This chapter sets out the analysis that gives the book its title. Having made an argument about the scope of the terrain of mental incapacity, and thus the focus of this book, in Chapter 2, I now analyse the terrain itself. This terrain represents the point of intersection between ‘madness’ and crime, or, between putative ‘madness’ and putative crime. In this chapter, I make the case that the terrain of mental incapacity has particular features, which I analyse under the label ‘manifest madness’. Based on a close and systematic study of mental incapacity doctrines and practices, I suggest that, on this terrain, ‘madness’ is constructed as having two formal qualities: on the one hand, it is dispositional, and, on the other hand, it can be ‘read off’ conduct by different participants in the criminal justice process. These two formal qualities can be thought of as two topographical features of the mental incapacity terrain, one ontological and one epistemological. It is to capture this dual aspect of ‘madness’ for criminal law purposes that I use the adjective ‘manifest’. As I discuss below, these features of the terrain of mental incapacity are significant as together they colour the legal evaluative and adjudicative practices associated with mental incapacity.

In turning to focus on the terrain of mental incapacity, as opposed to the content of the category of mental incapacity doctrines, a comment about the relationship between these two topics, and Chapters 2 and 3, is warranted. In Chapter 2, I make a case for a particular approach to the organization of criminal law doctrines based on mental incapacity. As discussed in the previous chapter, a specific kind of difference—one that I labelled abnormality—can be detected in doctrines based on mental incapacity. Here, I extend my line of sight, beyond legal doctrines, to encompass legal practices concerning evidence and proof of mental incapacity. This permits a closer and more nuanced view of what it is that distinguishes this area, enlarging the scholarly frame to produce a picture of the intricate internal pattern, logic, or coherence of the terrain of mental incapacity. Adopting a multidimensional approach to the terrain of mental incapacity (taking into account evidence and proof as well as legal doctrines) prompts me to adopt the term ‘madness’—a thicker notion and a term that comes with its own baggage—because there is something more complex and multilayered that I seek to capture here. I am aware of the loaded nature of the term ‘madness’ but employ it consciously in order to
convey the broader social and political relevance of this area of criminal law and by way of acknowledgment of the extra-legal scholarship on mental incapacity.\(^1\)

The analysis presented in this chapter is the outcome of a careful socio-historical study of the doctrines and practices that make up the terrain of mental incapacity. I have come to the arguments put forward here through a systematic examination of each of the different parts of the mental incapacity terrain (its doctrines and attendant practices of evidence and proof) as well as a consideration of the terrain as a whole (following the argument advanced in Chapter 2). As such, the analysis in this chapter differs from that offered in the chapters that follow in Part II and Part III of this book. In those chapters, I provide a close tracing of the historical development of each of the doctrines that are classed as mental incapacity doctrines on my account. Here, however, I have a different aim in mind. I aim to introduce the reader to a distillation of what I regard as the most salient features of the mental incapacity terrain. It is this distilled assessment of the mental incapacity terrain that ensures this analysis adds to the existing scholarly literature on mental incapacity in criminal law.

The argument in this chapter unfolds in two main steps. First, by way of a link to the arguments made in Chapter 2, I make a case for thinking about the terrain of mental incapacity (not just its doctrines) in a way that sensitizes us to what marks it out. I do this from two different perspectives—from history and from knowledge. This discussion provides the ground for the ‘manifest madness’ analysis, which represents the second step in my argument. This analysis is outlined in two parts, each of which looks at one of the two formal qualities—ontological and epistemological—that together constitute the topography of the mental incapacity terrain. In order to support my ‘manifest madness’ analysis I make reference throughout to various aspects of different mental incapacity doctrines. The value of my ‘manifest madness’ analysis for the scholarly engagement with mental incapacity in criminal law derives from its capacity to capture deep dynamics structuring the mental incapacity terrain.

The Terrain of Mental Incapacity in Criminal Law

Change and Continuity in Mental Incapacity over Time

One of the ways of thinking about what marks out the terrain of mental incapacity in criminal law is to reflect on the historical development of criminal law principles and practices more broadly. My reflection leads me to detect something which I call the formalization account, so named to capture the trajectory in the criminal law towards the formalization of legal principles and practices. As I discuss below, this kind of account can be found in various sorts of historicized analyses of

criminal law, but it is not usually expressly named or identified. This account of change over time is pitched at a rather general level. Identifying it is useful nonetheless because that provides a means of challenging the widespread, but typically tacit, belief that the development of criminal law principles and practices occurred in a more or less uniform way and in a unilinear direction.

According to the formalization account, the component parts of the law are most accurately understood as the product of broader processes by which, in a common law context, criminal law principles and practices solidified into the form they take in the current (late modern) era. The central idea is that the discrete and technical rules that have come to comprise offences, defences, and rules of procedure and evidence are specific instances of a wider trend in the criminal law towards the formalization of legal principles and practices. The flexible and overtly moral-evaluative aspect of the early modern criminal law is seen as having gradually given way to rigid processes and technical and precise rules, dependent on, for instance, a clear conceptual separation of notions of motive and intent, a separation which is now well-established. This gradual process of formalization entailed the cleaving apart of notions of conduct and fault, fact and opinion, liability and responsibility, and conviction and sentencing. It has pushed individual mental states to a pre-eminent place in criminal law doctrines and practices of evaluation and adjudication, and produced the corresponding decline in significance of the conduct element of the offence, the actus reus, which, rather oddly, has come to be thought of as significant only as a preliminary point, a mere threshold issue for criminal liability.

This process of formalization has proceeded on multiple levels. On the level of law, the process has included the ‘factualization’ of a concept of fault, and the subsequent elaboration of a subjective capacity concept of fault (mens rea)—which has meant that individual responsibility for criminal behaviour has come to form a lynchpin in the late modern criminal law—along with the development of other doctrines of liability and attribution. On the level of evidence, the process of formalization has produced sophisticated rules of evidence and procedure (such as burdens of proof and rules about opinion evidence) governing the process of proof in criminal trials. On the institutional level, this process of formalization has proceeded on multiple levels. On the level of law, the process has included the ‘factualization’ of a concept of fault, and the subsequent elaboration of a subjective capacity concept of fault (mens rea)—which has meant that individual responsibility for criminal behaviour has come to form a lynchpin in the late modern criminal law—along with the development of other doctrines of liability and attribution. On the level of evidence, the process of formalization has produced sophisticated rules of evidence and procedure (such as burdens of proof and rules about opinion evidence) governing the process of proof in criminal trials. On the institutional level, this process of formalization has proceeded on multiple levels. On the level of law, the process has included the ‘factualization’ of a concept of fault, and the subsequent elaboration of a subjective capacity concept of fault (mens rea)—which has meant that individual responsibility for criminal behaviour has come to form a lynchpin in the late modern criminal law—along with the development of other doctrines of liability and attribution. On the level of evidence, the process of formalization has produced sophisticated rules of evidence and procedure (such as burdens of proof and rules about opinion evidence) governing the process of proof in criminal trials. On the institutional level, this process of formalization has proceeded on multiple levels. On the level of law, the process has included the ‘factualization’ of a concept of fault, and the subsequent elaboration of a subjective capacity concept of fault (mens rea)—which has meant that individual responsibility for criminal behaviour has come to form a lynchpin in the late modern criminal law—along with the development of other doctrines of liability and attribution. On the level of evidence, the process of formalization has produced sophisticated rules of evidence and procedure (such as burdens of proof and rules about opinion evidence) governing the process of proof in criminal trials. On the institutional level, this process of formalization has proceeded on multiple levels. On the level of law, the process has included the ‘factualization’ of a concept of fault, and the subsequent elaboration of a subjective capacity concept of fault (mens rea)—which has meant that individual responsibility for criminal behaviour has come to form a lynchpin in the late modern criminal law—along with the development of other doctrines of liability and attribution. On the level of evidence, the process of formalization has produced sophisticated rules of evidence and procedure (such as burdens of proof and rules about opinion evidence) governing the process of proof in criminal trials. On the institutional level, this process of formalization has proceeded on multiple levels. On the level of law, the process has included the ‘factualization’ of a concept of fault, and the subsequent elaboration of a subjective capacity concept of fault (mens rea)—which has meant that individual responsibility for criminal behaviour has come to form a lynchpin in the late modern criminal law—along with the development of other doctrines of liability and attribution. On the level of evidence, the process of formalization has produced sophisticated rules of evidence and procedure (such as burdens of proof and rules about opinion evidence) governing the process of proof in criminal trials. On the institutional level, this process of formalization has


4 See, eg, Criminal Law, Tradition and Legal Order, Lacey ‘Responsibility and Modernity in Criminal Law’, and Norrie Crime, Reason and History. As Nicola Lacey argues, this development was accompanied by a profound change in the idea of criminal responsibility as a loose or thin formulation of criminal fault, whereby responsibility was assumed, which gave way to a thicker and more robust concept of fault or mens rea, which was itself the object of investigation at trial: see ‘Responsibility and Modernity in Criminal Law’ 261. More generally, regarding the accuracy of the story generally told about criminal responsibility, see N Lacey Women, Crime and Character: From Moll Flanders to Tess of the D’Urbervilles (Oxford: OUP, 2008).
included the ‘lawyerization’ of the criminal trial process and the subsequent professionalization of prosecution and defence, as well as the cut-and-thrust of the increasingly organized adversarial criminal process. More broadly, the process of formalization has resulted in formalized enforcement practices, more organized reporting and a regularized appellate system, as well as the development of a complex administrative framework comprising the criminal justice system. Relating the formalization account to the issue of mental incapacity specifically, the mental incapacity doctrines of the current era are seen as the products of the broad movement over time from informal practices of exculpation, to informal standards for criminal responsibility and legal subjectivity, and then to discrete and technical legal rules constituting distinctive doctrines and specific procedures.

