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Disability at the periphery: legal theory, disability and criminal law

Linda Roslyn Steele

University of Wollongong, lsteele@uow.edu.au

Stuart DM Thomas

University of Wollongong, stuartt@uow.edu.au

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Abstract

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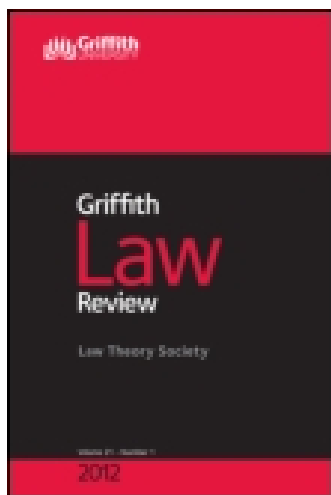
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Linda Steele^a & Stuart Thomas^b

^a School of Law, University of Wollongong

^b Forensic Mental Health, Faculty of Social Sciences, University of Wollongong

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Disability at the periphery: legal theory, disability and criminal law

Linda Steele^a and Stuart Thomas^{b*}

^a*School of Law, University of Wollongong;* ^b*Forensic Mental Health, Faculty of Social Sciences, University of Wollongong*

This special issue of the *Griffith Law Review* is dedicated to an examination of the relationships and intersections between disability, criminal law and legal theory. Despite the centrality of disability to the doctrines, operation and reform of criminal law, disability continues to inhabit a marginal location in legal theoretical engagement with criminal law. This special issue proceeds from a contestation of disability as an individual, medical condition and instead explores disability's social, political and cultural contexts. This kind of approach directs critical attention to questioning many aspects of the relationships between disability and criminal law which have otherwise been taken for granted or overlooked in legal scholarship. These aspects include the differential treatment of people with disability by criminal law, the impact of core legal concepts such as capacity on criminal legal treatment of people with disability, and the role of disability in ordering and legitimising criminal law. It is hoped that the special issue will contribute to the shifting of disability from its peripheral location in legal theoretical scholarship much more to the centre of critical and political engagement with criminal law.

This special issue of the *Griffith Law Review* is dedicated to a critical examination of the relationships and intersections between disability, criminal law and legal theory. Despite the centrality of disability to the doctrines, operation and reform of criminal law, disability inhabits a marginal location in legal theoretical engagement with criminal law. The simultaneous centrality and marginality of disability vis-à-vis criminal law provides the impetus for this special issue and as such we begin with a discussion of disability's current location in criminal law and legal theoretical scholarship.

Disability is central to criminal law in a number of ways. First,¹ disability is explicitly apparent in the text of criminal law doctrines across numerous stages of

*Corresponding author. Email: lsteele@uow.edu.au.

Linda Steele is a Lecturer, School of Law, University of Wollongong and member of the Legal Intersections Research Centre. Stuart Thomas is a Professor of Forensic Mental Health, Faculty of Social Sciences, University of Wollongong and member of the Legal Intersections Research Centre. This special issue has its origins in 'Disability at the Margins: Vulnerability, Empowerment and the Criminal Law', a one day symposium held at University of Wollongong on 27 November 2013 and hosted by the Legal Intersections Research Centre. Thank you to Nan Seuffert, Tim Peters and Ed Mussawir for their support and guidance in the editing of this special issue.

¹References in this paragraph are principally to the New South Wales jurisdiction in light of the jurisdictional location of the authors in New South Wales, Australia.

criminal legal process. For example, police questioning and investigation,² trial,³ determination of criminal responsibility,⁴ and sentencing.⁵ There is also a separate system of regulation and punishment within criminal law for people with disability who are found unfit or not guilty by reason of mental illness – the forensic mental health system.⁶ Disability is also apparent insofar as it informs the meaning of capacity and rationality, concepts that are central to criminal law's jurisdiction to try, convict and punish all individuals regardless of disability.⁷

Disability is also central to criminal law in an empirical sense. People with disability (notably people with diagnoses of cognitive impairment and mental illness) are overrepresented in the criminal justice system as offenders⁸ and experience high rates of victimisation:⁹ as such they could be said to represent part of the 'core business' of criminal law. This centrality of disability to the operation of criminal law has been the subject of research and advocacy by disability rights and human rights organisations.¹⁰ Moreover, there is a growing body of research highlighting the intersecting dimensions of disability, health, race, social disadvantage, gender and age with disability.¹¹ For example, Indigenous Australians with cognitive impairment are overrepresented in the criminal justice system¹² and there is a high

²See, for example, NSW Police Force (1998) pp 66–68; New South Wales Police Force (2013); *Crimes (Forensic Procedures) Act 2000* (NSW) ss 7, 98; *Criminal Procedure Act 1986* (NSW) ss 76, 185.

³See, for example, *Criminal Procedure Act 1986* (NSW) ss 91, 306M, 306P, 306R, 306T, 306ZK; *Evidence Act 1995* (NSW) ss 13, 41, 42, 85; *Mental Health (Forensic Provisions) Act 1990* (NSW) pts 2, 3.

