Review

Mental State Defences in Criminal Law by Steven Yannoulidis Ashgate Publishing Ltd, Surrey, 2012, 228 pp (ISBN: 978-1-4094-4645-3)

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Despite the attention-grabbing subject matter of books such as this — mental incapacity and criminal law — monographs on this subject are far from common. This book concerns an area of law that is still under-researched in Australia, but which represents a significant social justice and human rights part of the legal order. The book makes a substantial contribution to the debate about law reform in this area of criminal law and, as this topic is, at the time of writing, before at least two law reform bodies in the common law world (NSW Law Reform Commission; Law Commission (UK)), its publication is both timely and welcome.

Mental incapacity is a technical area of criminal law and, with the exception of intoxication by alcohol or drugs, an accused with a mental incapacity — whether caused by mental disorder, cognitive impairment or brain injury — which affects him or her in the requisite way is not a common sight in criminal courtrooms. Nonetheless, mental incapacity enjoys foundational significance in criminal law. It refers to the cognitive, volitional and moral capacities that an individual accused is both assumed and required to possess. Legal principles and practices, like a criminal trial and criminal punishment, rest on these capacities, and a person with such capacities is regarded as responsible in criminal law.

The area of criminal law that concerns mental incapacity comprises a range of legal provisions. The best-known is the mental illness defence (referred to as the 'insanity defence', both historically and in this book). As is well known to law students throughout the common law world, the modern law of insanity can be traced to the trial of Daniel McNaughtan in London in 1843, and the eponymous *M'Naghten Rules* that arose from it and continue to inform the law on insanity in many jurisdictions. Automatism — a plea based on a claim that the criminal conduct was either involuntary or unconscious; archetypally, a reflex or spasm — is another part of the area of mental incapacity in criminal law, of more recent legal creation. Because both insanity and automatism represent defence responses to prosecution claims, they are generally referred to as 'defences'. While sometimes treated separately, insanity and automatism are closely connected (Loughnan 2012) and their inclusion side by side in this book, along with the author's close treatment of relevant case law on each, provides a solid foundation for the discussion Yannoulidis provides.

Mental State Defences in Criminal Law seeks to provide 'a consistent and principled approach to the reform of the insanity defence and the doctrine of automatism' (p 1). The author makes a case for including a volitional limb to *M'Naghten* insanity (ch 5), and advocates for the introduction of a new partial defence of 'impaired consciousness', to be

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available only to those accused of murder (ch 6), which he suggests would enhance the coherency of the criminal law. Indeed, coherency is the author's primary concern. Yannoulidis starts from the position that it is a 'requirement' that the criminal law on mental incapacity provides a 'consistent set of rules' for fact finders (p 3). This appeal to consistency appears to refer to internal consistency (within/to the law), but, as the arguments unfold, it becomes clear that the type of consistency advocated is consistency between the law and a rather opaque and undeveloped notion which seems to be made up of justice-cum-fairness and fidelity to expert medical norms (that is, consistency between the law and something else — an external consistency).

The first four chapters of the book provide descriptions of the current law (and also include some discussion of expert medical approaches to mental disorder, as they relate to legal practices of evaluation and adjudication). The author shows understanding of the relevant law across code and common law jurisdictions (as well as in England and Wales, Canada and the USA), which suggests the potential for the book to make a contribution to the broader legal policy debate around Australia and beyond its borders. But there are a number of points at which a more careful and considered approach to terms and concepts — normative and evaluative; automatism used descriptively and as a defence, for instance — would have assisted the reader and advanced the discussion. More generally, the arguments here are not new. For instance, the idea that concerns with disposal have driven the development of the law of insanity is well known (see, for example, Mackay 1995), and Yannoulidis' discussion does not advance the well-rehearsed and still intractable argument about the relevance (or irrelevance) of an individual's fault in bringing about his or her incapacitating condition for the law on insanity (see, for example, Mitchell 2003).

For this reader, the more interesting part of the book is that which advocates specific reforms to the criminal law. Yannoulidis provides detailed discussion of two reform proposals: as mentioned above, the reform of the insanity defence to include volitional impairment, and the introduction of a new partial defence of 'impaired consciousness'. I discuss each of these in turn.