Looking at the scholarly literature, we see that what I have called the formalization account of the development of criminal law principles and practices has broad currency. As mentioned above, this formalization account forms the foundation of several sorts of historicized analyses of criminal law—albeit more often implicitly than explicitly. For instance, traces of the formalization account can be detected in normative argumentation about the development of criminal law. Such an argument runs along the lines that formalization has amounted to a ‘positivization’ of law in the common law world. Similarly, formalization is a central part of more doctrinal studies of the development of the criminal law; Keith Smith’s work is a prominent example here. The formalization account also seems to be implicit in an analysis evidencing a more ideological bent, as we see in Alan Norrie’s historicized analysis of criminal law. Forming as it does the circumscribed and descriptive


6 See M Constable The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge (Chicago: University of Chicago Press, 1991). In the context of a discussion of the decline of the mixed jury in the USA by the early nineteenth century, Marianne Constable argues that broad notions of ethics, justice, and difference have given way to more positivistic notions of law, rationality, and indifference.


8 Norrie develops a nuanced argument about the ‘juridification’ of the modern criminal law, and suggests that the creation and maintenance of technical legal concepts (such as M’Naghten insanity) may be understood as an attempt to avoid ‘open and contentious moral and political issues’: see Crime, Reason and History 29; see also Lacey ‘Responsibility and Modernity in Criminal Law’ 267–8. In an analysis suggesting the strategic significance of expert medical knowledge in the current law, Norrie argues that the ‘narrow rationalism’ of the M’Naghten test for insanity works to ‘withdraw the individual from the social conditions of his madness’, while the use of psychiatric testimony stretches the practical operation of the test when a compassionate response is warranted (Crime, Reason and History 189–90). Further, in linking legal ideas about incapacity with the pre-eminent notion of individual criminal responsibility, Norrie connects the legal notion of insanity with the development of the idea of the subject of the criminal law as a ‘reasoning being’. In Norrie’s words, the reasoning individual has become a ‘powerful mechanism of ideological legitimation’ for the criminal law (Crime, Reason and History 176). For discussion of Norrie’s analysis, see L Farmer The Obsession with
core of a number of powerful analyses of change over time across criminal law, it is clear that the formalization account has more than passing significance for understanding criminal law in historical relief.

The historical development of two specific mental incapacity doctrines—unfitness to plead and infancy—is particularly well explained by reference to the formalization account. This follows from the close connection these doctrines have with the criminal trial process. As procedural provisions, both unfitness to plead and infancy concern a defendant’s understanding of, and engagement in, criminal proceedings, and the reach of the criminal law. In Chapter 4, I suggest that, as infancy and unfitness to plead have developed along a trajectory of formalization, doctrines that had been driven by a deep dynamic of inclusion—whereby their scope has been drawn broadly—have now come to be structured by a dynamic of exclusion as well, whereby the scope of the doctrines is more circumscribed. As I discuss in that chapter, the change in the dynamics structuring the process of formalization itself reflects changing concerns with matters such as dangerousness. Beyond unfitness to plead and infancy, formalization is also helpful elsewhere on the mental incapacity terrain. For instance, it is useful in understanding the broad trajectory of the law of insanity, which evolved from a capacious informal law, operating under a flexible criminal process, to a formal and more technical doctrine, which is grounded in a narrow, medicalized notion of disability.9 Change in the scope of insanity was triggered in part by the formalization of other doctrines on the mental incapacity terrain.10

More generally, however, in relation to the mental incapacity terrain as a whole, the dynamic of formalization does not seem to have played out in the same way, or perhaps to the same extent. Although the formalization account assists in explaining the historical trajectory of mental incapacity doctrines in various respects, it does not seem to be able to capture it fully. This is because its emphasis on the degree and pace of change obscures certain significant dimensions of the terrain. For instance, the development of expert medical knowledge of insanity ushered in a more circumscribed approach to the law, and this resulted in a reconfiguration of the merciful space around exculpatory incapacity, which itself produced a discrete automatism doctrine. While this development represents a process of formalization, the outcome is not a thoroughly formalized new doctrine. By way of contrast with some other mental incapacity doctrines, but reflecting the persistence of a broad, moralized notion of incapacity on this part of the mental incapacity terrain, automatism is delimited via a tripartite construction, which tracks lines of

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9 See Chapter 5 on insanity and automatism.
10 As I discuss in Chapter 8, with the passage of the Infanticide Acts 1922 and 1938, all killings of newborn children by their mothers were taken outside the reach of the law of murder and the law of insanity. At around the same time, intoxicated offending was carved out from insanity when, in Beard’s Case, the House of Lords dismissed the M’Naghten test as irrelevant to consideration of the effect of intoxication on an individual alleged to have committed a criminal offence: see DPP v Beard [1920] AC 479 and, more generally, Chapter 7.
non-culpability, catching a miscellaneous collection of cases in which individuals share little more than an absence of blameworthiness.\(^{11}\)

Even just this one example of the persistence of overtly morally-evaluative concerns in relation to mental incapacity sensitizes us to the nuances of the historical development of this area of criminal law. In relation to what I call the formalization account, I am suggesting that change over time at the intersection of ‘madness’ and ‘crime’ is less wholesale and unidirectional than is typically assumed. That is, the story in relation to ‘madness’ for criminal law purposes may be as much one of continuity as of change.

Reflection on the historical development of criminal law principles and practices is one of the ways of thinking about what marks out the terrain of mental incapacity in criminal law. Another way of grasping what marks out the mental incapacity terrain arises from an examination of the types of knowledge enlisted in the legal practices that feature on this terrain, and it is to this I now turn.

**Expert and Non-Expert Knowledges of ‘Madness’**

The discussion thus far suggests the value of looking at both change and continuity in the law on mental incapacity. A close analysis of the point of intersection between ‘madness’ and ‘crime’ also needs to give space to the broader practices, concerning proof and knowledge, for instance, in which the historical developments, canvassed above, are embedded. As suggested in Chapter 2, thinking afresh about what criminal law doctrines based on mental incapacity share reveals the significance of the type of knowledge that is brought to bear on such claims—both exculpatory and non-exculpatory.\(^{12}\) Taking up the issue of the types of knowledge featured on the mental incapacity terrain again here provides another way of thinking about the distinctiveness of this terrain. Viewed from this knowledge perspective, I suggest that what marks out the terrain of mental incapacity in criminal law is not the presence of one particular type of knowledge, but the interaction of different types of knowledge.

At this point, a brief explanation of what I mean by knowledge is necessary. Within the literature on knowledge, spread across philosophy, sociology, and law, among other disciplines, knowledge and its study has been approached in different ways. For my purposes here, knowledge is approached as what Michael Bentley usefully calls ‘paradigms of what was and what was not to count as worth knowing’.\(^{13}\) What counts as knowledge, and who count as knowers, changes across time and space. This means that the linked concepts the study of knowledge often conjures up—such as truth, authority, and legitimacy—must be understood as

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\(^{11}\) See further Chapter 5.

\(^{12}\) See Chapter 2 for a discussion of these terms, which represent subsections of the category of mental incapacity doctrines. See also A Loughnan ‘Mental Incapacity Doctrines in Criminal Law’ (2012) 15(1) New Criminal Law Review 1.

both dynamic and contingent. In taking knowledge seriously in my examination of the mental incapacity terrain, I am following a rich scholarly tradition. What the recent scholarship on knowledge in socio-legal and law and society studies shares is a focus on the process or production of knowledges within legal contexts, rather than the particular content of that knowledge,¹⁴ and this is also the focus that is of interest to me.