⁴See, for example, mental defences including not guilty by reason of mental illness, substantial impairment by abnormality of mind, infanticide: *M'Naghten's Case* (1843) 10 Cl & Fin 200 (not guilty by reason of mental illness); *R v Presser* [1958] VR 45 (unfitness); *Crimes Act 1900* (NSW) ss 22A (infanticide), 23A (substantial impairment by abnormality of mind). See also 'battered women's syndrome' in the context of the defences of self-defence and provocation: Sheehy, Stubbs and Tolmie (2012).

⁵See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 60B.

⁶See generally *Mental Health (Forensic Provisions) Act 1990* (NSW).

⁷See, for example, Lacey (2001a); Lacey (2001b); Lacey (2010); Loughnan (2012); Norrie (2001).

⁸See, for example, Baldry et al (2012); Boyd-Caine and Chappell (2005–2006); Butler (2005); Dowse et al (2011); Fazel et al (2008); Hayes and McIlwain (2006); Hayes et al (2007); Holland (2004); Ogloff et al (2007); Ogloff et al (2013); Schofield et al (2006); Vanny et al (2008); Vanny et al (2009).

⁹See, for example, Dowse et al (2013); Hughes et al (2012).

¹⁰See, for example, Australian Human Rights Commission (2013); Australian Human Rights Commission (2014); American Civil Liberties Union (2009); Calma (2008); Canadian Mental Health Association & Public Interest Law Centre (2011); Dowse et al (2013); Equality and Human Rights Commission (2011); French (2007); Frohmader (2013); Intellectual Disability Rights Service et al (2008); Langdon (2007); Mental Health Law Centre (WA) (2013); Peters (2003); Rushworth (2011); Sotiri et al (2012); Talbot (2008); Victorian Equal Opportunity and Human Rights Commission (2014).

¹¹Baldry et al (2012).

¹²Calma (2008); Simpson and Sotiri (2006); Sotiri et al (2012); Trofimovs and Dowse (2014). In the United States context in relation to the intersections of disability, race and criminal justice see Ribet (2010); Watts and Erelles (2004).

incidence of mental illness, sexual violence and drug use among female prisoners.¹³ Thus, disability can be seen as being central to other categories of disadvantaged individuals in the criminal justice system including Indigenous Australians and women.

Last, disability is central to criminal law by reason of the growing attention paid to disability in the criminal law reform context. This has included review of the various ‘disability-specific’ aspects of criminal law, notably the forensic mental health system and mental defences.¹⁴ Review has also included consideration of the extent to which people with disability should be considered a specific category of criminal law subjects and should be treated differently when traversing various ‘mainstream’ areas of criminal law such as bail and sentencing.¹⁵ Furthermore, disability has been considered as a specific category of victim in criminal law.¹⁶ On a more general level, the foundational legal concept of ‘capacity’ has received attention from law reform bodies specifically in relation to people with disability and mental incapacity.¹⁷ The international importance of disability vis-à-vis criminal law reform is evident through the United Nations Committee on the Rights of Persons with Disabilities¹⁸ which recently raised concerns about the compatibility of existing criminal laws and criminal justice systems – notably mental defences and forensic mental health system detention – with the rights of persons with disability as provided by the United Nations Convention on the Rights of Persons with Disabilities (the ‘Disability Convention’; CRPD).¹⁹

Based on the centrality of disability to criminal law it might readily be assumed that disability would be a focus of legal theoretical engagement with criminal law. This, however, is not the case. That being said, there is an emerging body of scholarship which engages with disability as a political and social category exploring material and cultural intersections of disability with sexuality, gender and race in the context of law;²⁰ it is to this, and related, bodies of scholarship that this special issue seeks to contribute.

It is acknowledged that there is a body of scholarship on criminal law and mental health which explores the treatment of individuals who are experiencing mental

¹³Stathopoulos (2012).

¹⁴Australian Law Reform Commission (2014); Bradley (2009); New South Wales Law Reform Commission (2012b); New South Wales Law Reform Commission (2013); New Zealand Law Commission (2010); The Law Commission (2014); The Law Commission (2013); Victorian Law Reform Commission (2014).

¹⁵New South Wales Law Reform Commission (2012a); New South Wales Law Reform Commission (2012c).

¹⁶Law Reform Commission (2013).

¹⁷See, for example, Australian Law Reform Commission (2014); Scottish Law Commission (2014).

¹⁸*Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

¹⁹See generally Committee on the Rights of Persons with Disabilities (2014) pp 10–11 [38]–[42]; Committee on the Rights of Persons with Disabilities (2013) pp 4–5 [32]. See also Office of the United Nations High Commissioner for Human Rights (2009) pp 15–16 [48]–[49].

