

**‘IN A KIND OF MAD WAY’:
A HISTORICAL PERSPECTIVE ON EVIDENCE AND
PROOF OF MENTAL INCAPACITY**

ARLIE LOUGHNAN*

[This article examines the evidential and procedural aspects of claims based on mental incapacity in English courtrooms in the ‘long’ 18th century. It employs a frame the author has termed ‘manifest madness’ to analyse how such claims were articulated and elaborated at trial in this period. This analysis reveals, first, the substantive significance of the accused’s conduct; second, the part played by ordinary people; and third, the role of common knowledge of ‘madness’ in evidence and proof of mental incapacity for criminal law purposes. By reference to the law on what would now be called unfitness to plead, automatism and intoxication, this article demonstrates the utility of the ‘manifest madness’ frame for understanding the evidential and procedural practices attendant to mental incapacity claims in this period. The article then considers the insights this historical analysis provides into current criminal practices for proving mental incapacity.]

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I INTRODUCTION

In criminal trials, when mental incapacity is raised — whether for the purposes of exculpation, partial exculpation or for some other reason, such as to prevent a normal trial proceeding — it is often assumed to introduce distinctive and difficult issues of evidence and proof. When used in a criminal law context, mental incapacity connotes the absence of or impairment in the cognitive, volitional and moral capacities that are both assumed and required by the criminal law.¹ Insanity enjoys the highest profile of mental incapacity doctrines,

* BA (Hons), LLB (Hons) (Syd), LLM (NYU), PhD (Lond); Senior Lecturer, Sydney Law School, The University of Sydney. The quotation in the title is taken from ‘Trial of Susannah Milesent’ as recorded in the *Old Bailey Proceedings* (11 November 1794) 1333, 1335. The *Old Bailey Proceedings* contain accounts of trials which took place at the Old Bailey, London’s central criminal court. Digitised versions of some of the trials which took place between 1694 and 1913 are available at <<http://www.oldbaileyonline.org/index.jsp>>. See also below n 35.

¹ Antony Duff argues that mental disorder is best understood in terms of ‘an impairment of the capacities for rational thought, emotion and action that constitute responsible agency’: R A Duff,

and, as is well known, distinctive procedural and evidentiary rules attach to the doctrine.² Since the development of the modern insanity doctrine in the early 19th century, insanity has been thought to be difficult to prove for criminal law purposes.³ Perhaps by analogy with insanity, other types of mental incapacity are also dogged by concerns about their provability. A suspicion that mental incapacity is distinctively opaque in epistemological terms seems to account in part for the now ubiquitous practice of relying on expert psychiatric and psychological evidence in trials where mental incapacity is at issue. Such evidence is adduced on the basis that knowledge of ‘abnormal’ mental states — unlike knowledge of ‘normal’ mental states — is beyond the reach of the jury, although the jury is then called on to assess that expert evidence.⁴ Yet, even with the benefit of expert evidence, criminal law evaluation and adjudication practices based on mental incapacity seem unable to escape doubts about the genuineness of the particular mental condition as raised in court, and the legitimacy of any legal outcome based on a particular instance of incapacity.⁵

Although claims based on mental incapacity seem haunted by doubts about their genuineness and legitimacy, it is possible to point to an era in which such

Answering for Crime: Responsibility and Liability in the Criminal Law (Hart Publishing, 2007) 286. See also Arlie Loughnan, ‘Mental Incapacity Doctrines in Criminal Law’ (2012) 15 *New Criminal Law Review* (forthcoming) for a discussion of the roles of mental incapacity in criminal law and an argument in favour of using the term ‘mental incapacity doctrine’ (as used in this article), as opposed to the term ‘mental incapacity defence’, which has been more common to date.

² One of the most notable is the reverse burden, whereby the accused bears a persuasive burden in relation to insanity, which has been justified on the basis that the accused’s mental state is peculiarly within his or her knowledge. For a critical discussion of the reverse burden in insanity, see Eric Colvin, ‘Exculpatory Defences in Criminal Law’ (1990) 10 *Oxford Journal of Legal Studies* 381. For an analysis of the ‘peculiar knowledge’ doctrine, see Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010) 172–6.

³ Keith Smith has suggested that, coupled with anxiety about the ‘indeterminacy of [criminal] responsibility’, ‘fears of fakery’ aggravate ‘uncertainty over the level of moral, cognitive, and volitional capacity necessary to incur criminal liability’: K J M Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800–1957* (Clarendon Press, 1998) 95. The difficulty of distinguishing between an impulse that *could* not be resisted and an impulse that was merely unresisted beset the law on insanity until the notion of an ‘irresistible impulse’ was brought within the doctrine of diminished responsibility via the *Homicide Act 1957*, 5 & 6 Eliz 2, c 11, s 2. See also *R v Byrne* [1960] 2 QB 396, 402–4 (Lord Parker CJ).

⁴ The crucial significance of expert medical evidence in relation to mental incapacity has been invoked, for instance, in relation to automatism. Devlin J has stated that ‘I do not doubt that there are genuine cases of automatism and the like, but I do not see how the laymen can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent’: *Hill v Baxter* [1958] 1 QB 277, 285. In the United Kingdom, expert medical evidence is now mandatory if a jury is to acquit on the ground of insanity: *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK) c 25, s 1(1).

⁵ These concerns are often tied up with anxiety about individuals ‘getting off’ on mental incapacity claims. In an empirical study commissioned by the Law Commission for England and Wales, Barry Mitchell concluded that survey participants accepted expert evidence when it was ‘clear and unequivocal’ but also expressed ‘some cynicism or scepticism about the reliability of psychiatric evidence’ in relation to diminished responsibility for murder: Barry Mitchell, ‘Brief Empirical Survey of Public Opinion Relating to Partial Defences to Murder’ in Law Commission, *Partial Defences to Murder: Final Report*, Law Com No 290 (2004) 180, 196 [77]. Christopher Slobogin seems to be invoking this latent anxiety about proving ‘madness’ for legal purposes with the title of his monograph on insanity in United States criminal law: Christopher Slobogin, *Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness* (Oxford University Press, 2007).

claims were not beset by concerns about their provability. A close study of that era provides a useful perspective on the evidentiary and procedural practices relating to mental incapacity, placing into temporal relief the concerns that have become quite familiar in the current era. As I discuss below, in that era — defined as approximately up to the end of the 18th century — both George Fletcher’s paradigm of ‘manifest criminality’ and my own ‘manifest madness’ frame assist in understanding the evaluation of criminality and mental incapacity, respectively. In this article, my analysis, which has been inspired by Fletcher’s, is tested against evidentiary practices governing the law relating to unfitness to plead, automatism and intoxication. My discussion exposes parts of the epistemological side of mental incapacity in criminal law that have been glossed over and, more generally, under-analysed by some scholars, and which, as I discuss below in Part IV of the article, provide some insight into the current law. The purpose of this historical discussion is not to advocate a return to the law of the 18th century. Rather, it is to facilitate a critical approach to the current law, denaturalising norms of evidence and proof that seem to have a ‘taken for granted’ aura to them.

This article comprises three main parts. In Part II, I set the scene for my historical study of evidence and proof of mental incapacity by outlining my ‘manifest madness’ frame, which is tested in this article, and by providing a general picture of the 18th century criminal trial process, highlighting similarities and differences vis-a-vis the current era. In Part III of this article, I examine evidence and proof of mental incapacity in the ‘long’ 18th century.⁶ Here, my analysis is organised according to the three dimensions of ‘manifest madness’, and I draw on selected records from the *Old Bailey Proceedings* (a valuable resource for historical study, as I discuss below),⁷ to illustrate the utility of that frame for understanding the evidentiary and procedural practices of this period. Each dimension of the ‘manifest madness’ analysis is illustrated by reference to one type of mental incapacity claim. However, each dimension could also be illustrated with various examples from across the mental incapacity terrain. By way of conclusion, in Part IV of the article, I consider what light my argument about ‘manifest madness’ might shed on proof practices relating to mental incapacity in the current era.

