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Putting Mental Incapacity Together Again

In this chapter, I reassemble the terrain of mental incapacity in criminal law. As I discuss in the previous chapter, while philosophical and doctrinal scholarly approaches have dominated legal studies of this area of criminal law, such studies have not produced a thorough understanding of mental incapacity. As a result of its connection to criminal responsibility, legal scholars have analysed mental incapacity principally as a basis for exculpation, reflecting the significance of individual responsibility in the late modern era and its corresponding profile in the academic realm.[1] The dominance of the idea that mental incapacity is a basis for exculpation in the legal literature means 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 understood in relation to exculpation or as derivative of exculpation. In this chapter, I suggest that significant insights are to be gained through an alternative approach to the mental incapacity terrain. As it sets out the boundaries of the terrain of mental incapacity, this chapter also explains the scope of this book. As will become clear, the scope of this book is itself an argument—for a theorized boundary of the terrain of mental incapacity.

The discussion in this chapter unfolds in three steps. First, in order to develop the conceptual tools to understand mental incapacity in criminal law afresh, this chapter provides a reconstruction of the legal terrain concerned with mental incapacity. In my reconstruction, the terrain is traversed by a set of mental incapacity doctrines, a subset of which is exculpatory. On my account, mental incapacity doctrines share two formal features: each doctrine invokes a particular kind of difference, which I call abnormality, and, where the doctrines are exculpatory, the evaluative inquiry is not indexed to the reasonable person. This reconstruction of mental incapacity in criminal law—as mental incapacity doctrines—cuts across existing categorizations of the doctrines on this terrain and, as such, offers a rethinking of this area of the criminal law. This reconstruction prompts a reconceptualization of the role of mental incapacity in criminal law, which represents the second step in my discussion. Here, it becomes clear that mental incapacity doctrines play a multiplicity of roles—inculpation, imputation, and a

[1] See, for discussion, 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).

Manifest Madness. Arlie Loughnan.

procedural role—beyond exculpation. In the third step in my discussion, I analyse the kind of difference—abnormality—invoked by mental incapacity doctrines.

Reconstructing Mental Incapacity in Criminal Law

As the first step in my discussion, I offer a reconstruction of mental incapacity in criminal law. Without assuming the necessary priority of exculpation on the basis of mental incapacity, and taking seriously the moral import, function, and formal structure of different legal provisions, I reconsider what parts of the criminal law belong together and on what basis they are connected. Viewed from the perspective of the existing literature, my reconstruction involves three moves: from defences to doctrines, from moral evaluation to function, and from function to form. The resulting reconstructed terrain depicts mental incapacity as a set of doctrines, sub-classified into exculpatory and non-exculpatory doctrines. This reconstruction provides a basis for a reconceptualization—beyond exculpation—of the role that mental incapacity plays in criminal law.

From Defences to Doctrines

Perhaps the most notable feature of my reconstruction of the terrain of mental incapacity in criminal law, traversed by a set of mental incapacity doctrines, is that I do not use the label defence to refer to the subset of doctrines that are exculpatory (or partially exculpatory). In plotting out my reconstruction of mental incapacity in criminal law, I start with this point. As is well known, the term defence is sometimes used in a 'casual' sense by criminal lawyers to denote any part of a defendant's case that, if advanced successfully, would warrant an acquittal.[2] However, by contrast with criminal lawyers, criminal law scholars tend to use the term defence in a stricter sense, to refer to a claim that is in a causal sense 'compatible with the defendant's conceding that the offence charged was committed'.[3] That is, a defence is a claim that, for some reason related to the defendant or his or her circumstances, he or she should be acquitted, despite the commission of the offence. On this basis, defence is at least a facially plausible label for claims to exculpation based on mental incapacity—indeed, its acceptability is borne out by the bulk of doctrinal scholarship on mental incapacity, which revolves around defences.

There are, however, reasons to reject the label defence in favour of the more cumbersome label, exculpatory mental incapacity doctrine. Here, I refer to exculpation in a broad, non-technical way to denote not holding an individual liable for

[2] P Robinson 'Criminal Law Defences: A Systematic Analysis' (1982) 82(2) *Columbia Law Review* 199. In this sense, criminal defences include denial of the *mens rea* or *actus reus* elements of the offence and claims that the relevant statute of limitations has expired, as well as claims like self-defence and duress.

[3] J Gardner *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: OUP, 2007) 141.

an offence. There are three reasons to prefer the label exculpatory mental incapacity doctrine to the label defence.[4] The first reason is the strength of arguments, made by advocates of the categorization of defences by normative type, about the difference between exemptions (also known as 'denials of responsibility') and excuses. The organization of defences by normative type, which is arguably the most popular way of categorizing criminal defences, entails classifying defences either as justifications or excuses, or justifications, exemptions, or excuses.[5] As these terms suggest, this categorization of defences tracks social practices of responsibility attribution.[6] Over recent years, a significant weight of authority has come to locate exculpation on the basis of mental incapacity within the confines of exemptions. On this approach, claims based on incapacity are denials of responsibility rather than excuses because individuals who cannot 'believe and feel as reason demands, and because reasons demand it . . . do not need to bother making excuses'.[7] An alternative formulation is put forward by Antony Duff. In the context of his argument about criminal responsibility as answerability, Duff argues that excuses admit responsibility but deny liability, while exemptions (such as insanity based on 'serious disorder') mean that the exempted person is not, or should not be, expected to answer for her actions.[8] On this approach, the categorization of a particular doctrine as an exemption indicates that those who are seeking to rely on it are not individuals to whom the criminal law—as a normative system—speaks. Accepting the premises of this normative classificatory scheme, and, for the moment, the implied neutrality of not being 'called to answer', the effect of this is that, where a claim to exculpation based on mental incapacity is an exemption, it is a misnomer to refer to it as a defence.

Now, it might be argued that, even if some claims to exculpation on the basis of mental incapacity are most accurately thought of as exemptions, some such claims may be best regarded as excuses, and thus have a stronger claim to the defence label. Reflecting back to the idea that mental incapacity refers to an absence of or *impairment* in the moral, cognitive, and volitional capacities both assumed and

[4] See also A Loughnan 'Mental Incapacity Doctrines in Criminal Law' (2012) 15(1) *New Criminal Law Review* 1.

[5] This approach to criminal defences was advanced in Anglo-American criminal law in large part by the work of George Fletcher: see G P Fletcher *Rethinking Criminal Law* (New York: OUP, 2000) and G P Fletcher 'The Nature of Justification' in J Horder and J Gardner (eds) *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993).

[6] For discussion of these social practices, see M Baron 'Excuses, Excuses' (2007) 1 *Law and Philosophy* 21 and V Tadros 'The Scope and Grounds of Responsibility' (2008) 11 *New Criminal Law Review* 91.

[7] Gardner *Offences and Defences* 131–2. See also J Horder *Excusing Crime* (Oxford: OUP, 2004) 105; S Kadish 'Excusing Crime' (1987) 75(1) *California Law Review* 257, 262–3. According to Gardner, while other defences may be at base about the defendant's fitness for his or her role, defences such as insanity and infancy are straightforwardly about capacity (112). See also J Gardner 'The Gist of Excuses' (1998) 1(2) *Buffalo Criminal Law Review* 575, 589.

[8] See R A Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007) 284–91. Thus, according to Duff, exemptions are not actually defences because the latter are 'exculpatory answers for the commission of the offence for which responsibility has been proved' (263). On this approach, the question of the defendant's responsibility is prior to any question of a defence.

required by the law (discussed in Chapter 1), it might be argued that some claims to exculpation or partial exculpation are genuine excuses.[9] On this basis, they might then be thought of as genuine defences in that they are indeed 'answers' given by individuals.[10] Without deciding one way or the other about the most accurate label for such claims, I suggest that it is still advisable to reject the term defence in relation to claims to exculpation based on mental incapacity. This has the advantage of avoiding what is a deceptively sharp contrast between 'defences' and 'denials of responsibility' where exculpatory mental incapacity is concerned, and, further, such an approach deflects a potential over-emphasis on the distinction between exculpatory and non-exculpatory mental incapacity doctrines, obscuring what these doctrines share.