²⁰See, for example, Arkles (2013); Arrigo (2006); Arrigo (1996); Ben-Moshe, Chapman and Carey (2014); Bibbings (2010); Cobb (2010); Delaney (2003), pp 329–360; Howell (2007); Razack (2011); Razack (1998); Ribet (2010); Savell (2004); Spade (2011).

illness or (to a lesser extent) those with cognitive impairment in the criminal law and criminal justice system, especially in the context of the mental incapacity defences, the forensic mental health system and incarceration.²¹ Similarly, the therapeutic jurisprudence scholarship has engaged with how the law can achieve more beneficial and positive outcomes for people with disability in the criminal justice system.²² These overlapping bodies of scholarship highlight some of the ways in which individuals with mental illness or cognitive impairment have been disadvantaged by criminal law. Both have also alerted scholars and law reformers to areas of possible injustice and have also provided possible directions for law reform. However they generally stop short of a complex legal theoretical engagement with disability and criminal law. For example, these more traditional approaches have failed to consider many of the ideas around ability (and other dimensions of identity such as gender, sexuality, race and class) which underpin criminal legal approaches to disability, as well as disability's role in the construction of normal criminal legal subjects and the legitimacy of criminal law more broadly. Thus, while acknowledging the contributions both of these bodies of scholarship are making to recognition and reform of injustices experienced by people with disability, this special issue proposes a more complex understanding of the relationships between disability and criminal law, as well as problematising some of the key ideas underpinning these bodies of scholarship.

There has been little discussion of the marginality of disability in legal theoretical engagement with criminal law. However, in the aligned discipline of critical criminology, Dowse and colleagues have observed a similar marginality of disability noting that

critical criminology has been slow to encompass the notions of impairment and disability. ... Given the significant number of offenders with mental health and cognitive disabilities in the criminal justice system documented the world over, the absence of an engagement with disability and impairment within critical criminology is at the very least surprising and perhaps both generative and indicative of the currently disconnected, siloed and boundaried conceptual, service system and practical approach to this group.²³

On a more general level, critical disability studies scholars have observed the marginal place of disability in critical theory. Critical disability studies scholars have argued that disability is typically constructed as a natural phenomenon of no critical consequence. Disability is approached as an individual, medical abnormality, seen in scientific, value-neutral terms of internal processes (e.g. internal physical, neurological, sensorial, communicative and psychological processes) and their connections to diagnostic labels (e.g. cerebral palsy, intellectual disability, schizophrenia). Disability is at times used abstractly or as a trope in the service of analysing other dimensions of politicised identity and sometimes additionally is mentioned

²¹See, for example, Dhanda (2000); McSherry (1993); McSherry (1994); McSherry (2003); Peay (2010); Peay (2011); Slobogin (2006).

²²See, for example, Perlin (2013a); Perlin (2013b); Perlin (2000); Schneider, Bloom and Heerema (2007);

²³Dowse et al (2009) pp 38–39.

as a natural(ised) and irrelevant health-oriented nuance to otherwise constructed identities.²⁴ Moreover, critical theory centred on other dimensions of politicised identity (such as gender or race) might work in part to resist the associations between these dimensions of identity and features associated with a medicalised understanding of disability (for example, pathology, deviance, incapacity, irrationality) and in doing so leave unquestioned and affirm the possibility of a natural biomedical disability and inequality based on this disability.²⁵ Bringing these broader reflections to bear on the specific context of legal theoretical scholarship on criminal law, this is evident.

Therefore, the *marginality* of disability in legal theoretical engagement with criminal law in a context of the *centrality* of disability to criminal law itself provides the impetus for this special issue. Through this special issue the editors aim to retrieve disability from the periphery of legal theoretical scholarship and locate it much more at the centre of critical and political engagement with criminal law. There is a political urgency to the special issue on the basis of the social and political marginality of people with disability²⁶ and the place of criminal law in this marginality in a material sense (e.g. high incarceration rates, discrimination and vulnerability in criminal justice system)²⁷ as well as a cultural sense (e.g. the role of para-criminal concepts of risk, deviancy and abnormality in the meaning of disability).²⁸

As Richard Devlin and Dianne Pothier state, disability can be framed as ‘not fundamentally a question of medicine or health, nor is it just an issue of sensitivity and compassion; rather, it is a question of politics and power(lessness)’.²⁹ This special issue proceeds from a contestation of disability as an individual, medical condition and instead explores disability’s social, political and cultural contexts. Further, the special issue does not take for granted criminal law’s typical roles in relation to people with disability as variously protective, benevolent, therapeutic and controlling. Instead it questions how power, discrimination and violence operate through, because of or regardless of criminal law, and the material and discursive effects criminal law can have on people with disability. The articles included not only proceed from a critical approach to disability and to criminal law but also to the

²⁴See, for example, Siebers’ critique of Wendy Brown’s wounded attachments critique of rights, insofar as this relies upon the devaluing of trauma and injury which are both central to impairment and the politicising of disability: Siebers (2008), pp 79–80, 193–194. See more broadly the critique of the use of disability in other minority group critique (not necessarily in the specific context of legal or political theory): Davis (1995), p 5; Erevelles (2011), pp 29–33, 36–37; Watts and Erevelles (2004), p 276.

²⁵See, for example, Jarman (2011), pp 9, 18–19; Mitchell and Snyder (2000), pp 2–4, 6–10.

²⁶Baldry (2008) pp 33–35.

²⁷See, for example, Chenoweth (1996); Dowse et al (2013); Cockram (2005); Glaser and Deane (1999); Green (2002) 49; Keilty and Connelly (2001); Kendall (2004); Murray and Heenan (2012); Murray and Powell (2008); Trofimovs and Dowse (2014).

²⁸On deviancy and disability generally see, for example, Jarman (2012); Snyder and Mitchell (2006).