II A HISTORICAL APPROACH TO EVIDENCE AND PROOF OF MENTAL INCAPACITY IN CRIMINAL LAW

One way to get some perspective on the apparently vexed issue of proving mental incapacity for criminal law purposes is through a historical study of the ways in which claims to mental incapacity were introduced and elaborated in criminal trials. Such a historical approach reveals that it is possible to point to an era in which claims based on mental incapacity were dealt with in ways that were similar to, rather than different from, other kinds of claims made in court.

⁶ For a definition of ‘long’ 18th century, see below n 23 and accompanying text.

⁷ See text accompanying below nn 35–37.

Elsewhere, I have labelled this era — approximately up to the end of the 18th century — as one in which the paradigms of ‘manifest criminality’ and ‘manifest madness’ both help in understanding how criminality and mental incapacity were proved for legal purposes.⁸ As is well known to criminal lawyers, ‘manifest criminality’ is one of three conceptual structures (or ‘patterns of criminality’ or ‘patterns of liability’) that George Fletcher has argued provide an understanding of the substantive content of the criminal law.⁹ These ‘patterns of criminality’ have different explanatory power in different eras, and in relation to different parts of the criminal law. According to Fletcher, ‘manifest criminality’ was the dominant pattern of criminality until the end of the 18th century and, since then, the pattern of ‘subjective criminality’ and the pattern of ‘harmful consequences’ have risen to the fore.¹⁰ Taken together, the three ‘patterns of criminality’ Fletcher identifies generate what he refers to as ‘an interpretive mode for understanding commonalities and contrasts among a wide range of specific offenses.’¹¹ By way of contribution to scholarship on mental incapacity in criminal law, and inspired by Fletcher’s scholarly argument, I have previously argued that ‘madness’ is amenable to a similar analysis — which I called ‘manifest madness’.¹²

In order to provide the background against which my own analysis developed, some more detail about Fletcher’s ‘manifest criminality’ pattern is required. The central import of ‘manifest criminality’ is conveyed by the term itself: liability at criminal law under this ‘pattern of criminality’ is manifest or evident. ‘Manifest criminality’ can be best explained by way of contrast with Fletcher’s other two ‘patterns of criminality’. Under the pattern of ‘manifest criminality’, the case for criminal liability starts with an objective standard — ‘the manifestly criminal

⁸ See Arlie Loughnan, “‘Manifest Madness’: Towards a New Understanding of the Insanity Defence” (2007) 70 *Modern Law Review* 379. ‘Manifest criminality’ inspired the tripartite explanation of ‘manifest madness’ (and the corresponding nomenclature) that I outline in this article.

⁹ George P Fletcher, *Rethinking Criminal Law* (Oxford University Press, first published 1978, 2000 ed). In Fletcher’s analysis, ‘subjective criminality’ and the ‘pattern of harmful consequences’ comprise the other two of his three conceptual structures. For a discussion of ‘manifest criminality’, see Lindsay Farmer, ‘The Metamorphosis of Theft: Property and Criminalisation’ (Paper presented at the Criminalization Conference, Faculty of Law, Queen’s University, 7–8 September 2010) <<http://law.queensu.ca/events/conferences/criminalization.html>>. For an overview of Fletcher’s oeuvre, see Douglas Husak, ‘Crimes outside the Core’ (2004) 39 *Tulsa Law Review* 755. Husak’s article is part of a symposium entitled ‘Twenty-Five Years of George P Fletcher’s *Rethinking Criminal Law*’ contained in (2004) 39 *Tulsa Law Review* 737–994.

¹⁰ Fletcher, above n 9, 115–22. Fletcher states that ‘[t]he value of these abstract patterns is their explanatory power’ in that they provide a means for bringing order and unity to ‘dispersed data of the criminal law’: at 121. Fletcher begins from the premise that the criminal law is a ‘polycentric body of principles’ and that, as a result, no single formula will determine when conduct ought to be criminal: at xxii. Nonetheless, on Fletcher’s account, the ‘patterns of criminality’ have paradigmatic significance. For a critical discussion, see Farmer, ‘The Metamorphosis of Theft’, above n 9.

¹¹ Fletcher, above n 9, 60. Fletcher discusses his concept of ‘manifest criminality’ only in relation to criminal offences, and offers the concept as a way of understanding the core content of the criminal law. In extrapolating from Fletcher’s account to my own, I made two moves: from the doctrine or substance of the criminal law to the law of evidence and procedure, and from criminal offences to criminal defences: see Loughnan, ‘Towards a New Understanding of the Insanity Defence’, above n 8.

¹² See Loughnan, ‘Towards a New Understanding of the Insanity Defence’, above n 8.

act'.¹³ This means that the act manifests the actor's criminal purpose. So, for instance, when criminal liability is structured according to 'manifest criminality', '[t]hieves could be seen thieving; they could be caught in the act.'¹⁴ By contrast, under the 'subjective criminality' pattern, 'the actor's intent [is] the central question in assessing liability'.¹⁵ Thus, the act is of secondary importance: it is seen as a demonstration of the *firmness*, rather than the *content*, of the actor's resolve.¹⁶ The focus of the court's inquiry into liability is on the intent behind the act. Under the pattern of 'harmful consequences', liability is not dependent on a human action or state of mind. Rather, it is dependent on an 'objective attribution' of a harmful event to a responsible person.¹⁷ Thus, when compared with Fletcher's other 'patterns of liability', 'manifest criminality' can be seen to have three essential features: criminal acts have meaning when viewed externally;¹⁸ that meaning is 'manifest' or evident to neutral observers or third parties;¹⁹ and crime is an organic category, arising from community experience of it.²⁰

Having studied the relevant legal principles and practices, I developed 'manifest madness' as a theoretical frame for use in understanding the way 'madness' becomes known to the criminal law, where the term 'madness' is used advisedly to refer to all types of mental incapacity known to criminal law (I am aware of the loaded nature of the term 'madness' but employ it consciously in order to convey the broader social and political dimensions of this area of criminal law). As deployed in this article, 'manifest madness' provides a frame through which the evidentiary and procedural aspects of mental incapacity in criminal law may be viewed. It offers a means for looking at this area of criminal law and process afresh. Here, 'manifest madness' has three dimensions: an individual's conduct is a substantive condition of his or her evaluation as 'mad'; 'madness' is evident to ordinary people without specialist knowledge; and the meaning of 'madness' is derived from common knowledge of it. These three dimensions connect to the dimensions of Fletcher's 'manifest criminality'.²¹ Each of these dimensions of 'manifest madness' is explained further below. Taken together, and as I have argued previously, the three dimensions of 'manifest madness' provide a frame through which it is possible to account for the particular ways in which insanity

¹³ Fletcher, above n 9, 89.

¹⁴ Ibid 80.

¹⁵ Ibid 89.

¹⁶ Ibid 120.

¹⁷ Ibid 386.

¹⁸ Ibid 115–16.

¹⁹ Ibid.

²⁰ Ibid 116–17.

²¹ In relation to conduct, the connection with 'manifest criminality' is that the criminal act manifests the actor's criminal purpose and is treated as a substantive condition of liability: *ibid* 232. In relation to the role of ordinary people, under 'manifest criminality', the assumption is that the criminal nature of certain acts are intelligible to 'a neutral third-party observer' with 'no special knowledge about the offender's intention': at 116. Last, in relation to general knowledge, the connection with 'manifest criminality' is through Fletcher's notion of 'general knowledge', where criminal acts are perceived through 'shared paradigms': at 82.

(an archetypal species of ‘madness’ in criminal law) has come to be made known, and proved, for legal purposes.²²

Having developed the frame of ‘manifest madness’, and having tested its strength in relation to the rules of evidence and procedure attached to the insanity doctrine, I now seek to extend my analysis. Here, I proceed to test my argument about the utility of the ‘manifest madness’ analysis in relation to those claims of mental incapacity from the ‘long’ 18th century that fell around the outside of what we would now identify as the core of insanity law. The landscape of mental incapacity in criminal law looked rather different to the way it looks in the current era. In 18th century legal principles and practices, mental incapacity was not as differentiated a concept as it is in the current era. However, even absent significant conceptual differentiation, insanity was sufficiently disaggregated such that it is possible to detect variation beneath the omnibus term then in use. The informal insanity law — more an informal standard than a precise rule — that prevailed in this period had a capacious reach, and my focus here is on what can be thought of as its outer limits. At that time, what we would now call unfitness to plead, automatism and the doctrine of intoxication (which together form the subject matter of this article) were conceptually connected to insanity. The terrain demarcated by what would now be three distinct mental incapacity doctrines marks out a new frontier for testing the utility of ‘manifest madness’. These mental incapacity doctrines have not been subject to as much legal academic attention as insanity proper, and scholarly understanding of mental incapacity in criminal law is likely to be advanced by their close examination.