Other scholars have recognized the significance of knowledge for an understanding of criminal law principles and practices. For instance, Nicola Lacey analyses the influence of the development of psychiatric and psychological types of knowledge on the norms of criminal responsibility. As part of a larger argument about the way in which criminal responsibility principles and practices represent responses to ‘problems of co-ordination and legitimation faced by systems of criminal law’,¹⁵ Lacey argues that the rise of psychological and psychiatric knowledges influenced the rise of a ‘primarily capacity-based and heavily psychologised notion of mens rea’ that marked ‘the core of the late modern general part of the criminal law’.¹⁶ Lacey suggests that the criminal law is marked by a shifting balance between capacity responsibility and outcome-based responsibility.¹⁷ An illustration of the utility of her account is provided by the history of the recently altered but durable presumption that an individual intends the logical consequences of his or her actions.¹⁸ Lacey argues that, ‘particularly once the growth of psychological notions of individual responsibility began to pose intractable problems of proof for courts and juries’, the presumption provided a solution to ‘the problem of knowledge co-ordination’,

¹⁵ Lacey ‘In Search of the Responsible Subject’ 350. These ‘general problems’ of coordination and legitimation 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 (368). For Lacey, the changing coordination and legitimation requirements of a modern criminal law prompted the ‘search for a conception of criminal responsibility which could be explicated in legal, technical terms, and hence legitimated as a form of specialist knowledge underpinning an impersonal mode of judgment’: ‘Responsibility and Modernity in Criminal Law’ 267–8. See also Farmer Criminal Law, Tradition and Legal Order 139–41.
¹⁶ Lacey ‘Responsibility and Modernity in Criminal Law’ 266. These types of knowledge of criminal responsibility would eventually have a profound effect on conception of mens rea and ideas about fault. For instance, as Nigel Walker comments, by the time of the reception of a doctrine of diminished responsibility into English and Welsh criminal law, criminal responsibility was conceptualized as ‘a quality of mind’ and, as such, something that could be impaired: N Walker Crime and Insanity in England (Vol 1: The Historical Perspective) (Edinburgh: Edinburgh University Press, 1968) 151–2. I discuss diminished responsibility in Chapter 9.
¹⁸ This legal rule allowed a court to presume that a man [sic] may be taken to have intended the natural and probable consequences of his actions. This rule was changed by Criminal Justice Act 1967, s 8, which provided that the jury is not ‘bound in law’ to infer intention in this way, but is to determine what the defendant intended or foresaw ‘by reference to all the evidence’. As a result of this statutory provision, the presumption about intention no longer exists as a matter of substantive law: R v Sheehan; R v Moore [1975] 1 WLR 739, 743; for analysis, see Lacey ‘In Search of the Responsible Subject’ 370.
permitting the courts to refer to a ‘defendant’s interior mental world’ without requiring close investigation of that world.\(^{19}\)

As prominent expert knowledges of ‘madness’, psychiatric and psychological knowledges are obviously relevant to a study of mental incapacity in criminal law. As I discuss in Chapter 2, in the current era, mental incapacity claims typically entail the introduction of expert psychiatric and psychological evidence, either in support or against the claims made by the defendant.\(^{20}\) In the nineteenth century, the rise of an expert medical knowledge about ‘madness’ significantly altered the evidentiary and procedural practices governing mental incapacity claims in criminal law—it paved the way to the current era, in which expert psychiatric and psychological evidence may be just as likely to be adduced by prosecution or defence counsel. An expert medical knowledge about ‘madness’—then as now—is based on a depiction of ‘madness’ as a genuine object of expertise, about which it is possible to offer intelligible explanations about cause and effect.\(^{21}\) In the period since the appearance of an expert knowledge of ‘madness’, psychiatric and psychological knowledges have gradually risen to a position of dominance, such that they are the archetypal expertise about ‘madness’.

Although it might be assumed that it is the presence or prominence of expert medical knowledge on the terrain of mental incapacity in criminal law that marks it out, in terms of knowledge I suggest that what marks out the terrain is the interaction of different types of knowledges. Here, I am referring to the interaction of both expert and non-expert knowledges. There are good reasons to consider both types of knowledge as each bears on legal evaluation and adjudication of mental incapacity claims. For instance, examining the history of the capacious informal insanity law, and the flexible criminal process that attended it, reveals the role played by ordinary people, and what was then common knowledge about ‘madness’, in animating legal evaluations of exculpatory insanity. As I discuss in Chapter 6, the rise to prominence of expert knowledge about exculpatory ‘madness’ was a slower and more uneven development than is typically assumed.\(^{22}\) More generally, looking across the mental incapacity terrain, the point of intersection between ‘madness’ and crime appears to be the subject of

\(^{19}\) ‘In Search of the Responsible Subject’ 370. The presumption permitted the court to focus on the objective meaning of the defendant’s act, either ignoring or assuming what was going on in the defendant’s mind.

\(^{20}\) The relevance of expert evidence about an individual’s mental incapacity led me to follow Anthony Duff in holding that mental incapacity claims are granted rather than pleaded. I then suggested that this is one of the reasons to jettison the term ‘defence’ in relation to mental incapacity. See further Chapter 2.

\(^{21}\) See Chapter 6 for discussion.

\(^{22}\) About the same time as an informal law of insanity formalized into the insanity doctrine recognizable in the current era, evidence from medical witnesses came to be significant in trials involving claims to exculpation on the basis of mental incapacity. I suggest that, in terms of proving ‘madness’ for legal purposes, the significance of expert medical knowledge—now predominantly psychiatric and psychological knowledge—lies as much in its prudential as in its ontological dimensions, a factor which has not been accorded due importance in accounts of how ‘madness’ is made known for criminal law purposes. See Chapter 6.
different types of knowledge, each of which is relevant to an understanding of both legal practices and legal constructions of mental incapacity.

How might this non-expert knowledge of mental incapacity be understood? As it is distinguished from expert knowledge, which emerged out of a body of common knowledge, I adopt the term ‘lay’ to refer to this non-expert knowledge. I do not use terms like ‘common knowledge’ or ‘folk knowledge’, each of which might be thought to be analogous. Such terms do not capture what is to me a significant dimension of this body of knowledge—it derives its meaning in opposition to expert knowledge. With the rise of an expert knowledge, the knowledge ordinary people had of ‘madness’ must be seen in a different light: the rise of expert or specialized knowledges about ‘madness’ produced a lay knowledge of ‘madness’. Lay knowledge is distinct although related to lay evaluation (archetypally, the role of the jury in a serious criminal trial) because it refers to the kind of knowledge enlisted in legal practices as opposed to the roles of particular actors.23

This approach to non-expert knowledge means that, beyond the specific role of lay jurors in assessing certain types of claims, lay knowledge has a broader if more diffused role in relation to mental incapacity. The extent of the part played by lay knowledge becomes apparent if it is recognized that legal actors—judges, magistrates, prosecutors, and defence counsel—have lay knowledge when it comes to mental incapacity. This status as lay vis-à-vis knowledge of mental incapacity is not to deny legal actors their status as experts vis-à-vis legal practices and processes: rather, it is to acknowledge that, in Antony Giddens’ words, as a result of specialization, ‘all experts are themselves lay people most of the time’.24 It is my suggestion that, in relation to matters involving mental incapacity, legal expertise is mixed with lay knowledge or non-expertise. Of course, unlike lay people (such as those comprising a jury in a criminal trial), legal actors are in positions of privilege in a way that changes the impact of their knowledge, if not its content. This in turn suggests that the attitudes and beliefs of judges, and prosecution and defence counsel, are an important site for analysis of knowledge practices in criminal law. Approached this way, the role of lay knowledge of mental incapacity extends beyond lay evaluation, because legal actors employ lay knowledge of mental incapacity in the execution of their roles. This is significant in that, even if lay people have come to have a reduced role in the procedures relating to mental incapacity, this does not entail a correspondingly minor role for the knowledge of ‘madness’ here labelled as lay knowledge.