²⁹Devlin and Pothier (2006) p 2.

relationships between them. Leading scholars such as Fiona Kumari Campbell³⁰ and Margrit Shildrick³¹ have both argued that disability and normality are mutually constitutive and that constructions of disability shape both ‘abled’ subjects and ‘disabled’ subjects. This stance invites analysis of disability not only vis-à-vis the disabled as the abnormal and the exceptional. This stance also invites analysis of the abled as the normal and the valorised – the very core of legal subjects and law. An examination of the relationships between disability and criminal law directs attention to the discursive effects of disability on criminal law – variously pathologising, legitimating and humanising – in ways which negates its violent, discriminatory and marginalising effects. Thus articles in this special issue also consider the dynamics of disability as a political dimension of identity and the role of disability in ordering the operation of power over *all* individuals more broadly *and simultaneously* the depoliticising effect of disability.³² It is acknowledged that there is a body of criminal legal theory which has examined the place of mental defences in criminal law, looking at how these contribute to psychological understandings of criminal responsibility.³³ This scholarship highlights the significant relations between disability and the core of criminal law, but does not go so far as to consider the ramifications for this on disability as a political category. Authors in this issue engage with these interrelated issues, considering how disability produces the normal criminal legal subject and authorises, legitimises and humanises the ‘law’ itself. The authors also consider what the significance of disability is to foundational psychological concepts of the criminal law such as capacity, rationality and reasonableness, as well as what the implications are for people with disability in the criminal justice system. Consideration of these questions in the context of criminal law is a way into a broader reflection on the place of disability in foundational concepts in law more broadly – legal concepts such as capacity, rationality, reasonable, ordinary are central to the creation of legal obligation and responsibility and to state and private intervention in the lives of individuals. As such an examination of the relationships and intersections between legal theory, disability and criminal law can provide new and exciting possibilities for critical and political engagement with the very core of law.

Eileen Baldry opens the special issue with some reflections on the operation of criminal law in the context of the material and social experiences of individuals with disability in the criminal justice system. She draws on the findings of a large data linkage project on the criminal justice and institutional pathways of people with mental health disorders and cognitive impairment in the New South Wales, Australia criminal justice system in order to provide a more complex understanding of the criminal justice experiences of people with disability. Baldry highlights the significance of a number of dimensions of social marginalisation including poverty, non-existent or inappropriate social services and Indigeneity, as well as the intersections of offending and victimisation (including state neglect and abuse). In this empirical

³⁰Campbell (2009).

³¹Shildrick (2009).

³²See, for example, Campbell (2009); Carlson (2010); Corker and Shakespeare (2002); Erevelles (2011); Kafer (2013); Tremain (2005); Tremain (2002).

³³See, for example, Norrie (2001). See also Lacey (2001a); Lacey (2001b); Lacey (2010); Loughnan (2012). See further Naffine (2009) in the context of legal philosophy more broadly.

context, Baldry questions the current role of criminal law in relation to people with disability, notably its capacity to address the multiple, systemic and complex issues faced by people with disability in the criminal justice system. Her discussion confirms the political urgency of further theoretical engagement with disability and criminal law and provides a compelling material basis for legal theoretical engagement across disability and other dimensions of politicised identity.

Clare Spivakovsky engages with civil justice mechanisms of control of people with intellectual disability, and the interrelationships of these with criminal justice mechanisms of control of this group. Spivakovsky draws on critical disability studies and critical criminology to examine the production of the disabled, risky legal subject as central to the necessity of civil forms of control. She focuses on one such civil mechanism in the Australian state of Victoria: the Supervised Treatment Order (STO) regime. In doing so, Spivakovsky argues that during STO Tribunal Hearings, notions of criminal risk and dangerousness are made intelligible through a medico-legal construction of intellectual disability. It follows that individuals with intellectual disability appearing before the Tribunal are produced as innately risky and dangerous to society, and hence in need of control through an STO. Spivakovsky's article highlights the importance to the legal control of people with disability of underlying ideas of disability and their link to para-criminal concepts of dangerousness and risk, thus directing critical attention to the relationship between cultural understandings of disability and material forms of control and to the cultural role of criminal law in the broader legal treatment of people with disability.

Paul Harpur and Heather Douglas examine the extent to which the CRPD might impact on the criminal justice experiences of domestic violence survivors with disability, noting that the CRPD is the first international instrument specifically on people with disability *and* to specifically protect survivors with disabilities from domestic violence. The authors draw on disability theory's social model of disability to analyse the significance of disability both to the particular forms of violence against domestic violence survivors with disability and to legal responses to this violence – proposing the term 'disability domestic violence'. In utilising the social model of disability to analyse the criminal legal approach to disability domestic violence Harpur and Douglas consider the significance of medical approaches to disability (and related valorisation of carers) to the marginalisation of disability domestic violence in criminal law, including in legislative frameworks of domestic violence and in the operations of these frameworks. Their article provides a timely analysis of domestic violence against people with disability in light of the growing significance of the CRPD to domestic criminal law reform. Moreover, Harpur and Douglas demonstrate the possibilities of critiquing cultural ideas underpinning disability to reform of the normative content and operation of criminal law.

