

Inner Mind as Outer Self:  
Addressing Problems of Proof relating to *Mens  
Rea* through the Literary Figure of the Double in  
Gothic Fiction

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*For my family*

## Abstract

In formulating a test for determining the defendant's state of mind at the time of an offence, criminal courts have struggled to maintain a coherent and consistent approach. Located in the context of Law and Literature, which uses literary tools in analysing, understanding and shaping legal thought and action, my research explores problems of proof in criminal law, and the law's relationship with the internal mind, through the literary figure of the double. Specifically, I will be looking at doubles in Gothic fiction from the nineteenth century, a time which struggled to understand the guilty psyche and personified the internal mind as an external being.

By utilising Gothic doubles as a new way of reading doctrinal and theoretical debates regarding *mens rea*, my thesis aims to prove that doubles in Gothic fiction, specifically in *Strange Case of Dr Jekyll and Mr Hyde*, *Frankenstein; or, the Modern Prometheus* and *The Picture of Dorian Gray*, can be read as external manifestations of the internal mind; as representations of the criminal law of the nineteenth century which was in the process of developing *mens rea*. Ultimately, my research aims to provide new and unique ways of engaging with concepts of gender, character and the divide between subjective and objective approaches in cases of recklessness.

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## Chapter I: Introduction – Inner Mind as Outer Self

*'We are all subjected to two distinct natures in the same person. I myself have suffered grievously in that way.'*<sup>1</sup>

~ James Hogg, *The Private Memoirs and Confessions of a Justified Sinner*

### 1.1) Introduction

At present, criminal law makes specific reference to the guilty mind, or *mens rea* in the original Latin, as a requirement in judging a defendant's culpability. However, this was not always the case. During the eighteenth and nineteenth centuries, the primary means of responsibility attribution was through superficial constructions of the defendant's character. By the end of the nineteenth century, the criminal law had begun to incorporate the interior into what would eventually become *mens rea*. Scholars agree that the nineteenth century was a crucible for a deeper understanding of the interior self in both literature and criminal law.<sup>2</sup> This thesis looks to the literature of the time as a way to review historical progression in the criminal law.

By the *fin-de-siècle* the interior was increasingly explored by proponents of psychoanalysis like Sigmund Freud<sup>3</sup> and Carl Jung,<sup>4</sup> and taken up in the twentieth century by psychoanalyst Jacques Lacan's mirror stage,<sup>5</sup> philosopher George Herbert Mead's theory of the 'I' and the 'me',<sup>6</sup> and sociologist Erving Goffman's notion of the performed self.<sup>7</sup> While sociology and psychoanalysis can respond to the inner mind, this thesis looks more to literary and legal doubling, and will focus on literature as an

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<sup>1</sup> Hogg, J. 'The Private Memoirs and Confessions of a Justified Sinner' (Longman, Hurst, Rees, Orme, Brown and Green 1824), 293.

<sup>2</sup> Appleman, L. 'Gothic Stories, *Mens Rea*, and Nineteenth-Century American Criminal Law' in Goodman, N. and Stern, S. (eds). 'The Routledge Research Companion to Law and Humanities in Nineteenth-Century America' (Routledge 2017), 356-68. See also: Stern, S. 'Literary Analysis of Law' in Dubber, M.D. and Tomlins, C. (eds) 'The Oxford Handbook of Historical Legal Research' (OUP 2018), 63-78.

<sup>3</sup> Freud, S. 'The Interpretation of Dreams' (Franz Deuticke, Leipzig & Vienna 1899).

<sup>4</sup> Jung, C.G. 'Psychology and Religion' (Yale University Press 1938).

<sup>5</sup> Lacan, J. 'Some reflections on the Ego' (1953) *The International Journal of Psychoanalysis*, 34, 11-17.

<sup>6</sup> Mead, G.H. 'Mind, Self, and Society from the Standpoint of a Social Behaviorist' (The University of Chicago Press 1967), 173-74.

<sup>7</sup> Goffman, E. 'The Presentation of Self in Everyday Life' (Anchor 1956).

interpretive tool for analysing problems of proof relating to *mens rea*. It will be demonstrated that literature, and more specifically Doubles fiction, can explain, clarify and give us a deeper understanding of these problems. This will be achieved by reading problems of proof relating to *mens rea* as Doubles narratives in order to investigate how the guilty mind has been understood and explored by Gothic literature and criminal law.

Gothic fiction flourished throughout the nineteenth century and provided a setting in which characters could explore their internalities in external ways. Detective fiction of the period in contrast follows a retrospective and procedure-based investigation into a past crime and concentrates not on interrogating the mental processes of the perpetrator but on discovering the culprit through reason and logic. It is for this reason that my thesis foregrounds Gothic fiction, which pursues its characters through the dark recesses of their minds as they engage in illicit activity. In this way, Gothic literature grappled with the interior self and mental processes behind criminal action alongside contemporary criminal law. It will be argued that this complex interplay between the internal mind and the external self is explored most intriguingly in the Gothic sub-genre of Doubles fiction.

**My research question, then, is: How can Doubles fiction be used to illuminate, critique and destabilise problems of proof relating to *mens rea*?**

## **1.2) Theory and Methodology**

The field of criminal law and literature has yet to address how Doubles fiction can deepen our understanding of the guilty mind. The work described in the following chapters attempts to redress that. This thesis builds on, and critiques, the criminal legal theorists who have engaged with *mens rea*. Primarily, it looks to Alan Norrie because he critiques the oscillation between subjective and objective approaches; to Antony Duff because he emphasises the interconnectedness of *actus reus* and *mens rea*; and to Richard Tur because he advocates for a hybrid subjective/objective approach to determining *mens rea*. It builds on the work of Nicola Lacey, Simon Stern and Laura Appleman who explore shifting conceptions of responsibility through the eighteenth century to now by engaging

in readings of contemporary Gothic literature. Their work is important because it helps account for the law's struggle to explore the guilty mind, and points to instabilities that lie beneath current conceptions of *mens rea*. This thesis hopes to extend their work by examining in greater detail three problems of proof related to *mens rea* through three instances of doubles in three particular works of Gothic fiction, which raise separate but related issues.

A monster is made, a picture painted, and a self split in two. Separate from but connected to their originators, they display their counterparts' flaws, sins and vices on their faces. Their originators may seem genteel, attractive and moral, but their doubles tell quite a different story. This duality in works of Gothic fiction, my thesis suggests, anticipates the unstable binaries relating to *mens rea*. The concept of *mens rea* remains fluid and unstable, and yet is crucial to the criminal process - how can it be morally fair to convict a person of a crime if they did not intend to commit it? This thesis will suggest that doubles in Gothic literature exemplify the complex interplay between the internal and the external, and will evidence this through Oscar Wilde's *The Picture of Dorian Gray*, Robert Louis Stevenson's *Strange Case of Dr Jekyll and Mr Hyde* and Mary Shelley's *Frankenstein; or, the Modern Prometheus*.

Gothic and Doubles fiction developed alongside criminal law in the period, illustrating the shift from external to internal conceptions of culpability, and are genres suited to illuminating and critiquing problems relating to *mens rea* because they directly engage with questions regarding internal culpability by inviting readers into the characters' guilty minds. The double is therefore understood, in the context of this thesis, as a figure of instability and disruption, who comes into being directly because of the actions of the protagonist. It is the active role the protagonist plays in the creation of their double that is of import to this thesis, as the unstable interconnectedness of protagonist and double most persuasively embodies the bleeding in between binaries like the subjective and

objective, *actus reus* and *mens rea*, male- and female-coded misconduct, which this thesis interrogates.

In works of Doubles fiction, the protagonist commits criminal acts either directly by their own hand or indirectly by the actions of their double, with the latter bearing a tangible mark of those crimes on their person. This corresponds with the image conjured by David Gurnham of law as a vulnerable human body.<sup>8</sup> The interaction between the tangible and intangible, the physical and the abstract, allows legal concepts to be explored through literature and its translation in the visual medium, for example film and stage dramas. This thesis takes the view that the double of a character in fiction is a physical manifestation or projection of that primary character's inner thoughts and intentions, and at the very least a tangible representation of what that primary character is capable of. Nineteenth century Gothic fiction is therefore a valuable genre within which to locate criminal legal scholarship as it engages with concepts relating to the guilty mind – and though a range of offences will be discussed, as Leslie Moran notes, 'murder is the Gothic act par excellence'.<sup>9</sup>

### **1.3) Justifications for Research**

This thesis focuses on selected works of literature from the nineteenth century because this was an important era in the development of criminal law. Specifically there was a noticeable shift from external conceptions of responsibility attribution (at the start of the century) towards a more interior-looking legal system (by the *fin-de-siècle*).<sup>10</sup> It is by studying this period that we can show how literature exposes and illuminates gaps in legal discourse.

Having made the decision to focus on Gothic fiction, the scope has been further narrowed to explore the figure of the literary double, a prevalent feature of Gothic

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<sup>8</sup> Gurnham, D. 'Memory, Imagination, Justice: Intersections of Law and Literature' (Routledge 2016), 9.

<sup>9</sup> Moran, L.J. 'Gothic Law' (2001) 10 Griffith Law Review, 75-100, 76.

<sup>10</sup> Lacey, N. 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) Criminal Law and Philosophy, 4(2), 109–133. See also: Appleman (n2), Stern (n2).

literature such as James Hogg's *The Private Memoirs and Confessions of a Justified Sinner* and Fyodor Dostoyevsky's *The Double*. Narrowing down from Gothic fiction to the double was established in order to exclude instances of mere physical duplication, because Doppelgänger stories often involve narrative ambiguity as to whether the Doppelgänger is real or a figment of the protagonist's imagination. This suggests that Doppelgängers are more psychoanalytical, whereas the three chosen texts involve protagonists who participate in the creation of their double, a third party who subsequently confirms the existence of the double, and a double who physically manifests the protagonist's moral degradation in gruesome, unassailable ways.

Oscar Wilde's *The Picture of Dorian Gray*, Robert Louis Stevenson's *Strange Case of Dr Jekyll and Mr Hyde* and Mary Shelley's *Frankenstein; or, the Modern Prometheus* all personify the inner mind as outer self through their varying conceptualisations of the literary double. Though *Dorian Gray* was published towards the end of the nineteenth century, this thesis argues that it sheds light on the early nineteenth century notion of character as a means of attributing responsibility, and anticipates its resurgence in such forms as bad character and previous convictions in sentencing practiced today. Given that the painting is a separate entity to Dorian, and superficial in its pictorial representation of his features, *Dorian Gray* predicts the potential superficiality of character in judging a defendant for an alleged crime, and the bleeding in of internality in both legal and literary spheres by the century's end.

As this thesis will show, *mens rea* replaced character-based judgments and incorporated internal elements of individual responsibility in their place, and it will be argued that *Jekyll and Hyde* performs a very specific aspect of *mens rea*: it instantiates in literary form the complexity and instability between subjective and objective approaches to determining recklessness. Over-subjectivism might fail to take account of the fact that a subjective approach is determined by objective means; over-objectivism might fail to judge the defendant's individual culpability; and a hybrid approach fails to address the instabilities

of both. Therefore, separating them in theory and practice is complex and uncertain. The splitting of Stevenson's eponymous doctor into Jekyll and Hyde leads to instability between the two halves of the whole, representing the unstable divide between the subjective and objective approaches. This proceeds from deeper instabilities in society, such as class, gender and race, which *Jekyll and Hyde* also appears to dramatize, but which are not the focus of the following chapters.

Finally, it will be argued that *Frankenstein* anticipates problems relating to implicitly gendered criminal action that manifests in the old defence of provocation and in the loss of control defence that replaced it. *Frankenstein* involves perhaps the least overt literary double of the three texts because the creature is neither one side of a split self as in *Jekyll and Hyde*, nor a painted reflection of the protagonist's inner self as in *Dorian Gray*; but it is the fragmented responsibility between Victor and the creature that is most intriguing for the purposes of this thesis. Not only does the creature enact crimes that Victor seems to do little to prevent, he also performs both masculinised crimes (in which the commission of the criminal act follows almost immediately after the intent) and feminised crimes (in which there is a longer period of time between intent and action). It will be argued that this fundamentally calls into question the appropriateness of these gendered concepts.

#### **1.4) Thesis Overview**

The thesis will proceed as follows: the next chapter reviews the literature regarding problems of proof relating to *mens rea*, engaging with the general principles underlying theories of punishment, exploring the historical aspects of the legal understanding of the guilty mind and identifying three key problems related to *mens rea*. The first of these is the pre-*mens rea* method of judging a defendant's culpability, namely character, which constitutes a superficial construction of identity gleaned by solely external means. The second concerns the instability of the subjective/objective divide in judging the *mens rea* of recklessness. The final issue concerns gendered aspects of the objective 'reasonable



person' standard, focusing on gendered elements in the old defence of provocation and its replacement, loss of control. In order to be inclusive to all genders, the defendant will be referred to using they/them pronouns throughout the thesis, unless directly quoting from a source.

Addressing these problems of *mens rea* leads the thesis to the field of law and literature, developing a methodology that uses literature, and specifically works of Gothic/Doubles fiction, to critique and destabilise the *mens rea*-related problems discussed above. This involves building on Nicola Lacey's notion of the nineteenth century as a pivotal period for the developing understanding of the guilty mind in both literature and the law, and her reading of *Jekyll and Hyde* as an allegory for character-based responsibility attribution. It will build on the work of David Gurnham because he looks to literature to situate and clarify the ethics and morals of the law, and looks to Simon Stern and Laura Appleman who identify the narrative qualities of the law and the parallel development of *mens rea* in both nineteenth century Gothic literature and criminal law. All four historicise criminal law and literature and examine the intersection of both during the nineteenth century and now.

The critical framework developed incorporates readings of genre, intertextuality in literature and law, and Gothic/Doubles fiction located in the context of socio-political developments of the nineteenth century. Following these three methodology-based chapters, my thesis will comprise a further three chapters that each function as a case study of a distinct (though related) problem of *mens rea* and are each based on a different work of Doubles fiction. The first of these chapters looks to Oscar Wilde's *The Picture of Dorian Gray* as a means of analysing character-based attributions of responsibility in nineteenth century criminal law. It will consider the value of character in legal decision-making whilst also pointing to its weaknesses, which the chapter will argue are demonstrated by Wilde's novel. The second of these substantive chapters concerns Robert Louis Stevenson's *Strange Case of Dr Jekyll and Mr Hyde* in analysing the

subjective/objective divide in recklessness. It will argue that the divided doctor of Stevenson's tale instantiates the instability between these two distinct but connected approaches. The third chapter uses Mary Shelley's *Frankenstein* to analyse gendered notions of reasonable behaviour in law, illuminating complex notions of gendered behaviour in the provocation and loss of control defences.

The thesis will conclude that criminal law in the nineteenth century, as illustrated by the three texts, shifted to different constructions involving a deeper understanding of the guilty mind, and that case law and literature reconstruct these conceptions over time. It will be argued that *Dorian Gray*, *Jekyll and Hyde*, and *Frankenstein* illustrate and instantiate *mens rea*-related problems such as character, the subjective/objective divide in recklessness, and gendered defences to criminal action. Ultimately, it will show that these problems of proof relating to *mens rea* point to deeper instabilities in the law regarding who the law's subject is, how the law produces its subject, and the unstable intersectionality of legal fictions like the reasonable person.

## **Chapter II:** **Problems of Proof Relating to *Mens Rea***

### **2.1) Introduction**

As stated in the introductory chapter, this thesis uses Doubles/Gothic fiction to critique and destabilise three key problems relating to *mens rea*: the pre-*mens rea* practice of determining a defendant's guilt through an examination of their character that still pervades in certain forms; the courts' oscillation between subjective and objective approaches to determining cases of recklessness; and the standards of reasonableness demonstrated by the partial defences of provocation and loss of control that privilege male-coded emotional responses. Ultimately, the thesis aims to contribute a new perspective on problems relating to *mens rea* through the literary toolkit of Doubles fiction and show how these issues can be illuminated and re-approached when read as doubles narratives.

The chapter will begin with an overview of the criminal law concepts at play – the *actus reus* (guilty act) and *mens rea* (guilty mind), which form the foundations of the criminal justice system – and will examine case law and commentary concerning serious criminal offences including, but not limited to homicide. It will then discuss the first major problem relating to *mens rea*, namely character (which will be analysed in chapter 5 using *The Picture of Dorian Gray*), a primary means of determining culpability long before *mens rea* emerged as a distinct doctrine. Drawing on the work of Nicola Lacey, it will be argued that character-based notions still pervade the criminal law in the form of bad character evidence, the relevance of previous convictions at the sentencing stage, and motive as a proxy for character, and that perpetuating such concepts undermines the truth-finding mission of the courts. Although *mens rea* is not engaged at the sentencing stage, issues of motive are, which raises questions regarding character, moral blameworthiness and individual culpability.

The second major problem of *mens rea*, namely the subjective/objective divide in recklessness (which will be examined in chapter 6 using *Strange Case of Dr Jekyll and Mr Hyde*), will then be discussed. There continues to be intense debate around the use of these two approaches, whether distinct or combined, in cases of recklessness, and they have been subject to much interpretation, restructuring and reconceptualization in case law like *Cunningham*,<sup>1</sup> *Caldwell*<sup>2</sup> and *R v G and R*.<sup>3</sup> I then explore the final problem relating to *mens rea* in this thesis: provocation and loss of control (which will be investigated in chapter 7 using *Frankenstein*). The objective standard was historically conceptualised as ‘the reasonable man’, and though it is now regarded as the more gender-neutral ‘reasonable person’, it is contended that gendered assumptions still underlie these principles, which I argue is demonstrated through the defences to criminal action like provocation and its modern replacement loss of control. Even though the loss of self-control defence is more gender-inclusive in scope, I argue that problems relating to gendered agency and assumptions remain.

## 2.2) Criminal Law: General Overview

The maxim ‘*actus non facit reum nisi mens sit rea* – ‘the act does not make a person guilty unless the mind is also guilty’<sup>4</sup> – articulated by Sir Edward Coke<sup>5</sup> and likely derived from the teachings of Saint Augustine,<sup>6</sup> guides decision-makers in judging defendants’ actions. Contemporary commentators, like Saint Thomas Aquinas, were sceptical of a human being’s capacity to discern another person’s state of mind; he believed that while men were capable of judging ‘outward acts’, only God could judge the ‘inner movement

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<sup>1</sup> *R v Cunningham* [1957] 2 Q.B. 396.

<sup>2</sup> *MPC v Caldwell* [1982] A.C. 341.

<sup>3</sup> *R v G and R* [2003] UKHL 50.

<sup>4</sup> LaFave, W.R. ‘Criminal Law’ 4<sup>th</sup> ed. (West Academic 2003), 225. Referenced in Heller, K.J. ‘The Cognitive Psychology of Mens Rea’ (2009) *The Journal of Criminal Law and Criminology*, 99(2), 317-380, 317-18.

<sup>5</sup> Coke, E. ‘The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes’ (Flesher, Lee and Pakeman 1644; reprinted by W. Clarke and Sons 1817), 107. Referenced in Chesney, E.J. ‘Concept of Mens Rea in the Criminal Law’ (1939) *Journal of Criminal Law and Criminology*, 29(5), 627-644, 632.

<sup>6</sup> Augustine, C., Pollock, F. and Maitland, F.W. ‘History of the English Law Before the Time of Edward I’ Vol. 2 (Cambridge University Press 1895), 474-76.

of wills'.<sup>7</sup> However, Martin Gardner suggests that *mens rea*, which he describes as the notion that 'justifiable punishment is premised on and proportional to moral guilt', 'eventually became the foundation for a generalized principle throughout the criminal law'<sup>8</sup> and was 'well in place by the middle of the thirteenth century'.<sup>9</sup> He contends that *mens rea* as 'originally conceived constituted a normative judgment of subjective wickedness, requiring not simply that the [defendant] intend to commit the offense, but also that the offense be committed by a responsible moral agent for wicked purposes'.<sup>10</sup>

There have been many attempts to define modern conceptions of *mens rea* during the course of criminal case law throughout the years. Lord Patrick Devlin's *Enforcement of Morals* separates *mens rea* into two elements: firstly, the 'intent to do the act, and secondly, the knowledge of the circumstances that makes the act a criminal offence'.<sup>11</sup>

The *actus reus-mens rea* distinction is useful insofar as it relates to the separate external/internal elements of an offence. However, Antony Duff notes the difficulty in drawing a 'clear general distinction' between the *actus reus* and *mens rea*, not least because it is difficult to 'specify the *actus reus* without incorporating an aspect of the *mens rea*'.<sup>12</sup> Subsequently, Duff goes on to argue that removing the *actus reus*' sense of physicality in defining the *mens rea* through merely focusing on 'bodily movements... in fact loses any idea of agency' in the concept of *mens rea* itself,<sup>13</sup> i.e. the momentum of the defendant's physical body in the committing of the offence is driven (at least in part) by the defendant's internal thoughts, and vice versa.

To illustrate this, Duff notes that the offence of theft<sup>14</sup> comprises the *actus reus* of appropriation of property belonging to another, and the *mens rea* of dishonesty and the

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<sup>7</sup> Aquinas, T. and Hutchins, R.M. (ed) 'Summa Theologica' in 'Great books of the western world' Vol. 20: Thomas Aquinas (Encyclopædia Britannica, Inc. 1952), 261. Referenced in Heller (n4), 317-18.

<sup>8</sup> Gardner, M.R. 'The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present' (1993) *Utah Law Review*, 1993(3), 635-70, 655.

<sup>9</sup> *Ibid*, 663.

<sup>10</sup> *Ibid*.

<sup>11</sup> Devlin, P. 'Statutory Offences' (1958) *Journal of the Society of Public Teachers of Law*, 4, 213.

<sup>12</sup> Duff, R.A. 'Answering for Crime: Responsibility and Liability in the Criminal Law' (Hart Publishing 2007), 202.

<sup>13</sup> *Ibid*.

<sup>14</sup> S.1(1) Theft Act 1968.

intention to permanently deprive.<sup>15</sup> In this case, the ‘intention to permanently deprive’ aspect requires something tangible of which the owner is to be deprived, incorporating the action of depriving the owner in this mental element despite the fact that it would seem to fall within the *actus reus* definition. This inextricable link between *actus reus* and *mens rea* causes further problems for criminal legal theory and practice: *actus reus* can be proven with evidence more readily and more reliably than *mens rea*, if captured by a camera for instance; whereas *mens rea*, which relies more on witness testimony at best and judicial speculation at worst, is the far more problematic of the two, and as such is the focus of this study. *Mens rea* exists in many forms, including intention and recklessness, as well as concepts relating to individual fault such as negligence, capacity, and cases of strict liability in which a mental fault element is not required in relation to one or more elements of the *actus reus*. Of these elements, only recklessness is a focus of this thesis, and will be discussed later in this chapter.

As a concept, *mens rea* is centred around notions of responsibility and choice, and therefore grounded, as Andrew Ashworth observes, in ‘the principle of autonomy’, which in theory ensures that citizens ‘will only be liable to conviction and to the exercise of state coercion against them, if they knowingly cause a prohibited harm’.<sup>16</sup> Lacey, Wells and Quick point out that this is far more complex in practice: the law ‘presupposes an unrealistically dualistic approach to human behaviour, dividing physical and mental elements which cannot be meaningfully separated’.<sup>17</sup> Establishing guilt is not just a search for *mens rea* but for a confession, an admission of guilt on the part of the defendant.<sup>18</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> Ashworth, A. ‘Principles of Criminal Law’ 5<sup>th</sup> ed (OUP 2006), 158-9.

<sup>17</sup> Lacey, N., Wells, C. and Quick, O. ‘Reconstructing Criminal Law: Text and Materials’ 4<sup>th</sup> ed. (CUP 2010; reprinted 2012), 105.

<sup>18</sup> Hepworth, M. and Turner, B. ‘Confession, Guilt and Responsibility’ (1979) *British Journal of Law and Society*, 6(2), 219-234, 220. Confessions are not the focus of this thesis but may form the basis of further research drawing on the methods developed herein.

English and Welsh law holds a presumption that '*mens rea* will be required for conviction of any offence, unless it is excluded by clear statutory wording', according to Lacey, Wells and Quick.<sup>19</sup> Simester and Sullivan define *mens rea* as 'that part of the offence which refers to the defendant's mental state',<sup>20</sup> and Wilson notes that, although *mens rea* is translated as 'guilty mind', the law focuses on proving fault through a rather technical process as opposed to the approach of determining the defendant's 'moral blameworthiness',<sup>21</sup> i.e. the prosecution must establish that the defendant possessed the specified mental state toward the *actus reus* required for a particular offence.<sup>22</sup> Alan Norrie suggests that one of the core elements of criminal law is the notion of individual responsibility, namely holding an individual responsible for breaking the law of their own volition, and thus finds *mens rea* central to this tenet because it 'embodies a fault element: individuals should only be punished when they have at least recognised the harmful aspect of their conduct or its consequences'.<sup>23</sup>

Distinguishing the physical and mental aspects of an offence, Paul H. Robinson describes the difference between *actus reus* and *mens rea* as being one between conduct (which can be directly observed) and intention (which cannot).<sup>24</sup> Robinson goes a step further in asserting that, at a foundational level, the *actus reus* is largely objective in scope, but often takes into consideration the subjective state of mind of a defendant.<sup>25</sup> Similarly, whilst the *mens rea* of an offence is more subjective in nature than otherwise, it is usually measured against objective standards.<sup>26</sup> This distinction follows on from Antony Duff's assertion that the *mens rea* of an offence often incorporates elements of the *actus reus* and vice versa.<sup>27</sup> Robinson further argues that 'without *mens rea*, there is

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<sup>19</sup> Lacey, Wells and Quick (n17), 107.

<sup>20</sup> Simester, A.P. and Sullivan, G.R. 'Criminal Law Theory and Doctrine' 3<sup>rd</sup> ed. (Hart Publishing 2007), 119.

<sup>21</sup> Wilson, W. 'Central Issues in Criminal Theory' (Hart 2002), 130.

<sup>22</sup> *Ibid*, 119.

<sup>23</sup> Norrie, A. 'Crime, Reason and History: A Critical Introduction to Criminal Law' 2<sup>nd</sup> ed. (Weidenfeld and Nicolson 2001), 37.

<sup>24</sup> Robinson, P.H. 'Should the Criminal Law Abandon the *Actus Reus-Mens Rea* Distinction?' in Shute, S., Gardner, J. and Horder, J. (eds). 'Action and Value in Criminal Law' (Clarendon Press 1993), 187-211, 187.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*.

<sup>27</sup> Duff (n12), 202.

little justification for condemning or punishing anyone'.<sup>28</sup> He finds subjectivism and objectivism to be highly problematic, and in fact believes the distinction between *actus reus* and *mens rea* is not a useful one – primarily because he states the two elements share no common characteristics or functions.<sup>29</sup> Despite Robinson's assertion that the fault element of *mens rea* is largely subjective and the conduct element of *actus reus* is largely objective,<sup>30</sup> this study aims to demonstrate through Doubles literature that *mens rea* incorporates both subjective/objective and internal/external aspects, and that delineating between them risks arbitrariness.

In order to examine *mens rea*, we must ask why certain actions are punishable by the state. The answer, according to H.L.A. Hart, is 'to announce to society that these actions are not to be done and to secure that fewer of them are done'.<sup>31</sup> Hart goes on to list three main reasons behind the theory of punishment: retribution, deterrence, and acting in accord with principles of fairness and justice.<sup>32</sup> However, for Hart, the principal justification for the punishment of actions society deems to be criminal is that 'when breach of the law involves moral guilt the application to the offender of the pain of punishment is of itself a thing of value'<sup>33</sup> – in effect, then, the application of punishment to a state-ordained criminal act is an example set to the public, a demonstration of the state's jurisdiction and reach, and an enforcement of public morality fuelled by a quasi-contractual agreement in which the non-offending public make an implicit contract with the state to abide by its laws.

Continuing on this line of thought, Hart goes on to discuss the gradation of punishment, which is just as important as the justification of punishment in the context of academic studies into *mens rea*. Hart discusses the:

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<sup>28</sup> Robinson (n24), 208.

<sup>29</sup> Ibid, 210, 206.

<sup>30</sup> Ibid, 188.

<sup>31</sup> Hart, H.L.A. 'Punishment and Responsibility: Essays in the Philosophy of Law' (Clarendon Press 1968), 6.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, 8.



deeply entrenched notion that the measure [of the severity of punishment] should not be, or not only be, the subjective wickedness of the offender but the amount of harm done.<sup>34</sup>

Hart's theory of punishment is twofold: deterrence from breaking the law, and a 'just desserts' mentality. This theory reinforces the idea that a criminal action should be individually scrutinised on its unique facts and circumstances by decision-makers and the public at large, as opposed to a blanket punishment being applied for certain criminal offences and punishing the idea of the crime rather than working to determine an individual defendant's level of culpability. William Wilson notes that the internal mental element is 'quite distinct' from establishing conduct as part of the *actus reus: mens rea* 'operates to filter those deserving censure and punishment for their wrong from those who do not, and to grade liability according to their degree of fault'.<sup>35</sup> This resonates with Alan Norrie's critique of 'the legal individualism that underlies discussions of criminal law and justice', noting that:

[o]ur modern law begins in the early nineteenth century with a separation of the individual from her social and moral context in order that we might find the individual responsible for her acts in isolation from questions of the social causes of action, and the social responsibilities for what occurs.<sup>36</sup>

The separation between the individual and their context can be seen in Sir William Holdsworth's *History of English Law*,<sup>37</sup> which calls for courts to adopt an 'external standard' when judging *mens rea*, in which one must show that 'a man of ordinary ability, situated as the accused was situated, and having his means of knowledge, would not have acted as he acted without having that *mens rea* which it is sought to impute to him'.<sup>38</sup> Holdsworth goes on to state, somewhat paradoxically, that this approach 'does not mean that the law bases criminal liability upon an external standard',<sup>39</sup> which suggests a notable element of subjectivity in legal decision-making. Kumaralingam

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<sup>34</sup> Ibid, 234.

<sup>35</sup> Wilson (n21), 266.

<sup>36</sup> Norrie, A. 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) *The Modern Law Review*, 65(4), 538-55, 540. Norrie's argument in this passage informs much of the work in this thesis.

<sup>37</sup> Holdsworth, W.S. 'A History of English Law' Vol. 3: 1066-1485, 3rd ed. (Medieval Common Law 1923; 1908), 374. Referenced by Denning, T. 'Responsibility Before the Law: The Hebrew University of Jerusalem, Lionel Cohen Lectures (Seventh Series)' (Magnes Press 1961), 17-18.

