'Manifest Madness': Towards a New Understanding of the Insanity Defence

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This article introduces a new concept which can serve as a theoretical frame for understanding the way in which insanity is proved for the purposes of the criminal law. With reference to George Fletcher's concept of 'manifest criminality', it introduces the concept of 'manifest madness'. This concept constructs madness (a shorthand for the types of mental abnormality known to the criminal law as insanity) in criminal law as evident to lay observers, and its meanings, which are derived from collective knowledge of it, as encoded in the defendant's acts. Through an historical analysis of the way in which insanity has been proved in criminal law, the article argues that 'manifest madness' is useful for understanding how knowledge about insanity is structured in the criminal courtroom. The concept of 'manifest madness' provides a frame that incorporates evidentiary and procedural features of the insanity defence that have resisted systematic theoretical analysis.

INTRODUCTION

The insanity defence has existed in its current form since 1843. As is well known, under the *McNaughtan Rules*,[1] the insanity defence is available to a defendant who can prove that, at the time of his or her offence, he or she was suffering from a 'defect of reason', caused by a 'disease of the mind', rendering the defendant unable to understand the 'nature and quality' of his or her act or to know that it was wrong. In addition to the substantive content of the insanity defence, a particular set of rules of evidence and procedure attach to the defence. There are three particular rules of evidence attached to the insanity defence: the burden of proof (which lies on the defence – a reverse burden); the standard of proof (a persuasive or legal standard); and the relatively recent statutory requirement of expert medical evidence to support a claim to be insane for the purposes of the criminal law.[2] There are also three particular procedural rules attaching to the defence: it may be raised by the prosecution or the defence; the defence must go to the jury; and, if granted, it results in a 'special verdict' which brings with it a particular set of disposal options. Together, these six rules of evidence and procedure comprise the fact-finding context in which the insanity defence operates.

Despite the longevity of the insanity defence, it remains something of an oddity within the criminal law corpus. Given the technical construction of other mental incapacity defences, it is arguably the rules of evidence and procedure that

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1 See *R* v *McNaughtan* (1843) 10 Cl & F 200. I adopt the spelling of McNaughtan adopted by Richard Moran, for the reasons he gives: see R. Moran, *Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan* (New York: The Free Press, 1981) xi–xiii. For the *McNaughtan Rules*, see *ibid* 168–175.

2 *Criminal Procedure (Insanity and Unfitness to Plead) Act* 1991, s 5.

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attach to the insanity defence that mark it out from other criminal law defences. There are five unusual features of the way in which insanity is proved in the courtroom. First, the issue of a defendant's insanity may be raised by the prosecution as well as by the defence. Secondly, a claim to the insanity defence requires expert medical evidence to support it. Thirdly, the insanity defence is the only common law defence for which the defence bears a legal burden of proof. Fourthly, while judges are able to accept pleas in every other type of criminal proceeding, the insanity defence must go to the jury. Finally, the 'special verdict' is the sole alternative to a general verdict of 'guilty' or 'not guilty'. These evidential and procedural features of the insanity defence have meant that it is classed as aberrant within the law of criminal evidence and procedure. As Lord Sankey stated in *Woolmington* v *DPP*, *McNaughtan* 'stands by itself . . . it is quite exceptional'.[3]

The 'exceptional' status of the evidentiary and procedural rules attaching to the insanity defence has blunted any attempt to account systematically for these rules. The label 'exceptional' often suffices for an explanation in itself, as it seemed to do in *Woolmington*. For example, the most frequent comment on the reverse burden of proof for insanity is that, in the words of one commentator, it is an 'exceptional historical accident'.[4] On this basis, the peculiar nature of the *McNaughtan Rules* bears the blame for the evidentiary and procedural rules attached to insanity as well as the substantive construction of the defence. As is well known, the *McNaughtan Rules* were formulated in response to the questions put to the judges of the Queen's Bench by the House of Lords after Daniel McNaughtan was acquitted of the murder of the Prime Minister's Private Secretary, Edward Drummond. The *Rules* represent the current law on insanity. As the outcome of a political process, rather than the trial decision itself, the *McNaughtan Rules* are indeed unique. However, labeling the evidentiary and procedural rules attached to the insanity defence 'exceptional' is unsatisfactory because it leaves the question of why they are exceptional unanswered. Why were the *McNaughtan Rules* on proving insanity framed as they were? Why have these rules remained almost unaltered since 1843?

Some judges and commentators have attempted to articulate accounts of the rules of evidence and procedure attaching to the insanity defence that go beyond references to historical accidents. In these accounts, the rules relating to the insanity defence have been interpreted as a necessary but limited derogation from more generally applicable rules comprising the law of criminal evidence and procedure. Such a limited derogation from general principles is defended on one or other of two grounds. One defence rests on the particular nature of the insanity defence. An example of this type of defence is provided by Stephen Morse. In relation to the reverse burden of proof, Morse argues that a defendant pleading insanity is making a claim that is 'rarely justified'.[5] According to Morse, a reverse burden is appropriate because it minimizes 'the risk of success of insanity defenses in questionable cases' and at the same time permits 'the defense to succeed in the few cases in which it is morally proper'.[6] The second type of defence for the rules

3 *Woolmington* v *DPP* [1935] All ER Rep 1, 5.
4 P. Roberts, 'Taking the Burden of Proof Seriously' [1995] Crim LR 783, 789.
5 S. Morse, 'Excusing the Crazy: The Insanity Defence Reconsidered' (1985) 58 S Cal LR 777, 824.
6 *ibid* 824.

of evidence and procedure attaching to the insanity defence rests on the nature of the defendant pleading insanity. An example of this type of justification is provided by the House of Lords decision in *Bratty* v *Attorney-General for Northern Ireland*.[7] In *Bratty*, Lord Denning stated that, like defence counsel, the prosecution is entitled to raise the issue of the defendant's insanity.[8] His Lordship opined that it is the duty of the prosecution to raise the defence 'rather than allow a dangerous person to be at large'.[9] In this comment, the nature of the defendant – his or her dangerousness – justifies the legal position whereby the prosecution can raise an issue that would otherwise be within the purview of the defence.

These accounts of the evidentiary and procedural aspects of the insanity defence go beyond merely labeling (and discounting) the rules as 'exceptional'. They offer plausible justifications for derogating from more generally applicable rules of evidence and procedure in the case of potentially insane defendants. However, these accounts are problematic. The claim that the procedural and evidentiary aspects of the insanity defence may be defended as a necessary derogation from more generally applicable rules is unattractive: it suffers from being piecemeal, consequentialist and ahistorical. The accounts surveyed here inevitably focus on one or other procedural or evidentiary aspect of the insanity defence, and this limits their explanatory potential. In addition, these accounts are often grounded in a policy-based concern with dangerous defendants. Although this concern is never far from insanity defence cases or commentary, such a concern does not in and of itself offer a theoretically coherent explanation for the rules attached to the insanity defence. Further, these accounts ignore the particular historical contexts in which the rules of evidence and procedure arose. These contexts are an essential component of a nuanced account of the way in which insanity has been and is proved in the criminal courtroom. For these reasons, existing accounts are inadequate for the task of accounting systematically for the evidentiary and procedural rules attached to the insanity defence.