The second reason for jettisoning the label defence for claims to exculpation based on mental incapacity flows from the analysis developed by Duff in the context of his broader argument on criminalization and responsibility as answerability. Duff argues that denials of responsibility (or 'agent exemptions') are granted rather than pleaded: it falls to a third party—someone other than the defendant—to make the case for an exemption.[11] In relation to claims based on mental incapacity, this is most likely to be a psychiatrist or psychologist. This feature of claims based on mental incapacity accords with Duff's view that they are not properly thought of as defences—they do not involve the defendant him or herself answering for his or her conduct. The reason for jettisoning the term defence in my own analysis looks at this feature of exemptions from a different angle. From this angle, the type of knowledge enlisted in mental incapacity claims is a relevant consideration. Because exemptions are granted rather than pleaded, they rely on an alternative (ie as opposed to legal) expert body of knowledge, which we might call (broadly) psychiatric, psychological, or 'psy-knowledge'.[12] When medical professionals give evidence in relation to an individual's claim to exculpation (or for a reason other than exculpation), they bring with them a distinctive expert knowledge about mental incapacity. This distinctive knowledge is evident in, for instance, the particular language, certain notions of cause and effect, and specific professional authority structures those whom we may call psy-experts bring with them into the courtroom. This concern with the types of knowledge brought to bear on mental

[9] For instance, Fletcher makes a convincing case that, over centuries, insanity has drifted from being a general condition (compatible with the idea of exemption) to an excuse: see Fletcher *Rethinking Criminal Law* 837–9. For an opposing argument to the effect that insanity is an exemption, see, for example, Gardner 'The Gist of Excuses' 588 and S Kadish 'Excusing Crime' 257.

[10] This sort of thinking seems to have motivated Jeremy Horder, who advocates classification not in terms of exemptions and excuses, but in terms of excusatory claims, diminished capacity claims, and denials of responsibility. For Horder, these three categories appeal to different types of reasons for conduct: those with respect to which defendants are morally active, mixed reasons for conduct where defendants are both morally active and morally passive, and reasons for conduct with respect to which the defendant is morally passive, respectively: see Horder *Excusing Crime* 103–8. On this basis, Horder concludes diminished responsibility is most accurately thought of as a partial excuse rather than a partial exemption.

[11] See Duff *Answering for Crime* 286–7.

[12] I use the term 'psy-knowledge' following N Rose *Inventing our Selves: Psychology, Power and Personhood* (Cambridge: CUP, 1996).

incapacity in turn connects to the notion of abnormality, and I return to this issue below.

The third reason for rejecting the label defence for claims to exculpation based on incapacity is derived from the rules of procedure and evidence that apply to such claims. As I argue elsewhere, the rules of evidence and procedure that apply to the law of insanity, for example, are distinctive.[13] For instance, the most notable feature of the law on insanity is the special verdict, which, since 1800, has meant that, where a defendant's claim is successful, he or she is liable to an alternative set of disposal measures.[14] Beyond insanity, it is notable that, as well as defence counsel, the prosecution and the judge may raise a number of claims based on mental incapacity. For example, the prosecution may raise diminished responsibility (where the defence has raised insanity), or infanticide (which is an offence as well as a defence in England and Wales), each of which I discuss below. Either the judge or the prosecution or defence counsel may raise unfitness to plead, which I also discuss below. That legal actors other than the defence may raise claims to exculpation based on mental incapacity marks these claims out from criminal law defences such as self-defence, and suggests that the straightforward idea of a defence, in use in the broader criminal law, is obfuscating in this specific context.

From Moral Evaluation to Function

The argument thus far is based on a new sense of what knowledge (expert medical knowledge), and whose knowledge (expert medical professionals), counts, on the relevance of how arguments are initiated in the courtroom (not only by defence counsel), and on the effect of at least some successful claims to mental incapacity (exemption). Having explained why my reconstruction of mental incapacity in criminal law employs the label exculpatory doctrines, rather than defences, I turn now to the second feature of my reconstruction. Here, relative to the bulk of the existing scholarship, the move is from moral evaluation to function and I am relying on the literature concerned not with the relations between extra-legal and legal norms and practices of responsibility (as per the normative scholarship, canvassed above) but with relations between parts of the criminal law corpus. As this implies, a functional approach commences from a different starting point to that of normative approaches but this difference is attractive—a functional approach focuses on what work different criminal law doctrines *do* within the criminal law corpus.

A functional approach to the criminal law has been developed most fully by Paul Robinson as part of a project relating to criminal codes in the US context.[15] The categorization of parts of the criminal law (defences, offences, or other doctrines) by

[13] See A Loughnan 'Manifest Madness: Towards A New Understanding of the Insanity Defence' (2007) 70(3) *Modern Law Review* 397. See also my Chapter 6. See also A Loughnan '"In a Kind of Mad Way": A Historical Perspective on Evidence and Proof of Mental Incapacity' (2011) 35(3) *Melbourne University Law Review* 1047.

[14] For discussion, see E Colvin 'Exculpatory Defences in Criminal Law' (1990) 10 *Oxford Journal of Legal Studies* 381, 392.

[15] See P Robinson *Structure and Function in Criminal Law* (New York: Clarendon Press, 1997).

function depends not on a moral-evaluative assessment of particular conduct but on the role of the defence or offence or doctrine in the 'functional structure' of the criminal law. In relation to defences in particular, Robinson suggests that the popularity of the categorization of defences by normative type has obscured important distinctions between defences and between defence groups.[16] Rather than classifying the criminal law in terms of *actus reus* and *mens rea* requirements and defences, Robinson proposes an analysis based on the varying functions—rule articulation, liability assignment, and grading—that different criminal law doctrines perform. According to Robinson, doctrines with a rule articulation function define the prohibited conduct, while, by contrast, doctrines with a liability assignment function set out 'the minimum requirements of liability for a violation' of the law, and, by contrast again, doctrines with a grading function serve to aggravate an actor's liability.[17]

This approach promises a different and potentially more fine-tuned analysis of mental incapacity in criminal law. Initially, however, this promise is unfulfilled: Robinson's functional approach leads him to propose a five-part categorization of criminal law doctrines, but he places exculpation on the basis of mental incapacity wholly within the category of excuses—a category he borrows from the categorization of defences by normative type.[18] More helpfully, for my purposes, however, under Robinson's analysis, the function performed by various excuse defences is more precisely identified. According to Robinson, excuse defences may be subdivided into 'mistake excuses' and 'disability excuses', with the latter relying on a 'disabling abnormality'. In distinguishing between 'disability excuses' (such as insanity) and 'mistake excuses' (such as reliance on an official misstatement of law), Robinson argues that, in the former, 'the disabling abnormality sets the actor apart from the general population'.[19] Unlike 'mistake excuses', which involve a claim that 'the actor should not be punished because in fact he or she has acted in a way that anyone else would have acted in the same situation', 'disability excuses' exculpate (or partially exculpate) according to the defendant's difference from others. In Robinson's words, the 'disability requirement' 'serves to distinguish the actor . . . and allows the law to acquit the actor *because* he is different'.[20] Thus, in Robinson's scheme, as well as defining instances in which an individual is not liable for a criminal offence (liability assignment, a function shared by other excuses), 'disability excuses' serve to separate out those individuals who seek to rely on these excuses from individuals making other kinds of claims to exculpation (thus forming a subset of excuse defences).

[16] *Structure and Function in Criminal Law* 68.

[17] *Structure and Function in Criminal Law* 128, and, more generally, 127–42.

[18] Robinson's five-part categorization encompasses absent element defences (eg alibi), offence modification defences (eg renunciation in attempts or conspiracy), justifications, excuses, and non-exculpatory defences (eg diplomatic immunity): see *Structure and Function in Criminal Law* 14–15, 68–71. The last three are general defences that apply to all offences—they exist to bar liability unrelated to the criminalization decisions embodied in the offence definition.

[19] *Structure and Function in Criminal Law* 83.

[20] *Structure and Function in Criminal Law* 84 (emphasis added).