<sup>38</sup> Ibid, 18.

<sup>39</sup> Ibid.

Amirthalingam describes criminal fault as 'a composite of subjective and objective elements'<sup>40</sup> and explains that 'blameworthiness goes beyond mere conduct responsibility; it is a normative inquiry as to whether the person deserves to be labelled and punished as a criminal'.<sup>41</sup>

Controversy over the courts' handling of *mens rea* in criminal prosecutions remains as prevalent as ever, with two cases in 2013 causing particular debate: namely, *R v Brown*<sup>42</sup> and *R v Hughes*.<sup>43</sup> Davie and Zell argue that despite previous rulings of the Supreme Court (formerly the House of Lords) describing the concept of moral blameworthiness as 'constitutional' and analogous to the 'principle of legality' itself, the court in *Brown* 'failed to read a *mens rea* requirement into a serious sexual offence'.<sup>44</sup> In addition, the courts have taken a number of controversial approaches towards *mens rea* in cases of criminal attempts, primarily in the recent case of *R v Pace and Rogers*,<sup>45</sup> whose rationale according to Peter Mirfield seems to form a trio with *R v Khan*<sup>46</sup> and *Attorney General's Reference (No. 3 of 1992)*,<sup>47</sup> of conflicting jurisprudence as regards to the interpretation of *mens rea* in criminal attempts.<sup>48</sup>

Having given a general overview of internal elements of criminal legal theory, in the following sections I will highlight three problematic aspects of *mens rea*: firstly, conceptions (external, conduct-based, backward-looking) of character; secondly, the delicate balance between subjective and objective approaches to determining fault in cases of recklessness; and finally, the ways in which gender stereotypes have affected, and continue to affect, standards of reasonableness and defences to criminal action.

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<sup>40</sup> Amirthalingam, K. 'Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness' (2004) *The Modern Law Review*, 491-50, 495.

<sup>41</sup> *Ibid.*

<sup>42</sup> *R v Brown* [2013] UKSC 43.

<sup>43</sup> *R v Hughes* [2013] UKSC 56.

<sup>44</sup> Davie, M. and Zell, J.A. 'Criminal Law, Evidence and Procedure' (2014) *Cambridge Journal of International and Comparative Law*, (3)1, 196-203, 202.

<sup>45</sup> *R v Pace and Rogers* [2014] EWCA Crim 186.

<sup>46</sup> *R v Khan* [1990] 2 All ER 783.

<sup>47</sup> *Attorney General's Reference (No. 3 of 1992)* 2 All ER 121.

<sup>48</sup> Mirfield, P. 'Intention and Criminal Attempts' (2015) *Criminal Law Review* 140, 146.

### **2.3) Problem One: Character**

Although character has been displaced as an integral method of responsibility attribution in criminal trials, it maintains a presence in legal doctrine today, primarily at the sentencing stage, in contentious issues regarding motive and previous convictions, and in the substantive trial in the form of bad character evidence which is admissible in court only if it falls under one of seven strictly-defined gateways set out in the Criminal Justice Act 2003. This section will discuss the historical relevance of character and detail three specific ways in which character still brings to bear on liability specifically and blameworthiness more broadly: through the seven gateways for admitting evidence of bad character under the Criminal Justice Act 2003; through the relevance of character in determining an appropriate sentence; and through motive as a proxy for character, and how it is in fact relevant (if in a limited fashion) during both the substantive trial and at the sentencing stage.

#### 2.3.1) History of character

Criminal liability, according to Duff, goes 'deeper than action: on what lies behind or produces which defendants are formally convicted and punished', namely that 'it must be founded either on "choice", or on "character"; what justifies conviction and punishment must, that is, be either the defendant's wrongful choice, or some defect of character that [their] criminal conduct revealed'.<sup>49</sup> Duff observes that a defendant is convicted 'if and because [their] action warranted an inference to an undesirable character-trait; it is that character-trait which the law condemns and punishes'.<sup>50</sup> Extending this, character may be viewed as the likelihood of a defendant being the *type* of person to commit the alleged offence, whereas motive may be viewed as the likelihood of the *defendant* having committed the alleged offence.

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<sup>49</sup> Duff, R.A. 'Choice, Character and Criminal Liability' (1993) *Law and Philosophy*, 12(4), 345-83, 345.

<sup>50</sup> *Ibid*, 363.

During the eighteenth and nineteenth centuries – before the criminal law developed the technical doctrine of *mens rea* – the courts relied on character-based evidence for attributing responsibility to defendants.<sup>51</sup> As such, it relied less on what the defendant actually did or thought during the commission of an alleged offence (what we would now describe as the internal fault element), and more on whether they could summon witnesses to speak to their good reputation, or the prosecution’s ability to summon those who could speak against the defendant’s good name (i.e. an external judgment of the defendant’s character or perceived wickedness).<sup>52</sup> Nicola Lacey observes that ‘character evidence was hugely important to the conduct of criminal trials’ up until the mid-nineteenth century, with judges being ‘decisively influenced’ by ‘local knowledge of character and reputation’.<sup>53</sup> This arguably harkens back to medieval conceptions of mental fault as ‘evil motive’ and ‘wicked purposes’ identified by Gardner, which reflected contemporary Christian concepts of good and evil.<sup>54</sup>

The problems here are manifold, particularly the fact that this does not provide creditable or reliable judgment of the defendant’s culpability but rather, as Lacey observes, a judgment as to the ‘external facts’ of the defendant’s conduct.<sup>55</sup> It also relied on the defendant’s past actions to determine their capacity for committing the alleged crime. This appears to be not only an inchoate analysis, but a process which undermines one of the key assumptions of criminal law, laid out by John Deigh: that ‘legal guilt... is modelled on moral guilt’, and that defendants are held to be guilty if they are found to be responsible for their actions.<sup>56</sup>

### 2.3.2) The end of character

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<sup>51</sup> Lacey, N. ‘Space, time and function: intersecting principles of responsibility across the terrain of criminal justice’ (2007) *Criminal Law and Philosophy*, 1, 233-250, 244.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Gardner, M.R. ‘The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present’ (1993) *Utah Law Review*, 1993(3), 635-70, 663.

<sup>55</sup> Lacey, N. ‘From Moll Flanders to Tess of the D’Urbervilles: women, autonomy and criminal responsibility in eighteenth and nineteenth century England’ (2007) *LSE Working Papers 5/2007*, 1-31, 30.

<sup>56</sup> Deigh, J. ‘Responsibility’ in Deigh, J. and Dolinko, D. (eds) ‘The Oxford Handbook of Philosophy of Criminal Law’ (OUP 2011), 194-217, 194.

The criminal law had begun to incorporate the interior into its structures and procedures by the end of the nineteenth century, as Lacey observes: ‘the emerging conception of individual agency was reflected in the provisions of the Criminal Evidence Act 1898, which allowed the accused to give testimony in their own defence, thus producing a new form of knowledge available to courts’.<sup>57</sup> S.1(f)(ii) of the Act specifically allowed the cross-examination of a defendant’s bad character where the ‘nature or conduct of [their] defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution, or the deceased victim of the alleged crime’.<sup>58</sup> By allowing defendants to testify, the courts began the incremental shift towards *mens rea* as we know it today, as Lacey explains: ‘putting into operation a notion of criminal responsibility as residing in psychological states of mind – an evidentiary matter on which the emerging forensic sciences and sciences of mind and brain were also able to make a contribution’.<sup>59</sup> Therefore, character was an important and active aspect of the criminal law until it shifted into the temporally discrete *mens rea* which focuses on the moment of the crime and specific state of mind.

The precise timing of this shift from the external (character) to the internal (*mens rea*) remains difficult to determine; Lacey argues that change was visible in this regard from the end of the nineteenth century, but John Langbein, for example, could see the cracks begin to show in the cogency of character-based evidence from as early as the mid-seventeenth century.<sup>60</sup> By the mid twentieth century, the presiding orthodox Anglo-American tenet was, as Slough and Knightly observe, that ‘man should not be judged strenuously by reference to the awesome spectre of his past life’.<sup>61</sup>

### 2.3.3) The return of character

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<sup>57</sup> Lacey (n55), 15.

<sup>58</sup> S.1(f)(ii) Criminal Evidence Act 1898.

<sup>59</sup> Lacey (n55) 15.

<sup>60</sup> Langbein, J.H. ‘The Origins of Adversary Criminal Trial’ (OUP 2003), 190-202.

<sup>61</sup> Slough, M.C. and Knightly, J.W. ‘Other Vices, Other Crimes’ (1956) Iowa Law Review, 41(3),325-350, 325.

Following the shift towards a formulation of *mens rea* which focuses on the defendant's specific state of mind, the bearing of character on liability is now minimal, but Nicola Lacey argues that character has 'remained key to the institutional effort to distinguish criminality and innocence',<sup>62</sup> and further suggests that 'there is reason to doubt whether assumptions about character were ever entirely evacuated from criminal law in its path towards the refinement of a notion of individual capacity-responsibility', positing that even with our far more technical doctrine of *mens rea* firmly in place, 'character-based patterns of attribution are enjoying a revival' in Anglo-American jurisprudence, in 'substance if not in form'.<sup>63</sup> This section will identify three areas in which questions relating to character return: the carefully-regulated admissibility of bad character evidence under the Criminal Justice Act 2003;<sup>64</sup> the relevance of previous convictions at the sentencing stage; and motive as a proxy for character (which is legally irrelevant in practice but can be important during the sentencing process, such as the provisions for setting the term for a life sentence for murder according to the convicted person's motive in the Act).

### 2.3.3.a) *Bad character*

In determining whether a defendant has committed a certain offence, it can be persuasive to adduce evidence as to the defendant's character in order to demonstrate a disposition towards or propensity for a certain type of misconduct.<sup>65</sup> The Criminal Justice Act 2003 abolishes the majority of common law rules regarding bad character and sets out new provisions,<sup>66</sup> describing them as 'evidence of, or a disposition towards, misconduct on his part' other than that which is to do with the alleged offence,<sup>67</sup> and gives a broad definition of 'misconduct' as 'the commission of an offence or *other reprehensible behaviour*'.<sup>68</sup> This distinction between misconduct which does and does

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<sup>62</sup> Lacey, N. 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) *Criminal Law and Philosophy*, 4(2), 109–133, 109.

<sup>63</sup> Lacey (n55), 3.

<sup>64</sup> Criminal Justice Act 2003.

<sup>65</sup> S.100 Criminal Justice Act 2003 governs the admissibility of non-defendants' bad character but will not be discussed in this thesis as the bad character of the defendant is its primary focus.

<sup>66</sup> Criminal Justice Act 2003 (n64), S.99.

<sup>67</sup> *Ibid*, S.98.

<sup>68</sup> *Ibid*, S.112(1) [emphasis added].

not relate to bad character has been criticised as being ‘subject to uncertainty’,<sup>69</sup> and arguably destabilises notions of bad character in a statute intended to clarify. This is a particular risk when considering the rules governing good character are far less substantial, to relying on pre-2003 case law like *R v Vye*<sup>70</sup> and *R v Aziz*.<sup>71</sup>

S.101(1) governs the admissibility of bad character evidence, establishing seven strictly-defined gateways (a)-(g) through which such evidence is admissible: that all parties agree to admitting the evidence,<sup>72</sup> the defendant adduces the evidence,<sup>73</sup> it comprises ‘important explanatory evidence’,<sup>74</sup> it is ‘relevant to an important matter in issue between the defendant and the prosecution’,<sup>75</sup> has ‘substantial probative value in relation to an important matter in issue between’ defendants,<sup>76</sup> the evidence ‘correct[s] a false impression given by the defendant’,<sup>77</sup> or if the defendant has attacked another person’s character.<sup>78</sup> Andrew Choo notes that the potential ‘prejudicial effect of bad character evidence’ includes ‘reasoning prejudice’ and ‘moral prejudice’, which will be further discussed in chapter five.<sup>79</sup> Nicola Lacey contends that ‘broadened admissibility of character evidence’ in Ss.98-101:

will inevitably shape the practices of attributing criminal responsibility... by providing material from which judge and jury may form evaluative, character-based assumptions which will supplement legal capacity-based tests wherever – as is usually the case – they are sufficiently open-ended to admit of character-based inferences.<sup>80</sup>

Although S.101(3) advises against admitting evidence under gateways (d) and (g) if it ‘would have such an adverse effect on the fairness of proceedings’,<sup>81</sup> these two gateways have been met with more criticism than the others. Gateway (g), regarding an

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<sup>69</sup> Stockdale, M., Smith, E.C. and San Rogue, M. ‘Bad Character Evidence in the Criminal Trial: the English Statutory/Common Law Dichotomy – Anglo-Australian Perspectives’ (2016) *International and Comparative Law* 441-471, 445.

<sup>70</sup> *R v Vye* [1993] 1 WLR 471.

<sup>71</sup> *R v Aziz* [1995] 3 All ER 149.

<sup>72</sup> Criminal Justice Act (n64), S.101(3)(a).

<sup>73</sup> *Ibid.*, S.101(3)(b).

<sup>74</sup> *Ibid.*, S.101(3)(c).

<sup>75</sup> *Ibid.*, S.101(3)(d).

<sup>76</sup> *Ibid.*, S.101(3)(e).

<sup>77</sup> *Ibid.*, S.101(3)(f).

<sup>78</sup> *Ibid.*, S.101(3)(g).

<sup>79</sup> Choo, A. ‘Evidence’ 4<sup>th</sup> ed. (OUP 2015), 246-47.

<sup>80</sup> Lacey (n51), 243 [sic].

<sup>81</sup> Criminal Justice Act (n64), S.101(3).

'attack' by the defendant on 'another person's character', has been criticised for retaining the nineteenth-century 'tit for tat' rule on credibility.<sup>82</sup> This was further complicated by the court in *R v Hanson* noting that pre-2003 case law would 'provide useful guidance' on interpreting this gateway,<sup>83</sup> despite the fact that the Criminal Justice Act explicitly abolished common law rules on bad character.<sup>84</sup> Gateway (d), regarding 'matters in issue' including 'whether the defendant has a propensity to be untruthful',<sup>85</sup> is defined narrowly by the court in *R v Hanson*, noting that previous convictions could show a propensity for untruthfulness if that was an issue on the facts.<sup>86</sup> *Campbell*, which held that 'a defendant who has committed a criminal offence may well be prepared to lie about it',<sup>87</sup> garnered controversy because 'the argument that the guilty will tend to lie and the innocent tell the truth, irrespective of their propensity to be honest, would seem to apply to all credibility uses of character evidence'.<sup>88</sup> Redmayne ultimately finds gateway (g) problematic as it allows for character evidence to be used in what essentially becomes a 'moral contest'.<sup>89</sup>

All seven gateways are governed not only by the fairness provision in S.101(3) mentioned above but also S.101(4) which urges the court to 'have regard... to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged'.<sup>90</sup> Redmayne posits there is a discrepancy between the way in which the courts have treated gateways (d) and (g) in regard to S.101(4), in that 'time-lapse is seen as eroding propensity to offend [but] it is rarely seen as diminishing a lack of credibility'.<sup>91</sup> He finds this is demonstrated in the case of *R v Lewis*, in which the judge suggests that propensity to offend but not propensity to lie 'fades over

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<sup>82</sup> Redmayne, M. 'Character in the Criminal Trial' (OUP 2015), 205.

<sup>83</sup> *R v Hanson and Others* [2005] 2 Cr App R 21.

<sup>84</sup> Criminal Justice Act (n64), S.99.

<sup>85</sup> *Ibid*, S.103.

<sup>86</sup> *Hanson* (n83), at [13].

<sup>87</sup> *R v Campbell* [2007] 2 Cr App R 28 at [57].

<sup>88</sup> Redmayne (n82), 200.

<sup>89</sup> *Ibid*, 212.

<sup>90</sup> Criminal Justice Act (n64), S.101(4).

<sup>91</sup> Redmayne (n82), 207.



time'.<sup>92</sup> Even if a person's 'violent nature' might diminish over time, there is 'probably still a comparative propensity to be violent' at least in comparison to other people.<sup>93</sup> This means that 'previous convictions' are admissible under gateway (g) whereas they are considered mostly 'irrelevant' under gateway (d).<sup>94</sup>

### 2.3.3.b) Sentencing

Although sentencing does not actually engage notions of *mens rea* (as these would have already been determined during the substantive trial), we can learn more about the law today by examining eighteenth and nineteenth century ideas about character, and how they still affect legal thinking and legal provisions in the modern criminal justice system. It is also at the sentencing stage that character resurfaces in a more direct and explicit fashion, and where certain elements relating to *mens rea* such as individual responsibility, blameworthiness, remorse and motive are taken into account more formally than during the trial.

When a defendant is found guilty of an offence, John Child and David Ormerod explain that they 'will be subject to a criminal sanction, most commonly a fine, a community penalty, or prison sentence'.<sup>95</sup> They note the 'relative gravity of offences' in that 'the seriousness of... offences is graded on the basis of the maximum sentence available upon conviction',<sup>96</sup> for example, criminal damage carries a maximum of ten years' imprisonment<sup>97</sup> whereas aggravated criminal damage can result in a life sentence.<sup>98</sup> Of the possible rationales for sentencing offenders, including deterrence,<sup>99</sup> the incapacitation of dangerous offenders,<sup>100</sup> rehabilitation<sup>101</sup> and a retributive 'just desserts'

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<sup>92</sup> R v Lewis [2007] EWCA Crim 3030.

<sup>93</sup> Redmayne (n82), 207.

<sup>94</sup> Ibid, 210. See Hanson (n83) and Campbell (n87).

<sup>95</sup> Child, J. and Ormerod, D. 'Smith, Hogan, and Ormerod's Essentials of Criminal Law' 2<sup>nd</sup> ed. (OUP 2017), 6.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, 370.

<sup>98</sup> Ibid, 376-77.

<sup>99</sup> Ashworth (n16), 78.

<sup>100</sup> Ibid, 84.

<sup>101</sup> Ibid, 86.

mentality,<sup>102</sup> Ashworth suggests the 2003 Act intentionally embodies deterrence over the rest<sup>103</sup> with an emphasis on proportionality in sentencing.<sup>104</sup> The purposes of sentencing have been set out for the first time by statute in S.142(1) Criminal Justice Act 2003, which the court 'must have regard to' when determining a sentence,<sup>105</sup> including 'the punishment of offenders',<sup>106</sup> 'the reduction of crime (including its reduction by deterrence)',<sup>107</sup> 'the reform and rehabilitation of offenders',<sup>108</sup> 'the protection of the public',<sup>109</sup> and 'the making of reparation by offenders to persons affected by their offences'.<sup>110</sup>

Overarching guidelines for the Magistrates and Crown Courts urge courts to assess seriousness through balancing culpability and harm,<sup>111</sup> and to take into account the purposes of sentencing laid out in S.142(1). Each previous conviction is to be treated as an 'aggravating factor',<sup>112</sup> having regard to the 'nature' and 'relevance'<sup>113</sup> of, and the time that has elapsed between, the past conviction and the current offence.<sup>114</sup> The seriousness of an offence should be determined by 'consider[ing] the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused'.<sup>115</sup> Despite the Act's focus on proportionality, Mirko Bagaric argues that prior convictions are not only the 'primary cause of disproportionate sentences', but that they also 'perpetuate existing social injustices by leading to harsher penalties for offenders from deprived social

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<sup>102</sup> Ibid, 88.

<sup>103</sup> Ibid, 102.

<sup>104</sup> Ibid, 105.

<sup>105</sup> Criminal Justice Act (n63), S.142(1).

<sup>106</sup> Ibid, S.142(1)(a).

<sup>107</sup> Ibid, S.142(1)(b).

<sup>108</sup> Ibid, S.142(1)(c).

<sup>109</sup> Ibid, S.142(1)(d).

<sup>110</sup> Ibid, S.142(1)(e).

<sup>111</sup> Sentencing Council, General guideline: overarching principles (Magistrates Court), effective from 1 October 2019, accessed 1 February 2020 <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>> and Sentencing Council General guideline: overarching principles (Crown Court), effective from 1 October 2019, accessed 1 February 2020, <<https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/>>

<sup>112</sup> Criminal Justice Act (n63), S.143(2).

<sup>113</sup> Ibid, S.143(2)(a).

<sup>114</sup> Ibid, S.143(2)(b).

<sup>115</sup> Ibid, S.143(1).

backgrounds'.<sup>116</sup> Although prior convictions do not necessarily lead to more severe punishment for the defendants, Bagaric observes that defendants do 'lose good character as a source of mitigation and hence are effectively dealt with more harshly'.<sup>117</sup> In essence, Bagaric is criticising the way in which the law cumulatively punishes offenders by relying on character-based evidence from the defendants' past in judging their present alleged offence.

Cumulative sentencing is far from a recent innovation; Ashworth observes that '[s]ince at least the mid-nineteenth century there has been support for the cumulative principle of sentencing persistent offenders' as a means of deterring them from repeating their crimes.<sup>118</sup> However, he notes that in the nineteenth-century, as today, 'some [offences] stemmed from human weakness or poverty rather than "wickedness"'; indeed, in modern accounts of recidivism, 'most of these [repeat] offences are towards the lower end of the scale of criminality', which means that 'a cumulative principle therefore tends to heap punishment on minor and relatively non-threatening offenders' in a process Ashworth describes as 'significantly disproportionate'.<sup>119</sup> A cumulative sentencing principle based on the rationale of deterrence may be 'self-defeating'.<sup>120</sup> Sentencing therefore has the potential to ignore socio-political or non-legal contextualising factors if it persists in a cumulative approach.

### 2.3.3.c) *Motive*

Motive, distinguished from the mental fault elements of an offence, has been described as 'the reason that nudges the will and prods the mind to indulge the criminal'<sup>121</sup> and 'the "why" of an action while intent goes to the "what"'.<sup>122</sup> The criminal law 'purports to draw

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<sup>116</sup> Bagaric, M. 'Double punishment and punishing character: The unfairness of prior convictions' (2000) *Criminal Justice Ethics*, 19(1), 10-28, 9.

<sup>117</sup> *Ibid*, 11.

<sup>118</sup> Ashworth (n16), 198.

<sup>119</sup> *Ibid*, 199.

<sup>120</sup> *Ibid*, 200.

<sup>121</sup> Slough and Knightly (n61), 328.

<sup>122</sup> Candeub, A. 'Motive Crimes and Other Minds' (1994) *University of Pennsylvania Law Review*, 142(6), 2071-2123, 2071.

a sharp distinction between intention and motive and holds the latter to be generally irrelevant to the attribution of criminal liability',<sup>123</sup> reflecting the prevailing orthodox view that "[h]ardly any part of penal law is more definitely settled than that motive is irrelevant'.<sup>124</sup> However, the broad consensus is that this is descriptively untrue<sup>125</sup> because, as Eldar and Laist observe, motives are 'important to the administration of criminal justice through prosecutors' discretion, sentencing decisions, and parole board rulings',<sup>126</sup> and Whitley Kaufman explains that 'motive is irrelevant to criminal liability unless it is specifically made relevant as part of the definition of a crime (for example in hate crimes) or unless there is an established criminal defense that requires the establishment of a motive (e.g. duress)'.<sup>127</sup> To 'proclaim the irrelevance of motive to law', Alan Norrie argues, does not 'remove the relevance of motive to human conduct',<sup>128</sup> and it is 'impossible in practice to imagine people forming intentions without having motives as it is to imagine them developing motives without creating intentions to put them into effect'.<sup>129</sup> It is only at the sentencing stage that questions of 'motive and the ensuing moral judgments of right and wrong re-emerge'; a necessary step 'if the law's crude judgments of individual fault are to be tempered by a genuine regard for individual wrongdoing'.<sup>130</sup>

Although, as Paul Robinson notes, 'motive is not character',<sup>131</sup> he argues that a defendant's motive 'may tell us something about [their] general character' which 'may alter our assessment of the blameworthiness of the actor for that conduct',<sup>132</sup> and that

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<sup>123</sup> Lacey, Wells and Quick (n17), 109. See also: R v Moloney [1985] 1 AC 905, which distinguished intention from motive and desire.

<sup>124</sup> Hall, J. 'General Principles of Criminal Law' 2<sup>nd</sup> ed. (Bobbs-Merill 1960), 88.

<sup>125</sup> Binder, G. 'The Rhetoric of Motive and Intent' (2002) Buffalo Criminal Law Review, 6(1), 1-96, 4; Chiu, E.M. 'The Challenge of Motive in Criminal Law' (2005) Buffalo Criminal Law Review, 8, 653-729, 663; Hessick, C.B. 'Motive's Role in Criminal Punishment' (2006) Southern California Law Review, 80(1), 89-150, 90.

<sup>126</sup> Eldar, S. and Laist, E. 'The Irrelevance of Motive and the Rule of Law' (2017) New Criminal Law Review, 20(3), 433-464, 434.

<sup>127</sup> Kaufman, W.R. 'Motive, Intention, and Morality in the Criminal Law' (2003) Criminal Justice Review, 28(2) 317-335, 318 [sic].

<sup>128</sup> Norrie, A. 'Crime, Reason and History: A Critical Introduction to Criminal Law' 3<sup>rd</sup> ed. (Cambridge University Press 2014), 46.

<sup>129</sup> Ibid, 43.

<sup>130</sup> Ibid, 56.

<sup>131</sup> Robinson (n24), 605.

<sup>132</sup> Ibid.

motive can be used as a 'substitute for character'.<sup>133</sup> Lacey similarly observes that '[w]here liability turns on motive, assumptions about good or bad character are invited into jury deliberations', which means that even 'subjective *mens rea* concepts such as intention or knowledge are susceptible to interpretation as bearing on character as much as – or rather than – conduct'.<sup>134</sup> Although motive is 'technically irrelevant to psychological notions of *mens rea*', it 'has always entered into the "interpretative construction" of *mens rea*, through mechanisms such as shifts in time frame, and is arguably enjoying a new prominence, notably in the form of aggravated liability attendant on racial and religious motivation'.<sup>135</sup> Ashworth suggests that this 'initially caused a sentencing problem' because it led to 'increased... sentences for the different offences by different proportions'.<sup>136</sup> However, Ashworth finds this justified not only on grounds of 'toleration and respect' but because it 'coheres with the principle of proportionately in sentencing'.<sup>137</sup> Where Eldar and Laist suggest that '[s]ometimes *actus reus* and the non-motivational elements of *mens rea* cannot sufficiently capture the complexities of criminal liability',<sup>138</sup> Douglas Husak likens 'acknowledging the relevance of motives' to 'open[ing] Pandora's Box'.<sup>139</sup>

Issues about motive can be important during the sentencing stage, such as the provisions for setting the minimum term for a life sentence for murder according to the convicted person's motive in Schedule 21 of the Criminal Justice Act. Before the Criminal Justice Act, there had been since 1965 in England and Wales a mandatory sentence for all offenders aged 21 and over who were convicted of murder: life imprisonment.<sup>140</sup> The Criminal Justice Act retains life imprisonment as the maximum sentence for murder but also allows for a minimum sentence to be determined by the courts, therefore allowing

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<sup>133</sup> *Ibid.*, 609.

<sup>134</sup> Lacey, N. 'In Search of Criminal Responsibility' (OUP 2016), 150.

<sup>135</sup> *Ibid.* See for example the Crime and Disorder Act 1998.

<sup>136</sup> Ashworth (n16), 160.

<sup>137</sup> *Ibid.*

<sup>138</sup> Eldar and Laist (n126), 462.

<sup>139</sup> Husak, D. 'The Philosophy of Criminal Law: Selected Essays' (OUP 2010), 68.

<sup>140</sup> S.1(1) Murder (Abolition of the Death Penalty) Act 1965.

for judicial discretion in sentencing that the previous law did not.<sup>141</sup> Schedule 21 of the Criminal Justice Act establishes five starting points for the judge, the first being a 'life order' (i.e. a life sentence)<sup>142</sup> which can be imposed if the 'seriousness of the offence... is exceptionally high' and the defendant is aged 21 or over.<sup>143</sup> The Act lists a few specific offences that would normally garner a life sentence including the murder of a child' if involving 'abduction' or 'sexual or sadistic *motivation*'.<sup>144</sup> The specific wording of S.4(2)(b) regarding sadistic motivation might be viewed as an instance of motive bearing not on culpability but on the proportionate sentence for that act. It suggests that motive – even in such limited, specific terms – can be considered an aggravating factor in determining the length of a sentence and invites motive as a relevant factor in assigning proportionate punishment for criminal liability. In other words, motive remains irrelevant to liability but can be relevant to determining sentence, which is calculated based on liability. The conflicting approaches to motive's role will be the focus of the next subsection.

The 30, 25 and 15 year starting points all apply to defendants aged 18 or over: 30 years is the starting point if the court considers 'seriousness of the offence... is particularly high';<sup>145</sup> 25 years is the starting point if the defendant committed an offence 'normally to be regarded as sufficiently serious';<sup>146</sup> and 15 years is the starting point if the offence does not fall within any of the above descriptions of seriousness,<sup>147</sup> with a starting point of 12 years for offenders under 18 years of age.<sup>148</sup> The Schedule also lists a number of aggravating factors (including significant premeditation and victim vulnerability)<sup>149</sup> and mitigating factors (including an intention to cause serious bodily harm rather than kill and if the defendant was provoked)<sup>150</sup> which can be taken into account at the sentencing

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<sup>141</sup> Criminal Justice Act (n64), S.269.

<sup>142</sup> Ibid, Schedule 21, S.4(1).

<sup>143</sup> Ibid, S.4(1)(b).

<sup>144</sup> Ibid, S.4(2)(b) [emphasis added].

<sup>145</sup> Ibid, S.5(1)(a) and (b).

<sup>146</sup> Ibid, S.51(1A)(c), introduced by the Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010.

<sup>147</sup> Ibid, S.6.

<sup>148</sup> Ibid, S.7.

<sup>149</sup> Ibid, S.10(a)-(g).