Tina Minkowitz questions the sustainability of measures such as the insanity defence, unfitness to plead and incompetence to stand trial in the era of the CRPD. Minkowitz argues that the insanity defence contravenes a variety of rights enshrined in the CRPD: including legal capacity and equal recognition before the law, access to justice, liberty and security of the person, and equality and non-discrimination. She consequently argues that there is a need for a paradigm shift towards a new conceptualisation of criminal responsibility not drawn along traditional lines of mental ability and disability. Minkowitz proposes an alternative open-ended inquiry into criminal responsibility which considers a range of factors which may have

impacted on an accused's decision-making, such that disability is but one relevant factor which might interact with other factors. Minkowitz draws on her lived experience as a survivor of the psychiatric system and in so doing subverts the traditional epistemic devaluation that the criminal law affects through its focus on disability and incapacity, thus making an important scholarly contribution to an area where survivors' views are not routinely considered or sought.

Linda Steele analyses the legal dimensions of violence against girls with intellectual disability through Family Court authorised sterilisation. She argues that the criminal law of assault provides the legal basis for the status of court authorised sterilisation as a permissible, and a benevolent form of violence. Steele argues that girls with intellectual disability — by reason of their incapacity — are positioned outside the group of 'normal' legal subjects of assault such that the lawfulness of the contact involved in the act of their sterilisation is not dependent on the consent of the girls themselves, but instead on the consent of their parents as authorised by the Family Court acting in its welfare jurisdiction. Steele's article suggests a need for greater consideration of the role of law in violence against women and girls with disability, as well as the specific relations between abnormality, disability and capacity in the nature of this violence.

The special issue closes with Penelope Weller's article. Weller draws upon Foucault's concept of governmentality in her analysis of capacity. Weller argues that capacity and incapacity are mutually constitutive and that legal determinations of legal incapacity prevent individuals with disability from realising full membership in society. In turning to capacity in the specific context of criminal law, Weller makes the interesting observation that there is a paradox in capacity that plays out in criminal law: incapacity can result in individuals not being found criminally responsible and punished, yet on the other hand particularly in the lower courts incapacity is not recognised and individuals are subject to 'hyper-incarceration'. Weller argues that Article 12 of the CRPD (and its recent interpretation by the United Nations Committee on the Rights of Persons with Disabilities) prompts a critical re-evaluation of legal capacity as an ordering principle in law. This is on the basis that Article 12 contests the dichotomy and the devaluing of incapacity and focuses instead on support for all individuals regardless of their level of capacity. Weller's analysis of capacity highlights the important relationship in criminal law between the legal treatment of people with disability and the legitimating role of disability-related legal concepts, and provides new openings for critiquing the place of disability in the foundations of criminal law.

Taken altogether, this special issue provides a timely forum for directing critical reflection on the relationships between disability and criminal law. Legal theoretical engagement with disability and criminal law thus requires an unsettling of the naturalness of disability and of the operation of state power through criminal law. The articles explore the role of criminal law in the material and cultural conditions of people with disability in the criminal justice system, notably their subjection to discrimination, violence and regulation related to disability and the significance of other dimensions of politicised identity such as gender, sexuality and race to their criminal legal treatment. Moving beyond embodied individuals with disability, the articles in the special issue consider how disability circulates in criminal law to order and legitimise the operation of power and violence in the criminal law, as well as to construct the 'normal' (able, rational, capable) legal subject at the core of criminal

law doctrine. Ultimately, this special issue aims to demonstrate how legal scholarship can utilise legal theory in novel ways to engage with disability and criminal law, and at the same time provokes legal theory itself to be questioned and developed in this process.

References

Primary Sources

Cases

M'Naghten's Case (1843) 10 Cl & Fin 200.

R v Presser [1958] VR 45.

Legislation

Crimes Act 1900 (NSW).

Crimes (Forensic Procedures) Act 2000 (NSW).

Criminal Procedure Act 1986 (NSW).

Evidence Act 1995 (NSW).

Mental Health (Forensic Provisions) Act 1990 (NSW).

International Agreements

Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

United Nations Documents

Committee on the Rights of Persons with Disabilities (2014) *General Comment No 1 (2014) Article 12: Equal Recognition Before the Law*, CRPD/C/GC/1, 11 April 2014.

Committee on the Rights of Persons with Disabilities (2013) *Concluding Observations on the Initial Report of Australia*, 10th session, UN Doc CRPD/C/AUS/CO/1, 21 October 2013.

Office of the United Nations High Commissioner for Human Rights, Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, UN Doc A/HRC/10/48 (26 January 2009).

Secondary Sources

Alan W Norrie (2001) *Crime, Reason and History: A Critical Introduction to Criminal Law*, Butterworths.

Alison Howell (2007) 'Victims or Madmen? The Diagnostic Competition over "Terrorist" Detainees at Guantánamo Bay' 1 *International Political Sociology* 29.

Alison Kafer (2013) *Feminist, Queer, Crip*, Indiana University Press.

American Civil Liberties Union (2009) *Mental Illness and the Death Penalty*, American Civil Liberties Union.

Amita Dhanda (2000) *Legal Order and Mental Disorder*, Sage Publications.