As Robinson acknowledges, the categories of 'disability excuses' and 'mistake excuses' *look* different from each other. But, for Robinson, despite the apparent differences between 'disability excuses' and 'mistake excuses', they are in fact analogous because, in both types of excuses, an individual is excused if, due to 'special conditions', he or she could not have been expected to avoid a violation of the law.[21] That is, the function of both types of excuses is the same. Although in the next section of the chapter I take issue with Robinson's position on the irrelevance of the particular 'special conditions' which give rise to an excuse, at base, a functional approach to mental incapacity in criminal law is useful to me because it reveals that, like 'disability excuses', what I call exculpatory mental incapacity doctrines share a role in the criminal law: they distinguish individuals on the basis of their difference from others. In relation to exculpatory mental incapacity doctrines, exculpation is a product of, and contingent on, the individual's difference from others. This is a specific idea of difference, and it extends to non-exculpatory mental incapacity doctrines, and has a particular character and significance, which I discuss below. Before turning to this, I explain how this idea of a shared function provides the basis for my own analysis about what doctrines in this area of the law have in common, which forms the basis of my own categorization—something that becomes apparent in the third and final move comprising my reconstruction.

From Function to Form

Accepting my preference for doctrines over defences, and function over moral evaluation, it is then necessary to explain the third feature of my reconstruction of this area of the criminal law. Here, I am making a final move—from function to form. I make this move because of what I take to be the significance of the formal structures of those doctrines Robinson collects together in the category 'disability excuses'. By formal structures, I am referring to what might be called the mode or technique of exculpation. Here, in this third and final move comprising my reconstruction of the terrain of mental incapacity, I part company with Robinson: his category of 'disability excuses' and my category of exculpatory mental incapacity doctrines are not coextensive. For Robinson, what sets the actor apart from the 'general population'—his or her 'disabling abnormality'—may be either abnormal circumstances or characteristics.[22] Robinson does not see the distinction between circumstances and characteristics as relevant, arguing that, 'essentially', any claim of

[21] *Structure and Function in Criminal Law* 83. Indeed, for Robinson, '[j]ustifications, excuses, and non-exculpatory defences each represent a different kind of special condition' (14).

[22] *Structure and Function in Criminal Law* 83. Thus, Robinson's category of 'disability excuses' includes duress, where exculpation depends on the extraordinary coercive circumstances in which the defendant finds him or herself. Yet, duress is structured differently to other defences that Robinson identifies as 'disability excuses': it provides exculpation where a person of 'reasonable firmness' would have been unable to resist the coercion to which the defendant was subject (see *R v Graham* [1982] 1 All ER 801; *R v Hasan* [2005] 2 Cr App R 22). *Contra M'Naghten* insanity, for instance, the construction of duress requires that the defendant seeking to rely on the defence be *similar* to—rather than *different* from—the 'general population'.

excuse involves a claim that 'the reasonable person suffering a similar disability similarly would have been unable to avoid a violation' of the criminal law.[23] According to Robinson, the practical effect is likely to be the same whether a doctrine is formally structured along the lines of an 'individualized reasonable person test' (as in duress) or whether it is structured to require a sufficiently 'substantial' incapacitation to excuse an individual (evaluation absent the reasonable person comparator, as in the case of involuntariness or automatism, for example).[24] As will be clear, in keeping with Robinson's reliance on the normative idea of excuse in this part of his schema, this practical effect tracks normative lines of culpability in that the individual is not blameworthy whether for reasons internal or external to him or herself.

But there is something to be gained from breaking the category of 'disability excuses' down further. Even if the practical effect of constructing an exculpatory doctrine around the reasonable person standard and constructing it around a direct evaluation of capacity (as 'substantial') might be the same, and there is no appreciable difference detectable in the rather broad concept of excuse, these two doctrinal structures are different in a meaningful way—they rely on different constructions of the individuals raising them. For instance, an individual seeking to rely on either duress (or provocation or 'loss of control'[25]) is constructed as if he or she was making a claim as an ordinary person in extra-ordinary conditions. By contrast, an individual seeking to rely on insanity or infanticide, for example, is constructed as if he or she was making a claim as an other than ordinary person. That is, in these latter types of claims, exculpation is dependent on the individuals' difference—and the technique of exculpation is distinctive. It does not make sense to reference these latter claims to exculpation to the reasonable person standard. After all, such a standard is precluded by the logic of constructing defendants who make these claims as abnormal. As Eric Colvin argues, 'in situations of mental impairment, there is no good reason to insist upon any particular behavioural standards [such as reasonableness] being observed'.[26]

It is clear then that a specific notion of difference—which I call abnormality—is buried within the more generalized idea about difference from others that structures Robinson's category of 'disability excuses'. As noted above, according to Robinson, the 'disability requirement' 'serves to distinguish the actor . . . and allows the law to acquit the actor because he is different', and the relevant difference flows

[23] *Structure and Function in Criminal Law* 84. According to Robinson, the practical effect is likely to be the same whether a doctrine is structured along the lines of an 'individualized reasonable person test' (as in duress) (which Robinson includes in his category of 'disability excuses') or whether it is structured to require a sufficiently 'substantial' incapacitation to excuse an individual (evaluation absent the reasonable person comparator, as in the case of involuntariness or automatism, for example) (*Structure and Function in Criminal Law* 90–1).

[24] *Structure and Function in Criminal Law* 90–1.

[25] On provocation and loss of control, see *R v James* [2006] 1 Cr App R 440 and *Attorney-General for Jersey v Holley* [2005] 2 AC 580, which effectively overruled the decision of the House of Lords in *R v Smith (Morgan)* [2001] 1 Cr App R 31, each concerning Homicide Act 1957, s 3; see now Coroners and Justice Act 2009, ss 54–6, amending the Homicide Act 1957.

[26] Colvin 'Exculpatory Defences in Criminal Law' 403.

from either something about the defendant or his or her circumstances. But the apparent equivalence between self and circumstances obscures what is really at issue in this area of the law. The specific kind of difference, which I seek to capture by the term abnormality, and which flows from something about the individual rather than their circumstances, is distinctive. It maps onto the idea of mental incapacity—a substantive impairment of the standard cognitive, moral, and volitional capacities both assumed and required by the criminal law. This difference pertains to the individual who raises or relies on a mental incapacity doctrine. And, as I discuss below, this specific notion of difference, abnormality, constructs this individual as qualitatively, as opposed to merely quantitatively, different from others.[27]

Where this kind of difference—abnormality—is at issue, exculpation cannot be indexed to the reasonable person comparator because it does not make sense to evaluate the claim to exculpation on that basis. The absence of the reasonable person comparator in the formal structure of the exculpatory doctrines is a formal representation of the particular way mentally incapacitated subjects are imagined in criminal law. Traditionally this absence has been regarded as insignificant. The reasonable person has been thought to have a functional substitute in the requirement that incapacitation (for the insanity doctrine etc) be sufficiently substantial for exculpation (how disordered?; how intoxicated? etc).[28] However, some sort of comparison does exist within these exculpatory mental incapacity doctrines. As I suggest in the final section of this chapter, we can think of the comparison implied in exculpatory mental incapacity doctrines as drawn not so much with a 'normal' defendant but with a mythical, fictitious, constructed 'abnormal' person.

One particular point Robinson makes as part of his analysis of 'disability excuses' remains relevant to my own unit of study, mental incapacity doctrines. This point applies not at the level of categorization but at the level of the doctrines themselves. As Robinson argues in relation to his functional approach to criminal law, in defences such as insanity and intoxication, like most excuse defences, it is the cause of the excusing condition (such as mental disorder or drunkenness) rather than its results that determines which excuse defence is applicable.[29] Robinson suggests that the 'disability-organized system of excuses' may have evolved because disability is an 'independently observable phenomenon'.[30] As discussed above, for

[27] This difference, or abnormality, is a distinct state, although it may be a temporary one. Robinson argues that the durability of a defendant's incapacity is of little conceptual significance in the criminal law—what matters is its effect on his or her ability to understand and to control his or her conduct: Robinson *Structure and Function in Criminal Law* 71. Although Robinson concludes that, in addition to its conceptual irrelevance, the durability of the defendant's disabling condition has 'little' practical significance (71), it may be argued that the durability of the defendant's incapacity has a significant practical import as, for instance, it lies behind the special verdict, with attendant disposal orders, and the scope of the requirement of 'disease of the mind' in the *M'Naghten Rules*.