<sup>150</sup> Ibid, S.11(a)-(g).

stage. Ashworth is somewhat dissatisfied with the guidelines on aggravating and mitigating factors as they do not ‘indicate the weight that they should bear... nor indicate how they should interact when there are both aggravating and mitigating factors in a case’,<sup>151</sup> but Ashworth notes the ‘language in Schedule 21 is not constraining’: the criteria for the different sentences are ‘expressed as factors’ not requirements, and they are supplemented with a number of aggravating and mitigating factors to be taken into account,<sup>152</sup> the flexibility of judicial discretion in light of the Schedule being emphasized by Lord Woolf CJ in *R v Sullivan*.<sup>153</sup> Ashworth observes, however, that the Schedule was not without criticism or controversy, including the fact that murder ‘has variable degrees of seriousness, and can sometimes be less serious than manslaughter’, and the lack of a ‘dangerousness’ requirement to distinguish between offenders and their proportionate sentences.<sup>154</sup>

The presumptive minimum sentencing provisions in Schedule 21 have been criticised by the Ministry of Justice as an ‘ill-thought out and overly prescriptive policy’.<sup>155</sup> Kate Fitz-Gibbon notes the perception among practitioners is that the Criminal Justice Act provisions were responsible for ‘unduly increasing minimum sentences imposed for murder’.<sup>156</sup> Fitz-Gibbon argues that this ‘failure on the part of [Schedule 21] to allow for proportionality is concerning, given that Section 143(1) of the same Act establishes the importance of achieving proportionality in sentencing’.<sup>157</sup> Ironically, Fitz-Gibbon notes that this ‘proportionality requirement’ in the substantive body of the 2003 Act has in fact been ‘undermined by the effects of Schedule 21’.<sup>158</sup> These ‘restrictive’ sentences have ‘little deterrent value and rarely lead to a reduction in reoffending’ which, Fitz-Gibbon

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<sup>151</sup> Ashworth (n16), 193.

<sup>152</sup> Ashworth, A. ‘Sentencing and Criminal Justice’ 5<sup>th</sup> ed. (Cambridge University Press 2010), 118.

<sup>153</sup> *R v Sullivan* [2005] 1 Cr App R (S) 308.

<sup>154</sup> Ashworth (n152), 118-19.

<sup>155</sup> Ministry of Justice Green Paper ‘Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders’ (2010) CM 7972 of 2010, 50-51, para [170].

<sup>156</sup> Fitz-Gibbon, K. ‘Minimum sentencing for murder in England and Wales: A critical examination 10 years after the Criminal Justice Act 2003’ (2016) *Punishment and Society*, 18(1), 47-67, 52.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

posits, 'provides a stark illustration of the political promotion of retribution over rehabilitation in the formulation of sentencing policy over the last 10 years'.<sup>159</sup> Mandatory minimum sentencing is already being removed in other jurisdictions 'in a bid to reduce high rates of imprisonment'.<sup>160</sup>

Fitz-Gibbon, however, suggests that the Act reduces judicial discretion and sets up 'a formulaic approach to sentencing' which she doubts 'can recognise and allow for this range of culpabilities', including 'the gender differences' in male and female perpetrated violence.<sup>161</sup> For example, the mandatory 25 year starting point for murder involving a weapon 'fails to reflect that the majority of persons, namely women, who kill in response to prolonged family violence do so with a knife or other weapon'.<sup>162</sup> Case law has since interpreted the Act more flexibly, viewing the Schedule as 'a guideline rather than a rigid framework'<sup>163</sup> in such cases as *R v Sullivan*<sup>164</sup> and *R v Kelly (Marion)*,<sup>165</sup> but Julian Roberts argues the Act 'permits a relatively broad degree of discretion' that is 'less restrictive than other statutory provisions'.<sup>166</sup> Roberts argues that 'by limiting a court's ability to impose a proportional sentence, mandatory minima can violate the principle of proportionality, and this is likely to undermine, rather than enhance, public confidence in the courts'.<sup>167</sup> It is the view of this thesis that using previous convictions in calculating liability brings character in as a tacit judge of *mens rea* at the sentencing stage. Invoking a defendant's past crimes arguably engages in the same questions as in the eighteenth and nineteenth century trial. Doing so can thus allow the court to make a moral judgment of the kind that *mens rea* was supposed to replace and prevent, and harkens back to nineteenth-century conceptions of character.

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<sup>159</sup> *Ibid*, 53.

<sup>160</sup> *Ibid*.

<sup>161</sup> *Ibid*, 54.

<sup>162</sup> *Ibid*, 54-55.

<sup>163</sup> *Ibid*, 55.

<sup>164</sup> *Sullivan* (n153).

<sup>165</sup> *R v Kelly (Marion)* [2011] EWCA Crim 1462.

<sup>166</sup> Roberts, J. 'Sentencing guidelines and judicial discretion: Evolution of the duty of courts to comply in England and Wales' (2011) *British Journal of Criminology*, 51(6), 997-1013, 1007.

<sup>167</sup> Roberts, J. 'Public Opinion and Mandatory Sentencing: A Review of International Findings' (2003) *Criminal Justice and Behavior*, 30(4), 483-508, 504.



This section suggests the instability between the dichotomous relevance of motive during the substantive trial and sentencing stage. That motive is explicitly barred from consideration as to the guilt of the defendant for committing the alleged offence but can be a mitigating or aggravating factor regarding the (supposedly) proportionate sentence they are given for said crime, suggests a troubling imbalance in the approach towards issues of internal culpability. This demonstrates the law's inconsistent approach to internal culpability; the law distinguishes between motive and intention when the two are in reality interlinked. I would cross reference Duff's observation that *mens rea* and *actus reus* inform and impel each other with Norrie's notion that motive drives the intention, and that intention is an active realisation of the motive.

This section has provided sufficient analysis of relevant primary legal sources such as sentencing guidelines, illustrative case law examples and evidential rules on the admissibility and specific application of bad character. Although I acknowledge that sentencing does not actually engage notions of *mens rea* (as that has already been found by the jury during the substantive trial), I contend that issues regarding motive can be important at the sentencing stage, and have demonstrated this through an examination of the provisions for setting the minimum term for a life sentence for murder according to the convicted person's motive in the Criminal Justice Act 2003.

#### **2.4) Problem Two: The Subjective/Objective Divide in Recklessness**

There are two broad standards by which the element of *mens rea* may be proven: a subjective standard and an objective standard. A subjective standard of proof involves a consideration of what *the defendant* was thinking around the time of the act, whereas an objective standard speculates as to how a *reasonable person* would have behaved in the defendant's circumstances. Another possible reading of the subjective/objective interplay is unconscious intention, which means certain *mens rea* elements are not present in examples such as sane automatism (a 'lack of voluntary movement' of the defendant's body which 'rendered [them] totally incapacitated by some external

circumstances affecting' them),<sup>168</sup> intoxication (only if the intoxication results in an offence element not existing),<sup>169</sup> and insanity (the defendant's medical condition 'cause[s] some bodily malfunctioning' and 'prevent[s] [them] understanding the nature or quality of [their] acts').<sup>170</sup> Although different *mens rea*-related concepts engage with notions of the subjective and objective in determining fault, this thesis focuses on recklessness because it centres on voluntary action by the defendant, and most directly and engagingly demonstrates the complex interplay between subjective and objective approaches to determining liability. In this section I will first consider the general debate concerning subjective and objective approaches to *mens rea* before narrowing in on the common law's evolving and often inconsistent approach to the subjective and objective in cases of recklessness.

#### 2.4.1) A problematic balancing act between subjective and objective approaches: the general debate

A subjective approach to determining *mens rea* may be understood, as David Ormerod observes, as one in which 'the mental element should require proof that [the defendant] has personal awareness of [their] actions and has [themselves] perceived the relevant circumstances and consequences comprising the *actus reus* of the offence'.<sup>171</sup> In short, a subjective approach requires a decision-maker to judge the defendant according to what was actually in their mind around the time of the prohibited act. Subsequently, Ormerod describes an objective approach to establishing *mens rea* in which it would be 'sufficient to prove that the reasonable person would have perceived the relevant circumstances/consequences comprising the *actus reus*, irrespective of whether the defendant [themselves] was aware of them'.<sup>172</sup> Ormerod, however, goes on to state that his own definitions are 'grossly oversimplified summar[ies]' of what the law is in this area, and that a 'more realistic view is that there are shades of subjectivism and objectivism

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<sup>168</sup> Child and Ormerod (n95), 516.

<sup>169</sup> Ibid, 518-19.

<sup>170</sup> Ibid, 516.

<sup>171</sup> Ormerod, D. (ed). 'Smith and Hogan's Criminal Law' 13<sup>th</sup> ed. (2011 OUP), 104.

<sup>172</sup> Ibid.

along a spectrum'.<sup>173</sup> In fact, the argument for a mixed test for *mens rea* (i.e. containing both subjective and objective elements) has proponents in Richard Tur<sup>174</sup> and R. George Wright.<sup>175</sup> Ormerod confirms that although the judiciary are currently leaning towards a subjective approach, in serious crimes especially,<sup>176</sup> Parliament has recently legislated on a number of legal issues, such as the Sexual Offences Act 2003 in which the fault element is 'explicitly objective'.<sup>177</sup> Findlay Stark suggests that what is 'most troubling about English law[s] approach to *mens rea* is that it is not clear that the same words mean the same thing in all contexts'.<sup>178</sup> In other words, one person's intentional act might in fact be a genuine mistake or oversight on the part of another.

#### 2.4.2) Recklessness: an overview

Recklessness is the *mens rea* element required by S.1(1) *Criminal Damage Act 1971*, which holds that:

A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or *being reckless as to whether any such property would be destroyed or damaged* shall be guilty of an offence.<sup>179</sup>

Therefore, recklessness can be viewed, as Stark surmises, as 'the conscious taking of an unjustified risk'.<sup>180</sup> Regarding the common law interpretation of recklessness, John Child and David Ormerod note the 'interesting tension[s]' between subjectivism ('focusing on [the defendant's] individual culpability') and objectivism ('focusing on the harms caused by [the defendant's] conduct)', concluding that 'the current law represents an *often uncomfortable* compromise between the two'.<sup>181</sup> Child and Ormerod explain that the *mens rea* of recklessness is twofold: it must be demonstrated that the defendant

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<sup>173</sup> *Ibid.*

<sup>174</sup> Tur, R.H.S. 'Subjectivism and Objectivism: Towards Synthesis' in Shute, S., Gardner, J. and Horder, J. (eds) 'Action and Value in Criminal Law' (Clarendon Press 1993), 213-237, 237.

<sup>175</sup> Wright, R.G. 'Objective and Subjective Tests in the Law' (2017) *University of New Hampshire Law Review*, 16(1), 121-146.

<sup>176</sup> Ormerod (n171), 104.

<sup>177</sup> *Ibid.*, 105.

<sup>178</sup> Stark, R. 'Review: Mohammed Elewa Badar, The concept of *mens rea* in international criminal law: the case for a unified approach' (2014) *Edinburgh Law Review*, 18, 155-56, 156.

<sup>179</sup> S.1(1) *Criminal Damage Act 1971* [emphasis added].

<sup>180</sup> Stark, F. 'It's Only Words: On Meaning and Mens Rea' (2013) *Cambridge Law Journal*, 72(1), 155-77, 165.

<sup>181</sup> Child and Ormerod (n95), 106 [sic].

‘foresaw a risk of the relevant element of the *actus reus*’ (subjective) and ‘unreasonably continued to run that risk’ (objective),<sup>182</sup> an interpretation that was approved by the House of Lords in *R v G and R*.<sup>183</sup> The test is therefore a combination of subjective and objective standards, though Child and Ormerod describe the latter as ‘minor but *necessary*’.<sup>184</sup> The subjective element requires the defendant to foresee the risk – the size and likelihood of it<sup>185</sup> and what the defendant thinks of it (even if they consider it carefully)<sup>186</sup> are irrelevant.<sup>187</sup> Having established that the defendant foresaw a risk, the objective element of the test requires that the defendant ‘*unreasonably* chose to run that risk’.<sup>188</sup> The first element required the defendant to actually have foreseen the risk, but in this second element it is immaterial whether the defendant thought it was reasonable: ‘the question is whether *the court* think[s] it was reasonable based on the standards of reasonable people acting in [the defendant’s] circumstances’.<sup>189</sup>

Modern conceptions of recklessness emerged from *R v Cunningham*,<sup>190</sup> which established a subjective standard: namely, when a defendant foresees a particular type of harm arising from his action, which subsequently did happen, and continues to act regardless of the risk.<sup>191</sup> This test came to be known as Cunningham recklessness. *R v Mowatt*<sup>192</sup> had previously established that the defendant had to have foreseen their actions causing ‘some physical harm [to] some person’, though not necessarily the specific harm of the alleged offence.<sup>193</sup> Cunningham recklessness was affirmed in *R v Briggs*,<sup>194</sup> and appended with the notion of wilful blindness in *R v Parker*, which deemed a defendant reckless if he carries out ‘a deliberate act *knowing or closing his mind* to the

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<sup>182</sup> *Ibid.*

<sup>183</sup> *R v G and R* (n3).

<sup>184</sup> Child and Ormerod (n95), 107 [sic].

<sup>185</sup> *R v Brady* [2006] EWCA Crim 2413.

<sup>186</sup> *R v Parker* [1977] 1 WLR 600.

<sup>187</sup> Child and Ormerod (n95), 107-09.

<sup>188</sup> *Ibid.*, 109 [sic].

<sup>189</sup> *Ibid* [emphasis added].

<sup>190</sup> *Cunningham* (n1).

<sup>191</sup> *Ibid.*, per Byrne J. at [400-01].

<sup>192</sup> *R v Mowatt* [1968] 1 QB 421.

<sup>193</sup> *Ibid.*, per Diplock LJ at [426].

<sup>194</sup> *R v Briggs* [1976] 63 CAE 215.

*obvious fact* that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act'.<sup>195</sup> Somewhat complicating matters is the rule established in *R v Majewski*, which describes a type of recklessness that arises when committing a crime of basic intent under self-induced intoxication, and which holds that voluntary intoxication is no defence to crimes of basic intent.<sup>196</sup> This judgment will be discussed in greater depth in chapter six.

Over two decades after *Cunningham*, *MPC v Caldwell* established a test combining subjective and objective features, with an emphasis on the latter.<sup>197</sup> *Caldwell* recklessness was satisfied if the defendant's actions created an obvious risk (objective), and either they gave no thought to the possibility of risk (objective), or recognised a risk and continued on their course of action regardless (subjective).<sup>198</sup> *Caldwell* therefore recognised the existence of two states of recklessness: advertent recklessness (as in *Cunningham*, in which the defendant actually foresaw the risk) and inadvertent recklessness (as in *Caldwell*, in which the defendant might be considered reckless despite not foreseeing the risk simply because a reasonable person would have). This created a loophole which meant that a defendant who fails to realise a risk may be found culpable, but one who realises the risk but does not perceive it as a risk will not be culpable. *Caldwell* only applied to criminal damage cases, whereas *Cunningham* applied to all offences for which recklessness was the standard of *mens rea* required.<sup>199</sup>

The decision was controversial, not least because it runs the risk of both over-subjectivism and over-objectivism in practice. *Caldwell* recklessness risks being overly subjective because, as Cath Crosby remarks, 'it fails to catch all those who are morally blameworthy',<sup>200</sup> and it risks being overly objective because, as Alan Norrie attests, it

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<sup>195</sup> *Parker* (n186), per Lane LJ at 604 [emphasis added].

<sup>196</sup> *R v Majewski* [1977] AC 443.

<sup>197</sup> *Caldwell* (n2).

<sup>198</sup> *Ibid*, per Lord Diplock at [354].

<sup>199</sup> Norrie, A. 'Crime, Reason and History: A Critical Introduction to Criminal Law' (Weidenfeld and Nicolson 1993), 64

<sup>200</sup> Crosby, C. 'Recklessness – the Continuing Search for a Definition' (2008) *The Journal of Criminal Law*, 72(4), 313-34, 313.

'criminalises people unjustly',<sup>201</sup> as defendants who make a genuine error (as in *Elliott v C*)<sup>202</sup> are convicted despite 'their inability, through no fault of their own, to match the standard of the reasonable person'.<sup>203</sup>

Despite the controversy it engendered amongst legal scholars and practitioners alike, the courts continued to validate and apply *Caldwell* recklessness to a wide range of offences (such as criminal damage, reckless driving and manslaughter) in subsequent cases like *R v Lawrence (Stephen)*,<sup>204</sup> *Elliott v C*,<sup>205</sup> and *R v Seymour*.<sup>206</sup> In *Lawrence* the court applied the *Caldwell* test to an instance of reckless driving resulting in homicide, modifying it slightly to extend *Caldwell's* 'obvious risk' to 'obvious and serious risk'.<sup>207</sup> *Caldwell* was interpreted in a similarly controversial decision in *R v Reid*, which held that a defendant can be 'indifferent' to a risk even without knowing that it exists, but limited this test to criminal damage.<sup>208</sup> L.H. Leigh, commenting on the decision in *Reid*, would later note that the judges in that case 'unanimously reject[ed] the contention that recklessness should always require perception of risk', a notion which is consistent with *Caldwell* and *Lawrence*.<sup>209</sup> Leigh views this as confirmation that:

recklessness in its ordinary meaning connotes both advertent and inadvertent states of mind, and that in the criminal law generally, 'recklessness' has never attained the status of a word of art which would require its meaning to be narrowed to that of advertent risk-taking only.<sup>210</sup>

*Caldwell's* authority was once again reinforced by the decision in *R v Coles*,<sup>211</sup> which was referred to by Hobhouse LJ as 'the classic direction'<sup>212</sup> even if commentators like Michael Jefferson were sceptical of the test's continued efficacy.<sup>213</sup> After years of

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<sup>201</sup> Norrie, A. 'Crime, Reason and History: A Critical Introduction to Criminal Law' 2<sup>nd</sup> ed. (Weidenfeld and Nicolson 2001), 61.

<sup>202</sup> *Elliott v C* [1983] 1 WLR 939.

<sup>203</sup> Norrie (n201), 61.

<sup>204</sup> *R v Lawrence (Stephen)* [1982] AC 510.

<sup>205</sup> *Elliot v C* (n202).

<sup>206</sup> *R v Seymour* [1983] 2 AC 493.

<sup>207</sup> *Lawrence* (n204) [emphasis added].

<sup>208</sup> *R v Reid* (1992) 3 AER 673.

<sup>209</sup> Leigh, L.H. 'Recklessness after *Reid*' (1993) *The Modern Law Review*, 56, 208-218, 209.

<sup>210</sup> *Ibid.*

<sup>211</sup> *R v Coles* [1995] 1 Cr App R 157.

<sup>212</sup> *Ibid* at [162].

<sup>213</sup> Jefferson, M. 'Recklessness: The Objectivity of the *Caldwell* Test' (1999) *The Journal of Criminal Law*, 63(1), 57-66.

controversy, the House of Lords overruled *Caldwell* in *R v G and R* and reinstated a subjective test in regard to cases of criminal damage,<sup>214</sup> though *Cunningham* still applies to all other offences. The court in *R v G and R* ultimately held that:

A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to -  
(i) a circumstance when he is aware of a risk that it exists or will exist;  
(ii) a result when he is aware of a risk that it will occur;  
and it is, in the circumstances known to him, unreasonable to take the risk.<sup>215</sup>

This was the court's attempt to simplify the recklessness test, which is now satisfied, according to Stark, when a defendant 'foresee[s] an unjustified risk attendant upon [their] conduct and go[es] on to take it regardless'.<sup>216</sup> Stark accepts that 'different offences need different fault elements', but objects to the notion that it is 'proper... [to] use the same word to mean different things in different contexts'.<sup>217</sup> With the decision in *R v G and R*, Clarkson and Keating suggest that 'English [and Welsh] law has progressed to the point where there is, for almost all offences, now only one test of recklessness'<sup>218</sup> – i.e. a subjective one, a stance which was confirmed by *Attorney General's Reference (No. 3 of 2004)*.<sup>219</sup> However, Crosby warns that 'even if we adopt a subjective definition of recklessness it will nevertheless have an objective element to it, which is the taking of "an unjustified risk"',<sup>220</sup> and suggests that 'the plethora of current definitions and the lack of a morally substantive interpretation will lead to further developments and debate' in future.<sup>221</sup>

In this section, I have addressed the complex interplay of subjective and objective approaches relating to the *mens rea* of recklessness. The courts have demonstrated an inconsistent approach to recklessness in cases like *Cunningham*, *Caldwell*, *Reid* and *R*

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<sup>214</sup> *R v G and R* (n3), per Lord Steyn at [1058].

<sup>215</sup> *Ibid*, per Lord Bingham of Cornhill at [1057].

<sup>216</sup> Stark (n180).

<sup>217</sup> *Ibid*, 162.

<sup>218</sup> Clarkson, C.M.V, Keating, H.M. and Cunningham, S.R. 'Clarkson and Keating: Criminal Law' 7<sup>th</sup> ed. (London 2010), 173.

<sup>219</sup> *Attorney General's Reference (No. 3 of 2004)* [2004] EWCA Crim 868.

<sup>220</sup> Crosby (n200), 330.

<sup>221</sup> *Ibid*, 333.

*v G and R*, and although the test has now returned to its original subjective state, questions of objectivity remain, as do notions of advertent and inadvertent recklessness.

### **2.5) Problem Three: Provocation and Loss of Control**

It is becoming increasingly apparent that '[c]rime and society's responses to it, like virtually all social phenomena, are heavily influenced by issues of gender', as Donald Nicolson attests.<sup>222</sup> 'Gender stereotypes underlie the application and even the formulation of core criminal concepts such as *actus reus* [and] *mens rea*'; as to the latter, Nicolson observes the 'complex process whereby actors in the criminal justice system make different assumptions about male and female criminal behaviour'.<sup>223</sup> For example, Hilary Allen argues that male criminal behaviour is analysed externally and assumed to be rational, whereas women's criminality is analysed internally and assumed to be pathological.<sup>224</sup> Although, as Child and Ormerod observe, elements of *actus reus* and *mens rea* are not always applicable to defences,<sup>225</sup> the defendant's state of mind can be a mitigating factor in determining culpability, and therefore can be considered a *mens rea*-related issue in this thesis. This section will discuss interpretations of reasonableness, which are relevant in the criminal law when judging the blameworthiness of a defendant's conduct, and the ways in which reasonable behaviour may be said to be gendered by focusing on male- and female-coded responses to provoking acts in the historical defence of provocation, and the new partial defence of loss of control which replaced it.

#### **2.5.1) Gendering the reasonable person**

As a normative concept, reasonableness is used, according to Robert Alexy, 'for the assessment of such matters as actions, decisions, and persons, rules, institutions, also

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<sup>222</sup> Nicolson, D. 'Criminal Law and Feminism' in Nicolson, D. and Bibbings L. (eds) 'Feminist Perspectives on Criminal Law' (Cavendish 2000), 1-26, 1.

<sup>223</sup> *Ibid*, 2.

<sup>224</sup> Allen, H. 'Justice Unbalanced' (OUP 1987).

<sup>225</sup> Child and Ormerod (n95), 166.



arguments and judgments'.<sup>226</sup> The reasonable person, Mayo Moran explains, 'is used as a way of feeding the non-normative characteristics of the individual into the legal standard in order to fashion an individually-sensitive means for assessing the culpability of the accused',<sup>227</sup> and although the law 'occupies a self-consciously artificial and gender-devoid world in which the legal subject is presumed to be without gender', Joanne Conaghan posits that the legal subject 'is generally male by default'.<sup>228</sup>

A progenitor of the reasonable person appeared in the 1837 tort law case of *Vaughan v Menlove*, in which the defendant's behaviour was judged against that of 'a man of ordinary prudence'.<sup>229</sup> An early reference in criminal law can be found in Section 3 of the *Homicide Act 1957* which held that:

the question whether the provocation was enough to make *a reasonable man* do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on *a reasonable man*.<sup>230</sup>

This fictional comparator is in 'such heavy demand in law' according to John Gardner because it is not merely a legal standard but an 'extra-legal standar[d] of a notably versatile kind',<sup>231</sup> which does not arise naturally but must instead be 'invite[d]' in.<sup>232</sup> He suggests the reasonable person can also be thought of as the 'justified person', namely 'someone who is justified wherever justification is called for' and one who is 'justified in [their] actions', 'decisions', 'intentions', 'beliefs' and 'emotions'.<sup>233</sup> The reasonable person requires a decision-maker to think not 'whether *the defendant's* belief was justified' but whether it was the 'kind of belief, justified or otherwise, that would be held by *an average person* in the defendant's position'.<sup>234</sup> This is complicated by the law's ability to 'recas[t]

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<sup>226</sup> Alexy, R. 'The Reasonableness of Law', 5-15 in Bongiovanni, G. (ed) 'Reasonableness and Law' (Springer 2009), 5-15, 5, 7.

<sup>227</sup> Moran, M. 'The Reasonable Person: A Conceptual Bibliography in Comparative Perspective' (2010) *Lewis and Clark Law Review*, 1233-1283, 1272-73.

<sup>228</sup> Conaghan, J. 'Law and Gender' (OUP 2013), 5.

<sup>229</sup> *Vaughan v Menlove* (1837) 132 ER 490 (CP).

<sup>230</sup> *Homicide Act 1957*, S.3 [emphasis added].

<sup>231</sup> Gardner, J. 'The Many Faces of the Reasonable Person' (2015) *Law Quarterly Review*, 131(3), 563-584, 568.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*, 566.

<sup>234</sup> *Ibid.*, 581 [emphasis added].

the 'reasonable person' so that he 'stands for a particular standard of justification, or a particular approach to justification',<sup>235</sup> distinguishing between the 'ordinary reasonable person, designed to set standards for us all to be judged by in our non-specialist pursuits' and the 'enhanced reasonable persons [who] normally exist to set higher standards of justification', such as the reasonable neurosurgeon and the reasonable hairdresser.<sup>236</sup> This suggests there is no singular universal reasonable person but an intentionally generic template that can be remoulded to include the external and particularized characteristics of the defendant.

The vagueness of 'reasonable' conduct arguably allows for arbitrarily gendering criminal behaviour into strict binaries. Nicola Lacey suggests that the 'very structure or method of modern law' is 'hierarchically gendered'<sup>237</sup> and operates on rigidly gendered assumptions of criminal behaviour, with crimes of passion historically being coded as male crimes, and women often coded as poisoners.<sup>238</sup> The law's approach may therefore reinforce unhealthy stereotypes about gendered crime, as Mayo Moran observes, positing that:

boys are often exonerated in [social] situations that they knew to be dangerous on the basis that they reasonably yielded to temptation. In contrast, however, the claims of playing girls are routinely rejected even when the girl's behaviour does not seem nearly as dangerous as that of her male counterpart. ... The possibility of exonerating the playing girl on the ground that she was – like her male counterpart – tempted into a situation of danger rarely seems to occur to courts even as an option.<sup>239</sup>

This 'boys will be boys' idiom therefore implicitly underscores the reasonableness standard, and with it the notion of excusing male offenders for exhibiting typically 'masculine' behaviour. For Moran, this inevitably leads to the reasonable person acting as an 'invitation to draw on underlying stereotypes' of what is supposedly ordinary or reasonable.<sup>240</sup> To subjectify the standard to include a 'reasonable woman' may only

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<sup>235</sup> Ibid, 585.

<sup>236</sup> Ibid, 588.

<sup>237</sup> Lacey, N. 'Unspeakable Subjects: Feminist Essays in Legal and Social Theory' (Hart 1998), 2.

<sup>238</sup> Ibid. See also Nagy, V. 'Nineteenth-Century Female Poisoners: Three English Women Who Used Arsenic to Kill' (Palgrave 2015).

<sup>239</sup> Moran, M. 'Rethinking the Reasonable Person' (Oxford 2003), 101-2.

<sup>240</sup> Ibid.

aggravate the problem, as Moran fears this may ‘reinforce a view of women as victims’ and ‘replicat[e] the false and exclusionary universalism that characterized the reasonable man’,<sup>241</sup> while Marcia Baron posits that ‘relativiz[ing] reasonableness to gender’ in such a way will only ‘exacerbate’ the binaries of gendered behaviour.<sup>242</sup>

Their concerns are especially persuasive when considering the paradoxical way in which women are punished for criminal behaviour. The courts have historically shown more leniency to women defendants at the sentencing stage,<sup>243</sup> arguably because of gendered perceptions of women as being ‘more pure and moral than men’.<sup>244</sup> However, women also experience double deviance, in which they are punished more harshly for committing crimes, such as homicide, that transgress both legal *and* gender norms.<sup>245</sup> Some studies suggest that ‘sentencing outcomes will be more or less severe for women relative to men depending on the degree to which women deviate from or conform to their expected gender role, respectively’.<sup>246</sup>

Therefore, the law’s problems with gender run deeper than reasonableness. Just as character-based responsibility attribution shifted into the technical doctrines of *mens rea*, so the objective standard in the criminal law gradually shifted over time from the male-coded ‘reasonable man’ to the more gender neutral ‘reasonable person’ – but it does not necessarily follow that gendered assumptions and binaries have evolved along with it.<sup>247</sup> The shift to the more inclusive ‘reasonable person’ demonstrates a positive attempt to encompass defendants of all genders, but gender-neutral terminology may simply ‘mask the maleness of standard’.<sup>248</sup> The potential for the reasonable person to reflect

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<sup>241</sup> Moran (n227), 1262.

<sup>242</sup> Baron, M. ‘Gender Issues in the Criminal Law’ in Deigh, J. and Dolinko, D. (eds) ‘The Oxford Handbook of Philosophy of Criminal Law’ (OUP 2011), 335-402, 335.

<sup>243</sup> See Doerner, J.K. and Demuth, S. ‘Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?’ (2014) *Criminal Justice Policy Review*, 25(2), 242-69.

<sup>244</sup> Cahn, N.R. ‘The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice’ (1992) *Cornell Law Review*, 77(6), 1398-1446, 1415.

<sup>245</sup> Lloyd, A. ‘Doubly Deviant, Doubly Damned: Society’s Treatment of Violent Women’ (Penguin Books 1995).

<sup>246</sup> Tillyer, R., Hartley, R.D. and Ward, J.T. ‘Differential Treatment of Female Defendants: Does Criminal History Moderate the Effect of Gender on Sentence Length in Federal Narcotics Cases?’ (2015) *Criminal Justice and Behaviour*, 42(7), 703-21, 706.

<sup>247</sup> See Lacey (n55).

<sup>248</sup> Handsley, E. ‘The Reasonable Man: Two Case Studies’ (1996) *Sister in Law*, 1, 53-71, 61.

stereotypes about gendered perceptions of behaviour is illustrated particularly vividly in cases related to the old provocation defence.