This article proposes a new concept, 'manifest madness', which can provide a theoretical frame for understanding the rules of evidence and procedure attaching to the insanity defence. The concept of 'manifest madness' draws on the conceptual structure for criminal liability that George Fletcher called 'manifest criminality'.[10] This article argues that 'madness' is amenable to a similar analysis as criminality and that 'manifest madness' is a useful concept for understanding the way in which insanity has been proved historically and the way in which it is proved in the current era. By the term 'manifest madness', I mean that 'madness' (used advisedly as a shorthand for the forms of mental abnormality known to the criminal law as insanity) is constructed in the criminal process as intelligible to lay or non-expert observers, and that its meanings, which arise from collective knowledge of it, are encoded in a defendant's acts. In introducing the concept of 'manifest madness', I am not attempting to provide an account of the content of lay knowledge about madness, either historically or in the current era. This would

7 *Bratty* v *Attorney-General for Northern Ireland* [1963] AC 386.
8 *ibid* 411.
9 *ibid.*
10 G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000) 88–90.

be a different, more sociological project. My more circumscribed aim in this article relates to form rather than content, as I seek to make the case for the utility of the concept of 'manifest madness' in understanding how knowledge about madness is structured for the purposes of the criminal law.

'MANIFEST MADNESS' IN THE ERA OF 'MANIFEST CRIMINALITY'

In his landmark text, *Rethinking Criminal Law*, George Fletcher identifies three conceptual structures or 'patterns of criminality' that he suggests account for the core content of criminal law. The value of these abstract patterns is their explanatory power.[11] 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.[12] According to Fletcher, together, the three patterns of criminality 'generate an interpretive mode for understanding commonalities and contrasts among a wide variety of offenses'.[13] Fletcher's three 'patterns of criminality' are 'manifest criminality', 'subjective criminality' and harmful consequences. Under the pattern of 'manifest criminality', which was dominant up until the end of the eighteenth century, the case for criminal liability starts with an 'objective standard', 'the manifestly criminal act'.[14] This means that the act manifests the actor's criminal purpose and 'typically constitutes an unnerving threat to the order of community life'.[15] By contrast, under the 'subjective criminality' pattern, 'the actor's intent is the central question in assessing liability'.[16] This means that the act is of secondary importance: it is seen as a demonstration of the *firmness*, rather than the *content*, of the actor's resolve.[17] The focus of the court's inquiry into liability under the pattern of 'subjective criminality' is on the intent behind the act. Under the harmful consequences 'pattern of liability', liability is based on an 'objective attribution' of a harmful event to a responsible person and is thus 'conceptually independent' of a human action.[18] According to Fletcher, these three patterns of criminality provide a means for understanding the content of criminal prohibitions and a way of understanding changes in the way in which the law has criminalised behaviour over the centuries.[19]

'Manifest criminality'

It is possible to tease out three interrelated elements that constitute 'manifest criminality' as a pattern of criminality. The first constitutive element of 'manifest

11 *ibid* 121.
12 *ibid* xxii.
13 *ibid* 60.
14 *ibid* 61, 89.
15 *ibid* 388.
16 *ibid* 89.
17 *ibid* 120.
18 *ibid* 389.
19 *ibid*. For an assessment of the contemporary relevance of Fletcher's conceptual structure, see D. Husak, 'Crimes Outside the Core – Symposium: Twenty-Five Years of George Fletcher's Rethinking Criminal Law' (2004) 39 Tulsa LR 755.

criminality' is that criminality is reflected in an individual's act. In Fletcher's words, under 'manifest criminality', the commission of the crime is 'objectively discernable at the time that it occurs'.[20] This 'objective standard' means that it is the individual's act, rather than his or her intent, that is the focus of the analysis of liability.[21] It is the act that contains the danger to society, rather than 'the intent to violate a protected interest', as under 'subjective criminality'.[22] Therefore, under 'manifest criminality', intent is a 'subsidiary issue' – the defendant's act is of primary importance.[23] However, the criminal act is not merely a means for inferring intent. On the contrary, intent is not conceptually independent from its external manifestation. Thus, as Fletcher writes, the issue is not how to prove intent, 'but whether appearances were a reliable guide to reality'.[24] Further, under 'manifest criminality', while the 'external facts are typically incriminating', the subjective facts are exculpatory.[25] Thus, when 'manifest criminality' is the dominant pattern of liability, the criminal trial is exculpatory rather than inculpatory. This makes sense in the context of how the criminal trial process in England operated up until the eighteenth century. At this time, the English criminal trial involved what John Langbein has referred to as 'large numbers of hopeless cases of persons manifestly guilty'.[26] Thus, the criminal trial was largely an exculpatory one, whereby the defendant's responsibility was assumed.[27] Such a trial process meant that 'if any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved . . . but that if he were innocent he ought to be able to demonstrate it for the jury'.[28]

The second constitutive element of 'manifest criminality' is that criminal behaviour is discernable by neutral observers or third parties.[29] Under 'manifest criminality', the criminal nature of certain behaviour is readily intelligible as such to ordinary people. An illustration of liability under 'manifest criminality' is provided by the development of the law of larceny, which Fletcher examines in detail. When criminal liability is structured according to 'manifest criminality', 'thieves could be seen thieving; they could be caught in the act'.[30] Again, this makes sense in the context of the development of the criminal law. In the early modern period, which might be thought of as the genesis of 'manifest criminality', the criminal trial was gradually replacing 'lynch justice', whereby someone caught 'redhanded' was executed summarily.[31] Even if the defendant was not 'caught in the act', 'the act of thieving had to manifest a form of behaviour that could readily be identified as thieving'.[32] The ready intelligibility of criminality

20 n 10 above, 115–116.
21 *ibid* 117.
22 *ibid* 121.
23 *ibid* 86.
24 *ibid* 85–86.
25 *ibid* 88–89.
26 J. H. Langbein, *The Origins of the Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) 57.
27 N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 MLR 361, 369.
28 J. M. Beattie, *Crime and the Courts in England 1660–1800* (Oxford: Clarendon Press 1986) 341.
29 *ibid* 88.
30 *ibid* 80.
31 n 27 above, 65.
32 n 10 above, 81.

under conditions of 'manifest criminality' meant that no 'special knowledge about the offender's intention' was required to identify criminal behaviour.[33]

The third constitutive element of 'manifest criminality' is that, under this pattern, crime is something of a natural category. As Fletcher writes, under 'manifest criminality', crime is 'incorporated into our language as well as our legal judgments'.[34] Thus, under this pattern of liability, crime is not a category that is imposed on the community; rather, 'the crime itself crystallizes as a product of community experience'.[35] Under 'manifest criminality', the 'objective' legal meaning of a defendant's actions, which is at the centre of the criminal trial process, is derived from its wider social meaning. In Fletcher's words, under 'manifest criminality', whether certain behaviour is criminal turns on the 'conventional acceptability of the behaviour under the circumstances'.[36] In explaining how this worked in relation to the law of larceny, Fletcher states that 'the contours of what we perceive to be larceny spring from a shared experience with thieves', 'a shared image of the way thieves act'.[37] In this aspect of 'manifest criminality', Fletcher's emphasis on the social character of the category of crime means that collective knowledge underpins and informs it. Again, Fletcher's analysis makes sense in relation to the development of the criminal legal process. As Lacey has written in relation to the eighteenth century, the English criminal process utilised 'local knowledge which mapped onto widely accepted judgments about criminality' in the task of determining liability.[38]

'Manifest criminality' is not the most prominent pattern of liability in the contemporary criminal law. Fletcher argues that 'manifest criminality' was the dominant 'pattern of criminality' until the late eighteenth century.[39] From the nineteenth century onwards, 'subjective criminality' and the harmful consequences pattern of liability have been in ascendancy. However, Fletcher argues that 'manifest criminality' continues to inform the current law in some offences, such as burglary, attempts and possession offences.[40] My argument here is that, in addition, through a similar concept, 'manifest madness', Fletcher's analysis is useful in the task of analyzing the law of evidence and procedure relating to the insanity defence. This argument requires two preliminary moves, which modify Fletcher's theory: the first move is from the substance of the criminal law to the law of evidence and procedure and the second move is from criminal offences to criminal defences.