This article focuses on the English and Welsh criminal law and process in what historians have called the ‘long’ 18th century, extending from the last decades of the 17th century until the first decades of the 19th century.²³ This period marks the nascent formalisation of modern criminal trial processes, with some of the features of the adversarial trial — such as prosecution and defence counsel (although the latter had a limited role until the 19th century),²⁴ a distinction between fact and law, and the rudiments of laws of evidence and procedure — appearing.²⁵ While this period precedes the accelerated growth of rules of evidence and procedure of the 19th century, there were still significant developments in the trial process as what John Beattie calls the ‘old’ criminal trial came

²² See Loughnan, ‘Towards a New Understanding of the Insanity Defence’, above n 8. See also Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) (forthcoming). In this book, I offer a full, stand-alone explication of ‘manifest madness’, arising out of a careful and systematic study of each part of the mental incapacity terrain. Although my ‘manifest madness’ analysis is explicated differently in the book, that explication of it may be read alongside the discussion in this article and in Loughnan, ‘Towards a New Understanding of the Insanity Defence’, above n 8.

²³ The periodisation of a ‘long’ 18th century derives from the continuity in political structures and religious order that marked this time: Frank O’Gorman, *The Long Eighteenth Century: British Political and Social History, 1688–1832* (Arnold, 1997).

²⁴ David JA Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Clarendon Press, 1998) ch 4; John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) ch 3.

²⁵ See generally Langbein, above n 24; J M Beattie, *Crime and the Courts in England 1660–1800* (Clarendon Press, 1986); Antony Duff et al, *The Trial on Trial* (Hart Publishing, 2007) vol 3.

to be replaced by a 'modern' one.²⁶ Around the year 1700, prosecuting counsel rarely appeared in the criminal courts, and defence counsel were even rarer. Instead, judges dominated criminal trials — they were 'fully engaged' in all aspects of the progress of each case and exercised an 'immense influence' on the way the jury received the evidence.²⁷ Discretion featured at each stage of the criminal process and all the circumstances of the case — including the nature of the offence, the victim and the defendant — affected the response to any instance of criminal conduct.²⁸ Over the course of the 'long' 18th century, however, the increasing presence of prosecution and defence counsel 'gave more structure to criminal trials ... which ... encouraged evidential objections and the recognition of burdens of proof.'²⁹ As John Langbein argues, this development pushed counsel for the prosecution and defence, rather than judges and defendants, to the foreground and paved the way for the modern 'mode' of trial, the adversary trial, in which the defence tests the prosecution case.³⁰ The effect of these changes was that, although 18th century criminal justice remained 'particularistic, discretionary, and personalistic', in Martin Wiener's words,³¹ important moves towards the formalisation of criminal processes and practices date from this time.

In addition to representing the period of 'manifest criminality', this period is also interesting for the purposes of analysing the historical dimension of evidence and proof of mental incapacity. This is for two main reasons. The first of these relates to the similarities that exist between this era and the current era. By the 18th century, the content or substance of what had to be proved in mental incapacity claims had become recognisable to modern eyes. As Nicola Lacey argues, prior to the 18th century, the criminal trial employed 'a thin doctrine of capacity as a condition for criminal responsibility ... [so that such capacity] was assumed rather than being seen as [the] proper object of investigation' at trial.³² Between the 18th and 20th centuries, the English criminal process was marked by 'a broad movement from ideas of responsibility as founded in character to conceptions of responsibility as founded in capacity.'³³ But, as Lacey suggests,

²⁶ Beattie, above n 25, 341–2.

²⁷ Ibid 342–3, 345.

²⁸ '[C]onstant negotiation shaped the decision to prosecute, the gathering of evidence, the testimony given, the judge and the jury's reception of the information at trial, and the judge's decision to recommend for or against a royal pardon': Dana Y Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (Palgrave Macmillan, 2004) 25.

²⁹ Cairns, above n 24, 30.

³⁰ Langbein, above n 24, 253. See also Duff et al, above n 25, vol 3, 40–54.

³¹ Martin J Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914* (Cambridge University Press, 1990) 57.

³² Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 *Journal of Political Philosophy* 249, 261. Lacey argues that, in this era, a defendant's capacities were 'merely components of [his or her] character which was the object of evaluation' during a trial: at 263. She regards the key question as being 'the defendant's reputation as a member of the law-abiding community': at 261.

³³ Ibid 250. This emergent concept of capacity-responsibility was a subjective one: at 268. The rise to prominence of a capacity-based concept of criminal responsibility was later advanced by the development of psychological notions of mental states and personhood more generally. This would come to have a profound effect on concepts of mens rea and ideas about fault in criminal law, although such an effect was fully felt more recently (and perhaps remains more uneven and

while this profound change unfolded gradually, by the 18th century, the criminal law already evidenced ‘an exculpatory doctrine of exceptional incapacity, while its positive ascriptions of responsibility were shaped primarily by evidence about the defendant’s character.’³⁴ The significance of ‘exceptional incapacity’ as a basis for exculpation means that the content of what needed to be proved in a claim based on mental incapacity in the 18th century bears some relation to the substance of criminal law in the current era. The second reason why this era is interesting arises from one of the ways in which it is different to the current era. This period precedes the rise, in the 19th century, of a body of medical experts with specialist knowledge of mental incapacity and, as such, it is not characterised by the prominence or even dominance of expert evidence in court or the territorial division of types of expert knowledge across rather rigid professional boundaries. As a result of this feature of 18th century criminal process, in terms of the practices of evidence and proof pertaining to mental incapacity this period may be contrasted with the current era, in a way that seems likely to generate insights into criminal legal process.

At this point, a brief note about the sources referred to below is appropriate. In order to draw evidence in support of my argument about the utility of the ‘manifest madness’ frame, I rely on the *Old Bailey Proceedings*.³⁵ The *Proceedings* recorded many (although not all) of the trials that took place at the Old Bailey Criminal Court, which was the main felony trial court in London, from 1674 to 1913. Unlike the state trial reports, *State Trials*, which recorded a small number of celebrated treason trials (which had distinctive procedural features),³⁶ the records from the Old Bailey provide information about a large number of trials concerning different offences, giving a sense of the quotidian processing of criminal matters. Further, unlike private reports, the *Old Bailey Proceedings* provide a series that is substantially complete from 1624 and entirely complete from 1729. The *Proceedings* provide a useful complement to the contemporaneous writings of criminal law theorists and reformers, such as Sir Matthew Hale

incomplete) than is typically assumed. Lacey’s account allows for the coexistence of different conceptions of criminal responsibility at particular junctures in time and place, and canvasses the resurgence of character-based practices of responsibility attribution: see Nicola Lacey, ‘Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice’ (2007) 1 *Criminal Law and Philosophy* 233, 240–9.

³⁴ Lacey, ‘Responsibility and Modernity’, above n 32, 261. As Lindsay Farmer has written about the 19th century Scots context, defences constituted ‘disqualifying conditions related to the capacity of legal subjects’: Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997) 133. In this context, Lacey observes that the ‘moral fine-tuning of the criminal process lay in the determination of sentence or mercy via judicial, executive or jury discretion rather than in the fact of conviction’: Lacey, ‘Responsibility and Modernity’, above n 32, 262.

³⁵ The *Old Bailey Proceedings* are available at <<http://www.oldbaileyonline.org>>. As mentioned above, this website contains digitised versions of trial records for a number of cases heard between 1674 and 1913. The *Old Bailey Sessions Papers*, which contain additional information about trials at the Old Bailey, can also be viewed at <<http://www.londonlives.org/static/PSInfo.jsp>>.

³⁶ Langbein, above n 24, 14–15, 97–102.