[28] See, for instance, *Structure and Function in Criminal Law* 90–1 and the discussion above.

[29] As Robinson points out, even where the result of a particular disability is the same as the result of insanity (such as a distortion in perception), if the disability is not mental disease, insanity is not the appropriate excuse: *Structure and Function in Criminal Law* 92.

[30] *Structure and Function in Criminal Law* 92.

Robinson, the significance of this lies in the way in which such defences distinguish individuals who seek to rely on them from others. For me, the implications of a 'disability-organized system of excuses' are different. Keeping in mind the ways in which meanings are accorded to behaviour and individuals under mental incapacity doctrines, the significance of a 'disability-organized system of excuses' is two-fold. First, this feature of mental incapacity doctrines invokes the idea that there is an objective aspect to these doctrines, and, by extension, to the process of evaluation of claims based on mental incapacity. Second, the 'disability' aspect of mental incapacity doctrines provides another sign of the role of expert medical knowledges in proof of mental incapacity. I take up these points in the final section of this chapter.

At this point, in advance of a full discussion, below, it is appropriate to offer some preliminary comments on the specific kind of difference—abnormality—that is invoked by mental incapacity doctrines. Abnormality is the label I give to the idea of difference specifically attendant to mental incapacity. This idea of difference is open-textured, and the particular meanings attached to abnormality vary from doctrine to doctrine and over time. This difference is a construct of the law; it is produced through doctrines and practices (with the aid of expert psychiatric and psychological knowledge adduced in relation to claims of mental incapacity). Although Robinson does not argue in this way, I suggest that, as is the case with his category of 'disability excuses', this specific kind of difference is both produced by the doctrine and a precondition of the individual's success in relying on it. That is, the difference of the legal subject is both assumed by and constructed through these legal doctrines. Viewed in this way, mental incapacity doctrines are based on a particular construction of incapacity. Recognizing that mental incapacity doctrines involve the construction of individuals relying on them as abnormal—a difference of kind, not a difference of degree—prepares the way for thinking about the doctrines in a nuanced way, exposing what might otherwise be thought to be neutral or natural aspects of criminal law principles and practices.

Taking seriously both the formal structure of exculpatory criminal law doctrines, and the attendant constructions of individuals seeking to rely on them, means that, in my reconstruction, exculpatory mental incapacity doctrines are a smaller set than Robinson's 'disability excuses'. The category of exculpatory mental incapacity doctrines on which this book is based encompasses only those doctrines which share two distinct but allied features: doctrines in which the evaluative inquiry is not indexed to the reasonable person standard and through which the individual is constructed as abnormal. Thus, in England and Wales, these doctrines are insanity and automatism, and diminished responsibility and infanticide (the latter two are also inculpatory, as I discuss below). Non-exculpatory mental incapacity doctrines are those that have only the second of these two features—that is, the individual relying on them is constructed as abnormal. In this subgroup, there are two procedural doctrines: unfitness to plead and infancy, and one doctrine of imputation: intoxication. These seven doctrines, and the terrain which they traverse, form the subject matter of this book.

The Category of Mental Incapacity Doctrines in Criminal Law

As foreshadowed above, my reconstruction of the terrain of mental incapacity permits a reconceptualization of the role of mental incapacity in criminal law—beyond exculpation. In what follows, I briefly discuss each of the doctrines that, on my approach, are classed as mental incapacity doctrines, with an eye to their functional aspect. Like any such effort, my categorization does not capture everything that might be said about this area of the law, and, as will be seen, it is intended to be a more flexible approach to the organization of legal doctrines than the normative and functional approaches discussed above.

Exculpatory Mental Incapacity Doctrines

Insanity is arguably the archetypal mental incapacity doctrine in criminal law and it is not surprising that it shares the two features that, on my account, denote exculpatory mental incapacity doctrines. As the *M'Naghten Rules* make clear, the success of an insanity plea is dependent on whether the defendant's incapacity is of the requisite type; exculpation is not indexed to the reasonable person standard.[31] In addition, an individual raising insanity is constructed as abnormal in and through the insanity doctrine. A sense of this particular construction is provided by Lord Morris who, in *Bratty*, cited with approval the trial judge's statement to the jury that it was open to them to conclude that Bratty 'behaved in these, perhaps minor, ways of "abnormality"'.[32] In relation to insanity in particular, the meaning given to the difference of those individuals raising the doctrine has had a specific import—for a long time, the insane defendant has been regarded as dangerous. In *Sullivan*, Lord Diplock stated that 'the purpose of the legislation relating to the defence of insanity, ever since its origin in 1800, has been to protect society against recurrence of the dangerous conduct'.[33] Arguably, it was this construction of insane defendants that legitimated the automatic indefinite detention that followed a successful insanity claim until 1990 (via the special verdict).[34] The connection between abnormality, an idea of difference, as it is invoked in the insanity doctrine, and dangerousness, is a contingent association and may be contrasted with the way

[31] See *Bratty v Attorney-General for Northern Ireland* [1963] AC 386. As is well known, the *M'Naghten Rules* require that an individual suffer from a 'defect of reason' caused by a 'disease of the mind', and, as a result, he or she must not know the 'nature and quality' of the act or that it was wrong. These requirements are discussed in Chapter 5.

[32] *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 per Lord Morris.

[33] *R v Sullivan* [1984] 1 AC 156, 172. For a historical discussion of insanity and dangerousness, see R Moran 'The Punitive Uses of the Insanity Defence: The Trial for Treason of Edward Oxford (1840)' (1986) 9 *International Journal of Law and Psychiatry* 171.

[34] Since 1800, the special verdict resulting from a successful insanity defence has been inextricably connected with a particular set of disposal options. Until 1990, there was only one disposal option following a successful insanity defence: indefinite detention. For further discussion, see R D Mackay, B J Mitchell and L Howe 'Yet More Facts about the Insanity Defence' [2006] *Criminal Law Review* 399, 408 and my Chapter 6.

in which meaning is given to this idea of difference via other mental incapacity doctrines.

Automatism (or non-insane automatism) may seem at first glance to be an odd inclusion in a category of exculpatory mental incapacity doctrines. By contrast with insanity, automatism does not prescribe a particular disability as a baseline condition for exculpation.[35] The 'external cause' requirement of the doctrine, which has been used to mark the boundary between automatism and insanity, might be taken to mean that this exculpatory doctrine has little, if anything, to do with mental incapacity.[36] Yet, the automatistic individual is also constructed as abnormal; the 'external' factor must affect the individual raising automatism in a particular way, and exculpation is not referenced to the reasonable person comparator, making it an exculpatory mental incapacity doctrine on my account. Exculpation on the basis of automatism is available only to those individuals who are *un*conscious or acting *in*voluntarily—their loss of voluntary control must be total (albeit temporary)—and, in their total incapacitation, such individuals are constructed as qualitatively different from other defendants. Here, abnormality is given a contrasting set of meanings to that attendant to abnormality in insanity: automatism, arising from an external factor, is thought to mark out an individual who is less dangerous (or not dangerous at all) when compared with an insane individual. As Justice Devlin stated in *Hill v Baxter*, 'if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free'.[37]

Unlike insanity and automatism, diminished responsibility alters rather than abrogates criminal responsibility for killing. As a result, it is usually regarded as partially exculpatory. But, as I discuss below, viewed from another angle, diminished responsibility may also be thought to be partially inculpatory, or, to slide between my subcategories of exculpatory and non-exculpatory mental incapacity doctrines. As a result of changes made by the recent Coroners and Justice Act 2009, diminished responsibility is available where a killing is caused or explained by an 'abnormality of mental functioning', arising from a 'recognised medical condition', which has 'substantially impaired' the defendant's ability to understand the nature of his conduct, exercise self-control, or act rationally.[38] Again, exculpation via the doctrine is not indexed to the reasonable person, and the individual seeking partial

[35] As is well known, a defendant will be able to rely on automatism for exculpation if he or she meets three conditions: the cause of the automatic or automatistic behaviour is 'external', the defendant is not 'at fault' for getting into a state of automatism, and he or she lost 'total control' over his or her actions (again, there is no comparison with the reasonable person): see *Bratty v Attorney-General for Northern Ireland* [1963] AC 386. See Chapter 5 for a discussion of the law of automatism.