The first move – from the doctrine or substance of the criminal law to the law of evidence and procedure – turns out to be more apparent than real. Under the pattern of 'manifest criminality', there is an inextricable link between the substantive law and the law of evidence: Fletcher's concept of 'manifest criminality' implicates the law of evidence and procedure because 'manifest criminality'

33 *ibid* 116.
34 *ibid.*
35 *ibid.*
36 *ibid* 83.
37 *ibid* 116.
38 n 27 above, 265.
39 n 10 above, 61.
40 *ibid* 88.

applies to *how* issues are proved in the courtroom as well as to the content of *what* is to be proved. As Fletcher wrote in relation to the law of larceny, under the pattern of 'manifest criminality', the link between the 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'.[41] 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.[42] 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'.[43] Thus, under 'manifest criminality', where the act establishes the content of the defendant's intent, it is not possible to separate the evidentiary and substantive components of criminal liability. By contrast, under 'subjective criminality', a variety of means other than a manifest act may be used to prove intent because, as noted above, the act demonstrates 'the *firmness* of the actor's resolve', rather than the content of his or her intent.[44] 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 is not applicable under a pattern of 'manifest criminality'. The evidentiary and procedural aspect of the concept of 'manifest criminality' suggests that an inquiry into the relevance of a similarly structured concept for the current law of evidence and procedure is warranted and, further, likely to be fruitful.

The second move – from criminal offences to criminal defences – is a real move and requires some explanation. 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.[45] Extrapolating from the grounds on which actors were inculpated by the criminal law to the grounds on which they may be exculpated might seem to be a radical departure from Fletcher's conceptual structure. However, such a move can be justified on two grounds. First, on a conceptual level, a pattern of liability like 'manifest criminality' is also, by necessity, a pattern of non-liability, in that the absence of conditions of 'manifest criminality' characterised non-liability. Secondly, on an empirical level, a consideration of the bases on which defendants may be held not liable (criminal defences) is central to a study of criminal liability because of the way in which criminal law principles and practices have developed historically. In the era of the exculpatory criminal trial, the nascent development of general principles of liability focused on defences to criminal charges. As Lacey has argued, up to and including the eighteenth century, individual defendants were assumed to be accountable for their actions, unless exceptional factors such as insanity existed.[46] Thus, early discussions about the necessary conditions for criminal liability were

41 n 10 above 85.
42 *ibid.*
43 *ibid.*
44 *ibid* 120.
45 *ibid* 121.
46 N. Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 J Political Philosophy 249, 256.

generated in cases where those conditions appeared to be absent (as with defendants pleading insanity or self defence). This means that criminal defences, even more than criminal offences, have been an important site for the development of doctrines of liability.

In modifying Fletcher's concept of 'manifest criminality' to develop a concept of 'manifest madness', I might be criticised for using Fletcher's theory against Fletcher himself. As I discuss below, Fletcher has accounted for the evidentiary and procedural rules attached to the insanity defence via the origins of the criminal law in the principles and practices of private law adjudication. However, as Fletcher himself notes, the interesting issue is why the insanity defence continues to reflect those origins, having been left out of the changes that have taken place within the criminal law in recent decades.[47] I acknowledge that 'manifest madness' takes 'manifest criminality' in a new direction. I make an argument in favour of the concept of 'manifest madness' on the basis that this new direction demonstrates the utility and versatility of Fletcher's concept of 'manifest criminality' as an explanatory framework for the criminal law.

'Manifest madness'

'Madness' is amenable to a similar analysis to that given to criminality under Fletcher's conceptual structure of 'manifest criminality'. The era in which criminal liability was characterised by the pattern of 'manifest criminality', up until the end of the eighteenth century, may also be regarded as an era of 'manifest madness'. With the three constitutive elements of 'manifest criminality' in mind, I outline the concept of 'manifest madness' and seek to demonstrate that, like criminality, 'madness' for criminal law purposes was 'manifest' in this era.

The first element of 'manifest criminality' identified above is that the focus of the court's inquiry is on the act that constitutes the criminal offence, rather than the actor or his or her intent. In the era of 'manifest criminality', madness was similarly considered to be manifest in acts. Historians of the early modern period argue that, to use Roy Porter's words, this was an era in which 'madness is as madness does'.[48] This meant that the social judgment that an individual was 'mad' was made not by deducing his or her internal mental processes from his or her acts but on the basis that those acts constituted a mad condition. As Porter puts it, 'there were indeed inner as well as outer truths, but outward signs encoded inner realities'.[49] When a 'mad' individual was charged with a criminal offence, the meaning of his or her behaviour was also read off his or her acts. As Dana Rabin has argued, a defendant's 'personal appearance, demeanor, and history of peculiar behaviour served as evidence of his or her mental state'.[50] Rabin's use of the word 'evidence' here should be narrowly construed to refer to the task of proving a

47 G. Fletcher, 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases' (1968) 77 Yale LJ 880, 919.

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

49 *ibid*.

50 D. Rabin, *Identity, Crime and Legal Responsibility in Eighteenth Century England* (London: Palgrave MacMillan, 2004) 43.

question of fact in court. Like criminality under 'manifest criminality', the externality of the insane behaviour was not a proxy for internal, mental abnormalities – it constituted those states.

The construction of madness as constituted in acts is usefully revealed in the records of criminal trials incorporated into the *Old Bailey Proceedings*. The *Old Bailey Proceedings* include records of a significant number of the trials that took place at the Old Bailey Criminal Court in London from 1674 to 1834.[51] One example of proceedings involving an insane defendant is provided by the trial of Francis Brereton.[52] Brereton was charged with killing a servant. The record of the proceedings states that several people gave evidence that Brereton 'had been a person abstracted and much discomposed in his mind for some time before' and continues:

> 12 or 14 Witnesses appeared for him upon this account, as also a Minister and Doctor of Physick, whose whole business lies among Persons Distracted, they related several Stories of him to satisfy the jury and the Court, whereby it might appear that he was subject to Frensies and Deliriums, the Tryal held a great while, and the Jury taking all-into Consideration, brought him in not Guilty.[53]

It was Brereton's 'Frensies and Deliriums' that marked him out as mad. This extract suggests that the key question for lay witnesses observing an insane defendant was, in Porter's words, 'did the accused habitually behave like a lunatic?'[54] Thus, the emphasis in fact-finding was not just on the insane defendant's behaviour as a matter of form but on this behaviour as a matter of form and content conjoined – a defendant's insane behaviour constituted his or her insanity. The significance of a defendant's acts in this substantive sense is ongoing, having been built into the rules of evidence and procedure which currently govern the way in which madness is proved in criminal trials.

The second element of 'manifest criminality' that I identified above was that criminal acts were regarded as intelligible to a particular group: neutral observers. Similarly, under 'manifest madness', in part because it was perceived to be constituted in acts, madness could be detected by ordinary members of the community. Madness was considered readily intelligible to people without expert knowledge, who, observing others' behaviour, could be confident about their ability to know madness when they saw it. In Roy Porter's words, 'talking about madness – even talking *authoritatively* about it – was not traditionally the preserve of any profession'.[55] Fletcher himself notes that lunacy (his term) was 'treated as a condition discernible to the untrained eye'.[56] Because madness was evident to the 'untrained

51 The *Old Bailey Proceedings*, a digitised selection of the *Old Bailey Sessions Papers*, are available online at http://www.oldbaileyonline.org (visited 8 December 2006). For a useful introduction to the *Old Bailey Session Papers*, see J. Eigen, 'Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials' (1999) 33 *Law and Society Rev* 425 and Langbein, n 33 above, 180–190.

