert or lay knowledge are relevant for understanding how exculpatory incapacity claims are adjudicated in criminal law. The second main point is that the rules of evidence and proof applying to insanity and automatism reflect the different eras in which they formalized from informal practices. As I discuss in detail, while the rules related to insanity crystallized in the era of the ‘reconstructive’ criminal trial, the appearance of a discrete automatism doctrine in the second half of the twentieth century coincides with a version of the adversarial criminal trial concerned with due process and the effective processing of criminal cases.

Chapters 7, 8, and 9 make up the third and final part of this book. Here, in Part III, I examine specific components of the mental incapacity terrain. In the first chapter in this part, Chapter 7, I examine the law on intoxicated offending, according to which incapacity resulting from intoxication by alcohol or drugs can form the basis for imputed criminal liability.<sup>25</sup> The first of two main arguments made in this chapter is that while technical and complex rules appear to dominate, criminal law practices relating to intoxicated offending continue to depend on lay or non-expert knowledge of intoxication. This type of knowledge plays a significant part in criminal law practices concerning intoxicated offending into the current era—broadly, to block certain arguments about what is known and not known about intoxication. The second of the two main arguments advanced in this chapter relates to the meanings given to intoxicated offending in criminal law. I suggest that, in the law on intoxicated offending, intoxication is simultaneously constructed as exculpatory abnormality and morally culpable conduct, two sets of meanings that are held in a fine balance in law and process.

Chapter 8 takes up the issue of the relationship between gender, ‘madness’, and crime via an examination of the specific case of the infanticide doctrine. Broadly, I suggest that a dense network of meanings about the interrelationship between

<sup>25</sup> For this reason, voluntary intoxication has been referred to as a ‘doctrine of imputation’. Paul Robinson argues that doctrines of imputation impute missing offence elements, providing an ‘alternative means of holding the defendant liable as if the required elements were satisfied’: see P Robinson *Structure and Function in Criminal Law* (Oxford: Clarendon Press, 1997) 67. See further my Chapter 2.

gender, 'madness', and crime has sustained what is widely regarded as a peculiar or strange legal doctrine into the current era, permitting women who rely on infanticide to slide between the categories of offence and defence, or, more precisely, between charge and plea (and meaning that the doctrine itself is most accurately understood as either/both partially exculpatory and partially inculpatory). According to my analysis, a particular social type—the infanticidal woman—has come to determine the legal issue of the defendant's criminal responsibility, and the act of infanticide has come to be read as an instantiation of abnormality for criminal law purposes. In the current era, the doctrine of infanticide is sustained by a lay or non-expert knowledge about the interrelation of gender, childbirth, and 'madness', which over-determines the legal evaluation of infanticidal women and their acts in criminal law.

In the final chapter of the book, Chapter 9, I examine the doctrine of diminished responsibility. As I foreshadow in Chapter 2, useful insights are to be gained by viewing diminished responsibility as Janus-faced, both partially exculpatory and partially inculpatory. In Chapter 9, I take up this point again, with the aim of examining what kind of difference is encoded in the diminished responsibility doctrine, or, put another way, examining what kind of difference diminished responsibility makes to the individual who raises it. Supported by my assessment of the development of a doctrine of diminished responsibility from its origins in nineteenth-century Scotland, I make the case in this chapter that the sort of difference encoded in diminished responsibility is usefully conceptualized as one of kind, as opposed to one of degree.