### 2.5.2) The partial defence of provocation: a gendered critique

Provocation emerged as a distinct defence in the seventeenth century 'as a concession to human frailty at a time when inflexible homicide laws meant that capital punishment was mandatory for all offenders convicted of murder'.<sup>249</sup> Kate Fitz-Gibbon describes it as 'a partial justification for men defending their honour against other males' which would lead to an 'alternative verdict of manslaughter, in place of murder',<sup>250</sup> three key elements of which include 'proportionality', 'the notion of a person's loss of self-control' and the 'ordinary person test'; i.e. that the defendant's violent response was proportional to the level of provocation.<sup>251</sup>

Four main categories of provocation developed during the seventeenth century, according to Jeremy Horder: a general category of 'a grossly insulting assault', 'seeing a friend, relative or kinsman attacked', 'seeing an Englishman unlawfully deprived of his liberty', and 'seeing a man in the act of adultery with one's wife'.<sup>252</sup> Horder believes the categories are linked by ancient notions of honour, especially because women were considered the property of their husbands during this time.<sup>253</sup> Examples of male-coded excuses for killing can be seen in contemporary case law as early as the 1670 case of *John Manning* in which the court found that 'there could not be greater provocation' than a man discovering his wife committing adultery,<sup>254</sup> and downgraded the sentence from death to a 'gentl[e]' branding on the hand.<sup>255</sup> It has been suggested that, because the

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<sup>249</sup> Fitz-Gibbon, K. 'Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective' (Palgrave Macmillan 2014), 7.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*, 8.

<sup>252</sup> Horder, J. 'Provocation and Responsibility' (Clarendon Press 1992), 24.

<sup>253</sup> *Ibid.*, 43-58.

<sup>254</sup> *John Manning* (1670) 83 E.R. 112, referenced in LaCroix, L.A., McAdams, R.H. and Nussbaum, M.C. 'Fatal Fictions: Crime and Investigation in Law and Literature' (OUP 2017), 126.

<sup>255</sup> *Ibid.*

judge was so 'comfortable' and emphatic in stating infidelity to be the greatest provoking act, it was likely that the infidelity-as-mitigating-murder rule 'existed well before 1670'.<sup>256</sup>

There are two broad perspectives on provocation, according to Horder: firstly where provocation is 'grave' and 'genuinely [found] to have induced a loss of self-control', the killing is 'attributed to "human frailty"' and will lead to the defence being invoked; secondly, if the provoking act is found to be 'trivial', then it is attributed to a display of the defendant's 'bad character or malice in killing the victi[m]', and is more a testament to the defendant's wickedness than a mitigating factor in their blameworthiness.<sup>257</sup> He takes issue with the philosophical roots of the defence, finding killing in anger no different to killing out of greed or jealousy – at least from the perspective of whether such action is worthy of a defence.<sup>258</sup> I would cross reference this with Celia Wells' notion that the defence is inappropriate as it accuses the victim of misconduct, despite the fact that they cannot speak in their own defence.<sup>259</sup> Thus, Horder takes issue with the defence's capacity to distinguish between the motivations for killing, and Wells takes issue with it for shifting some of the blame for the victim's death onto the victim themselves.

The circumstances in which defence of provocation would mitigate a sentence of murder were not made clear, other than outlining specific instances on a case by case basis. The 1707 case of *Mawgridge* provided several examples, including '[w]here a man is taken in adultery with another man's wife, if the husband shall stab the adulterer or knock out his brains this is bare manslaughter: for *jealousy is the rage of man and adultery is the highest invasion of property*'.<sup>260</sup> The gravity of spousal infidelity as provoking act was thus accepted as a partial defence to murder. The 1869 case of *R v Welsh* established that the 'constant nagging' of one's wife was also sufficient to constitute a provoking

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<sup>256</sup> LaCroix et al (n254), 126.

<sup>257</sup> Horder (n252), 114.

<sup>258</sup> Ibid, 156-185.

<sup>259</sup> Wells, C. 'Provocation – the case for abolition' in Mitchell, A. (ed) 'Re-Thinking English Homicide Law' (OUP 2000), 85-106.

<sup>260</sup> R v Mawgridge (1707) Keil 119.

act,<sup>261</sup> even though this suggests a *series* of provoking acts over a period of time rather than the sudden and temporary ‘snap’; the gender imbalance in this would be later illuminated by the failure of battered wives to invoke this defence. *Welsh* also established that the provoking act had to be ‘something which might naturally cause an *ordinary and reasonably minded man* to lose his self-control and commit such an act’,<sup>262</sup> which signals a larger shift throughout the nineteenth century towards judging the provoking act partially by reference to an objective comparator.<sup>263</sup>

The common law partial defence of provocation historically applied to murder cases, and its scope was described by Devlin J in *R v Duffy*, a case which involved a battered wife killing her husband after years of abuse at his hands:

Provocation is some act, done by the dead man to the accused, which would cause in any reasonable man a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him not master of his mind.<sup>264</sup>

This was codified in Section 3 of the *Homicide Act 1957*.<sup>265</sup> The defence required evidence that the defendant was ‘provoked (whether by things done or by things said or by both together) to lose his self-control’, which called the decision-maker to question ‘whether the provocation was enough to make a reasonable man do as he did’.<sup>266</sup> The defence could apply even if the defendant induced the provocation (*R v Johnson*),<sup>267</sup> and even if the things done or said were not aimed at the victim (*R v Davies*).<sup>268</sup> *DPP v Bedder* held that provocation was to be assessed objectively,<sup>269</sup> which *DPP v Camplin* particularised to an extent, describing the reasonable man as:

a person having the power of self-control to be expected of *an ordinary person of the sex and age of the accused*, but in other respects sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be

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<sup>261</sup> *R v Welsh* (1869) 11 Cox CC 336.

<sup>262</sup> *Ibid* [emphasis added].

<sup>263</sup> See *R v Smith* [2001] 1 AC 146 per Lord Slynn of Hadley at [160].

<sup>264</sup> *R v Duffy* [1949] 1 All ER 932. It seems significant that the ‘reasonable man’ phrasing was used here even where the defendant was a woman.

<sup>265</sup> *Homicide Act* (n230).

<sup>266</sup> *Ibid*.

<sup>267</sup> *R v Johnson* [1989] 1 WLR 740.

<sup>268</sup> *R v Davies* [1975] 1 QB 691.

<sup>269</sup> *DPP v Bedder* [1954] 1 WLR 1116.

provoked to lose his self-control but also would react to the provocation as the accused did.<sup>270</sup>

The age and sex qualification was later codified in S.54(1)(c) Coroners and Justice Act 2009,<sup>271</sup> and subsequent cases dealt with the uncertain question of which other characteristics could be taken into account: *R v Newell* established that any 'sufficiently permanent' characteristics which actually related to the provocation could be considered,<sup>272</sup> which was upheld by *R v Raven*.<sup>273</sup> *R v Morhall* held that discreditable characteristics (in this case, the defendant's addiction) could be taken into account regarding the *gravity* of the provocation but were not attributable to the reasonable man.<sup>274</sup> Specific characteristics such as eccentricity and attention-seeking were held to be attributable to the reasonable man in the cases of *R v Dryden*<sup>275</sup> and *R v Humphreys*<sup>276</sup> respectively. *R v Acott* established that even if it was clear the defendant lost their control, being mocked and berated for being 'inadequate' was not enough to constitute a provoking incident.<sup>277</sup> *R v Ibrams and Gregory* established if there was a 'cooling-off' period between the provoking act(s) and the killing (contrasting with the 'boiling over' of provocation) the defendant was assumed to have regained control in this time and thus any subsequent violent retaliation would not be considered a 'sudden and temporary loss of control'.<sup>278</sup> Any evidence of planning would similarly negate the defence as it would suggest the defendants were 'masters of their own minds'.<sup>279</sup> No specific provoking act was outlined by these cases, but could include a baby crying (*R v Doughty*),<sup>280</sup> and did not have to be aimed at the victim (*R v Davies*).<sup>281</sup>

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<sup>270</sup> DPP v Camplin [1978] UKHL 2 [emphasis added].

<sup>271</sup> Coroners and Justice Act 2009, S.54(1)(c).

<sup>272</sup> *R v Newell* (1980) 71 Cr App R 331.

<sup>273</sup> *R v Raven* [1982] Crim LR 51.

<sup>274</sup> *R v Morhall* [1995] 3 WLR 330.

<sup>275</sup> *R v Dryden* [1995] 4 All ER 987.

<sup>276</sup> *R v Humphreys (Emma)* [1995] 4 All ER 1008.

<sup>277</sup> *R v Acott* [1997] 1 WLR 306.

<sup>278</sup> *R v Ibrams and Gregory* (1982) 74 Cr. App. R. 154.

<sup>279</sup> *Ibid* per Lawton LJ.

<sup>280</sup> *R v Doughty* (1986) 83 Cr App R 319.

<sup>281</sup> *Davies* (n268).

The old law therefore framed the loss of control very narrowly, and gendered conceptions of what the law regarded as justified behaviour gradually came to light when battered wives who killed their abusive partners tried and failed to invoke the provocation defence. Joanne Conaghan observes that 'women, often for reasons of self-protection and comparative physical vulnerability, are likely to delay reacting to injury or abuse until a time when they feel less threatened'.<sup>282</sup> As the provocation defence is 'tailored to a type of behaviour with which women are less likely to conform, women have encountered difficulties in invoking' it,<sup>283</sup> as demonstrated in the cases of *R v Ahluwalia*,<sup>284</sup> and *R v Thornton*,<sup>285</sup> and *R v Humphreys*,<sup>286</sup> all of whom killed their abusive partners. It was held on appeal in *Humphreys* that certain traits the defendant possessed (in her case, a psychotic condition and 'attention-seeking') should have been attributed to the 'reasonable person'.<sup>287</sup> Similarly in *Thornton*, the mental characteristics should have been taken into account, and allowed the appeal on diminished responsibility, precluding provocation on grounds that the minute it took her to retrieve the knife she used to stab her husband negated 'sudden and temporary loss of control'.<sup>288</sup> On appeal, the court found that the trial judge in *Ahluwalia* had directed correctly in terms of provocation, but downgraded the defendant's charge from murder to manslaughter through applying the defence of diminished responsibility.<sup>289</sup> The distinction between provocation and diminished responsibility is not merely legal but 'ethical', as the former is 'a partial *excuse for wrongdoing*' and the latter 'a partial *denial of responsibility*'<sup>290</sup> and likened prolonged abuse to a mental condition.<sup>291</sup> These cases demonstrate that battered wives who kill pose philosophical complications for the defence of provocation. David Gurnham

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<sup>282</sup> Conaghan (n228), 91.

<sup>283</sup> *Ibid.*

<sup>284</sup> *R v Ahluwalia* (1993) 96 Cr App R 133.

<sup>285</sup> *R v Thornton* (No. 2) [1996] 1 WLR 1174.

<sup>286</sup> *Humphreys* (n276).

<sup>287</sup> *Ibid.*

<sup>288</sup> *Thornton* (n285).

<sup>289</sup> *Ahluwalia* (n284).

<sup>290</sup> Horder, J. 'Between Provocation and Diminished Responsibility' (1999) *King's Law Journal*, 10(2), 143-66, 143 [emphasis added].

<sup>291</sup> Morgan, C. 'Loss of Self-Control: Back to the Good Old Days' (2013) *The Journal of Criminal Law*, 77(2), 119-35, 123.



suggests that the ‘solidification of such character types as the “male abuser” and the “battered woman” means that a discussion of the “facts” of a case will become confused with – and sometimes unwittingly replaced by – the a priori assumptions made in interpreting them’.<sup>292</sup> In practice, the defence appears to protect men for ‘snapping’ in a moment of rage but not women who kill after years of abuse, and the distinctions reflected in *Ahluwalia Thornton* and *Humphreys* misinterprets the power dynamics of abusive relationships and privilege male emotional responses. Lord Hoffmann later observed that the provocation defence has ‘serious logical and moral flaws’,<sup>293</sup> which the Law Commission expanded to include the broad interpretation of provoking acts in *Doughty*,<sup>294</sup> gender bias<sup>295</sup> and the ‘slow burn’ of domestic killings being excluded from the defence’s scope.<sup>296</sup>

### 2.5.3) The new law: loss of control

The *Coroners and Justice Act* 2009 abolished the provocation defence<sup>297</sup> and replaced it with ‘loss of self-control’ in S.54(1)(a)<sup>298</sup> which aims to encompass defendants who kill ‘in circumstances of justified anger or acute fear’,<sup>299</sup> as a direct response to concerns the ‘uncertainty and perceived unfairness’ and ‘inconsistent interpretations’ of provocation.<sup>300</sup> S.54 explicitly takes into account female-coded aggression by establishing the loss of control need not be sudden.<sup>301</sup> S.54(4) precludes the defence applying to those who kill out of a ‘considered desire for revenge’<sup>302</sup> or whose acts are pre-meditated.<sup>303</sup>

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<sup>292</sup> Gurnham, D. ‘Crime, Desire and Law’s Unconscious’ (Routledge 2014), 3.

<sup>293</sup> R v Smith (Morgan) (2000) 4 ALL ER 289 per Lord Hoffman.

<sup>294</sup> Law Commission Final Report: Partial Defences to Murder (2004) 5.72-5.73, 101, referencing Doughty (n280).

<sup>295</sup> Ibid, 5.49, 94.

<sup>296</sup> Ibid, 3.23, 33.

<sup>297</sup> Coroners and Justice Act (n271), S.56; S.62(2)(a) abolishes S.3 Homicide Act 1957 (n230).

<sup>298</sup> Ibid, S.54(1)(a).

<sup>299</sup> Child and Ormerod (n95), 165.

<sup>300</sup> Ibid.

<sup>301</sup> Coroners and Justice Act (n271), S.54(2).

<sup>302</sup> Upholding Ibrams and Gregory (n278).

<sup>303</sup> Upholding R v Inglis [2011] 1 WLR 1110.

The defence also requires a qualifying trigger,<sup>304</sup> which narrows the scope of provoking acts to fear of serious violence (the ‘fear trigger’)<sup>305</sup> from the victim to the defendant or another<sup>306</sup> or a sense of being seriously wronged by things done or said<sup>307</sup> (the ‘anger trigger’).<sup>308</sup> The fear trigger is a subjective requirement and most specifically aims to redress the gender bias from the provocation defence; *R v Dawes, Hatter and Bowyer* established that if the defendant consciously acted to provoke violence, the defence will not apply.<sup>309</sup> Interpretation of the anger trigger has been criticised, specifically that the things done or said must be of an ‘extremely grave character’<sup>310</sup> (objective) which ‘caused the defendant to have a justifiable sense of being seriously wronged’ (which combines objective and subjective).<sup>311</sup> *Dawes* established that both sub-provisions are to be judged objectively.<sup>312</sup>

#### 2.5.4) Critique of loss of control

Several issues have arisen in light of the new defence, not least the ‘problem... in knowing exactly what the law means by a “loss of self-control”’, which is ‘not defined by the 2009 Act’.<sup>313</sup> The ambit of the new defence was considered in *R v Jewell*, where the defendant killed the victim, who had intimidated and threatened the defendant’s life, after a period of several days during which he felt he was ‘shutting down’, and subsequently committed the act ‘as if in a dream’.<sup>314</sup> The conviction was upheld on the basis that ‘sufficiency of evidence is bound to suggest more than minimum evidence to establish the facts’, and evidence of planning negated the invocation of loss of control.<sup>315</sup>

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<sup>304</sup> Coroners and Justice Act (n271), S.54(1)(b), S.55.

<sup>305</sup> Edwards, S.S. ‘Anger and Fear as Justifiable Preludes for Loss of Self-Control’ (2010) *The Journal of Criminal Law*, 74(3), 223-41, 227.

<sup>306</sup> Coroners and Justice Act (n271), S.55(3).

<sup>307</sup> *Ibid*, S.55(4).

<sup>308</sup> Edwards (n305), 224.

<sup>309</sup> *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322.

<sup>310</sup> Coroners and Justice Act (n271), S.55(4)(a).

<sup>311</sup> *Ibid*, S.55(4)(b).

<sup>312</sup> *Dawes* (n309).

<sup>313</sup> Child and Ormerod (n95), 167.

<sup>314</sup> *R v Jewell* [2014] EWCA Crim 414.

<sup>315</sup> *Ibid*, per Raffety LJ.

The Act appears to have had some positive effect in redressing the gender imbalance. The defendants in *R v Workman*<sup>316</sup> and *R v Barnsdale-Quean*<sup>317</sup> were men who killed their wives in a sudden explosion of anger but who were not able to successfully invoke the loss of control defence. However the courts' interpretation of the exclusion of sexual infidelity as a provoking 'thing done or thing said' has faced some controversy,<sup>318</sup> as it seeks to redress the gender bias of provocation by removing it as a potential mitigating factor, but it has been made relevant in practice as a 'contextualising factor' in *R v Clinton, Parker and Evans*.<sup>319</sup> By tacitly bringing back sexual infidelity as a mitigating factor only three years after the loss of control legislation specifically precluded it as a qualifying trigger, James Slater contends that Lord Judge CJ 'significantly reduced the potential ambit' of the sexual infidelity exclusion,<sup>320</sup> and appears to have undermined the reasoning behind the loss of control defence. Therefore, as adultery in and of itself is no longer grounds for loss of control but can be considered as a contextualising factor, the defence still seems partly, in some senses, honour-based.

In this section I have addressed case law and statutory provisions concerning provocation and loss of control. I have analysed the gendered nature of provocation as a defence coded with stereotyped and dated conceptions of gendered violence, and evaluated the successes and missteps of the partial defence which replaced it - loss of control. Although the 2009 Act attempts a more gender inclusive reform of the law, and succeeds in acknowledging more circumstances in which aggression can be triggered (such as the slow-burn in cases of battered wives), it may be regarded as a rather trivial reform of the law due to the fact that sexual infidelity has been made relevant once more,

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<sup>316</sup> *R v Workman* [2014] EWCA Crim 575.

<sup>317</sup> *R v Barnsdale-Quean* [2014] EWCA Crim 1418.

<sup>318</sup> Coroners and Justice Act (n271), S.55(6)(c).

<sup>319</sup> *R v Clinton, Parker and Evans* [2012] EWCA CRIM 2.

<sup>320</sup> Slater, J. 'Sexual Infidelity and Loss of Self-Control: Context or Camouflage?' (2012) *Denning Law Journal*, 24, 153-168, 153.

harkening back to provocation that partially exonerated men provoked into killing by spousal infidelity.

## 2.6) Conclusion

In this chapter I have shown that *mens rea* is an essential element of criminal liability, which attempts to assign guilt only to defendants who have some awareness of their actions when committing an offence; but in demonstrating that this is not always the case in practice, I have evidenced three distinct though interconnected issues in the criminal law: the fraught divide between subjective and objective approaches in recklessness; the resurgence of character as a factor in judging blameworthiness in narrow but definite ways during the trial and sentencing stages; and the potential failure of the loss of control defence to protect the abused women whose plight it was partially created to address.

Notions of reasonableness are common to all three problems above. Bad character evidence might demonstrate the defendant has propensity for committing a certain criminal offence; however, sentencing primarily based on an accumulation of prior convictions risks failing to judge on individual responsibility, and in effect turns the clock back to the pre-*mens rea* era. As demonstrated by the loss of control defence, the patriarchy is timeless but manifestations of it differ: provocation in the nineteenth century, and the not-so-excluded-in-practice sexual infidelity exclusion today. Each of the three problems encounters dualities within the law, such as subjective/objective, male-/female-coded behaviour, *actus reus/mens rea*, and evil motive/specific state of mind for each particular crime. Untangling subjective states of mind has led to the law recognising a variety of differentiated categories by which *mens rea* can be judged. It is important that there are different layers of liability afforded to different mental states, which can be as disparate as an intention to kill for money or revenge and a person not realising a risk that would have occurred to another. The legal culpability has to be differentiated to cater to the nuance of mental fault of which humans are capable. However, the law still strays into arbitrariness and binaries.

The law is caught in a state of flux between judging a person for who they were (character), who they allegedly are (subjective/objective, loss of control), and who they might become (propensity from all three). It is enmeshed in its own binaries (subjective/objective, *actus reus/mens rea*, good/bad character, male-/female-coded criminality), but literature can illuminate the law in this regard. Literature can illuminate the fragility of the law's distinctions: we cannot be sure of the characters' true intentions; either they are obfuscated by distanced third person narration (Dorian), unreliable narration (Jekyll), or layers of communication (Frankenstein). Exploring law using legal methodology can only reveal so much, particularly as the law still struggles to conceptualise the inner bounds of the human mind. So I will turn to law and literature, which will enable me to clarify and critique problems of proof in *mens rea* by reading them as doubles narratives found in Gothic fiction; this genre will also allow me to examine the parallel development of literature and the criminal law, and evolving approaches and attitudes to the internal (guilty, criminal, human) mind. I argue that the literary works chosen for this thesis will historicise these problems and illuminate the interconnected nature of these unstable binaries. The books demonstrate that differentiating between states of mind can become arbitrary, and that moral blameworthiness does not always equate to legal culpability.

## **Chapter III:** **Law and Literature as Methodology**

### **3.1) Introduction**

Now that problems of proof in *mens rea* have been outlined in the previous chapter, I will be turning to literature for new methods, alternative perspectives and potential avenues for analysing critical discourses related to *mens rea*. A relatively young field of study, law and literature has been used by a number of criminal legal theorists to clarify and illuminate problems in criminal law. I will be examining, critiquing, and building on their methodologies and applying them to my three texts in later chapters. Literature, I contend, and more specifically the novel, can not only diagnose gaps and uncertainties in the law, but can afford access to the mental processes of its characters in ways that the law is not always equipped to do.

Firstly, I will be looking to the field of law and literature, its methods, and how it can be used to help critique problems of proof in *mens rea*. This section will focus on conceptualising law and literature as a discipline, including its two major branches: 'law *in* literature' (literary depictions of law as found in Dickens and Shakespeare); and 'law *as* literature' (legal texts analysed as works of literature). I will consider and select specific methods developed by James Boyd White and Robin West before analysing critiques of the discipline from the last twenty years of law and literature scholarship. I will investigate the claims and critiques of contemporary law and literature scholars, such as Greta Olson and Martin Kayman, who take a comparative approach to exploring distinct approaches to law and literature in the UK, US and Germany; Ralf Grüttemeier, who explores various modes of authorial intention in literature and the law; and Costas Douzinas and Adam Gearey, who critique the humanistic mode of orthodox law and literature scholarship.

From this I will move on to explore why law and literature is particularly suited to investigating and analysing problems of proof in *mens rea*. In order to do this, I will

critique and adapt the methods of law and literature scholars to develop my own methodology. Through this I will explore literary criticism, though this is not a field on which this thesis is focused; rather, I look to a different corpus (literature) in order to view the legal problems outlined in the last chapter from a new perspective. I will explain how my work aims to challenge the law's binaries by adopting and modifying the approach of Gerald Wetlaufer because he observes that not only can literature *contain* opposites but it can dramatize, problematise and work through them. In exploring the value and efficacy of literary tools in legal analysis, I will draw on the work of David Gurnham because he explores how literature can be used to illustrate and clarify legal problems. In historicising problems of proof using literary sources, I will look to the research of Nicola Lacey and Simon Stern who use contemporary works of literature to explore conceptions of character in eighteenth and nineteenth century criminal trials. This critical framework will form the basis for the next chapter in which I will explore Gothic/Doubles fiction, a specific genre in law and literature which I contend is most valuable for analysing problems of proof in *mens rea*, and where I employ literature as method and material to the historicising of contemporary criminal law.

### **3.2) Law and Literature: An Overview**

Broadly speaking, law and literature is a branch of interdisciplinary scholarship which studies the intersections between literary and legal thought, drawing on the distinct methodological practices of each to analyse the other. Greta Olson and Martin Kayman suggest that law and literature studies:

remind us how differences in traditional legal structures and in contemporary legal cultures affect approaches to relations between law, literature and language. When viewed from the outsider positions offered by comparative scholarship, assumptions about the genres, forms, and languages of law become more visible, opening up local preoccupations and texts onto larger cultural issues.<sup>1</sup>

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<sup>1</sup> Olson, G. and Kayman, M.A. 'Introduction: From "Law-and-Literature" to "Law, literature, and language": A comparative approach' (2007) *European Journal of English Studies*, 11(1), 1-15, 1.

Literature can thus be used to identify the gaps and ambiguities in law, which in turn point to larger social and political issues. It is possible to compare literature and law because they both engage with similar questions. Kieran Dolin observes that ‘law and literature have common properties of language and vision’, and that this connection ‘works to shape a culture’s notions of justice and legal entitlement’.<sup>2</sup> A number of key intersections between the two disciplines were identified by Richard Weisberg and Jean-Pierre Barricelli, including ‘literary representations of legal trials, practitioners and language’ and ‘the role played by narrative, metaphor and other rhetorical devices in legal speech and writing’ which can be broadly described as law *in* literature and law *as* literature respectively.<sup>3</sup>

Despite the interconnected nature and mutual aspects of law and literature, their differences are just as important and, arguably, just as decisive. Archibald MacLeish propounds that ‘[t]he business of law is to make sense of the confusion we call human life’, and the business of poetry is ‘to make sense of the chaos of our lives... To compose an order... To imagine man’.<sup>4</sup> MacLeish appears to take a transhistorical approach that views literature as stabilising, but I favour the more disruptive view of Melanie Williams, who suggests that ‘literature may provide a powerful challenge to the orthodoxies of law in understanding the moral and legal status to be attached to the acts and omissions of persons’.<sup>5</sup> Williams observes that ‘[o]ur world centres upon binary arrangements and opposition, not least... distinguishing male and female’, and thus posits that ‘[l]iterary works may provide an opportunity to think beyond’ the constraints of the law’s binaries.<sup>6</sup>

Notwithstanding Williams’ argument in favour of the critical potential literature might have over the law, there may be a disparity in the political authority they carry. Robin West

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<sup>2</sup> Dolin, K. ‘A Critical Introduction to Law and Literature’ (Cambridge University Press 2007), vii.

<sup>3</sup> Weisberg, R.H. and Barricelli, J.P. ‘Literature and the Law’ in Gibaldi, J and Barricelli, J.P. (eds) ‘Interrelations of Literature’ (MLU 1982), 150-75, 150. Referenced in Dolin (n2), 10-11.

<sup>4</sup> MacLeish, A. ‘Apologia’ (1972) Harvard Law Review, 85, 1505–11, 1508.

<sup>5</sup> Williams, M. L. ‘Law and Literature/Literary Jurisprudence’ in Auchmuty, R. (ed). ‘Great Debates in Gender and Law’ (Red Globe Press 2018), 185-97, 185.

<sup>6</sup> Ibid, 186.



finds 'value [in literature's] substantive contribution to our understanding of law'<sup>7</sup> and notes that 'great literature may contain truths about law that are not easily found in non-narrative jurisprudence'.<sup>8</sup> In doing so, she argues, 'imaginative' literature performs a function that law perhaps cannot: it tells us something about 'the meanings of law in the lives of its subjects, its agents, and its adjudicators, and the meanings of law in the lives of those that law wilfully ignores, subjugates, marginalizes or excludes'.<sup>9</sup> In short, 'literature contains substantive insights into the nature of law not readily found elsewhere'.<sup>10</sup> For West, it's literature's ability to criticise and more deeply understand legal doctrine that makes it of value to legal scholarship. She concedes that literature may have 'no capacity for command' but gains in 'normative force' what it may lack in authority:<sup>11</sup>

The worlds of 'law' and 'literature' – of political authority on the one hand and intellectual, moral and cultural authority on the other – have not always been so separate. Contrary to the spirit of the modern split between law and letters, 'law' and 'literature' have, in the not-so-distant past, constituted a seamless web of elite cultural authority.<sup>12</sup>

Although West is cognizant of the fact that literature has less impact in a legal sense, I do not believe that literature is the 'weak' partner to 'strong' law, as a reading of West above might suggest. I will later revisit this notion in relation to Greta Olson's critique of gendered law and literature. Literature and law are connected but distinct: in the same way as Mikhail Bakhtin notes, 'languages throw light on each other: one language can, after all, see itself only in the light of another language',<sup>13</sup> so too can law and literature illuminate each other. However, Jeanne Gaakeer critiques the arbitrary 'traditional bifurcation' of law in/as literature,<sup>14</sup> which Ian Ward cautions are in fact often

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<sup>7</sup> West, R. 'Literature, Culture, and Law – in Teaching Law and Literature (Catherine Frank & Matthew Anderson eds., forthcoming)' (2008), 1-29, 2, accessed 21 November 2017 from <<http://ssrn.com/abstract=1201867>>

<sup>8</sup> Ibid, 4.

<sup>9</sup> Ibid, 4-5.

<sup>10</sup> Ibid, 5.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, 7.

<sup>13</sup> Bakhtin, M.M. 'Epic and Novel: Toward a Methodology for the study of the Novel' in Holquist, M. (ed) 'The Dialogic Imagination: Four Essays' (University of Texas Press 1981), 43-62, 51.

<sup>14</sup> Gaakeer, J. 'The Future of Literary-Legal Jurisprudence: Mere Theory or Just Practice?' (2011) *Law and Humanities*, 5(1), 185-196, 185.

'indistinguishable' in practice.<sup>15</sup> Indeed, Jarrell D. Wright suggests that law and literature are 'only different as textual manifestations of the social order that animates them both'.<sup>16</sup>

Firstly, I will look at the two major branches of law and literature, conceptualising each as a separate but interconnected strand of scholarship, as a starting point for developing my own approach, which will demonstrate the bleeding in of the law's binaries and the instabilities that develop therein. This approach draws on queer theory and the work of Judith Butler, who 'sought to counter those views that made presumptions about the limits and propriety of gender and restricted the meaning of gender to received notions of masculinity and femininity'.<sup>17</sup> Butler's observation that 'power appear[s] to operate in the production of that very binary frame for thinking about gender', power which 'constructs the subject and the Other, that binary relation between "men" and "women", and the internal stability of those terms',<sup>18</sup> is relevant to this thesis in terms of the *mens rea*-related binaries discussed in the last chapter. My methodology adapts and modifies the approach of queer theorists like Butler and April Callis, the latter of whom observes that queer theory 'focuses on the constructedness of gendered and sexual identities and categorizations' which views categories such as 'heterosexuality and homosexuality [as] binary social constructs that hold saliency only in certain historical moments, rather than descriptors of innate sexual type'.<sup>19</sup> The poststructuralist features of queer theory, 'which maintains that meaning is unstable and that the individual is created by/creates social structures, with one not existing prior to the other',<sup>20</sup> are of particular import here. The critical work in this thesis is very much in the spirit of the queer theory Callis describes:

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<sup>15</sup> Ward, Ian. 'Law and Literature: Possibilities and Perspectives' (Cambridge University Press 1995; 2008 re-issue), 26.