52 *Francis Brereton*, 25 April 1688, OBP Ref t16880425–28.

53 *ibid.*

54 n 48 above, 38.

55 *ibid* 18.

56 n 10 above, 838.

eye', it was something that was intelligible to jurors, who were charged with judging whether an individual appearing in court was insane. In addition, evidence of 'manifest distraction' could be provided by lay witnesses, such as a defendant's neighbours, associates and relatives.[57] An example is provided by the trial of Thomas Draper for theft and burglary.[58] The trial record states:

> The prisoner instead of making his Defence, shewed such distracted Gestures as made it evidently appear he was not in his right Senses; to prove which several Persons appear'd, and gave such an Account of his Behaviour when he was first taken, and afterwards during the Time of his Confinement, as left it undisputable to the Jury, that he was Non compos mentis, and accordingly they brought in their Verdict, that the Prisoner was a Lunatick.

As in the trial of Francis Brereton, cited above, Thomas Draper's trial record indicates that lay people were considered competent both to testify to the individual's mad condition ('several Persons appear'd) and to assess the legal meaning of that condition ('that the Prisoner was a Lunatick', that is, not guilty because he was *non compos mentis*). This latter competency of lay jurors remains in the current era, having survived the challenge posed by the rise of the psychiatric profession in the nineteenth century.

The third constitutive element of 'manifest criminality' I identified above is that, under this pattern of liability, crime is something of a natural category, arising from community experience rather than imposed externally. For Fletcher, under 'manifest criminality', there is a 'natural connection' between a legal concept of criminality and community experience of criminal behaviour.[59] I qualify my reliance on this element of 'manifest criminality' for the purposes of the concept of 'manifest madness' in two respects. First, my own preference is to regard the relationship between social and legal meanings of behaviour under 'manifest criminality' as a *naturalised* connection, recognizing the socially constructed character of both criminality and madness. Secondly, given the contingency of the category of 'experience', I focus on what underlies Fletcher's reference to 'community experience' – a certain type of knowledge – rather than on that somewhat rarefied phenomenon itself. As Fletcher writes in relation to the law of larceny, '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'.[60] Here, Fletcher's idea of 'general knowledge' seems to amount to perfect knowledge but, as Fletcher himself emphasised the 'shared paradigms' through which criminal acts were perceived as such,[61] it seems more accurate to regard this type of knowledge as collective. Collective knowledge about madness has been and continues to be important in the fact-finding context of the criminal trial.

57 n 48 above, 38.
58 *Thomas Draper*, 17 May 1727, OBP Ref t17270517–12.
59 n 10 above, 116.
60 *ibid* 82–83.
61 *ibid* 82.

Having qualified the relevance of the third constitutive element of 'manifest criminality' for the concept of 'manifest madness', I suggest that, up until the end of the eighteenth century, 'madness' for the purposes of the criminal law was a similarly naturalised category, as courtroom judgments of 'madness' reflected collective knowledge of it. In this era, knowledge about madness was 'entrenched within a common cultural consciousness'.[62] A variety of forms of madness were familiar to members of communities in the early modern era and legal judgments of insane defendants were built on these forms of madness which existed in social discourse. The *Old Bailey Proceedings* from the seventeenth and eighteenth centuries are replete with references to the 'delusions', 'distraction', 'oddness', 'confusion', and 'phrensies' of defendants who claimed to be *non compos mentis*. In this era, claims to exculpation based on insanity may be thought of as 'informal pleas', to borrow Rabin's term.[63] In the absence of formal defence doctrines, and without a body of rules of evidence and procedure to structure the fact-finding process, brief references to abnormal mental states were designed to tap into a collective knowledge about insanity. It was this collective knowledge of madness that structured the way in which judgments about insane defendants that were made in the courtroom.

The concept of 'manifest madness', encompassing three elements – the substantive importance of a defendant's acts, its intelligibility to lay people and its naturalised character – seems to provide a useful theoretical structure for understanding how madness was proved in the courtroom up to the end of the eighteenth century. In the criminal courtroom, with the aid of evidence about a defendant's acts given by his or her acquaintances, the veracity of a defendant's claims to insanity could be readily assessed by judge and jury. In addition, the concept of 'manifest madness' is useful in understanding the way in which madness has been proved in the period since the end of the eighteenth century. It is to this that I now turn.

'MANIFEST MADNESS' AFTER 'MANIFEST CRIMINALITY'

'Manifest criminality' ceased to be the dominant 'pattern of criminality' around the end of the eighteenth century.[64] Since then, 'subjective criminality' and the harmful consequences patterns of liability have risen to prominence. As mentioned above, according to the pattern of harmful consequences, the law adopts a 'result-oriented mode of analysing liability.[65] According to the pattern of 'subjective criminality', 'the core of criminal conduct is the intention to violate a legally protected interest'.[66] In the current era, the significance of this latter pattern is such that the paradigm case of *mens rea* is widely considered to be a subjective mental state.[67] The rise of these patterns of liability has been accompanied by major changes in the

62 n 48 above, 19.
63 n 50 above, 11.
64 n 10 above, 61.
65 *ibid* 476.
66 *ibid* 118.
67 For a critical discussion, see Lacey, above n 27.

criminal trial process. At the institutional level, changes have included the 'lawyerization'[68] of the criminal trial, the professionalisation of prosecution and defence, and the demise of capital punishment. On the procedural level, the fact-finding process has come to be structured by a body of rules of evidence governing burdens and standards of proof and admissibility of evidence, among other matters. These institutional and procedural changes are part of a significantly altered criminal field, expanded by a burgeoning of criminal offences. Together, these developments render the current criminal trial process radically different from that of the 1700s.

In addition, in relation to the way in which insanity is proved in the courtroom in particular, in the nineteenth and twentieth centuries, the rise of expert knowledges about insanity might be thought to have fundamentally altered the way in which madness is proved for the purposes of the criminal trial. Expert knowledge about insanity would seem to pose a challenge to all three elements of 'manifest madness' – the substantive importance of a defendants' acts, its intelligibility to lay observers and its naturalised character. The expert knowledge about insanity encompassed bureaucratic, medical, psychiatric and psychological knowledge about 'madness'. Importantly, however, this knowledge did not develop in isolation: rather, it developed out of lay or collective knowledge about madness. As Porter has argued about expert psychiatric knowledge, it emerged on the back of 'natural beliefs' about madness that were entrenched in common culture.[69] Nonetheless, as Fletcher notes, the development of scientific knowledge about insanity removed ordinary people's confidence about identifying a defendant as insane for the purposes of the criminal law.[70] However, the process by which science and medicine came to cover the field of legal insanity was, in Roger Smith's words, 'neither smooth nor complete'.[71] I suggest that the rise of expert knowledge about insanity did not sound the knell for 'manifest madness'. Even as expert knowledge about insanity came to define and classify it in a way that separated it from community beliefs, and to construct it as something hidden from the lay observer, intelligible only to those with certain positions and experience, the elements of 'manifest madness' may still be detected in the law of evidence and procedure attached to the insanity defence.

In this part, I discuss each of the six evidentiary and procedural aspects of the insanity defence, in the order in which they are arise in a criminal trial, and make the case that each one supports the utility of the concept of 'manifest madness'.