As a non-expert form of knowledge, lay knowledge is both unsystematized and synthetic in that it is made up of different sources of understanding, such as suspicions and religious or other beliefs (and including knowledge that has entered the common domain from specialized arenas). Lay knowledge, which is a form of collective knowledge, is a broad and flexible construct, capturing the socially ratified attitudes and beliefs about ‘madness’ held by non-specialists. Beyond

23 This distinction between knowledge and knowers is acknowledged by others. See N Lacey ‘A Clear Concept of Intention? Elusive or Illusory?’ (1993) 56(5) Modern Law Review 621, 635–6.
24 See Giddens Modernity and Self-Identity 138, and, more generally, ch. 4.
acknowledging that lay attitudes and beliefs do not all flow in the same direction, the substance of these attitudes and beliefs is something of a black box. As Mariana Valverde has written of the common knowledge of alcohol held by inspectors, patrons, licensees, and hospitality staff, it has few intrinsic features. It can be distinguished by its formal qualities—as with Valverde’s ‘common knowledge’, it is qualitative, non-scientific, and non-numerical. Lay knowledge encompasses experiential or firsthand knowledge (of alcohol, or mental illness, for instance), but extends beyond this empirical base to include social attitudes to ‘madness’. The term lay knowledge is used here not with a view to investigating the content of lay knowledge of ‘madness’ but with the aim of conceptualizing it in order to be able to see what role it plays in criminal law.

Lay knowledge of mental incapacity (and also of other social objects) might be easily dismissed as a kind of generalized and nebulous knowledge background, against which more particular issues for determination (such as those discussed by experts) are foregrounded. Yet what has been called the ‘epistemological heterogeneity’ of legal discourse extends further than just to other expert knowledges. What I call lay knowledge of incapacity continues to be relevant across the mental incapacity terrain—as more than mere background knowledge. For instance, lay knowledge of mental incapacity was significant in the development of a jurisprudence of ‘abnormality of mind’ for the purposes of the recently amended doctrine of diminished responsibility. This is suggested by the comments made when the doctrine was imported to England and Wales. As Major Lloyd-George stated in

25 M Valverde Law’s Dream of Common Knowledge (Princeton: Princeton University Press, 2003) 171. Valverde has written extensively about the types of knowledges implicated in alcohol licensing laws. See M Valverde ‘“Slavery from Within.” The Invention of Alcoholism and the Question of Free Will’ (1997) 22(3) Social History 251; M Valverde Diseases of the Will: Alcohol and the Dilemmas of Freedom (Cambridge: CUP, 1998). In this body of work, Valverde examines the construction of a ‘common knowledge’ about alcohol possessed by untrained persons—knowledge that is simultaneously beyond the bounds of any one individual yet within the sphere of commonsense.


29 See Homicide Act 1957, s 2(1), which was recently amended by the Coroners and Justice Act 2009. In Chapter 9, I suggest that the meaning of ‘abnormality of mind’ developed in a dialectical relation with both lay knowledge of mental incapacity and the technical legal meaning of insanity per the M’Naghten Rules.
introducing the Bill that became the Homicide Act 1957, diminished responsibility was to be open to those who were insane in the ‘legal sense’, the medical sense, and ‘those who, not insane in either sense, are seriously abnormal’. Looking across the mental incapacity terrain, it is the dynamic interaction of the multiple types of knowledge that govern mental incapacity in criminal law into the current era—expert medical, expert legal knowledge, and non-expert or lay knowledge—that marks out the mental incapacity terrain.

On the previous pages, I have sought to suggest the distinctiveness of the terrain of mental incapacity from two different perspectives—change and continuity over time, and the types of knowledge enlisted in legal assessment of mental incapacity claims. Together, these sections constituted the first of two steps in my overall argumentation and provided a connection to the conceptual argument developed in Chapter 2. My analysis is intended to generate a sense of the terrain of mental incapacity on its own terms, as sui generis. At the same time, it made clear that a close account of the contours of the point of intersection between ‘madness’ and ‘crime’ would need to give space to the broader practices, concerning evidence and proof, in which legal doctrines are embedded. These two approaches to the terrain of mental incapacity—from history and from knowledge—serve as the grounding for the following discussion of ‘manifest madness’, as they provide a bridge between Chapter 2 and ‘manifest madness’. This ‘manifest madness’ analysis unfolds in two main parts, each of which looks at one of the two formal qualities—the ontological and epistemological—that together constitute the topography of the mental incapacity terrain. A key argument flowing from the following discussion is that the distinctiveness of the terrain of mental incapacity relates to both the principles and practices of mental incapacity, and evidence and proof of it. I show that at the point of intersection with crime, ‘madness’ is constructed as dispositional (the ontology of ‘madness’) and as able to be ‘read off’ the behaviour of an individual (the epistemology of ‘madness’).

The Ontology of ‘Madness’ at the Point of Intersection with Crime

‘He was a man not accountable for his actions’

Viewed ontologically, the main formal feature of the terrain of mental incapacity in criminal law—the point of intersection of ‘madness’ and ‘crime’—is that, here, ‘madness’ is constructed as dispositional. By this, I mean that ‘madness’ is regarded as something like a condition or a status in that it exists over a length of time, and is displayed in behaviour taking place over that time. By referring to the constructed nature of this ontology of ‘madness’, I intend to suggest that this feature of ‘madness’ at the juncture with crime is a product of legal practices; in other words, it does not pre-exist legal practices or refer to a transcendent ‘truth’ about

31 *OBP*, Patrick Carroll, 11 May 1835 (t18350511–1119).
madness’. Each of the roles of mental incapacity doctrines—exculpation, inculpation, imputation, and a procedural role—outlined in the previous chapter depend in distinct ways on a sense of ‘madness’ as dispositional, as subsisting. This idea of ‘madness’ as dispositional is fostered by the combined impact of different types of knowledges of ‘madness’, discussed below, which permit older patterns of meaning to persist into the current era.

My argument about the dispositional character of ‘madness’ at the point of intersection with crime specifically invokes the notions of time and space on which criminal law doctrines and practices depend. These notions of time and space have recently come to receive high-profile attention. As Lindsay Farmer argues, criminal law doctrines and practices rest on particular temporal and spatial logics, which are central to the enforcement of proscribed conduct, the definitions of crimes, and conceptions of criminal responsibility. In relation to criminal law defences in particular, Alan Norrie suggests that the defendant is recontextualized for the purposes of exculpation, having been decontextualized for the purposes of determining liability (whether he or she did the actus reus with the requisite mens rea). These different analyses hint at the value of thinking closely about the role of time and space in criminal law.

In relation to the role of time and space in mental incapacity, some hints about the distinctive temporal inflection pertaining in this part of criminal law can be gleaned from the analysis of criminal responsibility developed by Victor Tadros. In the context of a broader normative analysis of the concept of criminal responsibility, in which he argues that ascription of criminal responsibility should be dependent on the accused’s status as an agent, Tadros suggests that there is a problem in the way in which mental disorder defences have been understood. With reference to the case of a person who suffers a brain injury and undergoes a personality change, Tadros argues that the identity of that agent qua agent cannot be determined simply at the point in time at which she acts. As Tadros concludes, ‘if the defendant’s actions at a particular time are not reflective of her identity as constituted over time, she is not responsible for those actions’. Taking up Tadros’ exhortation, made in relation to mental disorder defences, that ‘insufficient attention is given to the relationship between responsibility and time’, I turned my mind to the issue of mental incapacity and time. This entailed looking across


34 Norrie Crime, Reason and History; see also Lacey ‘A Clear Concept of Intention? Elusive or Illusory?’ 621.

35 V Tadros Criminal Responsibility (Oxford: OUP, 2005) 141. This argument could be harnessed for inculpatory purposes, on the basis that, say, failure to take medication prescribed for a diagnosed mental condition at one point in time, may then disqualify an individual from relying on the insanity doctrine when charged with an offence taking place at a later point in time: see E W Mitchell Self-Made Madness: Rethinking Illness and Criminal Responsibility (Aldershot: Ashgate, 2003).

36 Tadros Criminal Responsibility 141.
mental incapacity doctrines—stretching beyond those relating to responsibility—to detect a deep structural dimension of the mental incapacity terrain. This leads me to my analysis of ‘madness’ as dispositional at the point of intersection with crime.

For my purposes in analysing mental incapacity closely, a particularly helpful analysis is the account of character-based criminal responsibility developed by Nicola Lacey. In relation to the historical development of criminal responsibility, Lacey argues that practices of responsibility-attribution founded in ideas of character remained significant for longer than is typically assumed (and indeed are making a resurgence in the current era).37 For Lacey, the late Victorian era evidenced a conception of responsibility, and non-responsibility (the latter associated with claims to insanity for instance) that represented a mix of moral evaluative and factual assessment, ‘of character and engaged psychological capacity’.38 Lacey argues that character-based responsibility (or character-responsibility) produces a distinct formulation of the adjudication question: did the defendant’s conduct ‘express a settled disposition of hostility or indifference to the relevant norm of criminal law, or at least acceptance of such a disposition?’, a question which opens up a different, longer relevant timeframe for the legal inquiry.39 This analysis of criminal responsibility seems to have resonance for the way in which mental incapacity claims are evaluated (and as per the previous chapter, such claims extend beyond the bounds of non- or partial responsibility, to include the way mental incapacity relates to legal subjectivity). To me, the construction of ‘madness’ at the point of intersection with crime shares features with character-based conceptions of responsibility: that is, as it is constructed as dispositional, ‘madness’ for criminal law purposes is character-like.