<sup>16</sup> Wright, J.D. 'Transcending Law and Literature: Literature as Law in Plato, Vico, and Shelley' (2017) *Law and Literature*, 29(2), 291-310, 294.

<sup>17</sup> Butler, J. 'Gender Trouble: Feminism and the Subversion of Identity' (Routledge 1999), vii.

<sup>18</sup> *Ibid.*, xxviii.

<sup>19</sup> Callis, A.S. 'Playing with Butler and Foucault: Bisexuality and Queer Theory' (2009) *Journal of Bisexuality*, 9(3-4), 213-233, 215. See also Kopelson, K. 'Dis/Integrating the Gay/Queer Binary: "Reconstructed Identity Politics" for Performative Pedagogy' (2002) *College English*, 65(1), 17-35.

<sup>20</sup> *Ibid.*, 216. See also Namaste, K. 'Genderbashing: Sexuality, gender, and the regulation of public space' (1996) *Environment and Planning D: Society and Space*, 14(2), 221-240.

illuminating the constructed binaries relating to *mens rea* and their resulting instabilities through the ways in which they may be seen to bleed in to one another.

### 3.2.1) Law in literature

This traditional branch of law and literature is characterised by Ward as that which ‘examines the possible relevance of literary texts, particularly those which present themselves as telling a legal story’.<sup>21</sup> There is a great deal to be gleaned from ‘reading literature to better understand the law’<sup>22</sup> as Ward explains: for example, Gary Watt and Paul Raffield suggest that themes of legality in Shakespeare’s work demonstrate that Elizabethan-era ‘government was conducted and represented as theatre’.<sup>23</sup> Shakespeare vividly reflects the theatricality of law and government in what Raffield and Watt term his ‘most obviously legal play’,<sup>24</sup> *The Merchant of Venice*<sup>25</sup> – one of the most prominent examples of criminal law in English literature. Legal systems only feature obliquely in the texts I have chosen; instead the novels focus on the moral ramifications of the criminal acts in question. The law does not punish Jekyll, Dorian or Victor: death does, either at their hand or as a direct result of their actions.

Literature can be used to portray and critique law, morality and notions of criminality, both conceptually and practically. For example, David Carroll argues that Albert Camus’ *The Stranger* ‘dramatically presents... the catastrophic effects of a political or judicial system that either explicitly or implicitly treats “race” as the determining factor first in establishing individual identity and then in determining individual responsibility and guilt’.<sup>26</sup> This approach can be particularly valuable when analysing novels that are structured like a legal case. For example, Marie-Thérèse Blanc reads Margaret Atwood’s *Alias Grace*, a fictionalised account of a real-life nineteenth century court case, as a trial

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<sup>21</sup> Ward (n15), 26.

<sup>22</sup> Ibid, x.

<sup>23</sup> Raffield, P. and Watt, G. ‘Shakespeare and the Law’ (Hart 2008), 4.

<sup>24</sup> Ibid.

<sup>25</sup> Shakespeare, W. ‘The Merchant of Venice’ (Wordsworth Classics 2000; Thomas Heyes 1600).

<sup>26</sup> Carroll, D. “Guilt by Race”: Injustice in Camus’s *The Stranger*’ (2005) *Cardozo Law Review*, 26(6), 2331-2343, 2334.

narrative,<sup>27</sup> and proposes that *Alias Grace*'s trial-like structure 'demands... that readers, acting as judges, ponder not the fate of Grace Marks but, rather, the nature of the narrative construction she offers'.<sup>28</sup> Reza Banakar posits that, in Franz Kafka's works, the 'two separate worlds [of literature and law] merge to uncover the inner contradictions of modernity',<sup>29</sup> and suggests that Kafka, as an insurance lawyer rather than an officer of the court, was 'simultaneously an insider and an outsider to legal processes and institutions',<sup>30</sup> and thus able to combine 'internal and external views of the law'.<sup>31</sup>

In this section I have shown how law in literature can dramatize, explore and critique law and legal conventions. Literature can illustrate legal issues, historicise the legal developments and present opportunities to illuminate the law's ambiguities, binaries and instabilities therein.

### 3.2.2) Law as literature

The second traditional mode of law and literature is described by Robert Weisberg as the 'parsing of such legal texts as statutes, constitutions, judicial opinions, and certain classic scholarly treatises as if they were literary works'.<sup>32</sup> In 'apply[ing] the techniques of literary criticism to legal texts',<sup>33</sup> Ward identifies two functions: firstly, 'to impress the necessity of our existence in language as a living force [and an] essential medium for social change',<sup>34</sup> secondly, to 'widen and deepen' legal study – this incorporates concepts and tools from literary theory which can 'be used so that as lawyers we can better understand what a text means, both functionally and interpretatively'.<sup>35</sup>

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<sup>27</sup> Blanc, M. 'Margaret Atwood's *Alias Grace* and the Construction of a Trial Narrative' (2006) *English Studies in Canada*, 32(4), 101-127, 101.

<sup>28</sup> *Ibid.*, 105.

<sup>29</sup> Banakar, R. 'In Search of Heimat: A Note on Franz Kafka's Concept of Law' (2010) *Law and Literature*, 22(3), 463-490, 464.

<sup>30</sup> *Ibid.*, 482.

<sup>31</sup> *Ibid.*

<sup>32</sup> Weisberg, R. 'The Law-Literature Enterprise' (1989) *Yale Journal of Law and the Humanities*, 1(1), 1-67, 1.

<sup>33</sup> Ward (n15), 3.

<sup>34</sup> *Ibid.*, 15.

<sup>35</sup> *Ibid.*

This social potential of law as literature puts it in a broader extra-legal context, as James Boyd White, one of the founders of the discipline, observes. For White, the law is ‘a way of creating a rhetorical community over time: it works by establishing roles and relations and voices, positions from which one may speak and audiences to whom one may speak, and giving us as speakers the materials and methods of a discourse’.<sup>36</sup> The law derives part of its authority from ‘the open hearing in which one point of view, one construction of language and reality, is tested against another. The multiplicity of readings that the law permits is not its weakness, but its strength’, precisely because it ‘makes room for different voices’, just as fiction ‘gives voice to the voiceless’.<sup>37</sup> I will return to literature’s potential for housing multiple different perspectives later in the chapter.

In light of White’s foregrounding of law and literature’s rhetorical value, it is worth briefly engaging with rhetoric, though it is not the focus of this thesis. Peter Goodrich describes classical rhetoric as ‘a highly elaborate analysis of the appropriateness of language context (audience) and its functions (practice – political, legal, ideological)’.<sup>38</sup> Goodrich suggests that the law defines itself using a ‘rhetoric of “inclusion” or identification’ which enables it to ‘exclude and stigmatise... all such discourses as are inherently recalcitrant to the basic belief system and preconstructions of legal language as an ideology’.<sup>39</sup> Building on Goodrich’s formulation of rhetoric as a mode of social criticism, John Harrington, Lucy Series and Alexander Ruck-Keene observe two ‘closely intertwined’ aspects of rhetorical criticism: a ‘reading of legal materials, as in literary or cultural studies’ and ‘the engaged study of how social and political forms are produced, reproduced, modified, and challenged in the substance of legal speech and legal writing’.<sup>40</sup> They describe the ‘external critique’ of rhetoric as one which ‘highlights the

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<sup>36</sup> White, J.B. ‘The Legal Imagination’ (Little, Brown and Co. 1973), xix.

<sup>37</sup> *Ibid*, 444.

<sup>38</sup> Goodrich, P. ‘Law and Language: An Historical and Critical Introduction’ (1984) *Journal of Law and Society*, 11(2), 173-206, 175.

<sup>39</sup> *Ibid*, 189.

<sup>40</sup> Harrington, J., Series, L. and Ruck-Keene, A. ‘Law and Rhetoric: Critical Possibilities’ (2019) *Journal of Law and Society*, 46(2), 302-327, 303.

gendered, raced and classed nature' of rhetoric<sup>41</sup> whereas the 'internal critique... challenge[s] technical conceptions of speaker, audience, and the relationship between them posited in orthodox theories'.<sup>42</sup>

### 3.2.3) Legal intertextuality

Intertextuality is important to my work because my research looks at the parallel development of the internal mind in nineteenth century law and literature as well as the three key *mens rea*-related problems as interpreted by the courts up until the present day. I suggest that intertextuality is the way that legal form registers in the structure of the novel, particularly in terms of the bleeding in between binaries.

As a concept, Julie Kristeva (drawing on Bakhtin) posits that intertextuality refers to 'any text [that] is constructed as a mosaic of quotations' and which is 'the absorption and transformation of another'.<sup>43</sup> Alex Steel describes how intertextuality attempts to 'locate meaning in the reader's understanding rather than in the author's intention',<sup>44</sup> and underscores the 'interconnected nature of literature through the references, allusions and connotations embedded in the work to other works', both 'intentional and unintentional'.<sup>45</sup> For example, Jean Rhys' *Wide Sargasso Sea* may be read as a feminist, post-colonial response to Charlotte Brontë's *Jane Eyre*.<sup>46</sup>

Intertextuality in the law can arguably be seen in the system of precedent, in that, as Steel notes, all judgments are 'laced with the intertexts of previous judgments'.<sup>47</sup> He invokes Roland Barthes' *The Death of the Author*, in which Barthes describes the orthodox view of literature as 'tyrannically centred on... the voice of a single person', namely the author.<sup>48</sup> He argues for the 'removal of the Author' which 'utterly transforms

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<sup>41</sup> Ibid, 310.

<sup>42</sup> Ibid, 311.

<sup>43</sup> Kristeva, J. and Moi, T. (ed) 'The Kristeva Reader' (Columbia University Press 1986), 37.

<sup>44</sup> Steel, A. 'Intertextuality and Legal Judgments' (1998) *Macarthur Law Review*, 2, 87-108, 87.

<sup>45</sup> Ibid.

<sup>46</sup> Ciolkowski, L.E. 'Navigating the Wide Sargasso Sea: Colonial History, English Fiction, and British Empire' (1997) *Twentieth Century Literature*, 43(3), 339-59.

<sup>47</sup> Steel (n44), 88.

<sup>48</sup> Barthes, R. 'The Death of the Author' in Barthes, R. and Heath, S. (ed) 'Image-Music-Text' (Fontana Press 1977; Aspen Magazine No. 5-6, 1967), 142-148, 143.

the modern text' so that it is 'read in such a way that at all its levels the author is absent'.<sup>49</sup> Barthes finds this imperative because '[t]o give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing'.<sup>50</sup> The text's 'unity lies not in its origin but in its destination'.<sup>51</sup> The writer is no longer 'the only person in literature'; indeed, 'to give writing its future,' Barthes argues 'the birth of the reader must be at the cost of the death of the Author'.<sup>52</sup>

Barthes' hypothesis, according to Steel, 'privilege[s] the role of the reader (the courts) over the intentions of the author (Parliament)'.<sup>53</sup> Steel notes the reader/courts insist that the author/Parliament's intentions are paramount, and draw on that notion as a means of legitimising and justifying their authority in legal decision-making.<sup>54</sup> Although Parliament legislates on the criminal law through statutes, it is arguably the courts who continually (re)construct the genre of *mens rea* through case law. Dolin notes the literary elements at work in legal judgments, stating that 'judges and lawyers routinely seek to clarify their pronouncements and arguments about the law by resorting to metaphors and stories' because 'law is inevitably a matter of language',<sup>55</sup> and that the 'border between law and literature has become a bridge'.<sup>56</sup> Costas Douzinas and Adam Gearey explain that 'evidence offered in trials and recorded in the reports is not constructed and evaluated against some "hard" external reality' but rather they are constructed by 'follow[ing] standard and coherent narrative frameworks drawn from the stock of specialist and common knowledge'.<sup>57</sup> This 'potential for multiple formulations of the facts

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<sup>49</sup> Ibid, 145.

<sup>50</sup> Ibid, 147.

<sup>51</sup> Ibid, 148.

<sup>52</sup> Ibid.

<sup>53</sup> Steel (n44), 93. This might be considered in conjunction with Wayne Booth's notion of the 'implied author', which in this case would be constructed by the courts and may be a point of interest for further research. See Booth, W.C. 'The Rhetoric of Fiction' 2<sup>nd</sup> ed. (University of Chicago Press 1983), Chapter 2.

<sup>54</sup> Steel (n43), 93.

<sup>55</sup> Dolin (n2), 2.

<sup>56</sup> Ibid.

<sup>57</sup> Douzinas, C. and Gearey, A. 'Critical Jurisprudence: The Political Philosophy of Justice' (Hart 2005), 68.

and law of both present and previous cases and the continuous dialogue of legal texts with non-legal contexts creates a fertile ground for alternative readings'.<sup>58</sup>

In this section I have shown the benefits of law as literature in the ways in which tools of literary criticism can be utilised to interpret and deepen our understanding of legal writing in all its forms. Analysing the construction of arguments and the particular rhetoric of legal writers can enable us to historicise law and locate it in its broader socio-political context, thus examining the bleeding in of binaries to reveal the instabilities beneath.

### **3.3) Criticism of Law and Literature: Particularised and Generalised Critique**

As law and literature is a mode of legal critique that utilises tools and perspectives beyond law, its interdisciplinary nature implies a precariousness that paints its weaknesses more vividly. I will first itemize particularised critiques of law in/as literature, before moving to general concerns about the discipline, starting with Posner's scepticism, the defence of orthodox scholars like James Boyd White, Robert West, and Richard and Robert Weisberg, before considering the shift towards literature as an interrogatory technique into legal problems that has developed over the last twenty years of scholarship.

#### **3.3.1) Critique of law in literature**

In order to express critiques specifically of law in literature, I find it useful to examine Douzinas and Gearey's appraisal of the discipline in general. In deeming literature 'a valuable resource' in 'giv[ing] future lawyers a rich, nuanced and pluralistic picture of the role of law and its practitioners in society',<sup>59</sup> they suggest that 'legal scholars turn to fiction about the law' not only to 'examine the wider cultural understanding and evaluation of legal operation... but also to the law's *internal world*, important personal and professional assumptions and characteristics of lawyers not addressed or discussed

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid, 339.



elsewhere in the legal curriculum'.<sup>60</sup> Literature, therefore, may be considered a 'repository of the cultural experiences, narratives and values of law'.<sup>61</sup> Psychoanalytically speaking, they suggest, 'literature becomes the law's dream, which presents some of the unacknowledged and unexplained symptoms of the institution'.<sup>62</sup> There is a tension here between symptoms and values which refers to (and I suggest personifies) the conflict between the orthodox humanistic mode of law and literature and the critical legal studies approach (augmented by feminist and queer theory). The former views literature as a repository of values, and the latter views literature as presenting symptoms, flaws and instabilities within the law. Psychoanalysis resonates with my critical approach, and though it is not the focus, there are affinities here with the uncanny in Gothic/Doubles fiction that will be discussed in the next chapter.

I detect two major critiques of law and literature inspired (but not necessarily exposed) by Douzinas and Gearey in the above paragraph. Firstly, literature may be a valuable resource to law, as they suggest, but the quality of intellectual insight gauged from examining legal issues in texts can vary significantly based on the texts that are chosen for such a purpose. Secondly, the type of texts chosen for such analysis run the risk of reinforcing rather than interrogating and critiquing the intellectual and societal status quo.

As to the first critique, Robert Weisberg argues that much of the scholarship in the field 'has produced skimpy intellectual results because it combines overly conventional readings of literature with a complacent understanding of law, sometimes masking itself in the self-congratulatory tones of broad cultural understanding'.<sup>63</sup> While there is some merit to Weisberg's unease, I feel that his concern about intellectually skimpy scholarship is a risk in every sub-discipline of legal scholarship, and not confined to law in literature. To simply explore for example the law's delay in Dickens' *Bleak House* might be

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<sup>60</sup> Ibid [emphasis added].

<sup>61</sup> Ibid, 340.

<sup>62</sup> Ibid.

<sup>63</sup> Weisberg (n32), 2-3.

considered prosaic at this point, but the only limit is the individual scholar's imagination. One of the advantages of using literature in legal scholarship is its capacity for (re)interpretation; over a hundred years later (and, in one case, two hundred), *Dorian Gray*, *Jekyll and Hyde*, and *Frankenstein* are still offering new insights on the criminal law in this thesis.

With regard to the second critique, the potentially exclusionary nature of law in literature means that some texts or types of literary works are esteemed more than others, to the potential detriment of less-revered works, and with the possible effect of reinforcing the hierarchical status quo. Judith Resnik questions the 'canon' of law and literature, specifically 'what (and who) is given voice; who privileged, repeated, and invoked; who silenced, ignored, submerged, and marginalized. Law and literature have shared traditions – of silencing, of pushing certain stories to the margin and of privileging others', such as an elitist hierarchical structure of the Western literary canon.<sup>64</sup> In law, Resnik suggests that 'white men have similarly enjoyed a place of power, speaking as if for us all, while women and minorities have been excluded-precluded from being judges, jurors, lawyers, and at times, even witnesses'; even when women are the 'subject of the discussion, as defendants or as property', they are 'not the authors or the speakers' but instead 'have been closed out of the hierarchy of holding the power to write the canon'.<sup>65</sup>

Concerns over the exclusionary elitism of the Western canon have also been raised by Maria Aristodemou who cautions that 'if we are seeking to derive lessons from literature and use literature as a complement or critique of the law, we must also be alive to the critique of literature itself', primarily because literature can be considered an 'ideology' in and of itself, and using it 'as a "humanizing" or "softening" effect on lawyers may mean choosing one ideology over another'.<sup>66</sup> While both Resnik's and Aristodemou's concerns

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<sup>64</sup> Resnik, J. 'Constructing the Canon' (1990) *Yale Journal of Law and the Humanities*, 2(1), 221-230, 221.

<sup>65</sup> *Ibid.*

<sup>66</sup> Aristodemou, M. 'Studies in law and literature: Directions and concerns' (1993) *Anglo-American Law Review*, 22(2), 157-193, 177.

are valid, I argue that choosing conventionally well-regarded texts as foci for legal analysis only becomes problematic when concerns like theirs remain unaddressed in scholarship. Therefore, the three novels of note to this thesis have been selected partially to historicise the socio-legal issues they raise or ignore; for example, I critique the lack of agency held by *Frankenstein's* female characters in chapter seven. Aristodemou also identifies her own rebuttal to the critique she raises: that although 'literature may indeed contain its own ideology... values and prejudice, it is also more likely than law to present and challenge received ideologies, values, and prejudices'.<sup>67</sup>

### 3.3.2) Critique of law as literature

The potential risk of 'skimpy intellectual benefits' in law in literature scholarship is also raised by Weisberg regarding law as literature.<sup>68</sup> He argues that '[m]ost of it has sought to exploit the analogy between legal and literary texts by treating legal texts as consciously crafted works of prose that can be appreciated and criticized in terms of explicit or implicit intended meaning'.<sup>69</sup> Doing so, Weisberg argues, has encountered 'the obvious, fundamental fact that lawmaking is an intellectual act conditioned by formal political constraints that do not apply to literary expression'.<sup>70</sup> However, I suggest that justifying one's approach and locating oneself in the broader context should alleviate the risks of which he warns. Weisberg's notion of literature as 'consciously crafted' contrasts with the critical approach taken in this thesis which looks for instabilities and ambiguities.

Although Aristodemou critiques the instrumental and humanistic approaches to law and literature generally, I find them particularly insightful when considering law as literature. The first critique, relating to the instrumental approach, criticises the notion that 'the study

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<sup>67</sup> Ibid.

<sup>68</sup> Weisberg (n32), 3.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

of literature will produce better *lawyers*'; the second, relating to the humanistic approach, criticises the theory that 'the study of literature will make lawyers better *persons*'.<sup>71</sup>

Proponents of the instrumental approach include John Henry Wigmore, the nineteenth-century American jurist, who believed that for lawyers to 'know human nature' and people's 'motives', they 'must go to fiction, which is a gallery of life's portraits' and 'a *catalogue of life's characters*'.<sup>72</sup> Aristodemou explains that 'jurisprudential questions concerning the nature and aims of the legal system may be examined in terms of their treatment in literary works' such as *Lord of the Flies* and *Robinson Crusoe*,<sup>73</sup> but warns that the efficacy of studying law in literature depends on 'what is meant by literature',<sup>74</sup> which seems to relate to Resnik's critique of the restrictive canon discussed above.

Concerning the humanistic argument, Aristodemou describes it as an attempt to 'offset the effects of positivist legal education by producing better persons, who will in turn become better lawyers'.<sup>75</sup> She questions whether 'knowing about morality necessarily make[s] somebody a moral person',<sup>76</sup> and suggests that it may instead open the door to individual scholars simply 'impos[ing] their *own* coherent understanding of experience on the text' and thus their own subjective appraisal of the material.<sup>77</sup> I would also suggest that the humanistic argument slips into the literature-as-feminizing, empathetic force on masculine law critique (which I will discuss in a later section). In contrast to the humanistic and instrumentalist critiques, my work does not aim to improve lawyers' sagacity or psyches, but instead aligns more with the methodology of critical legal studies which seeks to expose legal ambiguity and underlying assumptions,<sup>78</sup> favouring a

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<sup>71</sup> Aristodemou, (n66), 160 [emphasis added].

<sup>72</sup> Wigmore, J.H. 'A List of Legal Novels' (1907) *Illinois Law Review*, 2(9), 574-593, 579 [sic].

<sup>73</sup> Aristodemou (n66), 168.

<sup>74</sup> *Ibid*, 170.

<sup>75</sup> *Ibid*, 173.

<sup>76</sup> *Ibid*, 175.

<sup>77</sup> *Ibid*, 176 [sic].

<sup>78</sup> See Mangabeira Unger, R. 'The Critical Legal Studies Movement' (1983) *Harvard Law Review*, 96(3), 561-675.

diagnostic rather than curative approach, and use of specific works of literature to illuminate and critique specific *mens rea*-related problems.

### 3.3.3) Ransacking the remote: the critical view

The 'inception' of modern law and literature scholarship, according to Kayman and Olson, 'can be dated' from James Boyd White's 1973 text *The Legal Imagination* which aimed to 'cultivate the humane dimension that had allegedly been driven out' of the law at the time.<sup>79</sup> (Others trace it to Benjamin Cardozo's 1925 essay *Law and Literature*.)<sup>80</sup> Early progenitors viewed literature as 'the privileged means to restore humanity to the lawyers and hence greater justice to the community' and to 'ensure "reverence" for... law as performing justice'.<sup>81</sup> Kayman and Olson suggest that shifts over time and the influence of Continental scholarship in the field 'evinces a capacity to unsettle the prevailing categorisations of Law-and-Literature scholarship... which have tended to become normative and constraining'.<sup>82</sup>

The discipline's approach to deepening the understanding of law through the use of extra-legal texts has met with some friction. Richard Posner is particularly dismissive of the whole endeavour, criticizing legal scholars for 'ransacking the social sciences and the humanities for insights and approaches with which to enrich our understanding of the legal system', especially the 'remote' literary criticism which he sees as a prime example.<sup>83</sup> Although he acknowledges some 'overlap' between literature and the law, Posner concludes that 'the study of literature has little to contribute to the interpretation of statutes and constitutions', only conceding that it has 'perhaps a great deal to contribute to the understanding and the improvement of judicial opinions',<sup>84</sup> suggesting that:

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<sup>79</sup> Olson and Kayman (n1), 2.

<sup>80</sup> Cardozo, B.N. 'Law and Literature' (1925) 14 Yale Law Review 699.

<sup>81</sup> Olson and Kayman (n1), 3.

<sup>82</sup> Ibid, 10.

<sup>83</sup> Posner, R. 'Law and Literature: A Relation Reargued' (1986) Virginia Law Review, 72(8), 1351-1392, 1351.

<sup>84</sup> Ibid.

for literature to survive it must deal with things that do not change much over time; and, like love, ambition, and human nature generally, the law is a remarkably unchanging facet of human social existence. Specific doctrines and procedures may change, but the broad features of the law do not.<sup>85</sup>

Certain elements do recur in literature, as Posner notes, but I contend they are reconceptualised, re-contextualized and reconstructed over time. To relegate literature and the law to ahistorical conceptions as Posner does is to confine them to a fixed point in time, when in truth they are both constantly evolving and being reconstructed, and it trades on the canonical approach to literature, critiqued by Resnik and Aristodemou, whereby great men divine timeless truths.

#### 3.3.4) Enriching our understanding: the orthodox defence

In response to Posner's empirical critique, scholars of orthodox law and literature defended the humanistic dimension that underscored the formal origins of the discipline, arguing that literature could reconnect law to its erstwhile morality and provide an empathetic perspective lacking in traditional jurisprudence. James Boyd White finds law to be 'inherently disciplinary' and thus 'must always be open to learning what it can from other fields'.<sup>86</sup> White believes 'there is in principle no limit on the fields that may be relevant to a legal case... Anything may turn out to be relevant to the legal dispute, and have something to teach the law'.<sup>87</sup>

The notion of law being deeply interconnected with other fields like literature is also a key note of contention in Robin West's response to Posner. West believes that Posner 'misdcribes our external social life and our internal motivational nature' and hopes that 'literature might provide the bridge' to cross 'the descriptive and normative divide'.<sup>88</sup> Posner may read Kafka 'as a chronicler of our inner turmoil', but West chides his refusal 'to read [Kafka] as a chronicler of the choices and of the social institutions in which that

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<sup>85</sup> Ibid, 1356.

<sup>86</sup> White, J.B, 'Interview with James Boyd White' (2007) Michigan Law Review, 105(7), 1403-1420, 1415.

<sup>87</sup> Ibid.

<sup>88</sup> West, R. 'Submission, Choice, and Ethics: A Rejoinder to Judge Posner' (1986) Harvard Law Review, 99(7), 1449-1456, 1456.

turmoil is so strikingly reflected',<sup>89</sup> West argues that Kafka's *The Trial* and *The Judgment* 'are about the choices made under the influence of that guilt... Kafka, of all modern writers, understands and portrays the unity between our tumultuous inner lives, the outer world, and the role of choice in mediating the two'.<sup>90</sup> While Posner dismisses (Kafka's) fiction because it centres on non-legal issues, West argues that is precisely why literature is beneficial to legal study: because 'we need to understand how guilt-ridden souls react to the authority of law... particularly because those guilt-ridden souls may be our own'.<sup>91</sup> Richard Weisberg suggests that critiques of law and literature not only overlook its holistic and empathetic potential but also its connective power, claiming that '[w]e are bereft, as a legal culture, when we have no sense of values to connect us',<sup>92</sup> and viewing '[l]iterary art about law [as being] richer, if not more important, than most other jurisprudential sources'.<sup>93</sup> However, I suggest that emphasizing the holistic potential of literature itself overlooks its potential to illuminate, critique and destabilize, rather than merely underpin seemingly-normative conventions of morality that may in fact be anything but universal.

### 3.3.5) From 'literature as integrity' to 'literature as interrogation': 'law through literature' and the new critical turn

The orthodox defence of literature as an empathetic and humanising force on 'stringent' law has been challenged throughout the last twenty years or so of scholarship in the field. Where Richard and Robert Weisberg, Robin West and James Boyd White celebrated literature for reanimating the law's integrity, the field has since shifted from a celebration of literature's ethical qualities to a deeper interrogation of law at a sub-textual/subconscious level, and suggesting new interpretations of a discipline that some, like Jeanne Gaakeer, suggest may have become too 'insular'.<sup>94</sup>

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<sup>89</sup> Ibid, 1452.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, 1453.

<sup>92</sup> Weisberg R. 'Entering with a Vengeance: Posner on Law and Literature' (1989) *Stanford Law Review*, 41(6), 1597-1626, 1626.

<sup>93</sup> Ibid.

<sup>94</sup> Gaakeer, J. '(Con)temporary law' (2007) *European Journal of English Studies*, 11(1), 29-46, 31, 38.

In decreeing 'the law's task' to be 'impos[ing] order on the complexity of life',<sup>95</sup> Gaakeer appears to follow Boyd White in her description of literary works as 'exemplary performances from which to learn how to use language as well as sources of cultural information and values'.<sup>96</sup> However, the conservatism of Gaakeer's conception of law and literature becomes apparent when she takes issue with what she perceives to be its 'one major drawback': namely, having 'lost track' of its 'original aim' to 'provid[e] nourishment to the legal profession'.<sup>97</sup> Gaakeer appears to foreground the humanistic dimension of literature instead of its ability to critique and destabilise law and, as such, Gaakeer's is not the approach I have taken. In my view, literature may be considered to serve three functions in regard to law: to understand it, to enrich it, and to critique it. Those like Gaakeer who follow the humanistic approach of Robert and Richard Weisberg, Robin West, and James Boyd White appear to value literature for the way it enriches law, but my work rejects this approach in favour of using literature to formulate a radical critique of law, pointing out its instabilities and challenging its binaries.

The humanistic position on law and literature has been challenged by work in the last twenty years, with better views being offered by Greta Olson, Ralf Grüttemeier, and Costas Douzinas and Adam Geary. Their anti-/post-humanistic position requires a particular mode of reading the text which can be explicated with regard to ideas of intertextuality and post-structuralism (especially in relation to Grüttemeier, to whom I will return later in this sub-section), which I have been developing throughout this chapter. Barthes is particularly useful as he moves away from authorial intention in favour of freeing oneself from the patriarchal canon (a concern raised by Resnik and Aristodemou above)<sup>98</sup> and opening up/interpreting literature into a far more flexible and insightful tool for legal critique.

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<sup>95</sup> Ibid, 35.

<sup>96</sup> Ibid, 33.

<sup>97</sup> Gaakeer (n14), 185.

<sup>98</sup> See Resnik (n64) and Aristodemou (n66).