Raising insanity

In a trial involving a potentially insane defendant, the first unusual procedural feature is the way in which insanity is raised: the issue of the defendant's insanity may be raised by either the defence or the prosecution. The original position at

68 See Langbein, above n 24, 145.
69 n 48 above, 33.
70 n 10 above, 839.
71 R. Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh: Edinburgh University Press, 1981) 81.

common law was that only the defence could raise insanity. As an early Court of Criminal Appeal decision confirmed, the prosecution could place evidence at the disposal of the defence to use if they chose.[72] The origins of the procedural rule that insanity could only be raised by the defence are obscure. I suggest that the origins of this rule might lie in the time when courts adopted a practice of acquitting insane defendants. This practice featured in the medieval period.[73] In the seventeenth and eighteenth centuries, judges retained discretion to acquit insane defendants.[74] As an acquittal followed from a successful claim of insanity, it would only have been in the interests of the defence to raise the issue. Even after 1800, when a successful plea of insanity resulted in detention 'until his Majesty's pleasure shall be known',[75] the relatively late entry of prosecution and defence counsel into the criminal courtroom and the resulting late development of rules of evidence and procedure may have ensured the practice of the defence raising insanity remained.[76]

In the mid twentieth century, the rule that only the defence could raise insanity was reinterpreted retrospectively. In *Bratty* v *Attorney-General for Northern Ireland*,[77] the House of Lords held that, if the defendant adduces evidence of mental disorder to deny the requisite *mens rea* for an offence, the prosecution may adduce evidence in order to secure a special verdict rather than an acquittal. Lord Denning stated that 'the old notion that only the defence can raise a defence of insanity is now gone'.[78] Lord Denning relied on the clause in the *Trial of Lunatics Act* 1883, which refers to instances in which insanity 'is given in evidence' and does not stipulate that only the defence can give such evidence.[79] If the prosecution raises the issue of the defendant's insanity, it bears the burden of proving insanity beyond all reasonable doubt.[80] As a result of the decision in *Bratty*, it also seems possible that the judge may direct the jury on the issue of insanity even if it has not been raised by the defence or the prosecution. Lord Denning cited with approval the decision of *Kemp*, in which Devlin J stated that judges are entitled to raise insanity of their own accord.[81] After the decision in *Bratty* was handed down, the Lords' interpretation of the procedural rule about raising insanity received statutory endorsement in the *Criminal Procedure (Insanity) Act* 1964. The Act provides that where, in a trial for murder, the defendant raises either a defence of insanity or diminished responsibility, 'the court shall allow the prosecution to adduce or elicit evidence tending to prove the other of those contentions'.[82]

The procedural rule that the prosecution as well as the defence (and potentially the judge) can raise the issue of insanity has attracted little notice among legal practitioners and commentators. It might readily be interpreted as a device to

72 *Smith* (1910) 6 Cr App R 19.
73 N. Walker, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) 42.
74 *ibid.*
75 *Criminal Lunatics Act* 1800 39 & 40 Geo III c 94.
76 On the appearance of counsel in criminal trials, see generally Langbein, above n 24.
77 *Bratty* v *Attorney General for Northern Ireland* [1963] AC 386 at 411–12.
78 *ibid* 411.
79 *ibid* 411–412.
80 *Podola* [1960] 1 QB 325; *Grant* [1960] Crim LR 424.
81 *R* v *Kemp* [1957] 1 QB 399, cited with approval in *Bratty* 412.
82 *Criminal Procedure* (*Insanity*) *Act* 1964, s 6.

ensure that potentially dangerous defendants are not granted ordinary acquittals on the grounds that they did not form the requisite *mens rea* due to mental abnormality. On this interpretation, the rule seems to suggest that all parties have an interest in signaling the presence of an insane defendant in the courtroom, and in avoiding the general verdict (an acquittal or conviction) that would otherwise follow. Beyond the practical concern with potentially dangerous defendants, raising the issue of insanity so as to divert certain defendants away from a general verdict and into the special verdict arguably preserves the legitimacy of the task of ascribing criminal responsibility by excluding those individuals who do not belong in the criminal justice system because they are non-responsible. Explanations based on either potentially dangerous defendants or the legitimacy of the process of ascribing responsibility, are plausible. Reflecting the symbolic importance of the defence in the criminal law, each of these explanations elevates insanity from the position of a discrete defence to the status of a foundational precept.

In addition, I argue that the procedural rule that evidence of insanity can be raised by either the prosecution or the defence (and possibly the judge) may be understood via the concept of 'manifest madness'. As discussed above, according to the concept of 'manifest madness', madness for the purposes of the criminal law is intelligibility to lay observers, naturalised along the lines of collective knowledge of it, and substantially encoded in a defendants' acts. The procedural rule about raising insanity both assumes and requires that if a defendant may be insane for legal purposes then all parties in the courtroom are able to recognise this. This in turn requires that insanity be in some way manifest to lay people as prosecution and defence counsel, as well as the judge, are lay in the sense that they have a non-expert knowledge of madness. It is these individuals who, taking into account the particulars of a specific offence and defendant, raise the issue of a defendant's insanity. This approach to the procedural rule about raising insanity helps to understand not only how we might account for the rule, but also how it operates. With its premise of 'manifest madness', the procedural rule that insanity can be raised by the prosecution as well as the defence (and potentially the judge), provides support for the argument that this concept provides a useful frame for understanding the way in which insanity is proved in the courtroom.

Expert evidence about insanity

Once insanity has been raised, it must be proved to the satisfaction of the court. In insanity trials taking place in the current era, this usually involves expert evidence from psychiatrists and psychologists and perhaps other medical professionals. Expert medical evidence gradually became a common feature of insanity trials over the course of the nineteenth and twentieth centuries although, as the trial of Francis Brereton cited above demonstrates, there are examples of its use before this period. There is, however, no requirement at common law that medical evidence be adduced in relation to a plea of insanity. The authority for this rule is the Court of Criminal Appeal decision of *North*.[83] *North* does not reveal the basis on

83 *R* v *North* (1937) 1 *Criminal Law Journal* 84.

which the Court confirmed that there was no requirement that medical evidence be adduced in support of an insanity defence. Rather, the *North* decision turned on whether it was permissible for a judge to withdraw the defence of insanity from a jury where no argument about the *McNaughtan* criteria had been made (defence counsel had argued that the defence should have been left to the jury on the basis that the defendant's insanity could be inferred from the circumstances of the crime itself). The Court of Criminal Appeal concluded that withdrawing the defence was properly within the province of the judge.[84] The decision in *North* is evidence of the development of procedural rules around the insanity defence, and thus of the formalisation of the defence that has taken place since the *McNaughtan* decision. However, *North* does not explain the specific issue of the absence of a requirement of expert evidence.

As with the issue of how insanity is raised in the criminal courtroom, historical and critical commentary on the insanity defence has not attempted to account for the absence of a common law requirement of expert medical evidence. The absence of such a requirement at common law might be interpreted as the product of judicial aversion to medical testimony. An argument along these lines would hold that judges have been concerned to protect what Tony Ward has called the 'cognitive sovereignty' of the jury over the definition of insanity.[85] However, as Ward and others have noted, medical experts would not have been able to enter the criminal courtroom from the nineteenth century onwards without judicial sanction.[86] An alternative to the judicial aversion explanation for the absence of a requirement of expert medical evidence lies in the concept of 'manifest madness'. The absence of a requirement of expert evidence indicates that the lay or non-expert knowledge of the jury has been regarded as at least formally and arguably substantively sufficient for the purposes of adjudicating claims to the insanity defence. At the level of the structural co-ordination of knowledge about insanity, this represents a reliance on the ability of jurors to know madness when they see it.