(discussed below), which have been subject to a greater degree of scholarly attention.³⁷

As with any source material, it is necessary to be cautious in relying on the Old Bailey records for evidence about the nature of criminal trial process. As several scholars have noted in relation to the wider collection, the *Old Bailey Sessions Papers*, there are several aspects of these sources that call for a careful and reflective approach.³⁸ First, the Old Bailey records initially targeted a popular rather than legal audience, and this meant that legal proceedings were recorded selectively, based on likely popular appeal.³⁹ Second, because the Old Bailey tried matters arising from offences that took place in and around London, the Old Bailey records skew the picture of the criminal trial towards the capital, affecting the type and number of offences prosecuted in the records.⁴⁰ Third, the Old Bailey records compressed some of the details of the trials they recorded and it is not possible to know what was deleted or why.⁴¹ Overall, however, even mindful of their limitations, the Old Bailey records are a vital resource for this analysis because they facilitate a close examination of the ordinary, everyday operation of the practices relating to mental incapacity in a way that is not permitted by reliance on other sources. I have studied the Old Bailey records closely, and here I draw on them selectively in order to back up my analysis of evidence and proof of mental incapacity.

III 'MANIFEST MADNESS' APPLIED: BEYOND THE BOUNDS OF INSANITY IN THE 'LONG' 18TH CENTURY

A *The Substantive Significance of the Accused's Conduct*

The first dimension of my 'manifest madness' frame is that an individual's conduct is a substantive condition of his or her evaluation as 'mad'. There are two aspects to this dimension of 'manifest madness': the term 'conduct', and the idea that such conduct is a 'substantive condition' of the evaluation process. By the term conduct, I refer to both the act constituting the crime — the external elements of an offence — as well as other aspects of an individual's behaviour, such as his or her demeanour in court. Without sophisticated accounts of individuals' mental states, evidence about conduct, alongside character and social status, provided the means for assessing claims about mental incapacity. According to my 'manifest madness' analysis, the conduct of an incapacitated accused had a special significance in the criminal courtroom: evaluation of such an individual was made not so much via a deduction of his or her internal mental

³⁷ See, eg, Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *Modern Law Review* 350; K J M Smith, above n 3.

³⁸ See, eg, Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (Yale University Press, 1995) 7–8; Langbein, above n 24, 180–90.

³⁹ Langbein, above n 24, 182–3.

⁴⁰ *Ibid* 181.

⁴¹ *Ibid* 185.

processes from his or her behaviour, but on the basis that that behaviour constituted a 'mad' condition.

The idea that an individual's conduct is a substantive condition of the evaluative process means that his or her acts do more than operate as a threshold for the criminal inquiry, as is now the case for the actus reus of particular criminal offences. Rather, an individual's conduct has something of a 'thick quality', encompassing the attitude an interpreter reads off behaviour as well as the behaviour itself. And the significance of conduct in this respect extends beyond exculpation (the question of an individual's criminal responsibility), to the broader issue of his or her status as a proper subject of law (thus implicating the law on unfitness to plead, which I discuss below). The core idea of this dimension of 'manifest madness' is that the link between the conduct and the legal evaluation of it is both conceptual and evidentiary. That is, what counts as 'madness' is what is manifest as 'madness'. As Fletcher states in relation to 'manifest criminality', 'manifestness' is not merely a rule of evidence, but rather an 'independent substantive requirement'.⁴²

The utility of the first dimension of the 'manifest madness' frame — the substantive significance of the accused's conduct — may be demonstrated by reference to what was then known as insanity on arraignment (ie insanity at the time of the trial), and is now known as unfitness to plead. Unfitness to plead is a procedural provision exempting an individual from an ordinary trial, at least temporarily, on the basis that he or she does not have the physical or mental capacity to understand or participate in the trial.⁴³ Thus, unfitness to plead does not concern criminal responsibility as much as legal subjectivity — the issue of who can be brought within the criminal law and subject to criminal process. As the use of the term insanity on arraignment indicates, in the 18th century there was no conceptual distinction between mental incapacity as it related to conviction and mental incapacity as it related to entering a plea at trial. The relevant difference between the two lay not on the conceptual level but in the time at which the accused's insanity became apparent.⁴⁴

From my study of the *Old Bailey Proceedings*, a good example of the substantive significance of the defendant's conduct (per the 'manifest madness' frame) is provided by the record of the trial of Susannah Milesent for the theft of a

⁴² Fletcher, above n 9, 85. As Fletcher writes in relation to larceny, the link between the manifest crime and a defendant's liability is conceptual as well as evidentiary: 'The issue of intent in larceny was not thought of separately from the manifestation of that intent in the external world.'

⁴³ Unfitness to plead encompasses impediments to both communication and comprehension. For a discussion, see Law Commission, *Unfitness to Plead: A Consultation Paper*, Consultation Paper No 197 (2010) 27–30. See also *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK) c 25; *R v Pritchard* (1836) 7 C & P 303. In the Australian context, see *R v Presser* [1958] VR 45, 48 (Smith J).

⁴⁴ Historically, insanity could be raised at any stage between arrest and execution of sentence: Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh University Press, 1981) 90. According to Smith, '[w]hen a person showed extremely abnormal conduct ... there was of course greater likelihood of insanity being raised early on.' A conceptual distinction between insanity for the purposes of trial and insanity for the purposes of conviction would develop in the 19th century, achieved in part on the back of *An Act for the Safe Custody of Insane Persons Charged with Offences 1800*, 39 & 40 Geo 3, c 94, which included separate provisions for each form of insanity.

petticoat in 1794.⁴⁵ According to the record, a witness testified as follows in response to questions from a judge:

Q. Have you known this woman ever since she has been in gaol?

Q. What has been her conduct? — The same as the woman represented before, in a kind of mad way.

Q. What have you known her to do? — I saw her break the windows of the ward she was in ...

Q. Upon your oath, what is your opinion? Do you think she is a mad woman, or a woman in her senses? — I do not think her to be a woman in her senses.

Q. Do you take her to be a mad woman? — I do.⁴⁶

The jury found Susannah Milesent ‘deranged and not in a sound mind.’⁴⁷ In this testimony, although there is a reference to the accused’s ‘senses’, the emphasis is clearly on her conduct, and, in particular, on her conduct over the time since the offence was committed (this is a relevant consideration for the law now known as unfitness to plead). As this extract suggests, the significance of a defendant’s conduct is such that it is not so much a proxy for hidden or internal abnormalities as it is constitutive of those states — the conduct itself constitutes ‘madness’. As Roy Porter has written, in this period ‘there were indeed inner as well as outer truths, but outward signs encoded inner realities.’⁴⁸

Another illustration of the substantive significance of the conduct of a mentally incapacitated accused is provided by the record of the trial of James Innocent for arson and damage to property.⁴⁹ James Innocent’s trial is an example of those unfitness to plead matters that concerned individuals who were ‘deaf and dumb’.⁵⁰ The trial record states:

I am servant to Mr Akerman. I have attended the prisoner; I never heard him speak.

Who committed him? — Mr Sherwood. He has been about a week in our custody.

⁴⁵ ‘Trial of Susannah Milesent’ in *Old Bailey Proceedings* (11 November 1794) 1333. The record provides that the trial had been put off for two sessions ‘on account of [the accused] appearing insane’: at 1333. When Milesent was tried, a prison nurse testified that, while in gaol, the accused had broken windows, ‘made use of very bad expressions’ and taken off her clothes: at 1334.

⁴⁶ *Ibid* 1335.

⁴⁷ *Ibid*. The wording of the verdict betrays the close historical association between what is now termed unfitness to plead and the insanity doctrine. Interestingly, it appears that there was no suggestion that, at the time of stealing the petticoat (the accused stole the petticoat ‘to be wedded ... because [the accused’s petticoat was] a nasty old one’: at 1334), the accused had been deranged. Because the ‘insanity’ appeared only after the offence took place, the verdict arguably more closely corresponds to a finding of unfitness to plead as recognised in the current era.

⁴⁸ Roy Porter, *Mind-Forg’d Manacles: A History of Madness in England from the Restoration to the Regency* (Athlone Press, 1987) 35.