A trigger for my thinking about the dispositional quality of ‘madness’ has been George Fletcher’s landmark text, Rethinking Criminal Law.40 In particular, I draw on Fletcher’s analysis of what he calls ‘manifest criminality’, one of three conceptual structures or ‘patterns of criminality’ that he suggests account for the core content of criminal law.41 According to Fletcher, taken together, his three patterns of

37 See N Lacey ‘Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility’ (2010) 4 Criminal Law and Philosophy 109; see also N Lacey ‘In Search of the Responsible Subject’.
38 Lacey ‘Psychologising Jekyll, Demonising Hyde’ 123.
39 Lacey ‘Space, Time and Function’ 239. While retaining a focus on the specific allegation of criminal conduct that grounds conviction and punishment, it also situates the attribution of responsibility in a broader timeframe than implied by a capacity conceptualization of criminal responsibility (239).
40 G P Fletcher Rethinking Criminal Law (Oxford: OUP, 2000). Fletcher’s analysis enjoys a solid standing in criminal law academic discourse: it has been taken up by a number of criminal law scholars (see, for example, E Colvin ‘Exculpatory Defences in Criminal Law’ (1990) 10 Oxford Journal of Legal Studies 381) and seems to have been particularly useful in historicized discussions of the criminal law (see, for example, Farmer Criminal Law, Tradition and Legal Order; Lacey ‘In Search of the Responsible Subject’; Lacey ‘Space, Time and Function’; and Norrie Crime, Reason and History).
41 The value of these abstract patterns is their explanatory power, in that they provide a means for understanding the content of criminal prohibitions at different points in time (Fletcher Rethinking Criminal Law 121). Fletcher begins from the premise that the criminal law is a ‘polycentric body of principles’ and, as a result, that no single formula will determine when conduct ought to be criminal
criminality or ‘patterns of liability’ ‘generate an interpretive mode for understanding
commonalities and contrasts among a wide variety of offenses’. Fletcher argues that
‘manifest criminality’ was the dominant ‘pattern of criminality’ until the end of the
eighteenth century and, since then, the ‘subjective criminality’ and the harmful
consequences ‘patterns of liability’ have risen to the fore. The ‘manifest’ ‘pattern
of criminality’ resonates with my own reading of mental incapacity. There are two
aspects of Fletcher’s ‘manifest criminality’ that prove useful to me, the first of which
relates to the dispositional nature of ‘madness’ at the point of intersection with crime.
The aspect of Fletcher’s ‘manifest criminality’ analysis I wish to focus on for this
purpose is the intimate connection between the conceptual and the evidentiary,
which underpins the ‘manifest’ ‘pattern of criminality’.

To explain the significance of this for my analysis, some more detail about
Fletcher’s ‘manifest criminality’ ‘pattern of liability’ is required. The central import
of ‘manifest criminality’ can be explained by way of contrast with the other two of
Fletcher’s ‘patterns of criminality’. Under the pattern of ‘manifest criminality’, the
case for criminal liability starts with an ‘objective standard’, ‘the manifestly criminal
act’. This means that the act manifests the actor’s criminal purpose. By contrast,
under the ‘subjective criminality’ pattern, ‘the actor’s intent is the central question
in assessing liability’. 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. The
focus of the court’s inquiry into liability is on the intent behind the act. Under the
harmful consequences ‘pattern of liability’, liability is independent of a human
action or state of mind. Rather, it is dependent on an ‘objective attribution’ of a
harmful event to a responsible person. Overall, when compared with Fletcher’s

(xii). Nonetheless, the ‘patterns of criminality’ seem to have paradigmatic significance in Fletcher’s
account.

42 Rethinking Criminal Law 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 his 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 A Loughnan ‘Manifest Madness’: Towards A New Understanding of the

43 Fletcher Rethinking Criminal Law 61.

44 Elsewhere I have used Fletcher’s argument as a jumping off point for a tripartite explication of
‘manifest madness’, see Loughnan ‘Manifest Madness’. Although my ‘manifest madness’ analysis is
explicated differently here, that tripartite explication of it may be read alongside the discussion in this
chapter. I am aware of the critical reception Fletcher’s work has received. As Lindsay Farmer points out,
Fletcher’s argument about the changing form of criminal liability is developed exclusively on an
intellectual level. However, changes in criminal liability are not purely intellectual moments, but are
closely linked to changes in the manner of state and social organization: see L Farmer The Metamor-
phosis of Theft: Property and Criminalisation (forthcoming).

45 Fletcher Rethinking Criminal Law 89. So, for instance, when criminal liability is structured
according to ‘manifest criminality’, ‘thieves could be seen thieving; they could be caught in the act’
(80).

46 Rethinking Criminal Law 89.

47 Rethinking Criminal Law 120.

48 Rethinking Criminal Law 757.
other ‘patterns of liability’, ‘manifest criminality’ can be seen to have three essential features: criminal acts have meaning when viewed externally, that meaning is ‘manifest’ or evident to neutral observers or third parties, and crime is an organic category, arising from community experience of it.49

To reveal how this analysis connects to my point about the dispositional nature of ‘madness’ at the point of intersection with crime it is necessary to have a closer look at what Fletcher suggests about the intimate relation between the conceptual and evidentiary. The definitional feature of ‘manifest criminality’ is that, under that ‘pattern of liability’, the criminal act manifests the actor’s criminal purpose and is treated as a substantive condition of liability.50 For Fletcher, under the pattern of ‘manifest criminality’, there is an intimate connection between the way in which liability is proved and the content of what is to be proved.51 As he writes in relation to the law of larceny, under the pattern of ‘manifest criminality’, 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’.52 This does not mean, however, that the manifest nature of criminality is merely a rule of evidence, with the ‘manifest’ character of the act serving only as a presumption for establishing intent.53 Rather, under ‘manifest criminality’, where the manifest act establishes the content of the defendant’s intent, it is not possible to separate the evidentiary and substantive components of criminal liability.54

How does this analysis pertain at the point of intersection between ‘madness’ and crime? I suggest that a similar idea about the way meaning is given to ‘madness’ pertains at the point where ‘madness’ intersects with crime. My claim has two parts. The first is the relevant externality. In my thinking, the relevant externality is not the criminal act—the external element of an offence—but a broader notion of a ‘mad’ defendant’s conduct, which seems to have a thick significance in criminal law doctrines and practices. By the term conduct, I refer to the criminal act as well as other aspects of a defendant’s behaviour, such as his or her demeanour in court and aspects of his or her context. The second part of my claim relates to the connection between the conceptual and evidentiary. Compared with Fletcher’s analysis, the intimate connection between the manner of proof and the content of what is to be proved does not link the criminal act and liability (as per ‘manifest criminality’) but conduct and criminal responsibility (for exculpatory mental incapacity doctrines) or conduct and capacity (for non-exculpatory doctrines). In each case, the conceptual

49 Rethinking Criminal Law 115–16, 88, and 119 respectively.
50 Rethinking Criminal Law 232.
51 Rethinking Criminal Law 85.
52 Rethinking Criminal Law 85.
53 Rethinking Criminal Law 85. Rather, the requirement that criminal behaviour be manifest is an ‘independent substantive requirement’—if the manifest act is not established, ‘there is no point in inquiring further about the actor’s intent’ (85).
54 By contrast, under ‘subjective criminality’, a variety of means other than a manifest act may be used to prove intent because the act demonstrates ‘the firmness of the actor’s resolve’, rather than the content of his or her intent (Rethinking Criminal Law 120). Therefore, while the question of proof (and the law of evidence and procedure governing it) may now be thought of as distinct from the substantive criminal law, such a distinction was not applicable in the era of ‘manifest criminality’.
and evidentiary are not wholly separated: meaning resides in conformity between the thing itself and the idea of the thing. That is, what counts as ‘madness’ for criminal law purposes is what is manifest as ‘madness’ within criminal doctrines and practices. Put another way, at the point of intersection with crime—and whether relating to exculpatory or non-exculpatory doctrines—‘madness’ is what ‘madness’ does.