One of the more cogent critiques of law and literature is the gendered view of literature as a 'feminising' influence on 'masculine' law, an issue Greta Olson has recently observed. Olson problematises 'the troping of literature as feminine and that of law as masculine, and the emplotment of their relationship as that of an initially antagonistic, highly tempestuous yet ultimately satisfying (in that it is consummated) heterosexual romance'.<sup>99</sup> Olson argues that this binary presents a 'narro[w]' and 'monolithic' view of law as 'emotionally deficient' and literature as 'ethically superior', and that '[g]endering literature as womanly and law as manly does a disservice to both fields' because this binary 'imposes restrictions, reifies difference and reasserts historically limited ways of thinking about the legal and the literary'.<sup>100</sup> Although I would suggest that illuminating and critiquing are not (and, indeed, *should* not be) gendered concepts, the approach in this thesis is very much in the spirit of what Olson suggests here. Relatedly, queer readings also challenge this binary, which is evident in the works of Wilde,<sup>101</sup> Shelley<sup>102</sup> and Stevenson.<sup>103</sup>

The humanistic aspects of law and literature scholarship have been similarly critiqued by Costas Douzinas and Adam Gearey, who view 'argu[ing] that literature can bring an ethics or morality to law' as 'insufficient' in and of itself.<sup>104</sup> Douzinas and Gearey criticise the law and literature movement in its current state as a 'form of restricted jurisprudence', underpinned by a 'restricted sense of the literary' in the texts which the discipline appears to venerate, such as the nineteenth century novel.<sup>105</sup> This is indeed the subset of literature on which I have elected to focus, largely because of the contemporaneity between its and the law's developing attitudes to the 'guilty' mind, and its narrow focus on the male experience is not only acknowledged in this thesis, but forms a significant

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<sup>99</sup> Olson, G. 'Law is not Turgid and Literature not soft and Fleishy: Gendering and Heteronormativity in Law and Literature Scholarship' (2012) *Australian Feminist Law Journal*, 36(1), 6-86, 6 [sic].

<sup>100</sup> *Ibid.*, 67.

<sup>101</sup> Kaye, R.A. 'Gay studies/queer theory and Oscar Wilde' (Palgrave Macmillan 2004), 189-223.

<sup>102</sup> Rigby, M. "'Do you share my madness?': Frankenstein's queer Gothic' in Hughes, W. and Smith, A. 'Queering the Gothic' (Manchester University Press 2017), 36-54.

<sup>103</sup> Hall, D.E. 'Queering the Self: Dr. Jekyll and Mr. Hyde' in Hall, D.E. (ed) 'Queer Theories' (Palgrave 2003), 130-147.

<sup>104</sup> Douzinas and Gearey (n57), 346.

<sup>105</sup> *Ibid.*, 336.

portion of my critique (particularly as regards provocation/loss of control and *Frankenstein* in chapter seven). As I have discussed above and will return to in greater detail in the next chapter, I have chosen my texts precisely because my reading of them can illuminate the instability of the law's binaries. In the spirit of Barthes and intertextuality as discussed earlier, it is about how one *reads* the texts, not their supposed objective meaning.

As Douzinas and Gearey employ a mode of law and literature that looks to the unspoken biases and assumptions underpinning legal discourse,<sup>106</sup> I now turn to Ralf Grüttemeier who I find useful because he offers different modes of intention. Although Grüttemeier's work involves literary and legal intention, this thesis is not focused on its legal form (direct/oblique intention) but other *mens rea*-related issues concerning responsibility such as recklessness, character and loss of control discussed in the previous chapter. I suggest there are affinities between Grüttemeier's understanding of authorial intention and my intended use of the three novels of note in this thesis.

Emphasising the specificity of authorial intention, Grüttemeier identifies four broad types of intentionality: the standard model, Schleiermacher's model, intentional fallacy, and Barthes' death of the author (discussed earlier in the chapter).<sup>107</sup> Grüttemeier describes the first type as the 'standard model of authorial intention' with its roots in 'antiquity', which comprises 'a unity of the intention of the author, the intention that can be derived from the text, the context of both and the intention that the reader discovers'.<sup>108</sup> With 'authorial intention [located] in the text', Grüttemeier, in an earlier publication, had suggested that this 'conceptual unity of the intention of author, text, context and reader stood unquestioned for centuries' until 'the problem of the author' arose in the eighteenth

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<sup>106</sup> Ibid.

<sup>107</sup> Grüttemeier, R. 'On Concepts and Naps: A Historical Account of Intentionality in Criticism and the Law' (2014) *Arcadia*, 49(1), 21-29, 24.

<sup>108</sup> Ibid, 22.

century and developed in the nineteenth century, which Grüttemeier appears to consider a site of conceptual change in this regard.<sup>109</sup>

The 'problem of the author' gave rise to the second mode of intentionality: a 'conceptual contradiction between the intention of the author and the intention of the text', popularised in the nineteenth century by father of modern hermeneutics Friedrich Schleiermacher.<sup>110</sup> Schleiermacher proposed that literary critics 'have the expertise to see in literary texts meanings that can go further [than] the author himself would have agreed upon as his intention'.<sup>111</sup> In doing so, Schleiermacher 'adds the authority of the critic who *might* transgress the conscious intentions of the author, without damaging the authority of either', which amounts to the critic just 'add[ing] another layer of understanding around what the author had intended'.<sup>112</sup> This shift had the consequence of 'weaken[ing] the position of the author as the "pole star" of criticism in the standard model' while simultaneously affording the critic 'more independence in criticising'; Grüttemeier suggests this tacitly created a 'hierarchy of interpretation which puts the critic's view of the author's text above that of the author' in a way which maintains the authority of the author's intention.<sup>113</sup> This also appears to me as the only mode of intentionality, other than the standard, in which multiple contradictory interpretations of intention can harmoniously coexist.

Whereas the heteroglossia of Schleiermacher's model equalised the perspectives of critic and author to some extent, the New Criticism movement of the 1940s considerably deepened the divide between the two through the concept of 'intentional fallacy', which meant 'leaving the authorial intention behind'.<sup>114</sup> This comprised 'separating author intention from text intention' and 'us[ing] that distinction to establish a hierarchy with

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<sup>109</sup> Grüttemeier, 'Author and Critic Divorced? On Concepts of Intentionality in Dutch Literary Criticism around 1900' in Dorleijn, G.J., Grüttemeier, R. and Altes, L.K. (eds) 'Authorship Revisited: Conceptions of Authorship Around 1900 and 2000' (Peeters 2010), 195-212, 195.

<sup>110</sup> Ibid, 196. Referencing Schleiermacher, F. and Frank, M. (ed) 'Hermeneutik und Kritik' (Suhrkamp 1995), 94.

<sup>111</sup> Grüttemeier (n107), 23, referencing Schleiermacher (n110), 94.

<sup>112</sup> Grüttemeier (n109), 199.

<sup>113</sup> Ibid, 200-01.

<sup>114</sup> Grüttemeier (n107), 23.

textual intention on top', but unlike the largely-harmonious coexistence of multiple contrasting interpretations under Schleiermacher, or the mere separation of author from text under Barthes, intentional fallacy meant dismissing authorial intention as 'not relevant at all' in favour of the critic's interpretation.<sup>115</sup> As to the fourth and last mode of intention, the mid-twentieth century saw the rise of debates over authorial intention, popularised (and encapsulated) by Roland Barthes' *The Death of the Author* (discussed in more detail above) which 'locates the author, his intention and intentionality, in the periphery of' the now 'uncontrollable... process of meaning production'.<sup>116</sup> In critiquing the hierarchies of authorial intention, Grüttemeier's stance seems centrifugal, like Wetlaufer (as discussed above). Barthes, therefore, recalibrated authorial intention in a way that still foregrounds the critic and retains New Criticism's distance between author and text without locking out the former entirely.

In considering how these modes of intentionality might transfer to the legal sphere, Grüttemeier observes that the 'notion and concept of "intent" was often and explicitly used in jurisdiction and jurisprudence', but stresses that the legal understanding of the term 'needs careful reconstruction in its specific disciplinary historical context'.<sup>117</sup> Grüttemeier illustrates this by noting the difference between the interpretive freedom within literature and the law respectively: in the former, 'more room [is given] to critics in attributing meaning to texts' which is arguably not the case in the latter, especially given the 'diversity of judicial genres with regard to authorship and intent'.<sup>118</sup> For example, 'wills usually articulate the intention of one person', whereas 'contracts have to cope' with the intentions 'of at least two parties', and statutes are made by/for 'many individuals and individual intentions'.<sup>119</sup> In Grüttemeier's view the two seemingly contradictory modes of intention 'represent two sides of the same coin': first, the 'dominant concept of

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<sup>115</sup> Grüttemeier (n109), 201.

<sup>116</sup> Grüttemeier (n107), 23.

<sup>117</sup> *Ibid.*, 25.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, 26.

intentionality in jurisdiction and jurisprudence', in which the 'author's intention... guides the interpretation process'; and second, the late-twentieth century confusion of 'the frequent use of intention in legal contexts... for precursors of concurring, fundamentally differing concepts of intentionality in literary criticism'.<sup>120</sup> Grüttemeier argues that the latter was projected onto the standard mode of intentionality 'at the time when the law and literature movement got off the ground', likely not a coincidence.<sup>121</sup> Whereas there is a 'widening... space' for literary critics to interpret intention, the same is not true of law, which favours 'offering a (certain) promise of certainty and [in which] predictability concerning actions, their effects and conflicts prevails'.<sup>122</sup> Therefore, Grüttemeier suggests that the 'fundamental mechanism of knowledge-production' is 'centrifugal' in literary criticism ('aiming primarily at an increase of legitimate possibilities of interpretation and possibilities for distinction of individual scholars') and 'centripetal' in law ('as part of the field of power' and focused on establish[ing] inter-subjective foundations for professional academic behaviour').<sup>123</sup>

As the approach in this thesis involves freeing myself of the canon/text (which has affinities with New Criticism) and the author (Barthes), I find that Grüttemeier's conception of intentionality provides a useful gloss on the previously discussed problems of proof relating to *mens rea*, and I build on his conceptualisation by bringing together the 'centrifugal' mechanisms of literary criticism in destabilising the 'centripetal' binaries and assumptions relating to *mens rea*. I then juxtapose this with Resnik and Aristodemou's misgivings about who controls the narrative of literature and the law discussed earlier in the chapter. Grüttemeier's analysis of the conflicting authorities of author, text and critic lends credence to Resnik and Aristodemou's criticisms of the potentially exclusionary aspects of the Western canon in particular, and my critique of

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<sup>120</sup> Ibid, 37.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid, 38.

<sup>123</sup> Ibid.

law in/as literature in general, because of law and literature's potential to venerate certain texts and authors over others.

In response to the criticisms of the arbitrary delineation of law in/as literature, I would suggest an alternative term: 'law through literature' is my own conceptualisation of how law and literature might be considered in its modern form. In response to Gaakeer and Ward's criticism of the arbitrary delineation of law in/as literature, the preposition 'through' may facilitate combining aspects of 'in/as' without bifurcating between the two interconnected concepts. Law through literature suggests a deeper, more nuanced praxis which makes space for the instabilities between legal/literary genres as well as between law and literature. This broader formulation also lends itself to more intertextual readings and more fluidity and flexibility in (re)interpretation. In my view, 'law through literature' suggests interdisciplinarity without hierarchy. A more fluid conceptualisation of law and literature such as this addresses the concerns of the discipline's rigidity evidenced by Douzinas and Gearey, and avoids reinforcing the rigidity of existing binaries critiqued by Olson, or creating new ones.

In this section I have shown that reading law through literature can facilitate a more nuanced understanding of the ways in which legal problems develop and can illuminate and critique where certain legal binaries have become unstable. This can be achieved in part by observing the intertextual nature of law and how legal conceptions of *mens rea* can change and evolve over time.

### **3.4 Using Law and Literature to Analyse Problems of Proof in *Mens Rea***

As I have shown above, literature can be a useful resource in the study and practice of criminal law because of its capacity to critique, challenge and show instability within legal binaries. Writers such as Dickens and Shakespeare often addressed legal issues through the medium of literature by dramatizing legal dilemmas in their literary works. In this section I will demonstrate how literature can be used to destabilise problems relating

to *mens rea* through modifying the approaches of David Gurnham, Nicola Lacey, and Simon Stern, who have engaged in similar work to that of this thesis.

#### 3.4.1) Using literature to critique and destabilise criminal law

By using literary tools, it is possible to approach legal problems from alternative perspectives, as discussed in previous sections, and illuminate them using resources from literature. Despite the commonalities between literature and the law, particularly the way in which language helps to interpret and construct meaning in both, Gerald Wetlauffer stresses the importance of their differences, especially ‘the law’s distinguishing commitments to objectivity, certainty, closure, analysis, reason, clarity and judgment as well as to authority, hierarchy, intellectual unity, the impersonal voice, coercive argumentation... and the one objective and ascertainable meaning of texts’.<sup>124</sup>

Literature and the law both require performance in order to produce meaning. Balkin and Levinson argue that ‘law, like music or drama, is best understood as performance – the acting out of texts rather than the texts themselves’.<sup>125</sup> Law, like theatre, features elements of mimesis and phantasia (or, broadly speaking, show and tell).<sup>126</sup> Mimesis, in which an audience experiences a story being played out,<sup>127</sup> occurs offstage in trials/hearings, i.e. it does not enter the courtroom. Some of the parties (witnesses, defendants, police officers) may have been a part of these mimetic events, but there are no dramatic re-enactments, or further developments in the narrative of the crime in the trial environment. Instead, the courtroom operates primarily in terms of phantasia, which Harbinger defines as a pure narrative, a story that is told to an audience.<sup>128</sup> I extend Balkin and Levinson’s view of law as a form of performance, using texts to demonstrate instabilities. Law and literature, I contend, may not solve these problems, but it can

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<sup>124</sup> Wetlauffer, G.B. ‘Rhetoric and Its Denial in Legal Discourse’ (1990) *Virginia Law Review*, 76(8), 1545-1597, 1587.

<sup>125</sup> Balkin, J. and Levinson, S. ‘“Law as Performance”: Law, Music, and Other Performing Arts’ (1991) *University of Pennsylvania Law Review*, 139(6), 1597-1658, 1597.

<sup>126</sup> Harbinger, R. ‘Trial as Drama’ (1971) *Judicature*, 55(3), 122-128, 123.

<sup>127</sup> *Ibid*, 125.

<sup>128</sup> *Ibid*.

illuminate and critique them in newer ways than orthodox legal scholarship. Literature, then, can add this mimetic element by providing the opportunity to perform and clarify legal issues.

Whereas literary texts may thrive on producing multiple meanings, the law seeks rather to discern a single meaning from the texts they examine – Harrington suggests that ‘law aspires to “monologism” to use Mikhail Bakhtin’s term: speaking unambivalently with one voice’.<sup>129</sup> However, literature may help to reveal legal ambiguity – Wetlaufer suggests that lawyers’ commitment to true meaning of texts can often prove to be an ineffective weapon *against* legal ambiguity,<sup>130</sup> increasing, rather than reducing, the ambiguous nature of legal language. This commitment has the potential to render lawyers ‘ineffective readers of texts’, and though it strengthens the clarity and certainty of legal arguments, it also ‘operates to diminish their capacity to read texts as what they really are’.<sup>131</sup>

‘No one will be surprised to hear that judicial decisions are different from lyric poems’, Wetlaufer wryly observes; ‘[w]hat is interesting, though, is the specific *nature* of those differences’.<sup>132</sup> It is in its differentness that literature thrives as a resource for legal thinking, as Wetlaufer explains:

If the purpose of a judicial decision is to close what has been open, the motive behind literature is likely to be the desire to open what has been closed. Thus, literature is likely to celebrate and explore the problematic, the uncertain, the ambiguous, the subjective, the irrational, the insoluble. It will, at least usually, acknowledge and examine the multiplicity of perspectives and the personal contingency of reality.<sup>133</sup>

Just as Grüttemeier praised the variety of interpretations possible within literature, so does Wetlaufer highlight the value of its capacity for containing multiple, contradictory meanings. Law might not be inherently dogmatic, but it operates to establish a definitive answer to a problem or question. Therefore, whereas law seeks a single solution,

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<sup>129</sup> Harrington, J. ‘Towards a Rhetoric of Medical Law’ (Routledge 2017), 3. Referencing Bakhtin, M.M. ‘Dialogue in the Novel’ (University of Texas Press 1982), 270.

<sup>130</sup> Harbinger (n126), 125.

<sup>131</sup> Ibid.

<sup>132</sup> Wetlaufer (n124), 1564.

<sup>133</sup> Ibid.



literature will 'rarely claim to reveal the one true meaning of things' and instead 'confront the limits of knowledge and reason',<sup>134</sup> and thus is more fluid and polymorphous in seeking perspectives rather than solutions. In short, literature can contain opposites, ironies, paradoxes, non-linearity and competing perspectives.<sup>135</sup> This allows for the queer, (gender)fluid,<sup>136</sup> postmodern interpretive stance that will characterise the discussions relating to my chosen texts; therefore, I will build on Wetlaufer's approach by focusing in on the criminal law, and specifically the three *mens rea*-related problems discussed in the last chapter.

One of the aims of queer theory is to destabilise and subvert the binaries of social constructions like gender and sexuality, which is the methodological backbone of this thesis. This stems from the strategy developed by Judith Butler in *Gender Trouble*, which is 'based in a performative theory of gender acts that disrupt the categories of the body, sex, gender, and sexuality and occasion their subversive resignification and proliferation beyond the binary frame'.<sup>137</sup> Butler is talking about destabilising categories relating to sex and gender, but there appears to be a method to her work that is performative, rhetorical, unstable and contingent, that disrupts binaries of all sorts, and which I apply to the *mens rea*-related problems of concern to chapter two. Michael Thomson observes a shift in eighteenth and nineteenth century criminal cases in '[d]efining masculinity through performance',<sup>138</sup> and notes the 'masculine body that is imagined and privileged is generally an (otherwise) able-bodied, white and middle-class one',<sup>139</sup> culminating in the discrepancy in which '[m]en's bodies are constructed as safe and impermeable' whereas '[w]omen are constructed as unsafe and permeable'.<sup>140</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid, 1565, 1574.

<sup>136</sup> See Butler (n17), Callis (n19) and Kopelson (n19).

<sup>137</sup> Butler (n17), xxxi.

<sup>138</sup> Thomson, M. 'Endowed: Regulating the Male Sexed Body' (Taylor and Francis 2008), 75.

<sup>139</sup> Ibid, 80.

<sup>140</sup> Ibid, 56-57.

Building on the more fluid, polymorphous approach established by Wetlaufer and Butler, I will adopt and modify the concept of the uncanny as developed by David Gurnham. His use of literature entails 'exposing the unacknowledged assumptions, biases and prejudices that those vested with legal authority rely on, and their failures to appreciate important contextual dimensions or the unintended side effects of particular rules and interpretations'.<sup>141</sup> I adopt this approach, and modify it to use literature as a means of exposing and illuminating the problems relating to *mens rea*, and especially the binaries (subjective/objective, male/female, *actus reus/mens rea*) that bleed into one another more than the law acknowledges. Gurnham suggests that there may be 'important critical capital in [paying] psychoanalytic attention to the language of the texts of law, literature and culture that helps us bring the law's unconscious to light'.<sup>142</sup> I will briefly return to psychoanalysis in the next chapter, as it resonates with my critical approach, but my understanding of doubles comes from literary criticism rather than Freud and Lacan. The queer/fluid/polymorphous methods of Wetlaufer lead me to specifically draw on Gurnham's concept of the uncanny, which he argues might account for the problems and difficulties associated with rape myth discourse.<sup>143</sup> He highlights a recurring feature in studies of juries in rape trials, namely that the juries create a fictional figure of the 'innocently misunderstanding man'.<sup>144</sup> Gurnham goes on to note that the 'haunting presence' of 'this spectral double for "real man"' is an 'effect of constituting one thing... in terms of another'.<sup>145</sup> In doing so, he locates a literary figure (the double) that is present in legal doctrine and practice, and which is the cause of practical ramifications in real trials, and criminal legal discourse as a whole. I will build on his conception of the double by narrowing in further on three specific and distinct types of literary doubles in *Jekyll and Hyde*, *Dorian Gray*, and *Frankenstein*.

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<sup>141</sup> Gurnham, D. 'Crime, Desire and Law's Unconscious: Law, Literature and Culture' (Routledge 2014), 1.

<sup>142</sup> *Ibid.*, 5.

<sup>143</sup> Gurnham, D. 'Debating Rape: To Whom does the Uncanny 'Myth' Metaphor Belong?' (2016) *Journal of Law and Society*, 43(1), 123-43, 125.

<sup>144</sup> *Ibid.*, 128.

<sup>145</sup> *Ibid.*

### 3.4.2) Using literature to historicise the criminal law

Literature can also be used to historicise the criminal law, as Nicola Lacey demonstrates. Lacey has used Stevenson's *Strange Case of Dr Jekyll and Mr Hyde* as a way of analysing the concept of character in criminal law;<sup>146</sup> Lacey draws parallels between a literary work (*Jekyll and Hyde*) and the concept of character in the criminal law, and finds analogies, symbols and narratives in the fictional text that echo sentiments and precedents found in the contemporary criminal law of the time. Lacey reads *Jekyll and Hyde* as a 'powerful metaphor both for specifically late Victorian perplexities about criminality and criminal responsibility',<sup>147</sup> thus reading a literary text as a performance of legal problems at the time of publication. In doing so, Lacey challenges the assumption that, by the end of the nineteenth century, 'attributions of responsibility in English criminal law already rested primarily and unambiguously on factual findings about the defendant's state of mind'.<sup>148</sup> I will be building on Lacey's methods in later chapters.

Lacey also uses literature as a way of tracing the law's changing attitude to female criminality. She argues that the narrative difference between the titular heroines of Daniel Defoe's *Moll Flanders* (1722) and Thomas Hardy's *Tess of the D'Urbervilles* (1891) represents a drastic change in legal and societal attitudes.<sup>149</sup> Lacey uses these connected but contrasting heroines as symbols of the attitudes of their time. A female offender is the central protagonist of both texts; both Moll and Tess have committed acts deemed criminal by the legal system, though their character, intentions, and framing differ. Moll is presented as a confident, charismatic woman of her time and also ahead of it; and although the narrative spares no detail of her criminal activity, Moll is nevertheless portrayed as a lovable rogue who generally gets away with living a life of

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<sup>146</sup> Lacey, N. 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) *Criminal Law and Philosophy*, 4(2), 109–133.

<sup>147</sup> *Ibid.*, 111.

<sup>148</sup> *Ibid.*

<sup>149</sup> Lacey, N. 'From Moll Flanders to Tess of the D'Urbervilles: women, autonomy and criminal responsibility in eighteenth and nineteenth century England' (2007) *LSE Working Papers* 5/2007, 1-31. See also Lacey, N. 'Women, Crime and Character: From Moll Flanders to Tess of the D'Urbervilles' (OUP 2008).

crime with few legal ramifications.<sup>150</sup> In contrast, over a century and a half later, Tess is portrayed as more a victim than a perpetrator, despite having killed a man by the end of the book. Tess is arguably more righteous in her criminal act than Moll, the latter having broken the law out of necessity and pleasure, whereas the former killed the man who raped her and ruined her life, and yet Tess is the one who is punished by the law.<sup>151</sup> Lacey foregrounds different aspects of *mens rea* in her criminal law and literature research as well as using *Jekyll and Hyde* to illustrate the shift in conceptions of character; I will extend her methodology to *The Picture of Dorian Gray*, as I suggest it offers different insights into criminal responsibility and *mens rea* than *Jekyll and Hyde*.

In a similar vein, Illan Rua Wall has drawn parallels between Sophocles' Theban plays and the House of Lords' judgment in *R v Dudley and Stephens*,<sup>152</sup> framing both as (featuring literary conventions of) tragedies, in order to analyse a modern verdict in European case law.<sup>153</sup> In discussing the legal case in *Oedipus Rex*, Wall distinguishes between two types of responsibility: '*internal* (personal) guilt, symbolized by the committing of acts upon oneself by oneself; and *external* (criminal) guilt, handed down by the state and symbolized by the king'.<sup>154</sup> Wall speculates as to the framing of responsibility in the text: 'The drama, as a meditation on the guilt of one whose criminal actions were predetermined, is interesting, as it sets up a model of criminal responsibility which may, due to a lesser moral guilt, allow for a sentence to be reduced'.<sup>155</sup> A different conclusion is reached in another Oedipus text, namely *Oedipus at Colonus*, in which Oedipus 'continues to display his *moral* guilt' for his previous acts, but 'claims justification and self-defence for the murder of his father. He claims lack of *mens rea* for incest' and patricide.<sup>156</sup>

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<sup>150</sup> Ibid, 2.

<sup>151</sup> Ibid, 4.

<sup>152</sup> R v Dudley and Stephens (1884) 14 QBD 273 DC.

<sup>153</sup> Wall, I.R. 'Duress, International Criminal Law and Literature' (2006) Journal of International Criminal Justice, 4(4), 724-744.

<sup>154</sup> Ibid, 730.

<sup>155</sup> Ibid, 731.

<sup>156</sup> Ibid, 731-2.

Wall's intent then is to draw parallels between, but crucially not to equate, the legal case of *Dudley and Stephens* with the literary text of *Oedipus*.<sup>157</sup> One parallel between the two is that the men in both instances have committed crimes that 'draw the greatest stigma' from their respective societies,<sup>158</sup> and that all the men who are involved are wracked with 'internal guilt'.<sup>159</sup> In our era, Wall remarks that 'the lack of *mens rea* is now of seminal importance to criminal guilt'<sup>160</sup> and explains that 'some will consider it always immoral to kill, but the law justifies the acts of the hangman and excuses the self-defender'.<sup>161</sup> This is of particular interest to this thesis which looks at the evolution of the criminal law's approach to the guilty mind as it developed from conceptions of character to deeper considerations of the defendant's internal mind, as discussed in the previous chapter. The case of *Dudley and Stephens* demonstrates the criminal law's engagement with questions of internal guilt, and not merely external character, during the nineteenth century. Wall also keenly observes the potential contradiction with proclaiming killing to be wrong whilst creating legal exceptions to the rule (drawing on the difference between a justification and an excuse) and sympathises with the personal remorse felt by those who commit criminal acts under duress; in his view, literary examples keenly display this dichotomy. Wall's overall conclusion in likening a legal case to a literary tragedy is to criticise unjust real-life rulings and warn against the dangers of 'equating casual responsibility with criminal guilt'.<sup>162</sup>

#### 3.4.3) Using literature to critique and historicise mens rea

The parallel evolution of the internal mind in law and literature of the nineteenth century is a major focus in the work of Simon Stern, who suggests a new approach for criminal law and literature: 'Rather than contrasting literary ambiguity with legal clarity, we might

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<sup>157</sup> Ibid, 732.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid, 733.

<sup>160</sup> Ibid, 739.

<sup>161</sup> Ibid, 741.

<sup>162</sup> Ibid, 724 [sic].

instead ask how fiction can be used to expose legal ambiguity'.<sup>163</sup> This resonates with my own approach, which uses literary doubles to illuminate and critique problems relating to *mens rea*, as discussed in the last chapter.

As well as illuminating legal doctrine, literature can also shape and influence how people understand and articulate the criminal law. This is something Stern observes in the rise of the novel in the nineteenth century – which he argues 'served as a significant source for public perceptions of crime and criminality' and which critiqued and 'challenged the culture of criminal law administration'.<sup>164</sup> Like Lacey, Stern looks to the increasingly intricate exploration of responsibility and culpability (early versions of what would later become *mens rea*) as they evolved both in the criminal legal system and in the minds of contemporary authors, in what he terms 'psychological turn in nineteenth-century fiction':

Novelists such as George Eliot, Robert Louis Stevenson, and Henry James offered increasingly complex meditations on responsibility, and on the specification and representation of intention, which provide a context for evolving ideas about *mens rea*. The growing interest, among criminal lawyers, in formalizing the concept of *mens rea* is itself part and parcel of the culture that sponsored these intricate fictional investigations of agency, motive, and intent.<sup>165</sup>

This is true as regards the rise of the novel and the nineteenth century concern with interiority in literature and the law. In this way, it is the literary form of the novel as well as the content of *Dorian Gray*, *Jekyll and Hyde*, and *Frankenstein* which is significant for my work. The novel itself is a creature of the eighteenth and nineteenth centuries; a literary form which Terry Eagleton argues not only 'eludes definitions, but... actively undermines them'.<sup>166</sup> Eagleton observes not only how the novel 'cannibalizes other literary modes and mixes the bits and pieces promiscuously together', but how it 'quotes, parodies and transforms other genres, converting its literary ancestors into mere components of itself'.<sup>167</sup> Eagleton suggests that '[i]f the novel is the genre which affirms

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<sup>163</sup> Stern, S, 'Law and Literature' in Dubber, M.D. and Hörnle, T. (eds) 'The Oxford Handbook of Criminal Law' (OUP 2014), 111-130, 119.

<sup>164</sup> Ibid, 112.

<sup>165</sup> Ibid, 113.

<sup>166</sup> Eagleton, T. 'The English Novel: An Introduction' (Blackwell 2005), 1.

<sup>167</sup> Ibid.

the common life, it is also the form in which values are at their most diverse and conflicting', a mode which complements (or perhaps even embodies) our own 'fragmented and discordant' values and beliefs.<sup>168</sup> Indeed, Eagleton suggests that:

The late eighteenth and early nineteenth centuries was one of the most fertile, diverse and adventurous periods of novel-writing in English history, as Gothic fiction, romance, regional and national tales, Jacobin and anti-Jacobin novels, novels of travel, sentiment, abolitionism and the condition of women, stories of foreign and domestic manners, and works derived from ballad, myth and folk lore, tumbled copiously from the presses. The literary situation was exceptionally fluid, and the realist novel as we know it crystallized only gradually in this crucible of ingredients. Once that novel was up and running, it did not simply suppress these competing forms; on the contrary, it incorporated them, as a glance at the Gothic or romantic elements in, say, the Brontës would suggest.<sup>169</sup>

This notion of the novel as a fluid literary form that is continually mixing with other (sub)genres, parodying itself, and evolving over time resonates with my discussion of (both legal and literary) intertextuality earlier in this chapter. As a 'mixing of languages and forms of life', Eagleton describes the novel as 'a model of modern society, not simply a reflection on it',<sup>170</sup> and its refusal 'to be bound by the past' means that it operates in a forward-looking 'present which is always in the process of change'.<sup>171</sup> Eagleton suggests that '[t]he major nineteenth century novel, then, is for the most part the product of the provincial petty bourgeoisie, not of the metropolitan upper class', with the novel having 'always been regarded as something of an upstart, ill-bred form, and thus an appropriate literary mode for those who are socially aspiring, side-lined or displaced'.<sup>172</sup> The notion of the interior self developed in literature and law during this time; and Eagleton identifies it in Daniel Defoe's *Robinson Crusoe*, one of the first English novels.<sup>173</sup> In *Crusoe*, 'the self has to be constantly adaptive' in order to cope with the constantly changing events of the plot, which to Eagleton 'means that there is no immutable core of selfhood which might draw morals and store up memories'.<sup>174</sup> This notion of '[s]elfhood' in *Robinson*

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<sup>168</sup> Ibid.