[36] This argument is probably strongest in relation to what has been referred to as conscious automatism, describing the kind of behaviour resulting from spasms or reflex actions, where it might be thought that an individual's mind is unaffected. However, as Andrew Ashworth argues, automatism is most accurately understood as a denial of authorship, thus encompassing situations in which the ordinary link between mind and body was absent: see A Ashworth *Principles of Criminal Law* (Oxford: OUP, 2009) 88–90. My notion of abnormality extends to cover such situations.

[37] *Hill v Baxter* [1958] 1 QB 277, 285. See also *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.

[38] Coroners and Justice Act 2009, s 52, amending Homicide Act 1957, s 2.

exculpation via diminished responsibility is constructed as abnormal.[39] This construction of diminished defendants is invoked in the requirement of the newly formulated provision that an individual must suffer from an 'abnormality of mental functioning', or, in the rather infamous phrase it replaced, an 'abnormality of mind' (which was held to refer to 'a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal'[40]). Abnormality is also open-textured in relation to diminished responsibility, and, within the confines of the doctrine itself, it has accommodated a variety of meanings around reduced culpability (including supposedly altruistic lethal violence or lethal violence occurring in the context of sustained victimization[41]). As with other exculpatory mental incapacity doctrines, this specific kind of difference, which I am calling abnormality, is both a condition of exculpation and a construction of those individuals seeking to rely on these doctrines.

Like diminished responsibility, where it operates as an exculpatory doctrine, infanticide is partially exculpatory and it is available only to certain offences. In addition, as is both well known and controversial, infanticide is restricted by the type of defendant who can rely on it. In England and Wales, the provision operates to substitute liability for infanticide in place of murder or manslaughter where the 'balance' of the defendant woman's mind was disturbed at the time of the act or omission leading to the death of her child under the age of 12 months.[42] Again, the infanticidal woman is constructed as abnormal (evident in the language of disturbance and imbalance, for instance) and exculpation is not referenced to the reasonable person comparator, making infanticide an exculpatory mental

[39] By contrast, provocation, which was replaced by a partial defence of 'loss of control' in the Coroners and Justice Act 2009, is indexed to the reasonable person. Some commentators have suggested that the historical trajectory of provocation has been from a partial justification to a partial excuse; see, eg J Dressler 'Provocation: Partial Justification or Partial Excuse?' (1988) 51(4) *Modern Law Review* 467. Even if this means provocation should be best thought of as an excuse, nonetheless, on my reconstruction, it is not an exculpatory mental incapacity doctrine because exculpation via the doctrine is referenced to the reasonable person standard.

[40] See *Byrne* [1960] 2 QB 396, 403 per Lord Parker. Something of what is at stake in criminal law investment in a notion of abnormality is reflected in the hard-fought academic and practice debate about the difference between provocation and diminished responsibility, where the latter has been regarded as the appropriate preserve of an individual who is abnormal in some way. For a flavour of this debate, see B J Mitchell et al 'Pleading for Provoked Killers: In Defence of Morgan Smith' (2008) 124 *Law Quarterly Review* 675 and T Macklem and J Gardner 'Provocation and Pluralism' (2001) 64(6) *Modern Law Review* 815 and, in relation to legal practice, see *Attorney-General for Jersey v Holley* [2005] 2 AC 580 and *R v Smith (Morgan)* [2001] 1 Cr App R 31.

[41] See discussion in *R v Smith (Morgan)* [2001] 1 Cr App R 31. See also N Lacey 'Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds' in A Ashworth and B J Mitchell (eds) *Rethinking English Homicide Law* (Oxford: OUP, 2000) 107.

[42] Infanticide Act 1938, as amended by Coroners and Justice Act 2009. With its particular wording, the Infanticide Act 1922 and the subsequent 1938 Act 'simplified' the legal relationship between mental disturbance and the *actus reus* of the offence—a mere temporal connection between the disturbance and the killing suffices for partial exculpation. See N Walker *Crime and Insanity in England (Vol 1: The Historical Perspective)* (Edinburgh: Edinburgh University Press, 1968) 131. The recent Coroners and Justice Act 2009 amended the infanticide provision such that it is now clear that it is an alternative offence and a partial defence to both murder and manslaughter: see *Gore (Lisa Therese) (Deceased)* [2007] EWCA Crim 2789. The 2009 Act also altered the wording of the provisions in a minor way. Infanticide is discussed in my Chapter 8.

incapacity doctrine on my account. The creation and retention of this unique doctrine in the criminal law has been the subject of a thoroughgoing critique by feminist theorists.[43] For my purposes in thinking about the kind of difference of mental incapacitated subjects, one particular aspect of this exculpatory doctrine is of note: in providing that women's mental disturbance has a physical base in common reproductive practices (giving birth and breastfeeding), infanticide achieves a naturalization of the construction of abnormality for criminal law purposes. This in turn supports two facially contradictory effects: inculpation via the offence of infanticide, which I discuss below, as well as partial exculpation.

Non-Exculpatory Mental Incapacity Doctrines

Mental incapacity is a basis for doctrines which perform other roles in criminal law, beyond exculpation. The most prominent of these other roles is a procedural role, which the doctrine of unfitness to plead performs. Unfitness to plead is a procedural provision exempting a defendant from an ordinary trial (at least temporarily) on the basis that he or she cannot understand or participate in it.[44] Unfitness to plead is often swept up alongside exculpatory mental incapacity in academic studies, on the basis that exemption from trial via unfitness is a procedural cognate of exculpation. However, in thinking about unfitness to plead, it would be inaccurate to reduce its role to the ways in which it is similar to exculpation. Historically, unfitness to plead (as insanity on arraignment) had connections to the substantive criminal law, and, as is the case with insane defendants, the particular abnormality of unfit defendants has been closely connected with dangerousness.[45] But, as reflected in the way in which it is now decided (by a judge rather than a jury), the doctrine has come to be intimately connected with the progress of the trial and, as such, with due process.[46] With its increasingly technical identity as a procedural provision, unfitness to plead is now more closely connected to the integrity of the criminal trial process than to the role of mental incapacity as a basis for exculpation.

[43] See, eg, H Allen *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions* (Milton Keynes: Open University Press, 1987) and F E Raitt and M S Zeedyk *The Implicit Relation of Psychology and Law: Women and Syndrome Evidence* (London: Routledge, 2000).

[44] The Law Commission has recently proposed that the current, narrow cognitive criteria of unfitness be replaced with a broader test that assesses whether the accused has decision-making capacity for trial: see *Unfitness to Plead: A Consultation Paper* (Law Com No 197, 2010) para 3.41 for discussion. The Law Commission's proposal is based on the civil law on decision-making capacity. The Mental Capacity Act 2005 provides that a person is unable to make a decision for him or herself if he or she is unable to understand the information relevant to the decision, retain that information, use or weigh it as part of the process of making the decision or communicate the decision (s 3(1)). The Act also provides that a person is not to be treated as unable to make a decision 'unless all practicable steps to help him to do so have been taken without success' (s 1(3)). I discuss unfitness to plead in Chapter 4.

[45] On the historical connections to the substantive law of insanity, see Walker *Crime and Insanity in England (Vol 1)* for discussion. On dangerousness, the Criminal Lunatics Act 1800 provided that the unfit as well as the insane could be kept in 'strict custody until his Majesty's pleasure shall be known': see Moran 'The Punitive Uses of the Insanity Defence'. I take up both these issues in Chapter 5.

[46] See R D Mackay et al 'A Continued Upturn in Unfitness to Plead—More Disability in Relation to the Trial Under the 1991 Act' [2007] *Criminal Law Review* 530 for discussion.