Relatively recently, the common law position on expert medical evidence has been altered by statute. The *Criminal Procedure (Insanity and Unfitness to Plead) Act* 1991 introduced a requirement that no jury is entitled to find insanity without evidence from two or more registered medical practitioners. Section 1(1) of that Act requires 'written or oral evidence of two or more registered medical practitioners at least one of whom is duly certified' before the jury may deliver a special verdict.[87] Parliamentary discussion at the time the 1991 Act was introduced sheds little light on the legislative motivation for the evidence provision. Parliamentary discussion of the Bill indicates that the provision seemed to be uncontroversial. The private member who proposed the Bill stated that Section 1 was an 'important' component of the Bill which gave 'statutory backing to the *McNaughtan*

84 *ibid* 80.

85 T. Ward, 'A Terrible Responsibility: Murder and the Insanity Defence in England 1908–1939' (2002) 25 *International Journal of Law and Psychiatry* 361, 367.

86 T. Ward, 'Observers, Advisors or Authorities? Experts, Juries and Criminal Responsibility in Historical Perspective' (2001) 12 *Journal of Forensic Psychiatry* 105, 110.

87 This requirement had been suggested by the Butler Committee: see *Report of the Committee on Mentally Abnormal Offenders* Cmnd 6244 (1975), para 18.37.

Rules'.[88] Given that the Bill left the substantive insanity defence unaltered, and the fact that the *McNaughtan Rules* do not require expert medical evidence, it is hard to see how this is the case. Section 1(1) has attracted some attention from commentators, who have offered different explanations for its inclusion in the 1991 Act. These explanations include that it was introduced in order to (a) promote consistency between the criminal law and the civil law;[89] (b) alleviate judicial anxiety about 'the corrupt and/or unreliable medical expert';[90] or (c) satisfy the *European Convention on Human Rights*.[91] Each of these explanations seems plausible and, taken together, they provide a persuasive account of the introduction of the expert evidence requirement.

The expert evidence requirement contained in the *Criminal Procedure (Insanity and Unfitness to Plead) Act* 1991 seems to be a counterpoint to my argument about 'manifest madness'. However, it is not necessarily fatal to the argument made in this article. There are two bases for the continued relevance of the concept of 'manifest madness'. The first basis relates to the timing of the legislative provision: the statutory evidence requirement comes very late on in the development of the law on evidence and procedure that pertains to the insanity defence. As legislative change is so recent, this suggests that, for a considerable period of time, the way in which insanity was proved in the courtroom was structured around its intelligibility to lay people, who draw on collective knowledge about madness in their determinations. The second basis on which 'manifest madness' may still be relevant revolves around a specific interpretation of this expert evidence requirement: this requirement may be understood to reflect the changed conditions of legitimisation of the insanity defence in the current era. As Lacey has argued, ascriptions of criminal responsibility perform 'practical/normative roles' in relation to structural problems, such as the legitimation of the state's power to punish.[92] In relation to the way in which insanity is proved in the courtroom in the current era, at least the appearance of conformity with medical orthodoxy is necessary for a legitimated defence. Thus, the legitimacy of the insanity defence, as opposed to the more substantive issue of the coordination of knowledge about insanity in the courtroom, is behind the expert evidence requirement. These new conditions for a legitimate insanity defence should be understood as overlaid onto older ideas about how insanity is proved. When considered together with the requirement that the insanity defence go to the jury, which I discuss below, the expert evidence requirement seems to support what Ward has referred to as the 'dual authority of science and lay consensus', which he argues underpins mental incapacity defences such as insanity and diminished responsibility.[93] The concept of 'manifest madness' assists in accounting for the ongoing importance of the lay component of this consensus and, more broadly, for the continuities that characterize this area of the criminal law.

88 HC Deb vol 186 col 727 19 April 1991.
89 P. Fennell, 'The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991' (1992) 55 MLR 547, 549.
90 T. H. Jones, 'Insanity, Automatism and the Burden of Proof on the Accused' (1995) 111 LQR 475, 510.
91 E. Baker, 'Human Rights, M'Naughten and the 1991 Act' [1994] Crim LR 84, 86.
92 See n 46 above, 254.
93 n 86 above, 105.

The burden and standard of proof

The *McNaughtan Rules* provide that the legal burden of proving insanity lies with the defence. The *Rules* refer to the 'presumption of sanity', stating that 'jurors ought to be told in all cases that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction'.[94] The 'presumption of sanity' means that, unless the issue of insanity is raised by the prosecution, as discussed above, the defence must prove the defendant's insanity. The standard of proof is the balance of probabilities.[95] What is referred to as the reverse burden marks the insanity defence out from other common law defences. Where a burden on the defence exists elsewhere in the common law, it is an evidentiary one (as in duress and self-defence). In its famous decision on burdens of proof, the House of Lords in *Woolmington* stated that it is the duty of the prosecution to prove the guilt of the prisoner.[96] The *Woolmington* court classed the insanity defence as an exception to this principle, stating that insanity was one situation in which 'it is incumbent upon the accused to prove his innocence'.[97] The House of Lords in *Woolmington* gave no explanation as to why insanity was considered an exception. Rather, the House stated:

> *M'Naghten's* case stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *M'Naghten's* case the onus is definitely and exceptionally placed upon the accused to establish such a defence . . . It is not necessary to refer to *M'Naghten's* case again in this judgment for it has nothing to do with it.[98]

After *Woolmington*, the insanity defence became an 'anomaly' in the common law.[99] But why is the burden of proof in relation to the insanity defence 'exceptional'? Why is the exceptional status of the insanity defence sufficiently apparent that it can be dismissed out of hand? One commentator has suggested that the court in *Woolmington* was unwilling to challenge *McNaughtan*, given its 'quasi-legislative status'.[100] This is an attractive argument. However, like the 'historical accident' argument of which it is a specific instance, it does not explain why the burden of proof of insanity was placed on the defence in the first place. Nor does it account for the failure to remedy this anomalous situation in the decades since *Woolmington*.

The explanation that is sometimes given for the anomalous position of the burden of proof for insanity is that inferences about an insane defendant's mental state cannot be made with the confidence with which inferences about the *mens rea* of non-insane defendants may be made.[101] According to this account, an evidentiary burden on the defence would mean the prosecution has a near-impossible task of

94 Extracted in n 73 above, 100.
95 *Soderman* (1935) AC 462; *Carr-Briant* [1943] KB 607.
96 *Woolmington* v *DPP* [1935] All ER Repqqq 1.
97 *ibid* 8.
98 *ibid* 5.
99 n 90 above, 477.
100 See I. Dennis, *The Law of Evidence* (London: Sweet and Maxwell, 2nd ed, 2002) 377.
101 n 5 above, 824.

disproving insanity beyond all reasonable doubt. The Court of Criminal Appeal decision in *Smith*,[102] cited by the House of Lords in *Woolmington*, is sometimes raised to support this argument about the inaccessibility of an insane defendant's mental state. In *Smith*, the Court of Criminal Appeal rejected the defendant's appeal against his conviction for murder on the basis that there was nothing 'improper' about the trial judge's decision not to recall witnesses to the defendant's conduct before the deceased was killed in order for them to be cross-examined by the defence. The Court stated that 'the onus of proving insanity is upon the defence, and it is not for us, but for the jury to deal with the question of the prisoner's sanity or insanity'.[103] It seems a stretch to claim that this comment implies support for the idea that the defendant's sanity was regarded as inaccessible to prosecutorial proof. On its face, the court's statement in *Smith* simply indicates that the jury was regarded as competent to determine the defendant's insanity. On this interpretation, this faith in the ability of lay jurors to identify insanity suggests precisely the reverse of the inaccessibility argument. The reasoning in *Smith* seems to rest on a confidence in the intelligibility of madness as such in the courtroom.