Evidence in support of this dispositional dimension of ‘madness’ for criminal law purposes is to be found at a number of points across the mental incapacity terrain, in, for instance, the dependency different mental incapacity doctrines exhibit on generalized constructions of the capacities of individuals relying on these doctrines. Here, two examples suffice. In the newly formulated version of the doctrine of diminished responsibility, the statutory provision refers to an individual’s ‘ability’ to understand the nature of his or her conduct, form a rational judgment or exercise self-control at the time of the killing.\(^55\) Thus, while it is formally the actor’s state at the moment of the killing that is at issue, the statutory reference to ‘ability’ references a more status-like condition, one that is not easily reduced to a mere moment in time. In relation to the law on intoxicated offending, it is notable that references to generalized ideas about capacity abound. The doctrine of ‘specific intent’ refers to a subjective mental state but actually rests on a generalized construction of the altered capacities of intoxicated individuals. In referring to capacity to form intent, the doctrine of ‘specific intent’ collapses a question of fact (did the defendant form the requisite intent?) into the question of ongoing capacity over time (was the defendant capable of forming the requisite intent?)\(^56\).

Additional evidence in support of my analysis of the dispositional dimension of ‘madness’ for criminal law purposes is provided by the way in which, in relation to claims to exculpation, ‘madness’ interacts with the \textit{actus reus} and \textit{mens rea} of criminal offences. As mentioned above, a ‘mad’ defendant’s conduct has a thick significance in criminal law, and this resists reduction to the dualistic paradigm of liability (\textit{actus reus/mens rea}) otherwise largely taken for granted. We can see this in the multiple ways in which a mental condition can interact with criminal responsibility and thus criminal liability. For instance, it may be that the mental condition prevents the defendant from exercising control over his or her conduct (as per the doctrine of automatism), or the mental condition may affect an individual’s understanding of the nature and quality, or the wrongness, of their act (as per \textit{M’Naghten} insanity).\(^57\) Just these two examples indicate that claims to exculpation based on mental incapacity can be understood to impact on an

\(^{55}\) As a result of 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 or her conduct, form a rational judgment or exercise self-control, and the ‘abnormality provides an explanation for the defendant’s act in doing or being a party to the killing’: Coroners and Justice Act 2009, s 52, amending Homicide Act 1957, s 2. See further Chapter 9.

\(^{56}\) See Chapter 7 in which I suggest that lay knowledge plays a role in underpinning the complex and technical rules making up the law of intoxication.

\(^{57}\) See further Chapter 5.
individual in a way that traverses the *actus reus/mens rea* boundary, invoking an idea of a condition stretched out in time—beyond the narrow slice in time corresponding with the commission of the *actus reus*.

The construction of ‘madness’ as dispositional is achieved in part on the back of the distinct timeframes employed in expert systems of medical knowledge (which are also relevant to my discussion below). Psychiatry and psychology tend to operate with a different and broader notion of the relevant timeframe when compared with criminal law practices, which tend to adopt a snapshot view of the relevant time (generally, the moment of the commission of the *actus reus* of the alleged offence). Indeed, it is possible to refer to psychiatric time, which, depending on the circumstances, may well stretch back to, say, an adult defendant’s childhood.

The effect of the inclusion of expert medical discourses in courtroom evaluation processes is to expand the timeframe at issue in the legal inquiry into the criminal responsibility or the legal subjectivity of an individual making a claim to mental incapacity. Now, here, it might be pointed out that some criminal defences (such as provocation), and not just those in my category of mental incapacity doctrines, operate with an extended timeframe.58 I suggest that, in relation to mental incapacity, the invocation of different knowledge systems in aid of this extended timeframe is significant, invoking as it does the distinct norms of proof referred to in relation to psychiatric and psychological knowledge, and the extended timeframes structurally embedded in these disciplines.

As the above analysis suggests, at the point of intersection between ‘madness’ and ‘crime’, the dispositional nature of ‘madness’ means it is possible for the alleged crime to be regarded as a symptom of mental disorder or disease, on the basis that the disorder predates the offence. This is the first of several effects of the construction of ‘madness’ as dispositional at the point of intersection with crime. Interpreting the alleged crime as a symptom of mental disorder or disease helps to account for the association of offending by mentally incapacitated individuals with motiveless crime, an association that can be traced back to the Victorian era.59 This idea of crime as the symptom of ‘madness’ can be seen most clearly in relation to infanticide, where the defendant’s act of killing her child is read as an instantiation of abnormality for criminal law purposes.60 The idea that the crime is depicted as a symptom of disorder or disease is overlaid onto the different perspectives on time implied in criminal law practices versus those of psychiatry and psychology, in that this idea is premised on the subsisting nature of the mental condition. The idea that crime may be regarded as a symptom of disorder or disease is a deep-seated one, and may be found within both legal and psychiatric knowledge systems (and arguably in non-expert beliefs as well). This shared idea hints at the ways in

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58 Indeed this extended timeframe might be the temporal dimension of the recontextualization of the previously decontextualized defendant, for the purpose of exculpation. See Norrie *Crime, Reason and History*.


60 See further Chapter 8.
which criminal law and psychiatry and psychology each depend on a moralized discourse of deviance.\footnote{Indeed, in the development of a discipline of criminology, vocabulary, theories and strategies of intervention in the lives of individuals borrowed from the higher profile and longer standing specialism of psychiatry. See D Garland *Punishment and Welfare: A History of Penal Strategies* (Aldershot: Gower, 1985) and N Rafter *The Unrepentant Horse-Slasher: Moral Insanity and the Origins of Criminological Thought* (2004) 42(2) *Criminology* 979.}

The idea that the alleged crime may be regarded as a symptom of mental disorder or disease has a strange coda. It produces a complex relationship between the nature of the offence and the defendant’s claim to non- or partial responsibility, or to non-subjectivity. In relation to allegations of offending at the more serious end of the spectrum (such as murder and other crimes of violence), this type of offence can be taken to suggest that the individual is ‘becoming mad’, as opposed to ‘being mad’. That is, the offence itself can evidence the process of ‘becoming mad’, articulating with other factors such as the absence of motive, to encode a change in the defendant’s condition. Of course, an empirical assessment of the content of social beliefs about ‘madness’, which lies beyond the aims of my book, would be required to bear out this claim. Here, I confine myself to pointing to a comment made by Edward Griew in speculating about the practical operation of diminished responsibility. Griew suggests that, in deciding whether to grant a plea of diminished responsibility, the jury may ‘set the defendant’s abnormality and its effects upon him against the character of the offence’.\footnote{See E Griew ‘The Future of Diminished Responsibility’ [1988] *Criminal Law Review* 75, 83. See also J Horder *Excusing Crime* (Oxford: OUP, 2004) 155.} It is possible that a similar kind of weighing up process occurs in relation to other mental incapacity doctrines, both exculatory and non-exculpatory.

Another effect of constructing ‘madness’ as dispositional is that it feeds into a construction of the relevant individual as different in kind, exposing the ontological dimension of the argument about abnormality outlined in Chapter 2. For instance, an analysis of the historical development of diminished responsibility leads me to conclude that diminished responsibility relies on an idea of difference that is usefully conceptualized as one of kind rather than one of degree on the basis that this approach generates a closer understanding of the doctrine. Understanding diminished responsibility to connote a qualitative rather than a quantitative difference takes seriously the notion of abnormality, and helps to account for the prominence of expert medical evidence in decision-making around the doctrine.\footnote{It is this idea of difference—difference in kind rather than difference in degree—that can be seen to underpin the way in which diminished responsibility slides between a doctrine of exculpation and one of inculpation, which I discuss in Chapter 9.} Similarly, in relation to automatism, its tripartite construction (requiring a ‘total loss of voluntary control’, an external factor and no prior fault on the part of the defendant) ensures that those relying on automatism may be constructed as different in kind (unconscious or acting involuntarily).\footnote{See further Chapter 5.}

The dispositional dimension of ‘madness’ at the juncture with crime also facilitates a conceptual slippage between ‘crimes by the mad’ and ‘mad crimes’. For
instance, as I discuss in Chapter 4, in the law on infancy, there is a slippage between childhood offending (a categorization by type of offending) and offending by children (a categorization by offender). The conceptual slippage between ‘crimes committed by children’ and ‘childhood crimes’ has rendered children who commit serious offences vulnerable to the exhaustion of mercy: at this point on the spectrum of offending, the special status granted to children seems to wear out.

In addition, the law of infanticide provides an illustration of the over-determining effect of the construction of ‘madness’ as dispositional. By eliding a distinction between the descriptive aspects of infanticide (a woman kills her infant at the same time as having a mind disturbed by childbirth or lactation) and its evaluative aspects (this action under these conditions warrants partial liability), a finding of partial responsibility for killing flows straightforwardly from the construction of the act of infanticide as an instantiation of abnormality. This specifically gendered idea of abnormality supports both partial inculpation and partial exculpation via the law of infanticide. According to my analysis, which I develop in Chapter 8, a particular social type, the infanticidal woman, has come to determine the legal issue of the defendant’s criminal responsibility, and the act of infanticide has become an instantiation of abnormality for criminal law purposes.