Anthony J Holland (2004) 'Criminal Behaviour and Developmental Disability: An Epidemiological Perspective' in William R Lindsay, John L Taylor and Peter Sturmey (eds) *Offenders with Developmental Disabilities*, John Wiley & Sons.

Arlie Loughnan (2012) *Manifest Madness: Mental Incapacity in Criminal Law*, Oxford University Press.

Australian Human Rights Commission (2013) *Access to Justice in the Criminal Justice System for People with Disability: Issues Paper*, Australian Human Rights Commission.

Australian Human Rights Commission (2014) *Equal Before the Law: Towards Disability Justice Strategies*, Australian Human Rights Commission.

Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, ALRC Report 124.

Bernadette McSherry (1993) 'Defining What is a "Disease of the Mind": The Untenability of Current Legal Interpretations' 1 *Journal of Law and Medicine* 76.

Bernadette McSherry (1994) 'Mental Disease and Intention in Criminal Law' 2 *Journal of Law and Medicine* 92.

- Bernadette McSherry (2003) 'Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach' 21 *Behavioral Sciences and the Law* 581.
- Beth Ribet (2010) 'Naming Prison Rape as Disablement: A Critical Analysis of the *Prison Litigation Reform Act*, the *Americans with Disabilities Act*, and the Imperatives of Survivor-Oriented Advocacy' 17(2) *Virginia Journal of Social Policy and the Law* 281.
- Bruce A Arrigo (1996) *The Contours of Psychiatric Justice*, Garland Publishing.
- Bruce A Arrigo (2004) 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' 11(1) *Psychiatry, Psychology and Law* 23.
- Bruce A Arrigo (2006) 'Towards a Critical Penology of the Mentally Ill Offender: On Law, Ideology and the Logic of "Competency"' in Walter S DeKeseredy and Barbara Perry (eds) *Advancing Critical Criminology: Theory and Application*, Lexington Books.
- Canadian Mental Health Association & Public Interest Law Centre (2011) *Equality, Dignity and Inclusion: Legislation that Enhances Human Rights for People Living with Mental Illness: Final Report*, Canadian Mental Health Association & Public Interest Law Centre.
- Carolyn Frohmader (2013) *Dehumanised: The Forced Sterilisation of Women and Girls with Disabilities in Australia*, Women with Disabilities Australia.
- Christopher Slobogin (2007) *Minding Justice: Laws That Deprive People with Mental Disability of Life and Liberty*, Harvard University Press.
- David B Wexler (ed) (2008) *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice*, Carolina Academic Press.
- David Delaney (2003) *Law and Nature*, Cambridge University Press.
- David Hollinsworth (2013) 'Decolonizing Indigenous Disability in Australia' 28(5) *Disability & Society* 601.
- David T Mitchell and Sharon L Snyder (2000) *Narrative Prosthesis: Disability and the Dependencies of Discourse*, University of Michigan Press.
- Dean Spade (2011) *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, South End Press.
- Eileen Baldry et al (2008) 'A Critical Perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System', *Proceedings of the 2nd Australian and New Zealand Critical Criminology Conference*, 19–20 June 2008, Sydney, Australia.
- Eileen Baldry et al (2012) *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*, Family & Community Services: Ageing, Disability & Home Care.
- Elizabeth Sheehy, Julie Stubbs and Julia Tolmie (2012) 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' 34 *Sydney Law Review* 467.
- Equality and Human Rights Commission (2011) *Hidden in Plain Sight: Inquiry into Disabled-Related Harrassment*.
- Fiona Kumari Campbell (2009) *Contours of Ableism: The Production of Disability and Aabledness*, Palgrave Macmillan.
- Gabriel Arkles (2013) 'Gun Control, Mental Illness, and Black Trans and Lesbian Survival' 42(4) *Southwestern Law Review* 855.
- Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice and NSW Council for Intellectual Disability (2008) *Enabling Justice: A Report on Problems and Solutions in Relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System: With Particular Reference to the Practical Operation of s 32 of the Mental Health (Criminal Procedure Act 1990 (NSW))*, Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability.
- Ivan Eugene Watts and Nirmala Erevelles (2004) 'These Deadly Times: Reconceptualizing School Violence by Using Critical Race Theory and Disability Studies' 41(2) *American Educational Research Journal* 271.
- James R P Ogloff et al (2007) 'The Identification of Mental Disorders in the Criminal Justice System', *Trends & Issues in Criminal Justice No 334*, Australian Institute of Criminology.
- James R P Ogloff et al (2013) *Koori Prisoner Mental Health and Cognitive Function Study*, Centre for Forensic Behavioural Science Monash University, Victorian Institute of Forensic Mental Health & Victorian Aboriginal Community Controlled Health Organisation.

