SOLON Members' Research Interests and Current Projects

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'Manifest Madness': Mental Incapacity in Criminal Law

My current research focuses on mental incapacity in the` criminal law. This research reflects a broader interest in the criminal law and the criminal justice system, within which my focus is on the relationship between legal doctrines, practices, institutions and knowledges. More specifically, my particular interests are constructions of criminal responsibility and non-responsibility, the interaction of legal and expert medical knowledges and the historical development of the criminal law. My current project is my first monograph, and it has grown out of my doctoral research in which I developed an interpretive analysis of mental incapacity defences in criminal law.

Mental incapacity has come to occupy a prominent place in criminal law, where its symbolic significance outstrips its practical role (measured in terms of cases or defendants). Whether it is a question of the age below which a child cannot be held liable for any offending behaviour, or the attribution of responsibility to defendants with mental illnesses, criminal non-responsibility (and partial non-responsibility) is rarely far from the minds of legal actors, policy makers or legislators when it comes to crime and justice. Where it results in non-responsibility, mental incapacity denies or undercuts individual responsibility, a notion which has come to form a linchpin in the late modern criminal law. As the foundation of ascriptions of criminal liability, criminal responsibility lies at the core of the criminal trial process and its centrality has prompted the development of a rich vein of legal scholarship. Criminal non-responsibility – which may be defined at law as the absence of the set of capacities both required and assumed by the criminal law – has been less well traversed by scholars of law. Even in relation to the particular mental incapacity doctrines – usually called mental incapacity defences – criminal non-responsibility is often relegated to the margins of legal scholarship, dismissed as exceptional or atypical, and (in my view, wrongly) assumed to be a discrete area of specialist interest and significance. When approached more comprehensively, mental incapacity in criminal law can be seen to have a distinctive character – which I refer to as 'manifest madness' – and a broad significance for the criminal law as a whole.

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In broad brush strokes, and at some risk of caricature, the usual story told about this area of the criminal law proceeds along these lines: mental incapacity in criminal law is a self-contained and technical area featuring intricate legal constructs (such as 'disease of the mind') and unusual rules of evidence and procedure (such as the reverse burden of proof). The development of mental incapacity doctrines was and continues to be characterised by conflict, either explicit or implicit, between medical and legal knowledges. It is this conflict that has resulted in the creation of what is best understood as an uneasy middle ground between legal and medical norms about responsibility and capacity in the criminal law. Medical and legal types of expert knowledge are usually regarded as mutually exclusive and thought to develop in a *sui generis* way out of distinct and bounded bodies of knowledge promulgated by professional communities. In terms of their operation, however, individual mental incapacity doctrines are considered practically functional even if theoretically confused.

It is my suggestion that a close analysis of mental incapacity in criminal law may tell a different story. This story suggests that this area of criminal law has a greater significance than hitherto realized. The historical existence of the exculpatory criminal trial, whereby defendants were in effect presumed guilty and required to prove their innocence, meant that claims to exculpation based on incapacity were crucial in the development of criminal law defences and in the cleaving apart of defences and factors in mitigation. Later, the rise to prominence of a professional body of 'alienists' and a discipline of psychiatry made criminal trials about insanity prominent *fora* for discussion about the meaning, significance and means of identifying abnormal mental states. The deployment of the criminal law as an instrument of moralisation in the late Victorian era provoked what has turned out to be sustained social and political anxiety about individuals who seek to 'get off' on claims of incapacity. In the period since, a tension has developed between the relative opacity of pre-trial processes and the transparency of the trial. Ongoing controversy about the role of expert medical evidence in court exposes the contemporary relevance of the relationship between different knowledges about incapacity. The expert knowledges constituting the field of criminal non-responsibility inter-relate with each other and are mediated through legal institutions such as the jury and the trial. In addition, expert forms of knowledge must be seen to share the field with lay or non-expert knowledge of incapacity. Overall, a careful and historicised study of all aspects of mental incapacity in criminal law seems likely to reveal the significance of this topic for the development of the criminal law and its current theory and practice.

My research project is a monograph which has grown out of my doctoral thesis. This project seeks to generate a novel way of approaching mental incapacity in criminal law, and, as such, it constitutes an argument about the ways in which scholars should understand this area of law. The project focuses is the relationship between legal doctrines, practices, institutions and knowledge about non-responsibility. It brings together the hitherto disparate discussions on criminal non-responsibility that have taken place within analytical legal scholarship, socio-legal history and in studies of individual mental incapacity defences. I aim to provide a close and historicised account of the doctrines of non-responsibility – mental incapacity defences – up to the current era. In doing this, my research also traces the shifting boundary between normality and abnormality as constructed in law, helping to account for the significance of this demarcation and its fraught character in criminal law. I also assess the practices attendant to those doctrines, including rules of evidence and procedure, producing a comprehensive study of criminal non-responsibility.

The significance of this research project is three-fold. First, it provides a thematic treatment of the main issues in the area of criminal non-responsibility. In this, it provides a way of connecting what appear to be separate legal developments and offers a distinctive methodological approach to the subject matter. Second, my project draws on original historical research drawing on the *Old Bailey Sessions Papers* which will deepen understanding of the historical development of doctrines of non-responsibility. Third, the project provides a close analysis of legal doctrines and practices positioned in the context of the relevant secondary or academic literature, thus contributing to both the existing academic discourse and understanding of the operation of this area of criminal law.

The research methodology I am employing in this project can be broadly described as socio-legal. Like the broader field of critical inquiry of which it is a part, this genre of legal studies situates relevant doctrinal, evidentiary and procedural developments within their particular social, historical and institutional contexts. This approach evidences a commitment to examining law as a social phenomenon, and as a result, to approaching criminal law as a set of social practices. The legal scholarly research agenda benefits from appreciation of historical, as well as the social scientific and legal and philosophical disciplinary traditions. The benefits of this body of scholarship to a study of criminal law are several. On what has been called the level of weak historical argument, an historical analysis exposes the major changes in criminal law and process that have taken place in the common law world over time, including the demise of the exculpatory trial and the development of the adversarial trial, the regularisation of prosecution and defence, the formalisation of legal standards into rules, the growth of summary jurisdiction, the rise of imprisonment as the pre-eminent form

of punishment and a burgeoning of the number of criminal offences. On another level, and more significantly, a socio-historical analysis of the criminal trial opens the way for a *historicized* account that incorporates the principles and practices of criminal law, evidence and procedure that enmesh in the adjudicative process at particular junctures. This analysis is not merely a preliminary step towards a study of the current state of the law: rather, an historical methodology is necessary because it provides a way of approaching the criminal law as a historicised social practice. This critical perspective recognises contingencies in the criminal law, and, in the case of mental incapacity, opens the way for an account of both change and continuity in this part of the criminal law.

Given the nature of this project, I am interested in the SOLON network because of its commitment to combining the study of law, crime and history in a theoretically-informed and cross-disciplinary way. I am very pleased to be connected to SOLON, as a community of like-minded scholars, and strongly support its scholarly aims. I look forward to engaging with members of the network in relation to this and other projects.