To conclude this discussion, it is useful to return to the words, taken from the Old Bailey Proceedings, which I extracted at the beginning of this section—‘he was a man not accountable for his actions’.65 These words form part of the question the court addressed to Henry Parkin, a surgeon in the Royal Marines, who gave evidence that he had never seen the defendant, Patrick Carroll, in a ‘state of lunacy’. What appears to us to be the archaic wording used by the judge helpfully captures the idea of the dispositional quality of ‘madness’ at the point of intersection with crime. While the court’s specific interest was in the time of the stabbing that led to the death of Elizabeth Blake, the reference to the type of man the defendant was neatly conveys what I have sought to suggest about the ontological dimension of ‘madness’ for criminal law purposes.

The Epistemology of ‘Madness’ at the Point of Intersection with Crime

‘Do you take her to be a mad woman? I do’66

Viewed epistemologically, the main feature of the mental incapacity terrain is that, here, ‘madness’ is constructed as ‘readable’. Or put another way, the kind of difference invoked by mental incapacity doctrines is depicted as ‘readable’. Again, it is worth repeating that, by the reference to the constructed nature of ‘madness’, I suggest that it is a product of legal practices; in other words, it does not pre-exist legal practices or refer to a transcendent ‘truth’ about ‘madness’. In this section of

65 OBP, Patrick Carroll, 11 May 1835 (t18350511–1119).
66 OBP, Susannah Milesent, 11 November 1794 (t17941111–1).
the chapter, I discuss this idea of the ‘readability’ of ‘madness’ for criminal law purposes, on which the evidentiary and proof practices associated with each of the roles of mental incapacity in criminal law that I identified in Chapter 2—exculpation, inculpation, imputation, and a procedural role—depend. My argument about the epistemology of ‘madness’ is an analogue to the argument about the ontological features of ‘madness’, outlined above, in that the ‘readability’ of ‘madness’ at the point of intersection with crime is connected to its dispositional character.

At first, the suggestion that ‘madness’ is constructed as ‘readable’ at the point of intersection with crime might appear counter-intuitive because, over and above any connection to crime, ‘madness’ is now depicted as hidden to the ordinary observer. The hidden character of ‘madness’ is generally thought to be a product of the complex social, political, and economic changes associated with modernity. Modernity brought with it a set of expert systems, associated with distinctive competencies, claims to exclusive knowledge and specialization.67 The effect of the rise of an expertise about ‘madness’ in particular has come to be understood in light of Michel Foucault’s analysis of the historical development of institutions and professions devoted to the management of criminals and the insane in France.68 A useful point made by scholars who have been inspired in different ways by Foucault’s analysis is that, although, ‘madness’, had been both known and knowable in the early modern era, it is now hidden to the ordinary observer.69

The rise of expert psychiatric and psychological knowledge of ‘madness’ is regarded as effecting a change whereby medical professionals are equipped to provide insights into ‘madness’ that are hidden from the ordinary observer. Of course, this development has had significant impact well beyond the bounds of the criminal law and criminal process concerning mental incapacity. While I do not take issue with these analyses in general, I want to suggest that there are good reasons to think that, at the specific point marked out by the intersection of ‘madness’ with crime, this change has not been as wholesale or as unidirectional as is typically assumed. Within the space created by criminal law practices, it is possible to detect the persistence into the current era of older ideas about the way in which ‘madness’ becomes known. There remains a subsisting conviction, detectable in a close study of criminal law practices, that ‘madness’ is regarded as ‘readable’—in conduct, and by ordinary people without specialist knowledge, as well as to those with specialist knowledge of ‘madness’. Here, again, my thinking about the formal quality of ‘madness’ as ‘readable’ has been triggered by Fletcher’s ‘manifest criminality’ analysis, discussed above. There

68 See Foucault History of Madness, and Discipline and Punish: The Birth of the Prison.
are two aspects of Fletcher’s ‘manifest criminality’ ‘pattern of liability’ that are useful, the first of which relates to my point about the dispositional nature of ‘madness’ for criminal law purposes, which I discussed above. The second point relates to the role of certain knowledges and certain knowers in legal practices concerning mental incapacity, and it is to this that I now turn. A little more detail about Fletcher’s ‘manifest criminality’ analysis is needed here. Fletcher’s ‘manifest criminality’ analysis depends on certain knowledge conditions. According to Fletcher, under ‘manifest criminality’, the ‘assumption’ is that the criminal nature of certain acts is intelligible as such to a neutral third-party observer with ‘no special knowledge about the offender’s intention’.70 Fletcher utilizes the notion of ‘general knowledge’, referring to the ‘shared paradigms’ through which criminal acts were perceived as such.71 As Fletcher writes, the pattern of ‘manifest criminality’ rests on a ‘stipulation’ about the knowledge of observers: ‘if someone hired a horse . . . his selling [it] would be suspect only if we should assume general knowledge of his status as a temporary possessor’.72 Thus, as Fletcher argues, under ‘manifest criminality’, judgments of criminality depended on a community’s ‘general knowledge’.73

How does this analysis bear on the practices governing mental incapacity claims? Extrapolating to the mental incapacity terrain, ‘neutral’ observers viewing criminal behaviour without ‘special knowledge’ may be thought to be those who do not have an expert or specialist knowledge of mental incapacity. These observers play a role in criminal law practices: in lay evaluation by a jury, for instance. I suggest that expert knowledges of ‘madness’ have not covered the field of knowledge practices bearing on mental incapacity at the point of intersection with crime, and that ‘madness’ remains the subject of non-specialist knowledge. But, by contrast with Fletcher’s terminology, I do not consider this ‘general knowledge’. Rather, I refer to lay knowledge of incapacity, which as foreshadowed above, is explicitly contrasted with elite, expert, or specialist knowledge. As discussed above, the term lay knowledge is here employed to refer to socially ratified attitudes and beliefs about ‘madness’ held by non-experts. Lay knowledge of mental incapacity is non-expert knowledge of mental incapacity (that is, not medical knowledge where this is paradigmatically psychiatric and psychological knowledge). By contrast with expert knowledge, lay knowledge is unsystematized, incorporating a diverse array of attitudes and beliefs about ‘madness’. Lay knowledge, as a form of collective knowledge, captures the social nature of knowledge about mental incapacity. Again, as discussed above, the term is used here not with a view to investigating the content of lay knowledge of ‘madness’ but in order to reveal that it plays a role in criminal law.74

70 Fletcher Rethinking Criminal Law 116.
71 Rethinking Criminal Law 82.
72 Rethinking Criminal Law 82–3.
73 Rethinking Criminal Law 82.
74 See further Chapter 6 for a discussion in relation to the evidentiary and procedural aspects of insanity and automatism.
Evidence in support of this idea about the significance of lay knowledge of mental incapacity is provided by consideration of the law on intoxicated offending. In the current era, the law of intoxication comprises a complex set of rules in which the more moral-evaluative grounding of the law belies its technical neutrality and precision. The formalization of the law on intoxication, which produced a legal entity that is most accurately conceptualized as a ‘doctrine of imputation’, together with the development of a medical and psychiatric expertise about the effect of intoxication on individuals in the nineteenth century, went only some way toward covering the field of knowledge practices in criminal law. Space remained in criminal law practices for lay knowledge of intoxication. As I discuss in Chapter 7, stretching above its practical role in any particular decision, lay knowledge of intoxication has a further, more discursive part to play in criminal law. For instance, it bolsters the legal rules comprising the intoxication law in that it sustains the particularly complex and technical rules that make it up. In brief, viewed as a whole, the part played by lay knowledge in connecting the restrictions in the law of intoxicated offending with moral culpability and with genuinely different mental states may be interpreted as a bridge linking the law, which represents a half-way house of criminal liability (neither wholly subjective nor wholly objective), with the dominant subjective principles of mens rea or fault.75

Looking across the mental incapacity terrain, lay knowledge of ‘madness’ shares the field with expert knowledge, as both types of knowledge are enlisted in decision-making processes, and brought to bear on mental incapacity claims. As discussed above, when such claims are raised in court, the trial now typically entails the introduction of expert psychiatric and psychological evidence, either in support of or against the claims made by the individual. But, such expert knowledge does not form blanket coverage of mental incapacity, as lay knowledge is enlisted in these legal practices as well. It is the dynamic interaction between these types of knowledge that produces the distinctive epistemological contours of the mental incapacity terrain.