This discussion of unfitness to plead as a procedural provision leads me to consider the status of infancy and suggest it is appropriately included in my category of non-exculpatory mental incapacity doctrines. In criminal law, infancy or non-age refers to the principle that, below a certain age, an individual is beyond the reach of the criminal law. The exemption is provided to children who are considered to be insufficiently mature to be subject to criminal sanction.[47] Interestingly, infancy is usually identified as a *sui generis* provision and rarely included in studies of mental incapacity in criminal law—perhaps because it is thought of as a non-exculpatory defence (like diplomatic immunity in Robinson's account). While infancy cannot be considered an exculpatory doctrine as it blocks an inquiry into criminal responsibility, it might be thought of as a procedural doctrine, implicated in the legitimacy of the criminal process.[48] Infancy also relies on a construction of defendants as abnormal, although I acknowledge that, as is the case with intoxication, discussed below, this is something of an unstable construction.[49] The claim that young defendants are constructed as abnormal seems counter-intuitive because, as Lord Diplock stated in relation to age and the law of provocation, 'nothing could be more ordinary or normal than to be aged 15'.[50] Yet, to 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).[51]

In addition to these procedural doctrines, mental incapacity is also the basis of what Robinson has termed a 'doctrine of imputation': the law relating to voluntary intoxication.[52] In academic texts, the rules relating to intoxicated offending (which

[47] See *C (A Minor) v DPP* [1996] AC 1. The age of criminal responsibility has varied over time, and from jurisdiction to jurisdiction. In England and Wales, the age of criminal responsibility is currently 10 years: Children and Young Persons Act 1963, s 16. Significantly, infancy is a status; so, unlike unfitness to plead, there is no inquiry into the individual mental state of a child below the age of criminal responsibility and no possibility of a criminal trial and punishment. Infancy, and its close cousin, *doli incapax*, are discussed in Chapter 4.

[48] See G Maher 'Age and Criminal Responsibility' (2004–05) 2 *Ohio State Journal of Criminal Law* 493.

[49] The strongest evidence in support of this construction seems to be the historical connection between the development of the principles relating to infancy and those related to the substantive law of insanity: see A Platt and B L Diamond 'The Origins of the "Right and Wrong" Test of Criminal Responsibility and its Subsequent Development in the United Sates: An Historical Survey' (1966) 53 *California Law Review* 1227.

[50] *DPP v Camplin* [1978] AC 705, 718. A notion of 'normal immaturity' motivated the Government to reject the Law Commission's proposal to include 'developmental immaturity' in the new diminished responsibility provision contained in Coroners and Justice Act 2009, s 52, discussed above: see HL Deb 30 June 2009, vol 712, col 185–8.

[51] In criminal law scholarship, the conceptual connections between insanity and infancy are reflected in Michael Moore's theory that insanity, intoxication and infancy all belong in the category of 'status excuse': see M S Moore 'Causation and the Excuses' (1985) 73 *California Law Review* 1091, 1098. In a way that has long since fallen away for insane defendants, for instance, this abnormality is associated with vulnerability (warranting immunity from the rigours of the criminal law): see, eg, N Jareborg *Scraps of Penal Theory* (Uppsala: Iustus Forlag, 2002) 119–20. However, the House of Lords rather animated discussion of *doli incapax* in *C (A Minor) v DPP* [1996] AC 1, which led to legislative abolition of the doctrine, and recurrent debates about the appropriate age at which a child should be exposed to criminal liability, suggests that this notion of vulnerability is not all one way.

[52] According to Robinson, doctrines of imputation impute missing offence elements, providing an 'alternative means of holding the defendant liable as if the required elements were satisfied': see

include rules on involuntary intoxication) are sometimes included along with mental incapacity doctrines, although it has not been clear that this is not just because intoxication does not seem to belong elsewhere. As is well known, if controversial, the *Majewski* rules provide that voluntary intoxication is evidence that may be adduced in support of a defence argument that the prosecution has not proved that the defendant formed the requisite *mens rea* in offences of 'specific intent'.[53] As Robinson argues, although there is no suggestion that the actor in fact satisfied the required offence element, 'the special conditions required by the doctrine of imputation are said to justify treating the actor as if he satisfies the imputed element'.[54] As it does the work of imputation, voluntary 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.[55] The specific meaning given to intoxicated abnormality—something along the lines of a lay concept of recklessness—is suggested by the House of Lords in *Majewski*, where Lord Elwyn-Jones referred to a defendant who 'consciously and deliberately takes alcohol and drugs . . . in order to escape from reality . . . and thereby *disables* himself from taking the care he might otherwise take'.[56]

Beyond exculpation, imputation, and a procedural role, the last of the roles of mental incapacity doctrines in criminal law is that of inculpation. Here, I refer to the doctrines of diminished responsibility and infanticide. As it is not buttressed by the status of a distinct offence, diminished responsibility is a more controversial inclusion in this latter category than infanticide. As mentioned above, although typically regarded as partially exculpatory, viewed from the other side, diminished responsibility seems to be partially, or, more accurately, *differently* inculpatory, and thus to slide between my two subcategories of exculpatory and non-exculpatory doctrines. This approach to diminished responsibility is not common but it could follow from the idea that a manslaughter conviction may be contrasted with a special verdict based on insanity as well as with a murder conviction.[57] Indeed, existing analyses of diminished responsibility as an excuse wrestle with its unusual

Robinson *Structure and Function in Criminal Law* 67. In a similar analysis, Andrew Simester has argued that voluntary intoxication is specifically a form of constructive liability: see A P Simester 'Intoxication is Never a Defence' [2009] *Criminal Law Review* 3.

[53] *DPP v Majewski* [1977] AC 443. The law of intoxication forms the subject of Chapter 7.

[54] Robinson *Structure and Function in Criminal Law* 58. By contrast with voluntary intoxication, Robinson includes involuntary intoxication within his category of 'disability excuses' (71).

[55] The ubiquity of intoxication poses a challenge for a construction of the intoxicated defendant as abnormal and, so, this construction is perhaps a more tenuous one than that of the insane defendant, for example. However, the notion of abnormality subsists in the law of England and Wales, even as intoxication pleas are less uncommon than those of insanity. See Chapter 7 for further discussion.

[56] *DPP v Majewski* [1977] AC 443, 471 (emphasis added).

[57] That both insanity and diminished responsibility may be relevant in a murder trial has been recognised in Criminal Procedure (Insanity) Act 1964, s 6, which provides that, if the defence raises either insanity or diminished responsibility, the prosecution may raise the other as an alternative.

status as a partial doctrine, attempting to account for the fact that certain conditions affecting a defendant's mental capacity are relevant to conviction (not just to sentence), but merely reduce rather than abrogate his or her criminal responsibility.[58] It is possible that the ambiguity over whether diminished responsibility relates to the actor or the act, which has stalked the doctrine since its origins as a plea in mitigation in the late nineteenth-century Scots law, allows the doctrine to be Janus-faced in this respect.[59] Assessing the value of this way of looking at diminished responsibility awaits a fuller discussion of the doctrine in Chapter 9. For now, it is possible to suggest that, when the link between mental incapacity and exculpation is de-naturalized, different perspectives on what might be regarded as well-traversed territory become possible.[60]

As mentioned above, although not the subject of a large amount of academic analysis (and rarely a conviction), infanticide is an offence as well as an exculpatory mental incapacity doctrine.[61] Just as it is a unique kind of exculpatory doctrine, so it is a unique kind of offence. In Hillary Allen's words, as an offence, infanticide is distinctive because 'mental abnormality is a positive precondition for conviction'.[62] This distinctive feature has been largely occluded by the most prominent feature of infanticide—only mothers who kill their own children when the children are younger than 12 months may be convicted of it, a feature of the doctrine which I mentioned above.[63] As a 'positive precondition for conviction', it is notable that, as could also be said to be the case with diminished responsibility, abnormality is here functioning to inculpate the individual woman charged with infanticide. The legal formulation short-circuiting an inquiry into a woman's criminal responsibility (which is the most interesting aspect of the law of infanticide) is double-edged: the connection between a defendant woman's abnormality and particular (criminal) conduct (killing)—as constructed through the infanticide provision—sustains both an offence and an exculpatory doctrine. This inculpatory role for mental incapacity is diametrically opposed to its supposedly principal role of exculpation.

