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BOOK REVIEW

Manifest Madness: Mental Incapacity in Criminal Law, Arlie Loughnan (Oxford: Oxford University Press, 2012).

This book is part of the Oxford Monographs on Criminal Law and Justice series edited by Andrew Ashworth. That in itself is enough to signal that *Manifest Madness* is a challenging work of the highest scholarship that demands attention.

Arising out of a doctoral thesis, this work examines the ways in which "mental incapacity" is viewed in the criminal law. The concept of "mental capacity" can mean very different things to scholars and practitioners from diverse disciplines. Gareth Owen and colleagues point out that the "conceptual literature on mental capacity is complex because it mixes philosophical, legal and psychiatric vocabularies."[1]

In this book, Dr. Loughnan refers to "mental incapacity" as connoting "an absence of, or impairment in, the moral, cognitive, and volitional capacities both assumed and required by the law."[2] While the title *Manifest Madness* suggests a focus on the defence of insanity and its more recent formulations, her broad definition of mental incapacity enables Dr. Loughnan to analyze a wide range of doctrines including infancy, unfitness to plead, automatism, infanticide, intoxication and diminished responsibility, as well as insanity.

The book is divided into three parts. Part I deals with the conceptual terrain of mental incapacity doctrines; Parts II and III use a socio-historical approach to analyzing the law in England and Wales relating to unfitness to plead, infancy, insanity, and automatism (Part II), in addition to intoxication, infanticide, and diminished responsibility

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1 Gareth S Owen et al, "Mental Capacity and Decisional Autonomy: An Interdisciplinary Challenge" (2009) 52:1 Inquiry 79 at 81.

2 Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012) at 6.

(Part III). As well as examining the substantive components of these doctrines, Dr. Loughnan scrutinizes the special rules of evidence and procedure that apply to some of them. Unfortunately, there is no concluding chapter to assist the reader in synthesizing this thought-provoking material.

Loughnan points out in the first chapter that legal philosophers have tended to concentrate on the concept of criminal responsibility when examining the insanity defence and its more modern counterparts. Doctrinal scholars have focused on mental state/impairment "defences" such as insanity, automatism, diminished responsibility, infanticide, and sometimes intoxication, without taking a step back to analyze the conceptual underpinnings of this category of "defences" as a whole. By focusing on the concept of mental incapacity, Dr. Loughnan provides a fresh approach to the shared characteristics of a broad range of doctrines including what she labels the "non-exculpatory doctrines" of infanticide and fitness to plead.

Chapter Two is the lynchpin of the book. It sets out Dr Loughnan's "reconstruction of mental incapacity".[3] First, for a number of salient reasons, she establishes that it is better to think in terms of doctrines rather than defences. Secondly, drawing on the work of Paul Robinson,[4] Dr. Loughnan takes a functional approach to the doctrines, looking at their roles in the structure of the criminal law, rather than taking a "moral-evaluative assessment"[5] of them.

For Dr. Loughnan, both exculpatory and non-exculpatory mental incapacity doctrines function to distinguish individuals on the basis of their difference from others. Where she branches out from Robinson's functional approach is in analyzing that difference through constructing the individual concerned as "abnormal" in some way. This may be easily understandable in relation to the traditional conception of insanity. What

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3 *Ibid* at 17.

4 Paul H Robinson, *Structure and Function in Criminal Law* (Oxford: Clarendon Press, 1997).

5 Loughnan, *supra* note 2 at 21.

is interesting is that Dr. Loughnan uses this construction of abnormality as a basis for conceptualizing all of the doctrines she considers.

For example, she writes in relation to infancy: "[T]o the extent that it is regarded as an insufficiently developed or mature state, the criminal law doctrine of infancy invokes an idea of young people as abnormal (mentally and physically)."[6]

Similarly, in relation to intoxication, she writes: "[V]oluntary intoxication is properly regarded as a mental incapacity doctrine because it is based on the abnormality of the intoxicated defendant, even if this abnormality is temporary and is something a significant percentage of the population have experienced at least once."[7]

Using abnormality as a specific idea of difference provides a new and fascinating way of considering the doctrines discussed in this book. Although not discussed in this work, abnormality as a uniting doctrinal theme can be viewed as reflecting perspectives from social science on social exclusion and stigma[8] and opens the way towards further interdisciplinary work in this field.

The title of the book, *Manifest Madness*, is repeated in the title of Chapter Three. Dr. Loughnan concedes that she is aware of "the loaded nature of the term 'madness'"[9] and the title is perhaps somewhat misleading because she casts such a wide net in discussing doctrines beyond the traditional insanity defence. Infancy and unfitness to plead are not doctrines readily associated with the concept of madness, however defined. Nevertheless, Dr. Loughnan uses the term "manifest madness" to explore how both expert and lay knowledge have influenced exculpatory mental incapacity doctrines.