⁴⁹ ‘Trial of James Innocent’ in *Old Bailey Proceedings* (15 May 1782) 396.

⁵⁰ Deaf and dumb individuals were grouped together with those who were ‘insane’, on the basis that members of either group might fail to plead to the indictment: Nigel Walker, *Crime and Insanity in England* (Edinburgh University Press, 1968) vol 1, 224–5.

How do you make yourselves intelligible to him? — The prisoners make motions to him.

Does he seem to want for sense or understanding? Or only to be deaf and dumb? — Only deaf and dumb.

Does he act rationally? And eat and drink, and behave in the common actions of life as if he was sensible? — Yes.⁵¹

It is notable that, here, the relevant conduct extends beyond the acts comprising the offence, to encompass a wider set of actions. The judge's questions (eg 'does he act rationally?') hint at the 'thick' or substantive significance the role of conduct is playing in the criminal process.

This 'manifest madness' analysis of the significance of the conduct of the mentally incapacitated accused suggests something further about the law then known as insanity on arraignment. This may be illustrated with reference to the work of Sir Matthew Hale, who wrote *Historia Placitorum Coronae*,⁵² first published posthumously in 1736. According to Hale:

If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed ...⁵³

In this period, the developing law on unfitness has been thought by legal historians to be characterised by a strict approach. Hale's directives have been interpreted to suggest that his use of the term 'absolute' indicates the need for total or profound incapacity if an individual was to be given a reprieve from trial.⁵⁴ However, viewed through the lens of 'manifest madness', the embryonic principles that applied to exempting particular individuals from trial seem to have a different meaning. Hale's reference to the absolute character of the 'madness' that exempted a defendant from trial might be interpreted as a requirement of form rather than degree. According to this analysis, the requirement that the accused be 'absolutely mad' may have meant that his or her 'madness' had to be obvious or manifest, rather than extreme in the sense of total or profound. This reinterpretation is subtle but significant because it suggests that the emphasis in excusing individual defendants from trial may have been on behaviour rather than on the particulars of his or her disorder. As a result, the developing law on unfitness to plead was not as strict at this time as has been generally believed to be the case.⁵⁵

⁵¹ 'Trial of James Innocent' in *Old Bailey Proceedings* (15 May 1782) 396, 397.

⁵² Sir Matthew Hale, *Historia Placitorum Coronae* (Professional Books, first published 1736, 1971 ed).

⁵³ *Ibid* vol 1, 34.

⁵⁴ See, eg, Walker, above n 50, vol 1, 222, who argues that an accused had to be 'very disordered indeed' to have his or her trial postponed.

⁵⁵ The substantive significance of the accused's conduct, as per 'manifest madness', may help to account for the distinct procedural practice of the current era, relating to the way unfitness may be raised at trial. In a way that seems likely to have been reflective of established practice, the King's Bench stated in the mid 20th century that, when a defendant may be unfit, 'the court acts in such a case on information conveyed to it from any quarter', including from the defendant, the

B 'Madness' Evident or Obvious to Ordinary People

The second dimension of the 'manifest madness' theoretical frame is that 'madness' is evident or obvious to ordinary people. Here, ordinary people are observers looking at an individual's conduct without any special knowledge or particular claims to expertise or unique insights regarding it. In the 'long' 18th century, 'madness' was considered readily intelligible to people without expert knowledge, who, upon observing the behaviour of others, could be confident about their ability to know 'madness' when they saw it. Two assumptions underpin this dimension of 'manifest madness': ordinary people could identify 'madness' through their sensory perceptions, and ordinary people were regarded as competent to evaluate it as 'madness'. This dual confidence about the 'knowability' of 'madness' — identifying and evaluating it — stands in contrast to the lingering suspicions about the difficulties now assumed to attend the process of proving 'madness' for criminal law purposes, which I canvassed at the outset of this article.

The utility of this dimension of the 'manifest madness' frame may be demonstrated by cases involving external causes of incapacity. Such cases would now fall within the scope of automatism,⁵⁶ but in the 'long' 18th century, they were located within the broad remit of an informal insanity law. In the decades before the *M'Naghten Rules* were formulated in 1843, insanity law was not grounded in precise and technical requirements such as 'disease of the mind'.⁵⁷ Facilitated by the fact that, at this time, there was little 'refinement' of matters such as 'levels of mental culpability and recognition of defences involving incapacity or the actor's freedom of choice of action',⁵⁸ claims of mental abnormality and volitional incapacity were bound together. The absence of a distinct doctrine of automatism in this period entails examining the *Old Bailey Proceedings* cau-

defendant's advisors, the prosecution or an independent person: *R v Dashwood* [1943] 1 KB 1, 4 (Humphreys J for Humphreys, Hilbery and Tucker JJ). See also Walker, above n 50, vol 1, 231; Criminal Law Revision Committee, *Third Report: Criminal Procedure (Insanity)*, Cmnd 2149 (1963) 7 [15]; *R v H* [2003] 1 All ER 497, 502 [4] (Lord Bingham). While this practice may be explained by the fact that inquiries into unfitness predate the appearance of counsel in court, it is arguable that the 'manifest' nature of unfitness works to sustain this practice into the current era. This practice has been formalised into a particular rule about raising unfitness — both the prosecution and the defence can raise the issue of the accused's unfitness: *Criminal Procedure (Insanity) Act 1964* (UK) c 84, s 4(1). The judge must raise the issue of unfitness if he or she believes it to be an issue and it has not been raised by either party: *R v Podola* [1960] 1 QB 325, 349–50 (Lord Parker CJ).

⁵⁶ 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: *Bratty v A-G (Northern Ireland)* [1963] AC 386. In the Australian context, see *R v Falconer* (1990) 171 CLR 30.

⁵⁷ *M'Naghten's Case* (1843) 10 Cl & F 200, 210; 8 ER 718, 722 (Lord Tindal CJ). The *M'Naghten Rules* were formulated by 15 judges of the Queen's Bench in response to five questions put to them by the House of Lords when they were called to appear to defend the controversial *M'Naghten* decision. While the *Rules* themselves have been of primary interest to legal scholars, the way in which they were created has been at least as significant as their content. The unique character of the *Rules* — a judicial formulation, developed independently of a specific trial, and in a legislative context — has served to entrench them in the criminal law of England and Wales.

⁵⁸ K J M Smith, above n 3, 43.

tiously for what might be labelled prototypical automatism cases.⁵⁹ With this caveat, those trial records which reveal what might now be labelled an external cause may be tentatively regarded as informal claims to exculpation on the basis of automatism.

A useful illustration of the role played by laypeople as observers and evaluators of 'madness' is provided by the trial of William Walker for the murder of his wife in 1784.⁶⁰ Walker stabbed his wife with a knife. There was no evidence of discord between the defendant and his wife, and several lay witnesses, including work associates and neighbours, testified that they did not think Walker was mad. Regarding the accused, the Court asked Francis Jones, a neighbour:

Did he appear to you to be in health then? — Yes, Sir, as well as ever he was, as far as I saw.

You took no notice of any thing extraordinary about him? — No, Sir, not at all.

Had he ever talked at any time that you have observed, in any thing of a wild way? — No, Sir, I never heard him talk no other ways than as another man does. ...

Then according to your account you had no suspicion that the man was out of his mind? — No, Sir.

You had never seen any thing to lead you to suppose so? — No, Sir, nothing at all.⁶¹

In his own defence, Walker simply stated 'I am not sensible as I did kill my wife, and please you my Lord.'⁶² The judge seemed confounded by the situation, and commented that it was 'one of the most extraordinary cases I ever met with.'⁶³ In his summing up, the judge stated that something 'singular and extraordinary' must have happened to Walker in the days before the killing to disturb him from his 'orderly state',⁶⁴ effectively imputing an external cause in this case. Walker was found not guilty on the basis of insanity.

Laypeople gave evidence in support of an accused's claims to 'madness'. The record of the trial of Thomas Nash for the murder of his wife in 1727, in which he argued incapacity based on an external cause, also demonstrates the ways in which 'madness' was regarded as obvious or evident to ordinary people:

Eleanor Susmith depos'd. That she had known him for some years to be a very crazy person, not taking his natural rest, but magotting and rambling like a mad-man.