[58] See, eg, E Griew 'The Future of Diminished Responsibility' [1988] *Criminal Law Review* 75, 81–2 and R Sparks '"Diminished Responsibility" in Theory and Practice' (1964) 27(1) *Modern Law Review* 9, 16–18.

[59] For discussion of the historical development of diminished responsibility in Scotland, see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: W Green, 2006) 221–4.

[60] See further my Chapter 9. This dual assessment of diminished responsibility—as either or both an exculpatory and an inculpatory doctrine—may also shed light on the history of the insanity doctrine, which was, for a significant period of time, at least formally the basis of a conviction. In the Trial of Lunatics Act 1883, the special verdict was repackaged as 'guilty but insane' thus technically altering its form to a conviction from an acquittal. For discussion, see R Moran 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield' (1985) 19(3) *Law and Society Review* 487, 519. The Criminal Procedure (Insanity) Act 1964 restored the form of the special verdict to 'not guilty by reason of insanity' (s 1).

[61] See Infanticide Act 1938, s 1(1) (as amended by the Coroners and Justice Act 2009) which makes infanticide an independent homicide offence.

[62] See Allen *Justice Unbalanced* 27.

[63] Explanations for the existence of a separate homicide offence—like the explanations for the exculpatory provision—are historical: see my Chapter 8; see also T Ward 'The Sad Subject of Infanticide: Law, Medicine and Child Murder 1860–1938' (1999) 8(2) *Social and Legal Studies* 163.

Taken together, exculpatory and non-exculpatory doctrines make up my category of mental incapacity doctrines. As will be clear by now, the significance of my reconstruction lies not in its radical departure from what parts of criminal law have been captured to date by the category of mental incapacity defences (with allied procedural provisions included). With the exception of infancy, my approach to the category of mental incapacity doctrines mirrors the operational, if unarticulated, basis on which the authors of major monographs on the English and Welsh law proceed.[64] However, it should be noted that one of the consequences of my approach is that, because of its sensitivity to the particular formal structure of criminal doctrines, the scope of the category of mental incapacity doctrines will vary from jurisdiction to jurisdiction.[65] This greater sensitivity to doctrinal forms suggests that my reconstruction has a more rough-and-ready character, and this in turn indicates that it is not intended to be as definitive as the normative and functional approaches discussed in the first section of the chapter. Rather, my reconstruction is intended as a rethinking of mental incapacity in criminal law. The value of my reconstruction lies in what it allows us to see about this area of criminal law: that doctrines based on mental incapacity perform a variety of functions beyond exculpation, evident when the terrain of mental incapacity is re-assembled around those doctrines that imagine the subject who relies on them as abnormal, and, where the doctrines are exculpatory, that exculpation is not indexed to the reasonable person.

At this point, it is useful to comment on the relationship between the terrain of mental incapacity in criminal law, as marked out above, and criminal non-responsibility, which refers to the outcome of some criminal law adjudication processes. Criminal non-responsibility is sometimes regarded as coextensive with mental incapacity, and thus it might be thought that this term is synonymous with the references to mental incapacity in criminal law made here. On my approach to mental incapacity in criminal law, the terrain of interest to me is not coterminus with non-responsibility. Rather, non-responsibility—marked out by exculpatory mental incapacity doctrines—is a 'terrain within a terrain', encompassed by but not coextensive with mental incapacity. As my category of non-exculpatory mental incapacity doctrines suggests, the terrain of mental incapacity in criminal law extends beyond non-responsibility. But, while criminal non-responsibility and mental incapacity are not flip sides of the same coin, appreciation of the principles and practices of non-responsibility assists in illuminating what I want to suggest is distinctive in the terrain of mental incapacity.[66]

[64] See R D Mackay *Mental Condition Defences in the Criminal Law* (Oxford: Clarendon Press, 1995) and Walker *Crime and Insanity in England (Vol 1)*.

[65] For instance, it might be possible to draft a duress doctrine in a way in which it would construct the defendant as abnormal and would not incorporate a comparison between the defendant and the reasonable person and, if this was the case, it would move into my category of mental incapacity doctrines.

[66] See Chapter 3 on 'manifest madness'.

Difference within Criminal Law

Thinking anew about mental incapacity in criminal law, without the assumed priority of mental incapacity as a basis for exculpation, entails questioning what certain criminal law doctrines share with others, and on what basis they are grouped together. As the first step in my discussion, this chapter has offered a reconstruction of the terrain of mental incapacity in criminal law as mental incapacity doctrines, a subset of which is exculpatory. This reconstruction was based on a new sense of what and whose knowledge counts (to include expert psychiatric and psychological knowledges of incapacity), on the relevance of how arguments are initiated in the courtroom (not only by defence counsel), and on the effect of at least some successful claims based on mental incapacity (exemption). This reconstruction also took the formal structure of criminal law doctrines seriously, and considered the kind of subject imagined by them to be a factor germane to the way in which this area of the criminal law is organized. This reconstruction prompts a reconceptualization of the role of mental incapacity in criminal law, which represents the second step in my discussion. Here, it becomes clear that mental incapacity performs a multiplicity of roles—inculpation, imputation, and a procedural role—beyond exculpation. My own effort at categorization cashed out that rethinking and exposed those aspects of mental incapacity doctrines that are illuminated by my reconstruction.

It is now possible to consider in more detail the specific kind of difference—abnormality—that I suggest has definitional or constitutive significance in relation to mental incapacity doctrines. The specific kind of difference that goes under the label abnormality is the outcome of legal evaluation—either processorial or adjudicative practices produce constructions of individuals relying on mental incapacity doctrines. As foreshadowed above, I suggest that according to this kind of difference, the individual is marked out as *qualitatively* different (different in kind) rather than quantitatively different (different in degree) from others. This qualitative difference is both a requirement of the doctrine and a construction of the individuals (diminished, abnormal, disabled) who seek to rely on them. The effect of this qualitative difference is that it has a precise and definite scope and is not subject to infinite gradations. The construction of individuals seeking to rely on mental incapacity doctrines as abnormal or qualitatively different from others also assists in the construction of the primary subject of the criminal law as 'always accountable', to borrow Dana Rabin's term.[67] The notion that an identifiable and delimited category of individuals lies beyond the reach of the criminal law preserves the norms of responsibility that the law encodes. By constructing the non-responsible subject as abnormal, the 'normal' individual becomes a responsible legal subject, one to whom ordinary principles of responsibility, liability, and punishment apply.

[67] D Rabin *Identity, Crime and Legal Responsibility in Eighteenth Century England* (New York: Palgrave Macmillan, 2004) 110.

Further, because the specific kind of difference I have called abnormality is open-textured, the particular meanings attached to this kind of difference vary from doctrine to doctrine and over time. As Nicola Lacey argues, the responsible subject of law is a particular and temporally contingent phenomenon.[68] I consider the particular contours of the notion of abnormality in relation to each of the mental incapacity doctrines discussed in this book. To give a flavour of this discussion, I mention just two points here. As I discuss in Chapter 5, these particular meanings include, for instance, dangerousness (in relation to insane defendants, for example) and not so dangerous (in relation to automatistic defendants). In relation to infanticide, which I discuss in Chapter 8, the infanticidal woman's abnormality is depicted as less dangerous or not dangerous at all. In addition, an infanticidal woman's difference is naturalized, and, as it is depicted as a product of her physiology, something which all women share, it suggests a 'natural maternal violence', which cannot be subject to the usual legal restraints.[69] The effect of these varying constructions is that what is actually a contingent set of meanings is portrayed as if they were given and unproblematic. Further, the particular meanings given to abnormality (such as dangerousness) are encoded in an individual's behaviour. This enhances the importance of behaviour or conduct in the context of legal evaluation and adjudication of mental incapacity claims, and I take up this point in my 'manifest madness' analysis in the next chapter.