<sup>169</sup> Ibid, 94-95.

<sup>170</sup> Ibid, 6.

<sup>171</sup> Ibid, 7.

<sup>172</sup> Ibid, 128.

<sup>173</sup> Defoe, D. 'The Life and Strange Surprising Adventures of Robinson Crusoe, Of York, Mariner' (William Taylor 1719).

<sup>174</sup> Eagleton (n166), 30.

*Crusoe*, according to Eagleton, ‘implies some kind of interiority’,<sup>175</sup> and building on this, the idea that we even have a mind is an historical one. I chose to focus specifically on this literary form because the novel emerged in the realm of the bourgeois, the male and the colonial, and performs the instability between the interior and exterior.

Therefore, I have specifically chosen my three novels as reflections of both the nineteenth century legal-literary landscape in which they were conceived, and because I view them as historicising the three *mens rea*-related problems on which this thesis turns. This aligns with Stern’s observation that the interest of literary and legal figures in exploring the intricacies of the criminal mind developed in parallel to one another throughout the nineteenth century. Their dual investigations into internality cultivated a culture of analysis of mutual influence on literature and the law. Stern observes that ‘both detective and courtroom novels’ in particular ‘create space for reflection on particular doctrines or practices of criminal law, by using them as plot devices or by showing how they may result in injustice’.<sup>176</sup> However, I will propose in the next chapter that detective novels focus more on the retrospective procedural aspects than on an exploration of the guilty mind. Stern notes that ‘fictional narratives supply richly detailed illustrations of legal dilemmas, envisioned with a depth and fullness rarely found in legal opinions’,<sup>177</sup> which echoes Weisberg’s description of the richness of literary writing.<sup>178</sup> Stern believes that the reason for turning to literature is it provides a means of evaluating the law’s successes and failures, i.e. ‘to provoke thought about the validity and limits of legal doctrine and practices, through concrete depictions of law’s feats, quirks, and misfires’.<sup>179</sup>

### 3.5 Conclusion

In conclusion, I have demonstrated why literature can be a valuable and effective resource in illuminating and critiquing legal problems. Literature can perform legal

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<sup>175</sup> Ibid, 31.

<sup>176</sup> Stern (n163), 113-14.

<sup>177</sup> Ibid, 117.

<sup>178</sup> Weisberg (n92).

<sup>179</sup> Stern (n163), 117.



concepts, such as *mens rea*, in order to identify, expose and articulate their discrepancies, ambiguities and flaws – and provide alternate, contradictory perspectives – in ways which traditional legal discourse alone cannot. Subsequently, by drawing terminology and analytical methods from literary criticism, I have shown how to approach those legal problems in new, nuanced ways that illuminate the three *mens rea*-related problems outlined in the last chapter.

The methodological approach in this thesis is very much in the spirit of Greta Olson, Ralf Grüttemeier, and Costas Douzinas and Adam Gearey in its anti-humanist focus towards law and literature from a feminist, queer, critical legal studies perspective. Drawing on Barthes and New Criticism, this thesis takes a stance that frees itself from the canon/text/author in order to develop new readings for specific purposes. I draw on the methods developed by Gerald Wetlaufer in highlighting literature's ability to contain opposites, paradoxes and multiple perspectives which can be used to expose the law's ambiguities and unstable binaries, and relocate David Gurnham's conception of the double in three novels – in part because of the novel's capacity to historicise legal problems and contain myriad literary modes. Nicola Lacey, Illan Rua Wall and Simon Stern have demonstrated that works of literature can historicise crime by providing metaphors and manifestations of the law's attitude and approach towards responsibility, criminality, and gendered conceptions of crime.

Having developed a law and literature-based methodology in this chapter, I will use methods from genre studies to identify a particular genre of literature that I suggest offers specific potential for problematising assumptions underlying *mens rea*. For that, I will argue that Gothic fiction is the most applicable to this area of criminal scholarship, particularly its subgenre Doubles fiction. As we will see in the next chapter, nineteenth century Gothic fiction deals explicitly with guilt, responsibility and the criminal mind. Its nearest generic neighbour is arguably detective fiction, but such literary works focus more on retrospective investigation into the crime than on the defendant's state of mind

before, during and after the commission of a criminal offence. Gothic fiction and the double prioritise this latter aspect, giving readers unique access to the perpetrator's head. I further extend this by arguing that the Gothic novel provides an opportunity to dissect and discuss the internal criminal mind, particularly through the figure of the double, which I will demonstrate manifests the inner mind as the outer self.

## **Chapter IV:** **Doubles in Gothic Fiction**

### **4.1) Introduction**

As I demonstrated in the last chapter, law and literature methods can be used to illustrate and illuminate *mens rea*-related problems. Now I will show that not only can doubles in Gothic fiction be applied in regard to the critical mode of law and literature scholarship outlined in the chapter three, but the literary figure of the double can also offer a new mechanism for exploring themes of individual action and responsibility, particularly through its ability to externalise the protagonist's internal mind as a physical entity. My understanding of the protagonist-double relationship is that the former is the predecessor/progenitor of the double – it is their actions (words/deeds) which create the double and/or the metaphysical link between them. The double would not have come into being *but for* the actions of the protagonist – this is how we know, for example, that Jekyll is the protagonist and Hyde the double. The shift from external to internal conceptions of culpability in the nineteenth century, reflected in its development of the *mens rea* requirement, will be observed through Doubles literature of the same period, specifically Gothic fiction. Literature of this era in particular dramatizes English and Welsh criminal law's struggle to understand the guilty mind and shows the contradictions, paradoxes and unstable binaries within, as reflected by the need to personify the internal mind as an external being. My methodology, therefore, utilises literature as a means of doing legal history.

I will briefly engage with genre in order to justify my choice in focussing on Gothic fiction, and its subgenre Doubles fiction. I will then provide an overview of the novel as an emergent literary form in the eighteenth century, describing the origins of Gothic fiction from its roots in the work of Horace Walpole and Ann Radcliffe through to the nineteenth century with the works of Charles Dickens and Bram Stoker, and how the genre's development reflects the socio-political changes that took place throughout that century. I will then examine literary doubles in detail from their ancient origins in myth, folklore

and fairy tale to the Doppelgängers who populate nineteenth century fiction, in order to demonstrate how the double has the capacity to illuminate, destabilize and critique binaries, as it is itself a figure of instability. In doing so, I will argue that the figure of the literary double offers a unique perspective in analysing legal concepts because of its capacity to externalise a fundamentally internal (mental) concept, particularly *mens rea* as encountered in chapter two.

## 4.2) Gothic Fiction

The term 'Gothic' refers to the Germanic tribe, the Goths, who, according to Markman Ellis, 'destroyed classical Roman civilisation and plunged the civilised world into centuries of ignorance and darkness'.<sup>1</sup> The name 'Goth' was repurposed, as Chris Baldick notes, 'and used to prop up one side of that set of cultural suppositions by which the Renaissance and its heirs defined and claimed possession of European civilization', opposing cultural viewpoints which included 'medieval versus modern, barbarity versus civility [and] superstition versus reason'.<sup>2</sup> The term was later 'revised and transformed' in the eighteenth century with Romanticism which represented, Ellis suggests, the notion of 'an older chivalric past [being] idealised at the expense of a classical present' whereby the 'past is re-valued and found to be superior to the present, a process that wears a nostalgic aspect';<sup>3</sup> in other words, the Gothic was already transgressing binary division at a literary/generic level. Linda Dryden observes that 'Gothic novels of the eighteenth century were characterized by a preoccupation with the fantastic and the grotesque, the savage and the mysterious', and 'above all they appealed to the emotions rather than the rational'.<sup>4</sup> Describing the Gothic as 'a literature of transformations where identity is unstable', Dryden highlights how the genre itself underwent a transformation, shifting from the eighteenth century focus on the 'historically remote past' in 'wild' and 'isolated'

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<sup>1</sup> Ellis, M. 'The History of Gothic Fiction' (Edinburgh University Press 2000), 22.

<sup>2</sup> Baldick, C. (ed) 'The Oxford Book of Gothic Tales' (OUP 1993), xii.

<sup>3</sup> Ellis (n1), 23.

<sup>4</sup> Dryden, L. 'The Modern Gothic and Literary Doubles: Stevenson, Wilde and Wells' (Palgrave 2003), 25.

rural landscapes to a focus on 'the urban present' by the nineteenth century *fin-de-siècle*.<sup>5</sup>

Exploring, as it does, the mutable nature of identity, unstable binaries and the externalising of the hidden interior self, Gothic fiction is a potent genre for legal study; Sara Wasson, for example, has developed a reading of medical law as Gothic fiction.<sup>6</sup> I view nineteenth century Gothic fiction as a valuable genre within which to locate criminal legal scholarship, as it engages with criminal concepts relating to the guilty mind. This thesis focuses on identifying the problems originating in the nineteenth century legal system, and those that endure today, through works of Gothic literature. Although the legal system itself rarely features in Gothic texts, the Gothic genre revels in moral dilemmas and criminal offences which afford the reader access to the guilty mind. I will first look to genre as a way of giving context to Gothic/Doubles fiction.

#### 4.2.1) The genre of Gothic fiction

Genres may generally be understood to be ways of identifying, categorising and distinguishing between different types of narratives in fiction. This is primarily achieved by recognising certain recurrent narrative tropes and conventions that tend to recur in certain kinds of stories as opposed to others. Originally, the word 'genre' derives from French and Latin (*genus*) and means 'kind' or 'class' as well as 'gender'.<sup>7</sup> A conventional explanation of genres, Daniel Chandler notes, is based on the notion that 'they constitute particular conventions of content (such as themes or settings) and/or form (including structure and style) which are shared by the texts which are regarded as belonging to them'.<sup>8</sup> A genre, according to David Duff, may be regarded as a 'recurring type or category of text, as defined by structural, thematic and/or functional criteria',<sup>9</sup> and from

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<sup>5</sup> Ibid, 19.

<sup>6</sup> Wasson, S. 'Useful Darkness: Intersections between Medical Humanities and Gothic Studies' (2015) *Gothic Studies*, 17(1), 1-12.

<sup>7</sup> Chandler D. 'An introduction to genre theory' (1997) *The Media and Communications Studies Site*, 1-15, accessed 22 January 2017 from <<http://www.aber.ac.uk/media/Documents/intgenre/intgenre.html>>

<sup>8</sup> Ibid, 1.

<sup>9</sup> Duff, D. (ed) 'Modern Genre Theory' (Routledge 2000), xiii.

that, a subgenre may be understood as ‘a type or class of text which is identifiable as a subclass or offshoot of a larger category; for instance, the epistolary novel, the Bildungsroman and the historical novel are all subgenres of the novel, and the pastoral elegy a subgenre of both pastoral verse and elegy’.<sup>10</sup> John Frow defines subgenres as ‘the further specification of a genre by a particular thematic or formal content’,<sup>11</sup> and argues that any genre, for example the novel, ‘can subsume smaller sets within it (subgenres such as the novel of manners or ideas, the detective novel, the picaresque, or the historical novel)’.<sup>12</sup> Law (such as consumer contracts and wills), as well as literature, can be read through genre; indeed, this process looks central to the work of the legislator and the judge. I argue that the genre of Gothic fiction can be used to historicise the development of *mens rea* (and the problems that resulted from its development) during the critical era of the nineteenth century, when there was a shift from character-based conceptions of responsibility to a greater focus on the mental processes relating to the commission of an offence in both literature and the law.

Genre, in evolving and shifting through the interconnectedness and interrelatedness of texts, involves an intertextual component. Duff contends that ‘genre is, in effect, a *restrictive* mode of intertextuality’<sup>13</sup> (a concept which was discussed in the last chapter), presumably because it categorises certain conventions under generic labels. In spite of this, he suggests that genre has shifted over time from the elite hierarchy of Romanticism and Modernism to a more ‘redefined and democratised’ interpretation that replaces ‘prescription and exclusion [with] opportunity and common purpose: genre as the enabling device’.<sup>14</sup> Whereas Duff critiques genre for being ‘problematic and unstable’,<sup>15</sup> I would suggest that its instabilities make it a powerful tool for critiquing and destabilizing binaries, especially the *mens rea*-related problems discussed in chapter two. This

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<sup>10</sup> *Ibid.*, xvi.

<sup>11</sup> Frow, J. ‘Genre: The New Critical Idiom’ 2<sup>nd</sup> ed. (Routledge 2015), 73.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 17 [sic].

<sup>14</sup> *Ibid.*, 1-2.

<sup>15</sup> Duff (n9), 1.

conclusion is compounded by Amy Devitt's endorsement of the fluidity of genre, arguing in favour of 'flexibility in the definition of genre' in order to 'kee[p] the concept fluid and dynamic, able to respond to scholars' changing needs'.<sup>16</sup> Where Duff views genre as a restrictive mode of intertextuality, I align with Devitt in suggesting that genre may be regarded as a fluid and permeable form of intertextuality in that it is constantly being reinterpreted and recontextualised over time; it is this fluidity which enables a critique of rigid binaries in literature and the law.

The intertextual aspects of genre mean that certain commonalities do recur between texts over time. Identifying that these commonalities between texts appear to stem from the notion of 'family resemblance', a term originally coined by Ludwig Wittgenstein, who claimed that 'representations of a genre may then be regarded as making up a family whose... individual members are related in various ways, without necessarily having any single feature shared in common by all'.<sup>17</sup> In this context, the idea of 'family resemblances' between texts refers to similarity, variation and difference between works of fiction, i.e. the texts resemble each other in the sense that they share similar features, much as family members do in terms of looks or personality, but not to the point where they are identical. David Fishelov warns that 'classifying texts according to these family resemblances'<sup>18</sup> can be either 'too closed' or 'too open'.<sup>19</sup> To address this issue, I suggest that 'family resemblances' can be used to understand texts rather than to seal them into a fixed generic definition, especially because of the fluidity and flexibility of genre. This will be useful because my three texts have differences in location, protagonists, and nature of the double, but share many features, as I will show, which could be said to 'resemble' each other, such as their focus on a privileged white male protagonist, and

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<sup>16</sup> Devitt, A. 'Writing Genres' (Southern Illinois University Press 2004), 8.

<sup>17</sup> Wittgenstein L. and Anscombe, G.E.M. (transl.) 'Philosophical Investigations' (Basil Blackwell 1953), 33. Referenced in Fowler, A. 'Kinds of Literature: An Introduction to the Theory of Genres and Modes' (Harvard University Press 1982), 41.

<sup>18</sup> Fishelov, D. 'Genre theory and family resemblance – revisited' (1991) *Poetics*, 20(2), 123-138, 125.

<sup>19</sup> *Ibid.*

their exploration of criminal responsibility, morality and *mens rea* through the figure of the double.

The novel, according to Fishelov, 'seems to offer, at least at face value, an excellent case for the advocates of the concept of family resemblance... because the novel, a relative newcomer to the generic repertoire, has always been characterized by its elusiveness and lack of strict conventions'.<sup>20</sup> He therefore advocates for an understanding of the family resemblance approach that 'demonstrat[es] the rich network of relations that does exist between members of a "literary family"', rather than the 'reductive' view that 'isolate[s] the "negative" aspect' i.e. features that are not shared between texts.<sup>21</sup> He argues that 'in order to understand the way [a certain genre] functions in the literary system, we should look for the prototypical members of the genre, i.e. for those texts considered to be the most representative' of said genre.<sup>22</sup> He uses the tragedy as his example, which I here substitute for the Gothic. Fishelov argues that 'one of the reasons why [certain prototypical texts] are deemed typical is because they share many traits with each other', though this is not he stresses, to 'overlook or underestimate those texts that are not prototypical of that generic tradition'.<sup>23</sup> He concludes, referencing Paul Alpers' discussion of the pastoral,<sup>24</sup> that 'we have a constant and intimate intertextual relationship between different phases of the genre. Some writers may take the previous phase as an admired model, some as a challenge, but in all cases we will have some kind of textual "ancestry"'.<sup>25</sup> Fishelov is suggesting here that the very literary form of the novel is fluid and destabilizing, which is why novels are the focus of this thesis.

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<sup>20</sup> Ibid, 127.

<sup>21</sup> Ibid, 130.

<sup>22</sup> Ibid, 132.

<sup>23</sup> Ibid.

<sup>24</sup> Alpers, P. 'What is pastoral?' (1982) *Critical Inquiry*, 8, 437-460.

<sup>25</sup> Fishelov (n18), 134.



My understanding of genre and subgenre, therefore, relies on the fluid, unstable binaries that have been noted above by Duff and Devitt. I view the texts discussed later in the chapter as Gothic because of the commonalities, or ‘family resemblances’, between them in terms of character, conventions, and themes. The era in which they were written, the nineteenth century, was an era of significant socio-political/-legal change, and the Gothic texts that were produced during this time reflect these developments. Anxieties relating to selfhood – as individuals, as employees, as citizens – are recurring themes in works of Doubles fiction. The double exists outside of the Gothic, but many Gothic texts engage with notions of duality through this particular literary figure, which is why I view Doubles fiction as a subgenre of the Gothic. As noted in the last chapter, both law and literature can be understood through performance.<sup>26</sup> Genre, I contend, is a similarly performative medium, the fluid boundaries of what constitutes a particular genre allowing for continual (re)interpretation of concepts and literary conventions. I argue that Gothic/Doubles fiction not only dramatizes the *mens rea*-related problems outlined in chapter two, but historicises the socio-legal/-political developments of the nineteenth century.

#### 4.2.2) A chronological overview of Gothic fiction

In regard to the development of the Gothic novel, Terry Eagleton suggests that ‘[t]he late eighteenth and early nineteenth centuries was one of the most fertile, diverse and adventurous periods of novel-writing in English history, as [such genres including] Gothic fiction... tumbled copiously from the presses’.<sup>27</sup> This influx of new genres like the Gothic (which ‘incorporated’ elements of myth, folklore and the Realist novel),<sup>28</sup> was understandable in light of the era being, as Eagleton describes, ‘an epoch of dramatic social and political upheaval’, including ‘the massive expansion of empire’, ‘the beginnings of the industrial revolution’, ‘the consolidation of middle class power’ and ‘the

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<sup>26</sup> Balkin, J. and Levinson, S. “Law as Performance”: Law, Music, and Other Performing Arts’ (1991) University of Pennsylvania Law Review, 139(6), 1597-1658, 1597.

<sup>27</sup> Eagleton, T. ‘The English Novel: An Introduction’ (Blackwell 2005), 94.

<sup>28</sup> Ibid, 94-95.

first stirrings of the organized, politically vocal working class'.<sup>29</sup> These 'new experiments in fiction' were also innovated in part by Scottish and Irish writers, whose position 'on the colonial peripheries' enabled them to interrogate such dualities/binaries as 'history and cultural identity, tradition and modernity, the archaic and the enlightened, romance and realism, empire and anti-colonialism, community and individualism'.<sup>30</sup> In short, the Gothic evolved during a time of socio-political upheaval, the fluidity of the genre enabling writers to critique and transgress these binaries from the earliest days of the genre.

The orthodox view, articulated by Marshall Brown, is that Gothic fiction 'unequivocally'<sup>31</sup> began in 1764 with the publication of Horace Walpole's *The Castle of Otranto*<sup>32</sup> which, along with other late eighteenth-century books like Ann Radcliffe's *The Mysteries of Udolpho*<sup>33</sup> and Matthew Lewis' *The Monk*,<sup>34</sup> laid the foundation for the next century of Gothic fiction. However, John Mullan suggests that 'Gothic fiction began as a sophisticated joke' in that 'Horace Walpole first applied the word "Gothic" to a novel in the subtitle – "A Gothic Story" to *Otranto*, when the term 'Gothic' was previously used to denote something 'barbarous' and/or 'deriving from the Middle Ages': Walpole used it in order to portray his novel as an 'antique relic'; a true tale that had been discovered, rather than fabricated.<sup>35</sup>

The Gothic novel emerged, then, as a literary form concerned with the spectre of the past and its haunting of the present and future; as Eagleton observes, 'time for... the Gothic text is often doubled, as the novel delves into the ancient past as a way of illuminating the present and future' – a past which manifests as 'spectres, hauntings, [and] past crimes'.<sup>36</sup> Brown further claims that many Gothic novels centre not on ghost

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<sup>29</sup> Ibid, 95.

<sup>30</sup> Ibid.

<sup>31</sup> Brown, M. 'The Gothic Text' (Stanford University Press 2005), 2.

<sup>32</sup> Walpole, H. 'The Castle of Otranto' (Collier Books 1963; William Bathoe 1764).

<sup>33</sup> Radcliffe, A. 'The Mysteries of Udolpho' (G. G. and J. Robinson 1794).

<sup>34</sup> Lewis, M.G. 'The Monk: A Romance' (Joseph Bell Ltd. 1796).

<sup>35</sup> Mullan, J. 'The origins of the Gothic', British Library, published 15 May 2014, accessed 8 January 2020 from <<https://www.bl.uk/romantics-and-victorians/articles/the-origins-of-the-gothic>>

<sup>36</sup> Eagleton (n27), 100.

stories but on 'a contest of values'.<sup>37</sup> Therefore, the Gothic not only represents the fears and concerns of the time, but also reflects the era's evolving attitudes to morality. These generic features were developed from the works of Walpole, Radcliffe and Lewis through the early nineteenth century with Mary Shelley's *Frankenstein*,<sup>38</sup> Charles Maturin's *Melmoth the Wanderer*<sup>39</sup> and James Hogg's *The Private Memoirs and Confessions of a Justified Sinner*<sup>40</sup> – all utilise to varying extents the figure of the double, to which I will return in the next section.

Gothic conventions continued to be employed and developed during the mid-nineteenth century through such works as Edgar Allan Poe's *Tales of the Grotesque and Arabesque*<sup>41</sup> and Wilkie Collins' *The Woman in White* and *The Moonstone*,<sup>42</sup> as well as Charlotte Brontë's *Jane Eyre*<sup>43</sup> and Emily Brontë's *Wuthering Heights*.<sup>44</sup> The century closed with the 'metropolitan monster[s]'<sup>45</sup> Dryden identifies in the urban horror of Robert Louis Stevenson's *Strange Case of Dr Jekyll and Mr Hyde*,<sup>46</sup> Oscar Wilde's *The Picture of Dorian Gray*<sup>47</sup> and Bram Stoker's *Dracula*.<sup>48</sup> Eagleton suggests that '[w]hereas the Realist novel 'had the virtue of showing life as it is', the Gothic novel 'represents the shadowy underside of Enlightenment reason, exposing the family as a cockpit of murderous loathings, and society as a tainted legacy of guilt and crime through which the unquiet spectres of the past still stalk'.<sup>49</sup>

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<sup>37</sup> Brown (n31), 5.

<sup>38</sup> Shelley, M. 'Frankenstein; or, the Modern Prometheus' (Penguin Classics 2003; Lackington, Hughes, Harding, Mavor and Jones 1818).

<sup>39</sup> Maturin, C. 'Melmoth the Wanderer' (Penguin Classics 2012; Edinburgh 1820).

<sup>40</sup> Hogg, J. 'The Private Memoirs and Confessions of a Justified Sinner' (Longman, Hurst, Rees, Orme, Brown and Green 1824).

<sup>41</sup> Poe, E.A. 'Tales of the Grotesque and Arabesque' (Lea and Blanchard 1840).

<sup>42</sup> Collins, W. 'The Woman in White' (All the Year Round 1859) and Collins, W. 'The Moonstone' (Tinsley Brothers 1868).

<sup>43</sup> Brontë, C. 'Jane Eyre' (Smith, Elder & Co. 1847).

<sup>44</sup> Brontë, E. 'Wuthering Heights' (Thomas Cautley Newby 1847).

<sup>45</sup> Dryden (n4), 17.

<sup>46</sup> Stevenson, R.L. 'Strange Case of Dr Jekyll and Mr Hyde' in Stevenson, R.L. 'Dr Jekyll and Mr Hyde with The Merry Men and Other Stories' (Wordsworth Classics 1993; reprinted 1999; Longmans, Green and Co. 1886), 3-54.

<sup>47</sup> Wilde, O. 'The Picture of Dorian Gray' (Wordsworth Classics 1992; reprinted 2011; Lippincott's Monthly Magazine 1890).

<sup>48</sup> Stoker, B. 'Dracula' (Archibald Constable and Company 1897).

<sup>49</sup> Eagleton (n27), 104-5 [sic].

The stories of the above works vary quite significantly in terms of plot, character, setting and theme; so what connects them under the umbrella of Gothic fiction? Eve Kosofsky Sedgwick identifies features of Gothic fiction such as ‘an oppressive ruin, a wild landscape, a Catholic or feudal society’, ‘the poisonous effects of guilt and shame’ and, of course, ‘doubles’.<sup>50</sup> Jerrold Hogle describes the ‘antiquated or seemingly antiquated space’ as a quintessentially Gothic setting, encompassing castles, graveyards, laboratories and large old buildings’, within which are hidden ‘some secrets of the past (sometimes the recent past) that haunt the character’.<sup>51</sup> These hauntings can take the form of ‘ghosts, spectres or monsters’ and ‘manifest unresolved crimes or conflicts that can no longer be successfully buried from view’.<sup>52</sup> Therefore, these ‘gothic spaces’ (*Dracula’s* castle, *Wuthering Heights’* Yorkshire Moors, *Jane Eyre’s* Thornfield Hall) give Gothic literature its identity and backdrop.<sup>53</sup> Raphaël Ingelbien notes the ‘resemblance’ between *Dracula* and the Protestant ‘Ascendancy landlord’, his decrepit castle recalling the ‘condition of an aristocracy which had already fallen on hard times by the 1890s, when Ascendancy land ownership and the income landlords could derive from rents were being reduced by legal reforms’.<sup>54</sup> Ingelbien’s observation here perhaps suggests that the Gothic genre is also informed by Irish Protestant landlord anxieties about loss of power to the Catholic majority, which would allow for an ‘internal Colonial’ reading.

Despite identifying these common features between Gothic texts, it is important to note, as Hogle does, that the Gothic is a ‘highly unstable genre’; for Hogle, Gothic is ‘hardly “Gothic” at all’, having ‘scattered its ingredients’ into other types of literature throughout the nineteenth century.<sup>55</sup> He explains that the history of Gothic literature is a fraught one due to the fact that the ‘conflation of genres’ within the umbrella term ‘Gothic’ have

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<sup>50</sup> Sedgwick, E.K. ‘The Coherence of Gothic Conventions’ (Methuen 1976), 9.

<sup>51</sup> Hogle, J.E. (ed) ‘The Cambridge Companion to Gothic Fiction’ (Cambridge University Press 2002), 2.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, 2.

<sup>54</sup> Ingelbien, R. ‘Gothic Genealogies: “Dracula”, “Bowen’s Court”, and Anglo-Irish Psychology’ (2003) *ELH*, 70(4), 1089-1105, 1095.

<sup>55</sup> Hogle (n51), 1.

rendered it a 'pliable and malleable type of fiction-making'.<sup>56</sup> It is at this point that the genre tends to experiment with notions of the supernatural, a device which keeps the characters (and readers) in 'anxious suspense', and culminates in 'the gross violence of physical or psychological dissolution, explicitly shattering the norms (and repressions) of everyday life with wildly shocking, and even revolting, consequences'.<sup>57</sup> Crucially, Hogle highlights the Gothic's focus on the moral culpability and wickedness of the crime and the criminal.<sup>58</sup>

In terms of the characters themselves, Hogle observes that most Gothic stories focus on:

aspiring but middling, or sometimes upper middle-class, white people caught between the attractions or terrors of a past once controlled by overweening aristocrats or priests... or forces of change that would reject such a past yet still retain aspects of it (including desires for aristocratic or superhuman powers).<sup>59</sup>

This 'tug of war', as Hogle refers to it, gives context to the central conflict, and haunts characters and readers alike with 'deep-seated social and historical dilemmas... that become more fearsome the more characters and reader attempt to cover them up or reconcile them symbolically without resolving them fundamentally'.<sup>60</sup> Hogle ultimately argues that the 'longevity and power of Gothic fiction unquestionably stem from the way it helps us address and disguise some of the most important desires, quandaries and sources of anxiety, from the most internal and mental to the widely social and cultural'.<sup>61</sup>

I would argue that one of the effects of Gothic fiction is to address the moral quandaries, both internal (personal) and external (societal/cultural), that Hogle identifies. Linda Dryden highlights the urban setting of *fin-de-siècle* Gothic as a result of the growing apprehension of the hidden interior self:

The modern criminal like Dorian Gray, who chooses to cast off his moral restraint, is no throwback to an earlier form of humanity: he is the modern urban beast...

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<sup>56</sup> Ibid, 2.

<sup>57</sup> Ibid, 3.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid, 4.

Relocating the scene of horror to the metropolitan streets, the modern Gothic articulates a fear that civilization may not be an evolved form of being, but a superficial veneer beneath which lurks an essential, enduring animal self.<sup>62</sup>

#### 4.2.3) Law as Gothic

Drawing on this method, it is possible to understand and perceive the criminal law as a Gothic genre, and the many branches within it as subgenres. The act of responding to recurrent situations can represent the recurring discussion of *mens rea* in criminal legal theory and criminal courts, as outlined in earlier chapters. It is important to look to Lisa Rodensky's observation on a key narrative development in the genre of the novel. Rodensky argues that the:

third person narrator [provides] imaginative access to the minds of his or her characters. It need not be by inference from external evidence that third person narrators offer the thoughts of their characters; they can hold themselves out as representing thoughts directly. Novels invite readers to imagine that they are in the mind of the criminal. This access to the mind distinguishes fiction – and the novel in particular – from law, from history, from psychology, and even from other literary genres, like biography and drama. While drama can make action physically present in a way the novel cannot, the novel can enter the mind, and Victorian novels explored the interior life of its characters as never before.<sup>63</sup>

Rodensky notes that the 'Victorian novel's power to represent the interior life of its characters both challenges the law's definitions of criminal liability and reaffirms them'.<sup>64</sup> She observes that 'third person narratives give access to an inner self in ways that profoundly alter our experience of the criminal life', even though she concedes that Victorian novels are not 'the only kinds of literary narratives that imagine the interior life', citing *Paradise Lost* as another example.<sup>65</sup> I would therefore extend Rodensky's novels of the interior life to include Gothic fiction, as it can historicise the criminal law's engagement with the guilty mind and notions of criminality.

Rodensky posits that 'the narrator's special access both takes the novel outside of the law's epistemological boundaries and at the same time questions the consequences of

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<sup>62</sup> Dryden (n4), 32.