⁵⁹ The brevity of the records and the informality of claims to exculpation in this era meant that factors which would later be important, such as the cause of incapacity (internal or external), were sometimes left unidentified. It is also likely that, as Nigel Walker has argued in relation to the 19th century, at least some charges brought against defendants who engaged in what would now be called automatistic conduct were rejected by the grand jury and did not come to trial: Walker, above n 50, vol 1, 167.

⁶⁰ 'Trial of William Walker' in *Old Bailey Proceedings* (21 April 1784) 529.

⁶¹ *Ibid* 537.

⁶² *Ibid* 544.

⁶³ *Ibid* 537.

⁶⁴ *Ibid* 547.

Mr Page further depos'd. That at times he was besides himself, especially at Spring and Fall, when he was seldom in a capacity to follow business. ...

Mr Watson further depos'd. That he had known him 13 years, and that he would sometimes go to his neighbours houses and demand such things as he had occasion for, but where he met with opposition he came no more, and only tyrannized over them that feared him; ... he had formerly been a soldier for fourteen years, during which time he had received several dangerous wounds in the head, and has still several marks to show, which makes it probable those wounds might weaken his intellectuals.⁶⁵

As these Old Bailey extracts make clear, ordinary people gave evidence identifying and evaluating conduct as 'mad'. The role of ordinary people as witnesses to and evaluators of 'madness' was distinct from and separate to the role of jurors in the trial process, who, alongside the accelerating involvement of lawyers, came to play an 'increasingly constructive role'.⁶⁶ The evidence that the head wounds Nash had received in war made it 'probable [that] those wounds might weaken his intellectuals' and other evidence about his 'magotting and rambling' behaviour seems to have convinced the jury, who returned a verdict that the accused was *non compos mentis*.⁶⁷ As this verdict indicates, the scope of the informal insanity law was wide enough to encompass both external and internal causes of incapacity.

C Common Knowledge of 'Madness'

The third and final dimension of the 'manifest madness' frame is a corollary of the other two in that it relates to how 'madness' is known. This third dimension provides that 'madness' is given meaning through common knowledge, possessed by ordinary people. By contrast with expert knowledge, this common knowledge is collective and unsystematised, incorporating the diverse array of attitudes and beliefs about 'madness' that are socially ratified. In my analysis, this common knowledge is a broad and flexible construct, capturing the social nature of knowledge. In the absence of elaborate legal doctrines about exculpatory abnormality, common knowledge of 'madness' formed an animating frame for decisions about mental incapacity. By the term animating frame, I mean something more than a mere background set of meanings: both social and legal evaluative judgments were grounded in this collective knowledge about 'madness'. While individuals claiming expert knowledge of mental incapacity were beginning to appear during the 'long' 18th century, 'madness' was not an exclusive object reserved for authoritative assessment by a select few. Porter has argued that, up until the 19th century, 'madness' was familiar to ordinary people as 'an extremely broad sociocultural category, with many manifestations and meanings.'⁶⁸ For the purposes of mental incapacity in criminal law, general community knowledge of 'madness' would have encompassed attitudes and

⁶⁵ 'Trial of Thomas Nash' in *Old Bailey Proceedings* (12 April 1727) 3, 4.

⁶⁶ K J M Smith, above n 3, 45. See also Duff et al, above n 25, vol 3.

⁶⁷ 'Trial of Thomas Nash' in *Old Bailey Proceedings* (12 April 1727) 3, 4.

⁶⁸ Porter, above n 48, x.

experience, knowledge of the past behaviour of the individual and others, and a variety of beliefs about ‘madness’.⁶⁹

An illustration of the utility of this aspect of the ‘manifest madness’ frame is provided by the practices relating to intoxicated offending at the end of the 18th century.⁷⁰ The law on intoxicated offending has come to be a precise and technical part of the criminal law. It is now most accurately labelled a ‘doctrine of imputation’.⁷¹ However, prior to the development of this technical approach to intoxication in the 20th century, it was a much looser notion, and in the 18th century, it more closely approximated an excuse. In the period to the end of the 18th century, intoxication did not formally excuse, as the writings of commentators such as Hale make clear.⁷² However, in practice, the rule disallowing intoxication as an excuse was disregarded.⁷³ Thus, those individuals raising intoxication in arguing for acquittal, mitigation or pardon were invoking what may be called an informal plea in response to a criminal charge.⁷⁴ The relationship between intoxication and criminal responsibility remained somewhat indeterminate until the 19th century, when intoxication came to be regarded as relevant to a defendant’s *capacity* to form intent, a development that was followed by the elaboration of a doctrine of ‘specific intent’ in the 20th century.⁷⁵

⁶⁹ The knowledge of ordinary people prior to the development of an expert knowledge of ‘madness’ is appropriately labelled common. With the rise of an expert knowledge out of a body of common knowledge, however, the knowledge ordinary people had of ‘madness’ must be seen in a different light and, as I discuss elsewhere, it is appropriate to refer to this type of knowledge as ‘lay’: see Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law*, above n 22.

⁷⁰ The sharp division between voluntary and involuntary intoxication, now known to the criminal law, had yet to develop at this time. In *Historia Placitorum Coronae*, Hale refers to the case where a man’s intoxication results from ‘the contrivance of his enemies’, which, in contrast to voluntary drunkenness, was held to be an excuse for crime: Hale, above n 52, 32. For a discussion, see *R v Kingston* [1995] 2 AC 355, 368 (Lord Mustill). However, Hale’s comments on involuntary intoxication were criticised in this case. Lord Mustill concluded that ‘legal concepts of criminal responsibility [were] so different’ when Hale was writing that they could not ‘place any substantial reliance’ on his commentary for the current doctrine of intoxication: at 368. In addition to this criticism, it has also been noted that Hale’s comments about involuntary intoxication ‘never received direct judicial endorsement’: K J M Smith, above n 3, 340. It is therefore possible that a distinction between voluntary and involuntary intoxication may have only had academic rather than practical significance.

⁷¹ According to Robinson, doctrines of imputation impute missing offence elements, thereby providing an ‘alternative means of holding the defendant liable as if the required elements were satisfied’: see Paul H Robinson, *Structure and Function in Criminal Law* (Clarendon Press, 1997) 67. See also A P Simester, ‘Intoxication Is Never a Defence’ [2009] *Criminal Law Review* 3.

⁷² Hale, above n 52, 32. See also Rabin, *Identity, Crime, and Legal Responsibility*, above n 28, 78–85. See further Walker, above n 50, vol 1, 177.

⁷³ See Dana Rabin, ‘Drunkenness and Responsibility for Crime in the Eighteenth Century’ (2005) 44 *Journal of British Studies* 457, 457–8.

⁷⁴ Rabin refers to a claim based on intoxication in this period as an ‘informal defence’: *ibid* 458 n 4. However, the unrefined nature of structures of criminal liability in this period seems to warrant the looser term ‘plea’ instead.

⁷⁵ As is well known, 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 the defendant formed the requisite mens rea in offences of ‘specific intent’: *DPP v Majewski* [1977] 1 AC 443. This decision was controversial and was not followed by the High Court of Australia in *R v O’Connor* (1980) 146 CLR 64, although the *Majewski* approach to intoxicated offending has influenced the current law in New South Wales: see *Crimes Act 1900* (NSW) pt 11A. Regarding the development of the law on intoxication in England and Wales, see Alan D Gold, ‘An

Common knowledge of intoxication formed an animating frame and a structure for decision-making for the evaluation of claims based on mental incapacity. Cases concerning intoxication can be usefully categorised according to a typology offered by Dana Rabin. She argues that 18th century trials concerning intoxication and drunkenness generated two different kinds of informal defences: ‘a simple drunkenness plea’, in which defendants argued for diminished responsibility generally, and a plea linking the effects of intoxication with insanity.⁷⁶ Given the largely undifferentiated nature of the ‘language of mental excuse’,⁷⁷ these two types of claims were closely connected both conceptually and in practice. An example of the significance of common knowledge in a simple drunkenness plea is provided by the record of the trial of George Stone for theft and burglary in 1787:

Did he appear drunk, or mad, or insane? — He rather appeared in liquor.