- Jill Peay (2010) 'Civil Admission Following a Finding of Unfitness to Plead' in Bernadette McSherry and Penelope Weller (eds) *Rethinking Rights-Based Mental Health Laws*, Hart Publishing.
- Jennifer Keilty and Georgina Connelly (2001) 'Making a Statement: An Exploratory Study of Barriers Facing Women With an Intellectual Disability When Making a Statement About Sexual Assault to Police' 16(2) *Disability & Society* 273.
- Jenny Green (2002) 'Experiences of Inmates with an Intellectual Disability' in David Brown and Meredith Wilkie (eds) *Prisoners as Citizens: Human Rights in Australian Prisons*, Federation Press.
- Jenny Talbot (2008) *No One Knows: Report and Final Recommendations: Prisoners' Voices: Experiences of the Criminal Justice System by Prisoners with Learning Disabilities and Difficulties*, Prison Reform Trust.
- Jill Peay (2011) *Mental Health and Crime*, Routledge.
- Jim Simpson and Mindy Sotiri (2006) *Criminal Justice and Indigenous People with Cognitive Disabilities: A Discussion Paper*, Beyond Bars Alliance.
- Judith Cockram (2005) 'People with an Intellectual Disability in the Prisons' 12(1) *Psychiatry, Psychology and Law* 163.
- Julian Trofimovs and Leanne Dowse (2014) 'Mental Health at the Intersections: The Impact of Complex Needs on Police Contact and Custody for Indigenous Australian Men' 37(4) *International Journal of Law and Psychiatry* 390–398.
- Karen Hughes et al (2012) 'Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies' 379(9826) *Lancet* 1621.
- Kathleen Kendall (2004) 'Female Offenders or Alleged Offenders with Developmental Disabilities: A Critical Overview' in William L Lindsay, John L Taylor and Peter Sturmey (eds) *Offenders with Developmental Disabilities*, John Wiley & Sons.
- Kathryn Vanny et al (2008) 'People with an Intellectual Disability in the Australian Criminal Justice System' 15(2) *Psychiatry, Psychology and Law* 261.
- Kathryn A Vanny et al (2009) 'Mental Illness and Intellectual Disability in Magistrates Courts in New South Wales in Australia' 53(3) *Journal of Intellectual Disability Research* 289.
- Keith Bradley (2009) *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System*, Department of Health (UK).
- Kristin Savell (2004) 'Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law' 49 *McGill Law Journal* 1094.
- Law Reform Commission (2013) *Sexual Offences and the Capacity to Consent*, Law Reform Commission.
- Leanne Dowse et al (2009) 'Disabling Criminology: Conceptualising the Intersections of Critical Disability Studies and Critical Criminology for People with Mental Health and Cognitive Disabilities in the Criminal Justice System' 15(1) *Australian Journal of Human Rights* 29.
- Leanne Dowse et al (2011) *People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System: Impact of Acquired Brain Injury*, Brain Injury Association of NSW and Brain Injury Australia.
- Leanne Dowse et al (2013) *Stop the Violence: Discussion Paper*, Women with Disabilities Australia.
- Lennard J Davis (1995) *Enforcing Normalcy: Disability, Deafness and the Body*, Verso.
- Lesley Chenoweth (1996) 'Violence and Women with Disabilities: Silence and Paradox' 2(4) *Violence Against Women* 391.
- Liat Ben-Moshe, Chris Chapman and Allison C Carey (eds) (2014) *Disability Incarcerated: Imprisonment and Disability in the United States and Canada*, Palgrave Macmillan.
- Licia Carlson (2010) *The Faces of Intellectual Disability: Philosophical Reflections*, Indiana University Press.
- Lois Bibbings (2010) '*Regina v Stone. Regina v Dobinson*' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice*, Hart.
- Mairian Corker and Tom Shakespeare (2002) 'Mapping the Terrain' in Mairian Corker and Tom Shakespeare (eds) *Disability/Postmodernity: Embodying Disability Theory*, Continuum.

- Margrit Shildrick (2009) *Dangerous Discourses of Disability, Subjectivity and Sexuality*, Palgrave Macmillan.
- Mary Langdon (2007) 'Acquired Brain Injury and the Criminal Justice System: Tasmanian Issues', Brain Injury Association of Tasmania, 2007 <http://www.biat.org.au/documents/pdf/ABI%20&%20Criminal%20Justice%20-%20Tasmania%20Issues.pdf>.
- Mary Stathopoulos (2012) *Addressing Women's Victimisation Histories in Custodial Settings*, ACSSA Issues No 13, Australian Centre for the Study of Sexual Assault.
- Mental Health Law Centre (WA) (2013) Interaction with the Western Australian Criminal Justice System by People Affected by Mental Illness or Impairment, Mental Health Law Centre (WA).
- Michael L Perlin (2013a) *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law*, Ashgate.
- Michael L Perlin (2013b) *Mental Disability and the Death Penalty: The Shame of States*, Rowman & Littlefield Publishers.
- Michael L Perlin (2000) *The Hidden Prejudice: Mental Disability on Trial*, American Psychological Association.
- Michelle Jarman (2011) 'Coming Up from Underground: Uneasy Dialogues at the Intersections of Race, Mental Illness, and Disability Studies' in Christopher M Bell (ed) *Blackness and Disability: Critical Examinations and Cultural Interventions*, Michigan State University Press.
- Michelle Jarman (2012) 'Dismembering the Lynch Mob: Intersecting Narratives of Disability, Race and Sexual Menace' in Robert McRuer and Anna Mollow (eds) *Sex and Disability*, Duke University Press.
- Mindy Sotiri et al (2012) *No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*, Aboriginal Disability Justice Campaign.
- Neil Cobb (2010) 'Commentary on R v Stone and Dobinson' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice*, Hart.
- New South Wales Law Reform Commission (2012a) *Bail*, Report No 133.
- New South Wales Law Reform Commission (2012b) *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No 135.
- New South Wales Law Reform Commission (2012c), *Special Categories of Offenders*, Sentencing Question Paper No 11.
- New South Wales Law Reform Commission (2013) *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138.
- New South Wales Police Force (2013) *NSW Police Force Handbook*.
- New Zealand Law Commission (2010) *Mental Impairment Decision-Making and the Insanity Defence*, Report 120.
- Ngairé Naffine (2009) *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*, Hart Publishing.
- Nick Rushworth (2011) *Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System*, Brain Injury Australia.
- Nicola Lacey (2001a) 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' 64(3) *Modern Law Review* 350.
- Nicola Lacey (2001b) 'Responsibility and Modernity in Criminal Law' 9(3) *Journal of Political Philosophy* 249.
- Nicola Lacey (2010) 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' 4 *Criminal Law and Philosophy* 109.
- Nirmala Erevelles (2011) *Disability and Difference in Global Contexts: Enabling a Transformative Body Politic*, Palgrave Macmillan.
- NSW Police Force (1998), *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*.
- Peter W Schofield et al (2006) 'Traumatic Brain Injury among Australian Prisoners: Rates, Recurrence and Sequelae' 20(5) *Brain Injury* 499.
- Phillip French (2007) *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland*, Queensland Advocacy.