In what way does recognizing that lay knowledge of mental incapacity plays a role in criminal processes, alongside expert knowledge, connect to my argument about the ‘readability’ of ‘madness’? The connection lies in recognizing that the role that lay knowledge of mental incapacity, and actors with that knowledge, play in criminal processes depends on the ‘readability’ of ‘madness’ at the point of intersection with crime. This insight is significant in two respects. First, it has been obscured in the extant scholarship on mental incapacity, which has not grasped the full implications of the social dimension of mental incapacity. Second, in unveiling the way in which legal processes rest on the ‘readability’ of ‘madness’, my analysis exposes the highly charged practice that structures the knowledge field on the topic of ‘madness’: on the one hand, ‘madness’ is framed as hidden to anyone without an expertise in it, and, on the other hand, legal practices depend on the ‘manifest’ nature of ‘madness’ to all involved in legal evaluation and adjudication—expert and

75 See further Chapter 7.
non-expert actors. In this latter respect, ‘madness’ is like other ‘facts’ which are the subject of evidence and proof in the legal context. However, in contrast to these other ‘facts’, in relation to ‘madness’, ‘readability’ is significant because it simultaneously and somewhat contradictorily underpins the role played by both expert and lay knowledge, and experts and non-experts in legal processes. This older epistemological notion of ‘readability’ is embedded within modern knowledge practices, the lay actor playing a role alongside the expert.

My argument that ‘madness’ is constructed as ‘readable’ for criminal law purposes should not be taken to imply that the process of ‘reading’ is straightforward. Nor should my argument about the dispositional nature of ‘madness’ (provided above) be taken to suggest that the meanings given to ‘madness’ are devoid of internal conflict (homogenous) or separate from wider social and cultural dynamics (hermetically sealed). Of course, any process of ‘reading’ meaning is complex, and I acknowledge what could be referred to as the instability of somatic or bodily signification. ‘Reading’ ‘madness’ in the criminal context is a nuanced process, influenced by broader social norms that affect deviance, culpability, and incapacity more generally.

Evidence in support of my argument about the ‘readability’ of ‘madness’ for criminal law purposes is provided by the law on unfitness to plead, and specifically by the way in which unfitness may be raised at trial, a practice which implicates both expert and lay knowledge of ‘madness’. A legal assessment of an individual’s unfitness depends on the ‘readability’ of his or her unfitness status. Here, the (potentially unfit) accused’s conduct at the time of the trial—including for instance his or her demeanour in court—is relevant to the legal inquiry. Historically, the situation seems to have been that anyone with knowledge about the individual’s unfitness could raise the issue in court. In a way that seems likely to have been reflective of established practice, in the mid-twentieth century, the court in Dashwood stated that, when a defendant may be unfit, ‘the court acts in such a case on information conveyed to it from any quarter’, including the defendant, his or her advisors, or the prosecution or an independent person. This practice has since formalized into a particular rule about raising unfitness (according to which expert evidence is now mandatory). But the rule about raising unfitness—by judges,
lawyers, and jurors, as well as medical experts—clearly rests on the ‘readability’ of unfitness. This interpretation of unfitness to plead also conjures up the other topographical feature of the mental incapacity terrain—the construction of ‘madness’ as dispositional—in that the rule about raising unfitness depends on the subsisting nature of the defendant’s condition (at least over some of the time of the trial).

Regarding the expert knowledge side of the combination of types of knowledges about ‘madness’, I suggest that expert knowledges of ‘madness’ have a distinct significance in relation to the ‘readability’ of ‘madness’. This is the case in at least two respects. Both of these are apparent when that type of knowledge is viewed as a subset of scientific knowledge, an umbrella term for the types of knowledge arising from the Scientific Revolution, and subsequently implicated in a vast array of political, social, and cultural changes.80

The rhetorical force of these expert knowledges—presented as neutral, objective, and descriptive—81 is such that the boundary between explanation and excuse, description and evaluation is blurred. Thus, in relation to infanticide, and as discussed above, the legal provision is constructed such that a distinction between the descriptive aspects of infanticide (a woman kills her infant at the same time as having a mind disturbed by childbirth or lactation) and its evaluative aspects (this action under these conditions warrants partial liability), is elided. As I discuss in Chapter 8, a finding of partial responsibility for killing then flows straightforwardly from the construction of the act of infanticide as an instantiation of abnormality.82

There is a second dimension of the significance of the rhetorical associations of expert knowledge of ‘madness’. The rhetorical associations of this body of scientific knowledge—to notions such as ‘patient’, ‘suffering’, ‘illness’, ‘vulnerability’, ‘treatment’, and to ideas such as victimhood and lack of agency—cut across the idea of the defendant as what might be called the villain of the piece and assist in associating mental incapacity with a lack of culpability, addressing precisely what is at issue in relation to exculpatory mental incapacity doctrines.

These points about the rhetorical associations of expert evidence about ‘madness’ provoke an insight about the structure of exculpatory mental incapacity doctrines, to which I also referred in Chapter 2. Exculpatory mental incapacity doctrines are those doctrines which, if successfully invoked, result in findings of non- or partial criminal responsibility. In Chapter 2, I suggest that one of the definitional features of exculpatory mental incapacity doctrines is that they do not reference the reasonable person. Rather, mental incapacity doctrines entail a tacit reference to the non-criminal mentally incapacitated individual. That is, the evaluation of the defendant who seeks to rely on a mental incapacity doctrine involves a comparison of sorts—but not one that is overtly countenanced in the legal

82 See further Chapter 8.
Some evidence in support of this reading may be found in the recently repealed law relating to the rebuttable presumption of doli incapax, which involved a preliminary or circumscribed inquiry into the capacity of a defendant aged 10–14 years. As I discuss in Chapter 4, although the focus of the legal inquiry was on whether the child defendant him or herself could appreciate the difference between something ‘seriously wrong’ and something merely mischievous, that inquiry was dependent on generalized notions of child and adolescent development, and it was against these generalized notions (referent to non-criminal children) that the particular child defendant was compared.

This discussion of the epistemological dimension of the mental incapacity terrain, revolving around the ‘readability’ of ‘madness’, is intended to show that older ways of knowing inform the practices entailed in evaluative and adjudicative processes around mental incapacity. To conclude this discussion, it is again useful to return to the quote taken from the *Old Bailey Proceedings* with which this section began: ‘do you take her to be a mad woman? I do’. The quote is an extract from the evidence given in the trial of Susannah Milesent on the charge of theft of a petticoat in 1794. The words represent the court’s question, and the answer of the witness, a servant, as recorded in the trial record. To me, both this question and the emphatic answer it elicited in response capture something of the ‘readability’ of ‘madness’ at the point of intersection with crime. The words convey a palpable sense of the way in which ‘madness’ is known—in conduct, and to ordinary people without specialist knowledge—for criminal law purposes.

This chapter has advanced a novel account of the terrain of mental incapacity in criminal law under the name ‘manifest madness’. With the label ‘manifest madness’, I referred to the specific character of ‘madness’ at the point of intersection with crime. I argued that here, ‘madness’ has two formal features, one ontological (whereby it is constructed as dispositional) and one epistemological (whereby it is constructed as ‘readable’). Together, these features constitute the topography of the mental incapacity terrain. My ‘manifest madness’ analysis revolves around the subsisting significance, in legal doctrines and practices, of older ideas about both the means by which certain types of human behaviour are evaluated, and the confidence with which evaluative judgments are made. I argued that, in relation to mental incapacity, these older ideas continue to be felt, and that this gives the terrain of mental incapacity distinctive features, which I conceptualized as broad ontological and epistemological contours. Particular ways of being and knowing inform both the principles and practices entailed in evaluative and adjudicative practices around mental incapacity. Each of the roles of mental incapacity doctrines—exculpation, inculpation, imputation, and a procedural role—outlined in the previous chapter depend on a sense of ‘madness’ as dispositional, and the

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83 My analysis of this aspect of the significance of expert knowledge of ‘madness’ helps to account for the relevance, both historical and into the current era, of expert evidence of a general nature about the mental disease or illness with which the defendant has been diagnosed. See Chapter 6 for a historical discussion in the context of insanity.

84 OBP, Susannah Milesent, 11 November 1794 (t17941111-1). See also Chapter 4.
attendant practices of evidence and proof depend on a sense of ‘madness’ as ‘readable’.

My analysis of the mental incapacity terrain is intended to be a contribution to scholarly understanding of this area of criminal law, and may serve as a corrective to existing studies of this area of criminal law. This argument about the topography of mental incapacity in criminal law is an explanatory rather than a normative one—‘manifest madness’ is offered to assist in understanding the structure of the terrain of mental incapacity in criminal law. The utility of ‘manifest madness’ lies in its ability to facilitate a fresh account of mental incapacity in criminal law, exposing and capturing the deep structures that inform this terrain.