An alternative explanation for the anomalous position of the burden of proof in the insanity defence would account separately for the *McNaughtan Rules* placing of the burden on the defence, and for the fact that the burden has remained on the defence, even as a contemporary anomaly. In relation to why the burden of proof was placed on the defence at the time of *McNaughtan* in 1843, it seems that, in this era, such a burden was not anomalous, but rather an instance of the general practices of English courts.[104] Fletcher has argued that the reverse burden reflects the criminal law's debt to 'private litigation', to use his term for the civil (as opposed to criminal) law.[105] According to Fletcher, reflecting the norms of private litigation, criminal law conceptualised the prosecution and defence as two equal parties, each with 'duties to persuade' on the issues in the case.[106] Thus, the burden of proof fell on the defence for denials of the relevant facts (as opposed to affirmative statements of the facts): a plea of insanity was such a denial.[107] On this account, the reverse burden might originally have been one instance of a general rule that something like a nascent burden of proof for all defences rested on the defence.[108] For this reason, Timothy Jones suggests that the *McNaughten* judges may have been applying to insanity what they understood as a general rule.[109] This explanation would fit with the account of *Woolmington* that regards it as altering rather than affirming the law on burdens of proof.[110]

Why, then, was insanity excluded from *Woolmington* and left behind as, in Fletcher's words, burdens of proof became 'progressively more favourable' to defendants?[111] Here, successive failures to reform the *McNaughtan* insanity defence

102 *Smith* (1910) 6 Cr App Rep 19.
103 *ibid* 20.
104 n 47 above, 902.
105 *ibid* 917; see also n 90, above, 478.
106 *ibid* 899.
107 *ibid*.
108 n 90 above 477–478.
109 *ibid* 477.
110 *ibid*.
111 n 47 above, 890.

must bear a significant portion of the responsibility.[112] In addition, I suggest that the ongoing existence of the reverse burden may be explained by continuities in the era in which a reverse burden was not anomalous and the current era, in which it is. These continuities relate to the way in which insanity is proved in the courtroom, and, thus, the concept of 'manifest madness'. If, as argued in this article, insanity for the purposes of the criminal law may still be interpreted according to the concept of 'manifest madness', this structural continuity over time may have blunted both pragmatic and normative arguments that the prosecution should bear the burden of disproving a defendant's insanity (beyond all reasonable doubt). Morse's claim that 'no substantial injustice to the defendant will result from placing the persuasion burden on the defendant because, when legal insanity is truly present under a narrow test of insanity, most cases will be quite clear',[113] is premised on the manifest nature of insanity for the purposes of the criminal law. In this way, 'manifest madness' provides a plausible explanation for the retention of the reverse burden into the current era.[114]

The insanity defence must go to the jury

The question of whether a particular defendant is insane for the purposes of the criminal law is a question of fact for the jury. It is not possible for the prosecution to accept a plea of 'not guilty by reason of insanity' – the issue must go to a jury.[115] The unavailability of a plea marks insanity out from other defences, which are widely open to defence pleas. The requirement that the issue of insanity go to the jury was included in the *McNaughtan Rules*. Thus, it is usually explained as another unfortunate legacy of the 'historical accident' of the *Rules*. This feature of the *McNaughtan Rules* has put the practical advantages of a plea option, canvassed by the court in *Cox*[116] in relation to the defence of diminished responsibility, beyond the reach of the insanity defence. In the current era, however, the practical significance of the requirement that the defence go to the jury has been questioned. In empirical studies of the operation of the insanity defence since the passage of the *Criminal Procedure (Insanity and Unfitness to Plead) Act* 1991, several commentators have observed that, in several trials, juries were directed to return a special verdict or presented with a situation where all parties, and all expert evidence, supported the special verdict.[117] Some of this research concludes that expert

112 See, for example, Butler Report, n 87 above.

113 n 5 above, 825.

114 I believe that these explanations fail to justify the reverse burden. I support the arguments made by other commentators that the burden on the defence with respect to insanity should be an evidential burden only (see, for example, n 90 above, 491) or, alternatively, should lie with the prosecution (see n 47 above, 921; n 10 above 541).

115 *Smith* (1910) 6 Cr App R 19 at 20; *R* v *Crown Court at Maidstone ex parte London Borough of Harrow* [2000] 1 Cr App R 117 at 123. The Butler Committee recommended that the prosecution be allowed to accept a plea of insanity: see Butler Report, n 87 above, para 18.50. This proposal has not been implemented.

116 *R* v *Cox* (1968) 52 Cr App R 130.

117 R. D. Mackay B. J. Mitchell and L. Howe, 'Yet More Facts about the Insanity Defence' [2006] Crim LR 399, 404; see also R. D. Mackay and G. Kearns, 'More Fact(s) About the Insanity Defence' [1999] Crim LR 714, 721.

medical evidence is of primary importance in relation to the outcome of an insanity trial.[118] These data indicate that, in certain instances, the requirement that the issue of insanity go to the jury may be a mere formality. Of course, in other instances, the existence of the requirement that the defence go to the jury means that there is potential for an independent determination on the question of the defendant's insanity. Nonetheless, this research suggests that caution is needed in assessing the requirement that the insanity defence go to the jury so as not to overstate its significance.

With this caveat, the requirement that the issue of insanity go to the jury may be interpreted as evidence of the continuing utility of the concept of 'manifest madness' as a theoretical frame for understanding the way in which insanity is proved in the courtroom. Lay jurors are at least formally the final arbiters of a defendant's claims to the insanity defence. Because a jury is regarded as being competent to evaluate a defendant's claims to be insane, insanity for the purposes of the criminal law is constructed as intelligible as such to non-experts. In addition, the requirement that the insanity defence go to the jury points to the ongoing role of collective knowledge in the fact-finding context of insanity trials. Here, collective knowledge seems to operate on two levels. On a practical level, even taking researchers' claims about the importance of expert medical evidence in insanity trials seriously, arguably such evidence may lead jurors to 'reconsider their interpretations' but 'it does not compel them to abandon their own sense of what is plausible'.[119] On a symbolic level, jury decision-making provides the lay component of Ward's 'science and lay consensus' underpinning (and legitimating) the insanity defence.[120]

The special verdict

If the issue of the defendant's sanity is raised, and the jury finds the defendant insane, the outcome of the trial is the special verdict. The special verdict is the most prominent procedural aspect of the law on insanity. The special verdict took its familiar modern form at the turn of the nineteenth century. In James Hadfield's trial for treason in 1800, encouraged by the prosecution, the jury gave both their verdict and their reasons: '[w]e find the prisoner Not Guilty; he being under the influence of insanity at the time the act was committed'.[121] Hadfield's acquittal gave rise to considerable parliamentary concern because, although he was detained after the trial, the law's power over him was unclear.[122] This concern resulted in the passage of the *Criminal Lunatics Act* 1800, which was subtitled 'An Act for the Safe Custody of Insane Persons Charged with Offences'.[123] The Act provided that, where a 'person was insane at the time of the commission' of a

118 See Mackay and Kearns (1999), n 117 above, 721.
119 T. Ward, 'English Law's Epistemology of Expert Testimony' (2006), 33 *Journal of Law and Society* 572, 585.
120 n 86 above, 105.
121 R. Moran, 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield' (1985) 19 Law and Society Rev 487, 510.
122 *ibid* 511.
123 39 & 40 Geo. III c. 94.

felony offence, he was to be acquitted and 'the jury shall be required to find specially whether such person was insane at the time of the commission of such offence', after which the court 'shall order such person to be kept in strict custody'.[124] The *Criminal Lunatics Act* 1800 mandated juries to return what has been termed the special verdict in insanity cases. In contrast to a general verdict ('guilty' or 'not guilty'), the special verdict includes a statement of the basis on which the verdict had been reached.[125] The special verdict also mandated a particular disposal for insane defendants, which meant that, after 1800, it was no longer open to judges to discharge defendants found to be insane.[126]

Historians and legal commentators have regarded the special verdict as a unique device by which the detention of insane defendants in the interests of social protection was brought within the bounds of the criminal law. The special verdict was a compromise in that it purported to be an acquittal ('not guilty by reason of insanity') but enabled judges to keep the insane defendant in custody.[127] In Martin Wiener's words, it offered a 'middle path' between humanity and security.[128] Thus, the special verdict is both premised on and signals the dangerousness of the insane defendant. As Lord Denning stated in *Bratty*, a defendant who acts in a state of automatism due to a disease of the mind (one of the substantive requirements of the *McNaughtan Rules*) does not receive 'an unqualified acquittal, for that would mean that he would be let at large to do it again'.[129] The connection between the special verdict and an insane defendant's dangerousness seems incontrovertible.