Prisoner’s defence. I was very much in liquor and don’t know what I did. ... [I] had got a little beer more than ordinary ... I have got a wife and five small children; I never did such a thing in all my life.⁷⁸

As this extract suggests, in the absence of a finetuned gradation of levels of culpability, resting on a sophisticated account of the way in which intoxication affected a defendant’s mental state, a robust common knowledge of alcohol and its effects provided the measure for exculpation. As the Court’s question to the witness indicates, a close connection between insanity and intoxication prevailed in this era, with the latter being regarded as either a cause or a species of the former. The effect of intoxication was also regarded as akin to that of insanity, as it was held to render the accused ‘disturbed [in] mind’⁷⁹ or out of mind,⁸⁰ or held to ensure that the accused ‘did not know what he did’.⁸¹

In the second of the two kinds of cases concerning intoxication as an ‘informal defence’, defendants were attempting to associate the crimes they committed while affected by alcohol with ‘the uncontrollable behaviour expected of those deemed *non compos mentis*.’⁸² Again, ordinary, common knowledge functioned as an animating frame. An illustration of this is provided by the trial of Thomas Taplin for a highway robbery in 1780.⁸³ As recorded in the *Old Bailey Proceedings*, two of the accused’s acquaintances testified on his behalf:

ROBERT ASKEW sworn. ...

How long have you known the prisoner? — About six months.

Untrimmed “Beard”: The Law of Intoxication as a Defence to a Criminal Charge’ (1976) 19 *Criminal Law Quarterly* 34, 42.

⁷⁶ Rabin, *Identity, Crime, and Legal Responsibility*, above n 28, 79.

⁷⁷ *Ibid* 93.

⁷⁸ ‘Trial of George Stone’ in *Old Bailey Proceedings* (12 September 1787) 910, 911.

⁷⁹ ‘Trial of Mary Jones’ in *Old Bailey Proceedings* (18 May 1768) 214, 216.

⁸⁰ ‘Trial of Thomas Haycock’ in *Old Bailey Proceedings* (28 June 1780) 446, 451.

⁸¹ ‘Trial of Thomas Baggot’ in *Old Bailey Proceedings* (28 June 1780) 620, 621.

⁸² Rabin, ‘Drunkenness and Responsibility’, above n 73, 475.

⁸³ ‘Trial of Thomas Taplin’ in *Old Bailey Proceedings* (28 June 1780) 409.

Do you know any thing particular of him? — The first particular thing I ever saw of him was about six months ago. I was at the Blue Posts; all of a sudden he came down stairs without stockings and shoes, and he stood in an upright, bold manner, and shivered and shook. I could not think the meaning of it. I said what do you mean, what is all this about? He stood there like a cypher. I went to him; he shook greatly; I said what is the matter with you? I could get no answer from him a great while; at last he sat him down, got water, washed him, and so on. Some time afterwards he said, O, my wife is murdered, my wife is dead. ...

Did you look upon him by this conduct to be in his sense? — No, quite out of his senses. He was as much like a madman as any I know. ...

TIMOTHY TOMLINS sworn.

I am a coach-master, I live at the Eight Bells, St Giles's. I have known the prisoner between five and six years.

What has been his conduct as to his senses? — When he gets liquor he is void of his senses.⁸⁴

As this extract suggests, common knowledge of intoxication provided more than merely a background to the legal process. It was the knowledge ordinary people had about intoxication that animated or gave meaning to what Rabin calls the 'brief suggestions [that] were used to associate the crime and the accused with intoxicated incoherence.'⁸⁵ Common knowledge rendered these 'brief suggestions' intelligible in the informal practice of exculpation based on intoxication. Thus, although individuals including physicians and surgeons had begun to claim a certain expertise in relation to intoxication by this time,⁸⁶ knowledge of intoxication and its effects remained part of general collective knowledge. This knowledge was part of what Lacey refers to as 'local knowledge' that informed 'widely accepted judgments of criminality' in the task of determining liability in the 18th century criminal trial.⁸⁷

⁸⁴ Ibid 411–13.

⁸⁵ Rabin, 'Drunkenness and Responsibility', above n 73, 468.

⁸⁶ An illustration is provided by the record of the trial of William Edwards for theft and burglary in 1784, in which both an apothecary from Bethlem Hospital and a navy surgeon were called to testify on behalf of the defendant: 'Trial of William Edwards' in *Old Bailey Proceedings* (20 October 1784) 1258, 1259.

⁸⁷ Lacey, 'Responsibility and Modernity', above n 32, 265. Some evidence in support of the ongoing relevance of common or local knowledge regarding intoxicated offending is provided by the reliance on an undifferentiated concept of an intoxicant in the current law. In part because medical and scientific experts have made few inroads into the law on intoxication, there has been little attempt to articulate the different effects of different substances. In practice, it seems that the law on intoxication applies to all intoxicants by way of analogy with alcohol, which is the intoxicant that has most often come to the attention of the courts. For a discussion, see *R v Lipman* [1970] 1 QB 152, 156–9 (Widgery LJ for Widgery and Fenton Atkinson LJ and James J). Further, as McCord has argued, the factual beliefs concerning intoxication 'have been based not on ... available scientific data, but on personal experience and folk wisdom': David McCord, 'The English and American History of Voluntary Intoxication to Negate Mens Rea' (1990) 11 *Journal of Legal History* 372, 372.

IV RETHINKING EVIDENCE AND PROOF OF MENTAL INCAPACITY

The historical discussion provided above sought to demonstrate the utility of the ‘manifest madness’ frame for analysing the evidential and procedural aspects of claims to mental incapacity in the ‘long’ 18th century. As outlined above, my frame has three dimensions: the substantive significance of an accused’s conduct; the role of common knowledge of ‘madness’ in the legal evaluation process; and that a ‘mad’ condition was considered to be obvious to an ordinary person, who could both testify to and evaluate ‘madness’. In relation to mental incapacity claims lying on the edge of the then capacious informal insanity law — unfitness to plead, automatism, and the doctrine of intoxication — it seems that ‘manifest madness’ provides a means of capturing the salient aspects of evidentiary and procedural practices operating in this era. Here, in the final Part of this article, I turn to consider the insights generated by my argument about ‘manifest madness’ in order to critically analyse mental incapacity in the current era.

Of course, any such consideration must acknowledge the large-scale shifts in criminal process that have taken place in the period since the end of the long 18th century. In the intervening period, criminal process has been marked by the formalisation of informal standards and practices into apparently precise and technical doctrines and rules. These procedural changes were one plank in a large raft of reforms that were themselves part of a broader reform of government, aimed at modernising political and legal institutions.⁸⁸ These developments in criminal process significantly altered the structure of the criminal trial, moving it towards ‘a more restrained, rule-governed, predictable, depersonalized process.’⁸⁹ At the same time, over the 19th century, ‘madness’ rose in the social consciousness, accompanied by a heightened concern with social order⁹⁰ (something which is also a feature of the current era). By the late Victorian era, the reliance on the criminal law (and to a lesser extent the civil law) as an instrument of moralisation had pushed the notion of a subjective test for criminal liability to the fore, as a defendant’s ‘powers of reason and self-government’ were subjected to new scrutiny.⁹¹ This movement, in turn, pushed claims based on mental incapacity — most prominently, for exculpation, but also for exemption from trial, for instance — to prominence, and set the tone for the current era, in which mental incapacity enjoys a symbolic significance that far outstrips its practical role in criminal law.

In relation to evidence and proof of mental incapacity, unequivocally, the most significant development in the intervening period has been the appearance in the 19th century of an expert body of knowledge about ‘madness’. Of course, this development has extended well beyond the bounds of the criminal law, but it had a significant impact on legal procedures from the first decades of the 19th

⁸⁸ See generally, Cairns, above n 24, 169–76; Clive Emsley, *Crime and Society in England 1750–1900* (Longman, 3rd ed, 2005) 183–211.

⁸⁹ Wiener, above n 31, 65.

⁹⁰ *Ibid.* 84.