- Richard Devlin and Dianne Pothier (2006) 'Introduction: Toward a Critical Theory of Dis-Citizenship' in Dianne Pothier and Richard Devlin (eds) *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, UBC Press.
- Richard D Schneider, Hy Bloom and Mark Heerema (2007) *Mental Health Courts: Decriminalizing the Mentally Ill*, Irwin Law.
- Robert McRuer (2010) 'Disability Nationalism in Crip Times' 4(2) *Journal of Literary & Cultural Disability Studies* 163.
- Seena Fazel et al (2008) 'The Prevalence of Intellectual Disabilities among 12000 Prisoners — A Systematic Review' 31 *International Journal of Law and Psychiatry* 369.
- Scottish Law Commission (2014) *Report on Adults with Incapacity*, Scot Law Com No 240.
- Sherene H Razack (1998) 'From Pity to Respect: The Ableist Gaze and the Politics of Rescue' in Sherene H Razack (ed) *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, University of Toronto Press.
- Sherene H Razack (2011) 'Timely Deaths: Medicalizing the Deaths of Aboriginal People in Police Custody' 9(2) *Law, Culture and the Humanities* 352.
- Sharon L Snyder and David T Mitchell (2006) *Cultural Locations of Disability*, University of Chicago Press.
- Shelley Tremain (2002) 'On the Subject of Impairment' in Mairian Corker and Tom Shakespeare (eds) *Disability/Postmodernity: Embodying Disability Theory*, Continuum.
- Shelley Tremain (2005) 'Foucault, Governmentality, and Critical Disability Theory: An Introduction' in Shelley Tremain (ed) *Foucault and the Government of Disability*, University of Michigan Press.
- Suellen Murray and Anastasia Powell (2008) *Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response*, Australian Centre for the Study of Sexual Assault.
- Suellen Murray and Melanie Heenan (2012) 'Reported Rapes in Victoria: Police Responses to Victims with a Psychiatric Disability or Mental Health Issue' 23(3) *Current Issues in Criminal Justice* 353.
- Susan Hayes and Doris McIlwain (2006) *The Incidence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study*, University of Sydney.
- Susan C Hayes et al (2007) 'The Prevalence of Intellectual Disability in a Major UK Prison' 35(3) *British Journal of Learning Disabilities* 162.
- Tessa Boyd-Caine and Duncan Chappell (2005–2006) 'The Forensic Patient Population in New South Wales' 17(1) *Current Issues in Criminal Justice* 5.
- The Law Commission (2014) *Unfitness to Plead: An Issues Paper*, The Law Commission.
- The Law Commission (2013) *Criminal Liability: Insanity and Automatism: A Discussion Paper*, The Law Commission.
- Tobin Siebers (2008) *Disability Theory*, University of Michigan Press.
- Tom Calma (2008) *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, Australian Human Rights Commission.
- Tony Butler (2005) 'Mental Disorder in the New South Wales Prison Population' 39 *Australian and New Zealand Journal of Psychiatry* 407.
- Victoria (2013) *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers: Final Report*, Parl Paper No 216.
- Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond Doubt: The Experiences of People with Disabilities Reporting Crimes: Research Findings*, Victorian Equal Opportunity and Human Rights Commission.
- Victorian Law Reform Commission (2014) *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.
- William Glaser and Kirsten Deane (1999) 'Normalisation in an Abnormal World: A Study of Prisoners with an Intellectual Disability' 43(3) *International Journal of Offender Therapy and Comparative Criminology* 33.
- Yvonne Peters (2003) *Federally Sentenced Women with Mental Disabilities: A Dark Corner in Canadian Human Rights*, Disabled Women's Action Network (DAWN) Canada.