Dr. Loughnan argues that an accused's conduct—that is, the act constituting the crime as well as his or her general behaviour—has a

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6 *Ibid* at 30.

7 *Ibid* at 31.

8 For an overview of these theories, see Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (New York: Routledge, 2014) ch 2.

9 Loughnan, *supra* note 2 at 39.

special significance in criminal trials through the way in which experts evaluate whether the accused is "mad". She also points out that "madness" derives its meaning from common knowledge concerning it. She argues that "madness" has two features: from an ontological perspective, it has a dispositional nature, and from an epistemological perspective, it has a "readable" nature.

Simply using the terms "ontological" and "epistemological" signifies that this book assumes a level of philosophical sophistication in the reader. There is nevertheless enough "signposting" to ensure that the underlying theory is constantly in the reader's mind and the writing is more accessible than in many legal philosophy tomes. Being most familiar with the doctrines of insanity and automatism, I found Chapters 5 and 6, which explored the law and evidentiary requirements on these topics, particularly engaging. The detailed references to Old Bailey Proceedings that tapped into common ideas of "madness" are fascinating.

In combining evidentiary, procedural, and historical approaches to the topic, Dr. Loughnan provides an original conception of the connections between mental incapacity doctrines. For readers in other common law countries, it can at times be frustrating that the book focuses on the laws of England and Wales. Simon Verdun-Jones's seminal work on insanity, automatism, and fitness to stand trial in Canada goes unmentioned,[10] as does other international work on the relation between automatism and insanity.[11] Nevertheless, the conceptual framework set out in Part I provides a new and challenging perspective for all criminal law scholars, no matter from which country they hail.

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[10] See e.g. Simon N Verdun-Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country?" (1979) 14:1 UBC L Rev 1; Simon N Verdun-Jones, "The Doctrine of Fitness to Stand Trial in Canada: The Forked Tongue of Social Control" (1981) 4:3-4 Int'l J L & Psychiatry 363.

[11] See e.g. Deborah Jang and EM Coles, "The Evolution and Definition of the Concept of 'Automatism' in Canadian Case Law" (1995) 14:3-4 Med & L 221; Bernadette McSherry, "Criminal Responsibility, 'Fleeting' States of Mental Impairment, and the Power of Self-Control" (2004) 27:5 Int'l J L & Psychiatry 445.

Developments in international human rights law and, in particular, the requirements of article 12 of the *Convention on the Rights of Persons with Disabilities*,[12] which calls for universal legal capacity, have raised the issue of whether mental incapacity should be used as the basis for restrictions in civil law areas relating to involuntary mental health treatment and guardianship. These developments are now raising the broader question about whether capacity-based tests are appropriate in the criminal law.[13]

If, as Dr. Loughnan contends, a uniting feature of mental incapacity doctrines is the "abnormal" individual, then it would be interesting for her to consider the words of the United Nations High Commissioner for Human Rights:

> In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant.[14]

There is therefore an important question as to whether criminal law should move away from mental incapacity doctrines altogether. Peter Bartlett has warned that any limitation in the scope of mental state/impairment defences is likely to exacerbate rather than ameliorate the problem of the overrepresentation of those with mental health problems in prison.[15] Tina Minkowitz, on the other hand, claims: "It does greater harm to exclude people with disabilities from recognition as moral

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12 30 March 2007, 2515 UNTS 3 at 78, Can TS 2010 No 8.

13 See e.g. Tina Minkowitz, *Submission to Committee on the Rights of Persons with Disabilities on the Draft General Comment on Article 12* (22 January 2014), online: Office of the High Commissioner for Human Rights <http://www.ohchr.org>.

14 *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, UNHCHROR, 10th Sess, UN Doc A/HRC/10/48, (2009) at para 47.

15 Peter Bartlett, "The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law" (2012) 75:5 Mod L Rev 752 at 776.

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subjects, than to pretend to excuse us from responsibility while in fact imposing even greater restrictions on our rights and freedoms."[16]

It would be fascinating to see how Dr. Loughnan's analysis of mental incapacity doctrines could be situated in this broader international context.

Overall, *Manifest Madness* is a well-written and thoughtful book that, while limited to the laws of England and Wales, displays a level of scholarship of the highest merit.

Loughnan is to be congratulated for her insightful work on a complex topic, and hopefully she will now turn her attention to broader international human rights law developments in relation to legal and mental incapacity and what this may mean for the criminal law.

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[16] Minkowitz, *supra* note 13 at 3.

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