Abnormality as a specific idea of difference, and the absence of the reasonable person standard in exculpatory doctrines (the second of the two constitutive features of the doctrines included in my reconstruction), are connected. The absence of the reasonable person standard in exculpatory mental incapacity doctrines may seem unimportant at first glance. Thus, noting that the 'reasonable person' plays an important role in the English and American criminal law, but not in the German criminal law, Hörnle argues that social expectations stand behind the 'reasonable person'; for Hörnle, these social expectations are relevant to judgments about wrongdoing but not judgments about personal responsibility, which she argues need to be shaped with a view to the individual offender.[70] Similarly, as discussed above, Robinson argues that the presence or absence of the reasonable person standard is merely a question of form rather than substance. Like scholars such as John Gardner, Robinson argues that, although excuses might be thought to be subjective, in that they are dependent on the actor rather than the act, they are structured according to some form of objective standard, such as the reasonable person.[71] According to Robinson, 'where a disabling abnormality exists, the claim

[68] 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 and N Lacey 'Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice' (2007) 1 *Criminal Law and Philosophy* 233.

[69] Allen *Justice Unbalanced* 28.

[70] See T Hörnle 'Social Expectations in the Criminal Law: The "Reasonable Person" in a Comparative Perspective' (2008) 11 *New Criminal Law Review* 1.

[71] Robinson *Structure and Function in Criminal Law* 89–90; see also Gardner *Offences and Defences* 111.

of excuse is essentially a claim that the reasonable person suffering a similar disability would have been unable to avoid a violation'.[72] Other scholars have made arguments to similar effect.[73]

Is this all that might be said on this topic? What is the potential significance of exculpation and partial exculpation absent a reasonable person comparator? Something of a guide to this question is provided by the significance of the *presence* of this comparator elsewhere in the criminal law. As a number of scholars attest, the reasonable person occupies a central role in the criminal law. Indeed, the figure of the 'reasonable person' is arguably at the centre of the criminal law.[74] Lindsay Farmer's analysis of the 'reasonable person' in criminal law is most helpful here. Farmer regards the 'reasonable man' as the 'emblem of the modern criminal law', arguing that the 'concern with reasonableness is a feature of the modern law alone'.[75] As Farmer argues, the reasonable person is a device with a particular role in the modern criminal law. In Farmer's words, the 'reasonable man' is 'the means by which a governable community can be imagined by the modern law'. The criminal law 'does not express community values through this device, but seeks to create them'.[76] It is through this device that 'judges labour to connect the operation of the law to community feelings or community interests'.[77] The significance of the reasonable person in criminal law hints at something intriguing about its absence in the area of mental incapacity.

If the absence of the reasonable person comparator is significant, as I suggest it is, the challenging task of interpreting an absence (reading a silence) follows. If the figure of the 'reasonable person' may be thought to occupy a central place in the modern criminal law,[78] what is the significance of exculpation via formal structures

[72] *Offences and Defences* 84.

[73] Although he does not employ the same reasoning, Gardner reaches a similar conclusion. Referring to the tradition of placing a reasonableness requirement on excuses in criminal law, Gardner argues that the absence of this requirement in some excuses 'does not show a drift to a more purely "subjective" account of excuses' but rather indicates that some excuses 'may actually serve to negate an element of the offence rather than to excuse or justify its commission': see *Offences and Defences* 111. Following this logic would mean that exculpatory mental incapacity doctrines go exclusively to the absence of the elements of the offence, rather than the presence of additional exculpatory factors. Arguably, mental incapacity defences do not reduce to this but rather work both ways. For instance, a successful insanity defence may indicate that a defendant did not form the requisite *mens rea* for an offence, or that he or she did form it, but nonetheless met the requirements of the *M'Naghten Rules*. As several commentators have pointed out, knowledge of the wrongness of an act is not an application of the ordinary rules of *mens rea*: see for instance, T Ward 'Magistrates, Insanity and the Common Law' [1997] *Criminal Law Review* 796, 802. A defendant may have the *mens rea* for an offence, and yet, as a result of a defect of reason resulting from a disease of the mind, he or she may not know that the act was wrong. As a result, the insanity defence actually operates in two ways: it either negates an element of the offence (*mens rea*) or it excuses or exempts the defendant although he or she performed the *actus reus* with the requisite *mens rea*: see Colvin 'Exculpatory Defences in Criminal Law' 394.

[74] G P Fletcher 'The Right and the Reasonable' (1985) 98 *Harvard Law Journal* 949, 949.

[75] L Farmer 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5 *Social and Legal Studies* 57, 66.

[76] Farmer *Criminal Law, Tradition and Legal Order* 183.

[77] Farmer 'The Obsession with Definition' 57.

[78] Farmer 'The Obsession with Definition' 66.

other than a reasonable person comparator? One way of thinking about this is to suggest that, in the absence of the reasonable person comparator, exculpation on the basis of mental incapacity is coordinated and legitimated in distinctive ways.[79] This approach seems germane to the topic of mental incapacity. For instance, if exculpation on the basis of mental incapacity implicates expert and lay knowledge of incapacity, then both types of knowledge are required for the legitimation of verdicts relating to mental incapacity.[80] These arguments invite a close assessment of the relevance of different types of knowledge of mental incapacity brought to bear on mental incapacity claims in criminal law.[81]

My own study of mental incapacity in criminal law leads me to suggest that the adjudication of claims to exculpation based on mental incapacity involves a tacit comparison, but not one drawn to the 'reasonable person'. I suggest we might think of the comparison involved in adjudication of such claims as drawn not so much with a 'normal' defendant but with a mythical, fictitious, constructed 'abnormal' person, that is, an individual with the relevant condition but without the criminal act. As Robinson notes, and as discussed above, various incapacitating conditions are accommodated by the existence of various 'disability excuses', which are generally associated with a particular disability.[82] As I suggested above, the existence of exculpatory mental incapacity doctrines correlated with particular disabilities signals something objective about the process of evaluation of claims based on mental incapacity, as well as providing another sign of the role of expert medical knowledges in proof of mental incapacity. The combined effect of these two aspects of 'disability'-named doctrines is such as to conjure up a (mythical, fictional, constructed) mentally incapacitated individual and to invoke some sort of implicit comparison to him or her in the legal evaluation and adjudication process.

In this chapter, I offered a reorganization of mental incapacity in criminal law, which led to a reconceptualization of the roles played by mental incapacity. Thinking anew about what parts of the criminal law belong together and on what basis they are connected, I made a case for a particular theorized scope of the terrain of mental incapacity. I then examined closely the significance of what

[79] The notion that changes in the principles of criminal responsibility represent responses to problems of coordination and legitimation has been developed by Nicola Lacey. Lacey argues that these 'general problems' relate to the ways in which both the values expressed by the criminal law and the knowledge or belief in facts on which individual judgments depend are coordinated and legitimated: see Lacey 'In Search of the Responsible Subject' 368.

[80] Tony Ward suggests something along these lines in the 'dual authority of science and lay consensus', which he argues underpins the historical operation of mental incapacity doctrines such as insanity and diminished responsibility: see T Ward 'Observers, Advisors, or Authorities? Experts, Juries and Criminal Responsibility in Historical Perspective' (2001) 12 *Journal of Forensic Psychology* 105.

[81] I discuss this in Chapter 3, as part of my 'manifest madness' analysis, and in Chapter 6 regarding evidence and proof of insanity and automatism. For a discussion of the role of expert knowledge of mental incapacity, see, eg, M Lynch 'Circumscribing Expertise: Membership Categories in Courtroom Testimony' in S Jasanoff (ed) *States of Knowledge: The Co-production of Science and Social Order* (New York: Routledge, 2004) 161 and T Ward 'English Law's Epistemology of Expert Testimony' (2006) 33(4) *Journal of Law and Society* 572.

[82] Robinson *Structure and Function in Criminal Law* 92.

I regard as the definitional features of mental incapacity doctrines—the construction of the subject as abnormal, and the absence of the reasonable person comparator. This analysis exposed the distinctive features of mental incapacity doctrines when compared with other criminal law doctrines.

It now falls to analyse the mental incapacity terrain itself, on its own terms. This involves looking across each of the mental incapacity doctrines to capture something of the topography of this terrain taken as a whole. It also entails extending the inquiry from doctrines to doctrines and practices, that is, taking into account the evidentiary and procedural aspects of mental incapacity in assessing the mental incapacity terrain. In the next chapter, I examine the formal qualities of this terrain under my 'manifest madness' analysis.