⁹¹ *Ibid.*

century.⁹² Each of the individuals who claimed to have this knowledge — a group which, at least initially, included alienists, mad doctors, prison surgeons and asylum superintendents, and each with varying claims to authority⁹³ — shared a depiction of ‘madness’ as a genuine object of expertise, from which it was possible to offer intelligible explanations about cause and effect. Reflecting its place in a wider if loose alliance of elite knowledges about health and the relationship between mind and body, the burgeoning expertise or specialist knowledge about ‘madness’ encompassed bureaucratic, administrative, scientific and medical knowledges, as well as an emergent psychiatric knowledge.⁹⁴ The rise to prominence of expert or elite knowledge of ‘madness’ is generally thought to be premised on the ability of medical professionals to provide insights that are hidden from the ordinary observer. As it relates to criminal process, this premise seems key in paving the way to the current situation, one in which expert psychiatric and psychological evidence is a prominent feature of trials concerning mental incapacity (and where such evidence is just as likely to be adduced by prosecution or defence counsel).

If we accept this account of the metamorphosis of the way ‘madness’ is proved and becomes known then it might be thought to be analogous to crime, per Fletcher’s analysis of changes in ‘patterns of criminality’ over time. Like ‘manifest criminality’, ‘manifest madness’ depicts an intimate relation between the way something is identified and the content of *what* has been identified (crime in the case of ‘manifest criminality’, and ‘madness’ in the case of ‘manifest madness’). The decline of ‘manifest criminality’ in the period since the end of the 18th century is thought to mark the cleaving apart of the conceptual and the evidentiary for criminal law purposes. The rise of the other two of Fletcher’s three ‘patterns of criminality’ — the pattern of ‘subjective criminality’ and the pattern of ‘harmful consequences’ — has meant that evidence and proof of individual, subjective mental states now occupies a pre-eminent place in the criminal process and the actus reus has been reduced to a mere threshold issue for criminal liability. As Lacey has argued, this development was accompanied by a profound change in the idea of criminal responsibility: a loose or thin formulation of criminal fault, whereby responsibility was assumed, gradually gave way to a thicker and more robust concept of fault or mens rea, which was itself the object of investigation at trial.⁹⁵ As a result of these developments, we can no longer be confident that we know crime when we see it.

But, as to the question of how this broad trajectory of ‘madness’ applies in the criminal law context, I would like to sound a short note of caution here. It may be questioned whether the move away from ‘manifest madness’ has been as thorough or wholesale as is usually assumed. For instance, it seems possible that, just as was the case in the ‘long’ 18th century, there remains a subsisting convic-

⁹² See generally Wiener, above n 31; Eigen, above n 38.

⁹³ See Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law*, above n 22, ch 6.

⁹⁴ *Ibid.*

⁹⁵ Lacey, ‘Responsibility and Modernity’, above n 32, 260–1. See also Farmer, *Criminal Law, Tradition and Legal Order*, above n 34.

tion, detectable in an analysis of criminal law practices, that 'madness' is manifest in conduct (perhaps in motive-less or particularly violent offending), and that, as such, it continues to be regarded as evident to ordinary people without specialist knowledge.⁹⁶ Further, the role of ordinary people and their knowledge of 'madness' in legal evaluation of mental incapacity also seems to have had a long and strong legacy in criminal law, reflected in the ongoing part played by laypeople in legal evaluation processes (as jurors, for instance).⁹⁷ Any detailed discussion of these points would require more space than is available here. Yet, even in the absence of discussion of these brief points, it is possible to posit that continuity as well as change has marked out the development of this area of criminal law over time.

It is now possible to return to the point with which this article began, with the benefit of the historical analysis developed above. I commenced my discussion by noting the assumptions — which are rather readily made — about the difficulty of proving claims of mental incapacity, and the doubts that waft around the genuineness of mental conditions as raised in court, and the legitimacy of any legal decisions resting on such claims. The historical analysis developed above is notable for the absence of assumptions about either the distinctiveness or the difficulty of proving mental incapacity for criminal law purposes. Of course, the myriad of developments that have taken place since the end of the 'long' 18th century, and the complexity of the current law and legal processes, weigh against any neat explanation for the rise of concerns about the provability of 'madness'. No doubt any analysis of these concerns would need to take into account developments such as the politicisation of criminal justice, and indeed, the politicisation of psychiatry and allied practices, in the late modern era.⁹⁸

Here, I wish to emphasise a discrete but significant point that emerges from my 'manifest madness' analysis. This point relates to the value of taking seriously the different types of knowledge (and the types of knowers) that bear on practices of evidence and proof concerning mental incapacity in criminal law. Alongside experts, non-experts continue to play a role in adjudication and evaluation of claims to mental incapacity (in the form of evaluation by a lay jury, for instance). The development of medical and psychiatric expertise about 'madness' went only some way towards covering the field of knowledge practices in criminal law. Space remained for non-experts and non-expert knowledge. Scientific and allied knowledges (such as medical and forensic knowledges) have dominated scholarship on the roles played by extra-legal knowledges in legal practice. Yet, it seems clear that extra-legal knowledges

⁹⁶ This hints at the particular ontological and epistemological dimensions of 'madness' in criminal law: see Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law*, above n 22.

⁹⁷ See *ibid* for a discussion of the way in which criminal law practices developed in relation to the rise of an expert medical and psychiatric knowledge of 'madness'. In this book, I suggest that, after the development of an expert knowledge of 'madness' in the 19th century, it is useful to conceptualise ordinary people's knowledge as lay or non-expert knowledge.

⁹⁸ See, eg, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001); Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (Free Association Books, 2nd ed, 1999).

interact with legal knowledge in various ways.⁹⁹ Indeed, different expert knowledges seem to be treated differently in the legal context.¹⁰⁰ However, what has been called the ‘epistemological heterogeneity’ of legal discourse extends further than just to other expert knowledges.¹⁰¹ In most studies to date, non-expert knowledge has been largely eclipsed. Yet, it is necessary to take such knowledge seriously if we are to properly grasp the practices of evidence and proof concerning mental incapacity.¹⁰² Further, taking the knowledge possessed by ordinary people seriously would then invite a reconsideration of the apparent centrality of expert medical and psychiatric evidence adduced regarding mental incapacity, and an interrogation of the way in which the rise to prominence of expert knowledge appears to track the rise of uncertainty about the provability of ‘madness’ in criminal law.¹⁰³

⁹⁹ See Mariana Valverde, ‘Authorizing the Production of Urban Moral Order: Appellate Courts and Their Knowledge Games’ (2005) 39 *Law & Society Review* 419. Valverde concludes that legal knowledge is both derivative and dependent, an ‘ever-shifting network in which actors ... deploy legal or quasi-legal tools to creatively recycle knowledge claims generated elsewhere’: at 420.

¹⁰⁰ For a discussion of the courts’ treatment of historical and anthropological knowledge, see Robert van Krieken, ‘Law’s Autonomy in Action: Anthropology and History in Court’ (2006) 15 *Social & Legal Studies* 574. For a contrasting discussion of the courts’ treatment of scientific knowledge, see Thomas Scheffer, ‘Knowing How to Sleepwalk: Placing Expert Evidence in the Midst of an English Jury Trial’ (2010) 35 *Science, Technology, & Human Values* 620.

¹⁰¹ Valverde, above n 99, 423.

¹⁰² If, for instance, exculpation on the basis of mental incapacity implicates both expert and lay knowledge of mental incapacity, it might be that both types of knowledge are required for the legitimation of verdicts relating to mental incapacity. Tony Ward has suggested something along these lines in his argument about the ‘dual authority of science and lay consensus’: Tony Ward, ‘Observers, Advisers, or Authorities? Experts, Juries and Criminal Responsibility in Historical Perspective’ (2001) 12 *Journal of Forensic Psychiatry* 105, 105. He argues that this dual authority underpins the historical operation of mental incapacity doctrines such as insanity and diminished responsibility.

¹⁰³ For a critical discussion of courts’ continued reliance on ‘ordinary common sense’ as a normative issue, see Michael L Perlin, ‘Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning’ in James R P Ogloff (ed), *Law and Psychology: The Broadening of the Discipline* (Carolina Academic Press, 1992) 109. For a contrasting view, see Michael S Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge University Press, 1984).