The belief that the criminal law on insanity requires reform and, in particular, the belief that reform should ensure that volitional impairment (an impairment in an individual's ability to exercise control over conduct) caused by an internal factor falls within the scope of the insanity defence is familiar to scholars in the area (see, for instance, Yeo 2008). Indeed, as Yannoulidis notes (pp 134–6), a number of code jurisdictions include a volitional limb in their insanity defences. The 'cognitive bias' in the *M'Naghten Rules* has been much lamented for almost as long as those rules have existed. And, as Yannoulidis reveals in his discussion of pyromania, certain psychiatric conditions are characterised by problems with impulse control without cognitive impairment. Should the criminal law allow such conditions to exculpate individuals via the insanity defence? Yannoulidis answers this question in the affirmative. He claims that, because either absence (or impairment) of control or reason renders an individual 'not a fit subject of criminal law', the insanity defence — which distinguishes those who are not responsible from all defendants — *should* encompass both cognitive and volitional defects (p 65, emphasis added).

The basis for this claim — in fairness?; social protection?; 'consistency'?; principle? — is almost wholly unarticulated, aside from brief references to deterrence and the likely effectiveness of medical treatment (p 164). But showing that internally generated volitional impairment is not currently part of the law of insanity, on the one hand, and showing that, as a clinical matter, volitional impairment need not be associated with cognitive impairment, on the other, is not the same as showing *why* such involuntariness should be part of the law

of insanity (p 163). Without further and deeper analysis, Yannoulidis' claim is left exposed to a ready counter-claim: the problem of distinguishing between unresisted and irresistable impulses aside, why not rely on mitigation of sentence to deal with individuals who are charged with a criminal offence but suffer from pyromania, on the basis that the condition does not affect them in a way that is relevant to their criminal responsibility?

The second specific reform discussed in *Mental State Defences in Criminal Law* is the introduction of a new partial defence of 'impaired consciousness', to be available only to those accused of murder. Here, Yannoulidis seeks to carve out from within the category of volitional impairment or involuntariness a subset of claims to exculpation grounded in 'impaired consciousness'. This new defence would apply to individuals experiencing volitional impairment that does not arise from a 'disease of the mind', as per the *M'Naghten Rules*, but is 'sufficient' to mitigate his or her blameworthiness (p 200). One of the presuppositions of this discussion (pp 169–72) — that involuntariness is best understood as a defence, while, by contrast, voluntariness is an element of the offence — is familiar to criminal law scholars (see, for example, Robinson 1997). The other basis — that both control and consciousness are matters of degree — is taken by Yannoulidis to support the creation of a partial defence (reducing but not abrogating criminal responsibility/liability) to govern cases where a person accused of murder has 'substantial' difficulty controlling his or her conduct, and an 'ordinary person in like circumstances' would be similarly affected (p 195, and more generally, pp 194–201). According to the author's proposal, the fact-finder would be assisted by expert evidence when determining that the individual in fact experienced difficulty controlling his or her conduct (p 200). The need for such a defence — to ensure that not all claims of volitional impairment give rise to a denial of responsibility — is just briefly mentioned (p 201). But it is precisely this that needs defending: Why should 'impaired consciousness' partially excuse an individual? And why only an individual accused of murder? These questions are left unanswered here.

A number of interesting issues are raised in this book, and those who argue that a more thoroughgoing alliance with expert medical norms and practices will alleviate the ills of this area of criminal law will find things to like. But, at least for this reader, the discussions offered in the book left key questions unaddressed and, as a result, undermined the case made for the particular reforms to the criminal law outlined by the author. Yannoulidis correctly identifies some of the problems in this area, and explains one of the tensions — between fairness to the accused and protection of the community — animating the law, but it seems that the reform proposals laid out here require further development, and a more robust defence, before each can truly represent an attractive way forward for mental incapacity in criminal law.

Viewed in historical perspective, mental incapacity in criminal law is marked by the prominence of judicial decisions over legislation and by strong continuities over long periods of time. In recent years, however, in Australia and in other common law jurisdictions, mental incapacity in criminal law has been the focus of high-profile attention from law reform agencies and parliament-driven changes to the law. These changes to the law, and the recommendations made by various law reform agencies, are complex and varied. But, at base, each is attempting to get to grips with a fundamental issue: How can mentally incapacitated individuals be dealt with fairly and appropriately, bearing in mind that they are alleged to have committed a criminal offence? The discussion in this book addresses precisely this question and it is hoped it will stimulate further debate and discussion within law reform circles.

Cases

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