As well as encoding a defendant's dangerousness, the special verdict encodes a particular finding on the part of the jury that returns it: via the special verdict, the jury pronounces a particular finding of fact which is to be taken into account by the court. This interpretation of the special verdict is based on the history of the practice of special verdicts before the beginning of the nineteenth century. The modern special verdict may be regarded as an instance of the wider practice of returning 'special findings', antedating 1800, through which certain defendants (those who were insane, or those who had killed in self-defence, for example) might be granted a pardon.[130] Viewed in this light, the special verdict following

124 *ibid.* The insanity provisions of the 1800 Act applied to offences of treason, murder or felony but not to misdemeanors. This may have been the result of an assumption that the insanity defence applied only to capital offences (n 73 above, 80). The *Prisoners Act* 1840 (3 & 4 Victoria c.54) introduced the 'special verdict' of 'not guilty by reason of insanity' for misdemeanors.

125 This statement is 'by reason of insanity'. However, between 1883 and 1964, the special verdict was 'guilty but insane'. For a discussion of the changes in the wording of the special verdict, see n 73 above, 189.

126 n 73 above, 81.

127 Until the *Criminal Procedure (Insanity and Unfitness to Plead) Act* 1991, indefinite detention was the only disposal option available to judges sentencing insane defendants. The 1991 Act introduced a range of disposals for those found 'not guilty by reason of insanity', with the exception of those charged with murder (in these cases, indefinite detention is the only option). One of the possible disposal options – guardianship orders – was removed by the *Domestic Violence, Crime and Victims Act* 2004, s 24.

128 M. Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914* (Cambridge: Cambridge University Press, 1990) 85.

129 n 7 above, 410.

130 See n 73, 41.

a successful insanity defence is as much about jury decision-making as it is about a defendant's dangerousness. Like the requirement that the insanity defence go to the jury, the special verdict is built on both the intelligibility of madness to lay people, and the part played by collective knowledge in the fact-finding context of insanity trials. On this basis, the special verdict may be understood through the frame provided by the concept of 'manifest madness'.

CONCLUDING THOUGHTS

This article has introduced the concept of 'manifest madness', which provides a theoretical frame through which the evidentiary and procedural aspects of the insanity defence may be interpreted. I have argued that madness (a shorthand for the types of mental abnormality known to the criminal law as insanity) is constructed within the criminal law as constituted in acts, intelligible to lay observers, and its meaning is derived from collective knowledge of it. The concept of 'manifest madness' provides a frame that accounts for features of the insanity defence that have resisted systematic theoretical analysis. 'Manifest madness' assists in understanding how knowledge about madness is structured for the purposes of the criminal law. By way of conclusion, I will briefly consider two of the implications of my argument about 'manifest madness' in the broader context of the criminal law.

The concept of 'manifest madness' is potentially useful as a frame for more empirical or sociological studies of legal insanity. As discussed above, according to the concept of 'manifest madness', the connection between collective knowledge of madness and its elaboration at law is a naturalised one. Although this element of 'manifest madness' was not evident in the rules of evidence and procedure that attach to the insanity defence, empirical studies of decision-making in insanity trials may bear out its significance. Such studies may also bear out the claim that the insane defendant's acts have a substantive importance in the process by which his or her insanity is proven in the criminal trial. There is already some awareness of the importance of collective knowledge (even if not so called) about insanity for the operation of the insanity defence. Moore advocates an analysis of the 'popular moral notion of mental illness' which he argues is the key to understanding why juries have 'for centuries excused the otherwise wrongful acts of mentally ill persons'.[131] He posits that the unofficial version of the insanity defence may restrict legal insanity to those popularly considered 'crazy' or 'mad'.[132] Mackay states that his own research could be taken to support Moore's conclusion.[133] Collective knowledge of madness is arguably an important component in the remarkable stability of the insanity defence over many decades, in that such knowledge contributes to the workability of the defence in practice. Alongside expert medical and legal constructions of madness, collective knowledge is a worthy subject of critical attention.

131 M. Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984) 244.
132 *ibid* 245.
133 R. Mackay, *Mental Incapacity Defences in Criminal Law* (Oxford: Oxford University Press, 1995) 90.

The concept of 'manifest madness' is potentially useful beyond the insanity defence. Other mental incapacity defences are amenable to an analysis via the concept of 'manifest madness'. One example is the defence of diminished responsibility, which shares some of the evidentiary and procedural features of the insanity defence. Diminished responsibility, introduced to England and Wales in the *Homicide Act* 1957, mirrors the insanity defence in that it places a legal burden of proof on the defence.[134] In addition, although the prosecution may accept a plea of manslaughter on the basis of diminished responsibility, decision-making on this point involves lay assessment (by prosecutors and the court) of the defendant's mental condition. A recent Court of Appeal decision, *R* v *Shickle*, on the availability of the defence of diminished responsibility, illustrates the relevance of the concept of 'manifest madness' to that defence.[135] In *Shickle*, the defendant was convicted of the murder of an acquaintance, who died from an overdose of insulin. At trial, Susan Shickle initially denied causing the death of the victim, and then claimed she could remember nothing of the events that led to the victim's death. On appeal, Shickle claimed that her psychiatric condition, a personality disorder, 'effectively removed the possibility of putting the issue of diminished responsibility before the court, as it caused her to maintain that she was not involved with [the victim's] Mr Harvey's death'.[136] The Court of Appeal rejected the claim that Shickle should be able to raise fresh evidence of diminished responsibility and that her conviction for murder was unsafe. The Court noted that the appellant's trial counsel described her as 'lucid, presentable and, at least to the layman, devoid of any manifestation of abnormality of mind'[137] (one of the requirements of the defence of diminished responsibility). The Court also observed that it 'should [not] . . . be overlooked that with diminished responsibility, although psychiatric evidence is adduced to assist the jury, the decision on the critical questions is that of the jury . . . [I]t is notoriously difficult to persuade juries that personality disorder amounts to an abnormality of mind'.[138] The Court concluded that there was 'no reasonable explanation for failing to adduce the evidence of diminished responsibility at the trial'[139] and declined to grant the appeal. With its emphasis on the evident meaning of the defendant's lucidity and presentability to the lay person, and on the jurors' judgment of mental abnormality, the Court of Appeal decision in *Shickle* can be understood using the the concept of 'manifest madness'.

134 *Homicide Act* 1957, s 2; see also *R* v *Dunbar* [1957] 3 WLR 330. In this respect, diminished responsibility is different from the other partial defence available only to murder, provocation. In raising a defence of provocation, the defence bears only an evidential burden of proof: *Attorney-General for Jersey* v *Holley* [2005] 3 WLR 29.
135 *R* v *Shickle* [2005] EWCA Crim 1881.
136 *ibid* at [31].
137 *ibid* at [18].
138 *ibid* at [63].
139 *ibid* at [64].