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

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Abstract

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.

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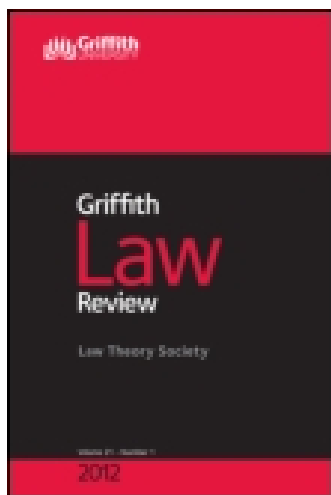
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Disability at the periphery: legal theory, disability and criminal law

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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

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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.

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