<sup>63</sup> Rodensky, L. 'The Crime in Mind: Criminal Responsibility and the Victorian Novel' (OUP 2003), 6.

<sup>64</sup> *Ibid*, 7.

<sup>65</sup> *Ibid*, 11.

its own transgression'.<sup>66</sup> She questions what happens 'when a novelist creates an intent that is as active and material for the reader as an act? How are attitudes toward criminal responsibility altered, and what is the novel's response?'<sup>67</sup> Rodensky also argues that 'more extensive medical testimony about medical states' of mind towards the end of the nineteenth century meant that 'the relations between the internal and the external necessarily shifted'.<sup>68</sup> I would argue this developing diversion of blame and sympathy for criminals in Gothic texts of the nineteenth century (and the general absence of criminal trials within such Gothic works) makes the reader an active decision-maker in assigning legal fault as well as moral blameworthiness. And though doubles might be involved in the commission of crimes in my three texts, the fault traces back to the source of the protagonist, as I will show in later chapters.

We can develop the argument further by looking at the use already made of Gothic in criminology, developed by Caroline Picart and Cecil Greek, which has shown Gothic imagery can be used to compare 'both "real" and "reel" worlds [of criminal activity], which are intertwined in complex ways',<sup>69</sup> including 'the gothicization of male serial killers as vampiric'.<sup>70</sup> Greek and Farah Britto discuss the intersections between law and gothic horror, utilising methodology from sociology, monster theory and dystopia theory.<sup>71</sup> This resonates with my critical approach, in which I shift the focus to the literary and legal exploration of the guilty mind rather than the sociological aspects Picart and Greek foreground.<sup>72</sup>

The efficacy of the Gothic as a mode of reading texts, especially in *mens rea*-related problems, has been highlighted by Sue Chaplin, who describes the Gothic as 'one of the

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid, 18.

<sup>69</sup> Picart, C.J.S. ('Kay') and Greek, C. 'The compulsion of reel/real serial killers and vampires: Toward a gothic criminology' (2002) *Journal of Criminal Justice and Popular Culture*, 1-26.

<sup>70</sup> Ibid, 16 [sic].

<sup>71</sup> Britto, F. and Greek, C. 'A Depiction of Evil, Order and Chaos: The Symbiotic Relationship of Law and the Supernatural in Film and Television' in Picart, C.J.S ('Kay'), Jacobsen, M.H. and Greek, C. (eds). 'Framing Law and Crime: An Interdisciplinary Anthology' (Rowman and Littlefield 2016), 371-400.

<sup>72</sup> Picart and Greek (n69).

most *knowing*, one of the most self-referential, self-disruptive and self-mocking forms of contemporary cultural representation: it is hyper-aware... of its own problematic relation to representation and reality'.<sup>73</sup> Chaplin suggests that the Gothic 'does not simply *play games* with "truth"' but rather 'offer[s], in various ways, a deeply serious interrogation of the hidden criminality that constricts notions of "lawful" origin and authority'.<sup>74</sup> It is the more horrifying features of the Gothic, in Chaplin's view, that enable it to so vividly critique the law: '[w]ith its liminal, aberrant representation of terror and power... the Gothic places before the law its "disavowed ghosts", its demonised others, outlawed victims and hidden crimes'.<sup>75</sup>

Chaplin thus suggests that the 'law is necessarily and uncannily dependent upon its relation to death, textuality and spectrality', including through mimesis,<sup>76</sup> and posits that 'Gothic fiction [of the eighteenth and nineteenth centuries] comes to exemplify... the tensions inherent within "a certain interpretation of mimesis"', where eighteenth century literature represented both truth and Gothic 'fakery'.<sup>77</sup> Chaplin appears to be drawing on Freud's notion of the uncanny, *das unheimliche*, a useful concept to which I will briefly return later in this chapter.

I argue that law is a genre or set of genres that must be performed, and that each performance reinterprets and reinvents the genre. Leslie Moran notes that law is presented in Gothic fiction as something 'archaic and dark' that 'haunts, corrupts and renders labyrinthine the straight path of rule and reason'.<sup>78</sup> Moran identifies certain features of the law ('the court room, the trial, the dungeon, the prison, guilt')<sup>79</sup> as

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<sup>73</sup> Chaplin, S. 'Textual Properties: The Limit of Law and Literature – Towards a Gothic Jurisprudence' in Sarat, A. (ed) 'Special Issue: Law and Literature Reconsidered' (Studies in Law, Politics and Society, Vol. 3) (Emerald Group Publishing Ltd 2008), 113-131, 129 [sic].

<sup>74</sup> *Ibid* [sic].

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*, 118. As discussed in the last chapter, mimesis refers to the acting out of a story which occurs of stage in criminal trials – see chapter three, 77.

<sup>77</sup> *Ibid*, 121.

<sup>78</sup> Moran, L.J. 'Law and the Gothic Imagination' in Botting, F. (ed) 'The Gothic: Essays and Studies' (DS Brewer 2001), 87-110, 87.

<sup>79</sup> *Ibid*.



'important legal sites within the Gothic', each feature representing 'law as labyrinth'.<sup>80</sup> Moran describes murder as 'the gothic act par excellence'<sup>81</sup> and uses the example of Maturin's *Melmoth the Wanderer* to show that '[t]he wrongful act is the mark through which man's corruption is given form: evil made manifest. By way of the criminal act the body is made monstrous as a living example of this theme'.<sup>82</sup> However, Moran fails to identify exactly how this inner wrongfulness is manifested externally in Gothic fiction. In the next section, I intend to redress this by demonstrating how doubles in Gothic fiction can be read as manifesting the protagonist's internal crimes in an external way.

In a similar vein, Laura Appleman identifies the intersection between developing conceptions of the internal mind in both nineteenth century Gothic literature and legal doctrine, but I will augment her work by illustrating that the double is the literary figure which best allows us to explore the internal/external interplay in conceptions of the guilty mind. I suggest that this is an original feature of my law and literature methodology in substance, and fluid, gendered and queer in mode.<sup>83</sup> I will illustrate this by reading problems of proof in *mens rea* as works of Gothic fiction and, crucially, as doubles narratives. The law is de-historicising, a machine for taking out history; however literature can put the history back in and show when and how developments were emerging. This thesis defers resolution, but instead can illuminate, historicise and demonstrate that certain binaries within the law are unstable and bleed into each other.

The parallel evolution of the internal mind in law and literature of the nineteenth century has also been observed by Appleman, this time focusing on American jurisprudence of that era. Appleman, whose research focuses on *mens rea* and Gothic fiction in

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<sup>80</sup> Ibid, 88.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Regarding the use of queer/fluid as concepts in this thesis, see Butler, J. 'Gender Trouble: Feminism and the Subversion of Identity' (Routledge 1999) and Thomson, M. 'Endowed: Regulating the Male Sexed Body' (Taylor and Francis 2008).

nineteenth century criminal law,<sup>84</sup> suggests that 'Victorian literature on both sides of the Atlantic was worked alongside the law to expose the relationship of hidden motives to acts'.<sup>85</sup> I will build on her work by narrowing the focus from Gothic fiction to literary doubles. She argues that the works of American authors like Edgar Allan Poe, Washington Irving and Nathaniel Hawthorne were centred on 'the psychological motivations of the criminal offender beguiling a developing nation', and focused on 'mystery, internal psychology, and vaguely evil protagonist... [which] had some influence in the shaping of nineteenth-century criminal law'.<sup>86</sup> Here, Appleman is highlighting the commonalities between criminal law and Gothic fiction, particularly the emphasis on the internal mind of criminal defendants and literary protagonists alike.

Appleman notes a number of reasons why Gothic fiction was influential on nineteenth century criminal law, including a rise in third person narrative forms coinciding with the development of *mens rea* analysis, the latter of which required 'actual intent to commit a specific crime' as opposed to judging the defendant's 'wickedness'.<sup>87</sup> This mirrors the theories of Nicola Lacey regarding nineteenth century criminal law conceptions of character.<sup>88</sup> Appleman argues that 'nineteenth-century criminal responsibility came to encompass internal intent in addition to overt criminal acts in both law and fiction',<sup>89</sup> and goes so far as to suggest that:

Gothic fiction gave us precisely what the judge and jury can never know for sure: the thoughts of the offender at the time of the crime. By delving into the mind of the evildoer, Gothic fiction, like other American [and British] genres of the time, may very well have prompted its readers to think about what it means to have the *bad intent* to commit the crime. Victorian literature on both sides of the Atlantic was worked alongside the law to expose the relationship of hidden motives to acts.<sup>90</sup>

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<sup>84</sup> Appleman, L. 'Gothic Stories, *Mens Rea*, and Nineteenth-Century American Criminal Law' in Goodman, N. and Stern, S. (eds) 'The Routledge Research Companion to Law and Humanities in Nineteenth-Century America' (Routledge 2017), 356-68.

<sup>85</sup> *Ibid.*, 360.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Lacey, N. 'The Resurgence of Character: Criminal Responsibility in the Context of Criminalisation' in Duff, A. and Green, S. (eds) 'Philosophical Foundations of Criminal Law' (OUP 2011), 151-178.

<sup>89</sup> Appleman (n84), 360.

<sup>90</sup> *Ibid.*

Using Appleman's methodology will be important for my own work, particularly this contemporaneous analysis of *mens rea* in literature and the law via the developing understanding of the internal mind in both disciplines. I will augment Appleman's methods on the internal mind through the figure of the double, an externalised manifestation of the internal mind that is particularly prevalent in Gothic literature. I suggest that the double can be read as personifying the Gothic in that it externalises the internal mind of the protagonist, externally manifesting their internal (guilty) minds. In my view, Appleman's neglect of doubles represents a lost opportunity to utilise the full scope of the Gothic and its capacity to illuminate *mens rea*, a potential which I will explore in depth in the next section.

#### **4.3) Doubles Fiction: Conceptualising the Literary Double**

In the eighteenth and nineteenth centuries, one can detect an image of the self emerging in criminal law discourses and in the novel, particularly in the Gothic novel. In a sense, law and literature of the eighteenth century constructed the notion of the self, which both developed a sense of internal and external culpability for criminal actions: criminal law through a decreasing focus on character as a signifier of criminality in favour of probing the motivations of the defendant; and Gothic fiction through the figure of the double, which I suggest externalises the internal criminality of its counterpart, the protagonist.

Having shown that reading Gothic fiction can historicise legal and literary engagement with the criminal mind in the nineteenth century, I concentrate on an aspect of the genre that engages with the complex interplay of internality and externality in *mens rea* discussed in earlier chapters: namely, the literary double in Gothic fiction. Although the Gothic mode of the double will be my focus, I will first contextualize it as a figure in mythology, fairy tales and folklore. I will then discuss the prevalence of the literary double in literature, as well as its parallel development within the field of psychoanalysis, before narrowing in on the double and *mens rea* in nineteenth century fiction. I will use the terms double and Doppelgänger interchangeably in the following section in the mode of Karl

Miller,<sup>91</sup> because although the Doppelgänger is a literal duplicate of a person and the double is more general, both figures engage with notions of duality, unstable identity and the divided self that are key to my understanding of the literary double in Gothic fiction, which employs the double in ways that specifically explore the internal culpability of its protagonists.

#### 4.3.1) Origins: the double in mythology, folklore and history

The literary motif of the double is a fluid and often elusive one, as the term may take a variety of forms including Doppelgänger, evil twin and alter ego.<sup>92</sup> The Doppelgänger (or “double-goer”/“double walker”), perhaps the most visually striking mode of double, is a term coined by German Romantic novelist Jean Paul in 1796,<sup>93</sup> but the figure was prevalent for some time previous in folklore, where visions of a Doppelgänger (a ghostly duplicate of oneself) were seen as a harbinger of death.<sup>94</sup> Hillel Schwartz describes Doppelgängers as ‘mirror-twisted twins without whom the other has neither past nor future, yet in whose present and presence tragedy must ensue’; he argues that the ‘gothic horror and romantic terror of the Doppelgänger is the horror and terror of... a life contravening yours, but its fate your fate’.<sup>95</sup> Nicholas Royle also warns of the inextricable bond between character and double, noting that ‘one may want one’s double dead; but the death of the double will always also be the death of oneself’.<sup>96</sup>

More generally, the double is a figure that dates back to European antiquity: Zeus, ruler of the Gods in Greek mythology, often transformed his appearance in order to walk the earth and seduce mortal women.<sup>97</sup> Myths and legends are, for Katherine Burkman, sources where one might locate ‘paradigms of the dramatic dilemma of the self’ in such

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<sup>91</sup> Miller, K. ‘Doubles: Studies in Literary History’ (Faber and Faber 1985; reprinted 2008), 21.

<sup>92</sup> Fonseca, T. ‘The Doppelgänger’ in Joshi, S.T. (ed) ‘Icons of Horror and the Supernatural: An Encyclopaedia of Our Worst Nightmares’, Vol. 1 and 2 (Greenwood 2007), 187-214, 188.

<sup>93</sup> Paul, J. ‘Siebenkäs’ (Insel 2008; Leipzig und Wien 1796-97). Jean Paul, born Johann Paul Friedrich Richter, originally spelled Doppelgänger as ‘Doppeltgänger’.

<sup>94</sup> Fonseca (n92), 188.

<sup>95</sup> Ibid, 64.

<sup>96</sup> Royle, N. ‘The Uncanny’ (Manchester University Press 2003), 190.

<sup>97</sup> Christodoulou, G.N. (ed). ‘The Delusional Misidentification Syndromes: Key Issues, Mental Health’ (Basel Karger 1986), 164.

figures as Narcissus, Oedipus, and Demeter; she suggests that not only can the mythological double be viewed as ‘a way of expanding the self, of finding what is lost, of seeking to be whole’ but that the double ‘becomes a way into what is primal in all literature’.<sup>98</sup> Linda Dryden also suggests that ‘the fall of Satan’ in the book of Genesis ‘is frequently regarded as the story of an evil double, a theme picked up in [John] Milton’s *Paradise Lost* (1667)’.<sup>99</sup>

The double appears in fairy tales perhaps most evocatively as a hidden or second self, such as in Gabrielle-Suzanne Barbot de Villeneuve’s *Beauty and the Beast* (1790), where the true self is made monstrous by magic, and returned to its former beauty by love.<sup>100</sup> The double may feature in either a positive or negative capacity in fairy tales, according to Terence Patrick Murphy: as the ‘Angelic Double’ like Puss in Boots, who ‘carr[ies] out the major Heroic plot functions’ as well as the ‘initial preparatory work that will allow the Hero’ to succeed;<sup>101</sup> and as the ‘Diabolic Double’ like Tom-Tit-Tot, the ‘mirror image of the Angelic Double’ whose ‘sinister embrace’ the Heroine ‘must... elude’.<sup>102</sup> This good/evil dichotomy may also manifest in the fairy tales via foils, characters who help define the hero(ine) by contrasting them in physical, moral or thematic terms. For example, Alexandra Robbins observes that, in *Cinderella*, writer ‘[Charles] Perrault emphasizes the step mother’s assertiveness as a wicked trait serving as a foil to Cinderella’s pliant passivity’; it is the ‘juxtaposition of the assertive, evil woman with the submissive, acquiescent heroine [which] clearly suggests that little girls should aspire to be as tractable and compliant as Cinderella, the exemplary female’.<sup>103</sup>

Who the double is can, therefore, be read quite broadly, certainly more broadly than the *Doppelgänger*, which is significant for this thesis because a wider understanding of

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<sup>98</sup> Burkman, K.H. ‘The Drama of the Double: Permeable Boundaries’ (Palgrave Macmillan 2016), 15-16.

<sup>99</sup> Dryden (n4), 38.

<sup>100</sup> See Jacobs, L. ‘Resurrecting the buried self: Fairy tales and the analytic encounter’ (2011) *The Psychoanalytic Review*, 98(6), 871-890.

<sup>101</sup> Murphy, T.P. ‘The Fairytale and Plot Structure’ (Palgrave Macmillan 2015), 118.

<sup>102</sup> *Ibid*, 129.

<sup>103</sup> Robbins, A. ‘The Fairy-Tale Façade: Cinderella’s Anti-grotesque Dream’ (1998) *The Journal of Popular Culture*, 32(3), 101-115, 106.

doubles is needed to be able to include *Frankenstein* and even perhaps *Jekyll and Hyde* and *Dorian Gray* – all contain aspects of the Doppelgänger but are not clear-cut instances. The understanding of the double in this thesis is narrower than narrative foils, as in fairy tales, but broader than the Doppelgänger. The protagonist is, in my understanding, the progenitor of their double in some way; they existed first, and the double is born out of their being. Dorian Gray's portrait exists because of Dorian, Hyde exists because of Jekyll, and the creature exists because of Frankenstein. The protagonist of each has had a direct hand either in the creation of the double, as with Frankenstein and Jekyll, or the bond between them, as with Dorian after he makes the wish for his portrait to age instead of him.

#### 4.3.2) Haunting the text: doubles in literature

The dramatic, comedic and thematic potential of the double has long been exploited in literature and was favoured by William Shakespeare in many of his plays. Thomas Connolly explains that Shakespeare often employed a 'double man' to serve as a character's 'alter ego, a familiar spirit' who represents a 'unique facet in an individual's personality',<sup>104</sup> in order to enhance the tragedy or irony of the narrative.<sup>105</sup> Examples of this include Othello and Iago, King Lear and the Fool, Julius Caesar and Brutus. Connolly describes the disparity between character and double thusly: 'one is brave, honorable, strong, inclined to be conventional and not too bright, while the other is the devious character already described, who places intelligence, even a dark intelligence, above mere honor'.<sup>106</sup> Although they are opposites, they form two halves of the same whole; to locate it using imagery of the Gothic, the genteel Jekyll to the violent Hyde. Furthermore, Connolly observes that 'Hamlet is the double man in one package and he must therefore talk to himself, be deceived and mocked by himself. He is mad because he must be his own fool'.<sup>107</sup> Hamlet has more straightforward literary foils in the form of Laertes,

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<sup>104</sup> Connolly, T.F. 'Shakespeare and the Double Man' (1950) *Shakespeare Quarterly*, 1(1), 30-35, 30.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, 31.

<sup>107</sup> *Ibid.*

Fortinbras and Horatio, but Connolly discards them as true doubles for Hamlet's character because they provide too simple a contrast. They also fail as doubles for Hamlet because they do not play the 'Iago role', i.e. 'something which leads [Hamlet] to doubts and rationalizations and eventual defeat'; instead, that role is performed by Hamlet himself.<sup>108</sup>

Though the literary double is, I argue, most prototypical of the Gothic, it appears across a variety of genres including the tragedies, comedies and histories that Shakespeare's works may be categorised as, and genres that emerged in later centuries. John Cawelti, for example, locates it within the Western, which he observes 'is always set on or near a frontier, where man encounters his uncivilized double. The western thus takes place on the border between two lands, between two eras, and with a hero who remains divided between two value systems (for he combines the town's morals with the outlaws' skills)'.<sup>109</sup> Therefore, doubles not only represent the duality of moral codes between which the protagonist must choose, but also instantiate the old era and the new (and the instabilities therein) in physical form.

Having discussed the Doppelgänger in folklore and fairy tales in the previous section, I turn now to the literary Doppelgänger. As a 'figure of displacement', Andrew Webber describes the literary Doppelgänger as 'a figure of visual compulsion' in that the 'subject beholds its other self as another, as visual object, or alternatively is beheld as object by its other self'.<sup>110</sup> Webber is specifically investigating the Doppelgänger in German literature, but I am building on his conception by widening it to encompass the literary double in a broader sense. Webber finds the literary Doppelgänger most compelling when it is acting as a:

slippery double-agent, carrying out the dialectical transactions of the divided whole. As such it eludes the pursuit of criminal or psychological cases against it. The

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<sup>108</sup> Ibid, 32.

<sup>109</sup> Cawelti, J.G. 'The Six-Gun Mystique: Christian Metz, Language and Cinema' (Mouton 1974), 148-61. Referenced in Altman, R. 'A Semantic/Syntactic Approach to Film Genre' (1984) *Cinema Journal*, 23(3), 6-18, 11.

<sup>110</sup> Webber, A.J. 'The Doppelgänger: Double Visions in German Literature (Clarendon Press 1996), 3.

Doppelgänger is characteristically at once permissive and prohibitive, both a vicarious agent and a frustrating usurper of the subject's pleasures.<sup>111</sup>

As an 'inveterate performer of identity', Webber notes the Doppelgänger 'engages in a process of enactments of identity always mediated by the other self', and 'operates divisively on language' in that it 'echoes, reiterates, distorts, parodies, dictates, impedes, and dumbfounds' speech.<sup>112</sup> Webber highlights as a central element of the literary Doppelgänger the 'power-play between ego and alter ego' in which 'power... is always caught up in an exchange, never to be simply possessed as mastery of the self, of the other, or of the other self'.<sup>113</sup> In exploring this exchange across time, Webber suggests that the double 'returns compulsively both within its host texts and intertextually from one to the other. Its performances repeat both its host subject and its own previous appearances. It therefore plays a constitutive role in the structuring of its texts, by doubling them back on themselves'.<sup>114</sup> Webber has already highlighted the double's capacity to manipulate speech, and here he is addressing the metatextual power of the double both inside and outside of its text. His interpretation of the double is particularly relevant here as this thesis engages with the intertextual development of the interior self in both literature and the law through the figure of the double.

Therefore, the double functions to manifest, and often enact, the protagonist's immoral desires – although the doubling might be metaphorical, allegorical or symbolic rather than physically identical. Webber argues that the 'duplication' of a character in literature 'points up an essential lack which must be supplemented, a lack within the "real self", and by extension within the order of the real'.<sup>115</sup> I disagree with Webber's hypothesis that the double 'resists all categorical literary-historical identification'<sup>116</sup> because, as discussed above, genres can change and mutate as they are performed and reinterpreted. Webber seems to be criticising the form of the literary double, as opposed

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid, 4.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid, 10.



to its function. The form of the double might change (as I have shown, the doubling might be physical or symbolic), but the function of the double remains recognisable in its ability to manifest the protagonist's internal mind. As I argued in the last chapter, intertextuality is the way in which legal form (and especially legal precedent) registers in the structure of the novel. From my view, it appears that the intertextual power of the double makes it an easily identifiable, but extremely mutable and fluid literary figure who can personify division, dichotomy and fragmentation. This is the case, in my view, because the double *is* a figure of instability, contradiction and paradox; two binaries representing one whole self (protagonist and double), the mutability of which in relation to each other can be utilised, as in this thesis, as a way of critiquing and destabilizing the binaries of the *mens rea*-related problems discussed in chapter two.

This interconnectedness of protagonist and double is supported by Shraddha Pal, who argues that 'the central premise of the motif of [the] double is the paradox of encountering self as other'.<sup>117</sup> Pal goes on to explain the two main types of doubles in literature: the external double (i.e. the 'duplicated figure of a character as an identical self or alter ego') and the internal double (which comprises 'an attribute to consciousness of a character').<sup>118</sup> Pal argues that doubles in literature represent the process of seeing the self as other; I would extend this by suggesting that doubles in literature manifest the illusive *mens rea* element of seeing themselves as observers rather than as participants in their mental processes. I would also add a third category to Pal's theory: that of a constructed double, a character that is externally separate from, but internally connected to, the protagonist. Though a constructed double may not be identical to the protagonist, nor share a literal part of their consciousness, they might function as a mirror of the protagonist's hidden self – an understanding I have developed specifically in relation to doubling in *Frankenstein*, *Jekyll* and *Dorian*. The doubling in *Frankenstein* is less obvious

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<sup>117</sup> Pal, S. 'Encountering Self as Another: The Motif of Double in Dostoevsky's Novel "The Double" and Jose Saramago's Novel "The Double"' (2015) *Research Scholar: International Refereed Journal of Literary Explorations*, 3(2), 434-438, 435.

<sup>118</sup> *Ibid.*

than in, for example, *Jekyll and Hyde* or *Dorian Gray*, but the relationship between Victor and the creature provides, in my view, insight of a different kind. In other words, the constructed double combines elements of Pal's internal and external doubles whilst also incorporating elements of symbolic or philosophical doubling. I will further explore my understanding of the constructed double later in this section.

#### 4.3.3) The double as the unconscious self: an overview of the psychoanalytic perspective

The literary double rose to a new prominence in nineteenth century Gothic fiction, culminating in parallel to the burgeoning field of psychoanalysis at the *fin-de-siècle*. Literary critic, Ralph Tymms, looking back on the era, presents the double as 'an allegorical representation or as a projection of the second self of the unconscious'.<sup>119</sup> My understanding of the double draws primarily from literary criticism and literary theory, though the psychoanalytical perspectives of Sigmund Freud, Carl Jung and Otto Rank resonate with my critical approach and, as such, will be briefly engaged with in this section.

Early proponents of psychoanalysis argued that the double was the secret side of oneself that contained the dark impulses people sought to repress, especially in the conservative Victorian *fin-de-siècle*. Otto Rank for example highlights the 'equivalence of the mirror and shadow as images, both of which appear to the ego as its likeness'.<sup>120</sup> This would appear to complement Pal's theory (above) of the double representing 'the self as other'. Rank observes that texts in which the double 'is clearly an independent and visible cleavage of the ego (shadow, reflection) are different from those actual figures of the double who confront each other as real and physical persons of unusual external similarity, and whose paths cross'.<sup>121</sup> An example of the former given by Rank is Goethe's *Fairy Tale*, in which a giant's shadow appears to possess an uncanny tangibility

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<sup>119</sup> Tymms, R. 'Doubles in Literary Psychology' (Cambridge 1949).

<sup>120</sup> Rank, O. 'The Double: A Psychoanalytic Study' (University of North Carolina Press 1971), 10.

<sup>121</sup> *Ibid*, 12.

and independence;<sup>122</sup> an example of the latter would be Dostoyevsky's *The Double*,<sup>123</sup> in which Golyadkin meets his exact physical duplicate.<sup>124</sup>

The psychoanalytical conception of the shadow-self Rank describes was developed Carl Jung, who conceptualised the double as the secret inner self, a 'shadow [which] personifies everything that the subject refuses to acknowledge about himself'.<sup>125</sup> Jung argued that '[p]eople will do anything, no matter how absurd, in order to avoid facing their own souls. One does not become enlightened by imagining figures of light, but by making the darkness conscious'.<sup>126</sup> The double evokes a similar feeling to Freud's notion of the uncanny ('*unheimliche*'),<sup>127</sup> a word which is 'obviously the opposite of *heimlich*, *heimisch*, meaning "familiar," "native," "belonging to the home"', and that '[s]omething has to be added to what is novel and unfamiliar to make it uncanny':<sup>128</sup>

The word *heimlich* is not unambiguous, but belongs to two sets of ideas, which, without being contradictory, are yet very different: on the one hand it means what is familiar and agreeable, and on the other, what is concealed and kept out of sight. *Unheimlich* is customarily used, we are told, as the contrary only of the first signification of *heimlich*, and not of the second... On the other hand, we notice that Schelling says something which throws quite a new light on the concept of the *Unheimlich*, for which we were certainly not prepared. According to him, everything is *unheimlich* that ought to have remained secret and hidden but has come to light.<sup>129</sup>

The *heimlich* and the *unheimlich* are therefore connected, in Freud's view; similar but distinct, opposites but intertwined – reminiscent of, I suggest, the divided selves of Jekyll and Hyde that I will discuss in a later chapter. Drawing on Schelling's theory and the fiction of E.T.A. Hoffmann, Freud conceptualises the uncanny as something previously hidden that has come to light, in the same way that the literary double may reveal once-concealed truths about its counterpart. However, Freud appears to view the uncanny

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<sup>122</sup> Rank is presumably referring to Von Goethe, J.W. 'Goethe's Fairy Tale of the Green Snake and the Beautiful Lily' Vol. 14. (Red Wheel/Weiser 1982; 1795), referenced in Rank (n120), 12.

<sup>123</sup> Rank (n120), 12, referencing Dostoyevsky, F. 'The Double: A St Petersburg Poem' (Dover Thrift 1997; *Otechestvennye Zapiski*/Fatherland Notes 1846).

<sup>124</sup> Rank (n120), 12.

<sup>125</sup> Jung, C.G. 'The Archetypes and the Collective Unconscious, Vol. 9, Part 1 of 'The Collected Works' (Princeton 1969), 284-85.

<sup>126</sup> Jung, C.G. 'Psychology and Alchemy', Vol. 12 of The Collected Works (Princeton 1980). See also: Campbell, J. (ed) 'The portable Jung' (Penguin 1971), 362-63.

<sup>127</sup> Freud, S. '*Das Unheimliche*/The Uncanny' in Freud, S. and Strachey, J. (ed) 'The Standard Edition of the Complete Psychological Works of Sigmund Freud' Vol. 17 (Hogarth Press 1976; Imago 1919), 1920-22.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

figure of the double as a symptom of narcissistic delusion, in contrast to my reading of the double as a product of the unconscious and the repressed who can externally reveal the hidden interior self. There are, in short, affinities between my understanding of the double and that of Freud, Rank and Jung, particularly Freud's notion of *das unheimliche* and Jung's conscious darkness: although these remain distinct from the approach in this thesis, which develops an understanding of the double rooted in literary criticism and literary theory, as demonstrated in this chapter. My approach draws instead on Valdine Clemens', who repurposes Freud's 'return of the repressed'.<sup>130</sup> Clemens identifies the 'repressed' in Gothic literature as:

Something – some entity, knowledge, emotion, or feeling – which has been submerged or held at bay because it threatens the established order of things, develops a cumulative energy that demands its release and forces it to the realm of visibility where it must be acknowledged.<sup>131</sup>

Therefore, my methodology adapts this theme in relation to the literary figure of the double, as it embodies the ways in which Gothic fiction disrupts and destabilises binaries.

#### 4.3.4) *The Double in nineteenth century Gothic fiction*

Literature of the nineteenth century increasingly engaged with crime, both in terms of unlawful activities and the perpetrators of such actions. The Newgate novels, such as Dickens' *Oliver Twist*<sup>132</sup> and William Harrison Ainsworth's *Rookwood*,<sup>133</sup> fictionalised (and arguably glamorised) the lives of criminals. Early works of detective fiction, such as Arthur Conan Doyle's *A Study in Scarlet*,<sup>134</sup> Edgar Allan Poe's *The Murders in the Rue Morgue*,<sup>135</sup> and Wilkie Collins' *The Woman in White*<sup>136</sup> and *The Moonstone*,<sup>137</sup> also incorporated themes of legality and criminality into their narratives. The detective novel and the Gothic novel both engage in the process of determining culpability, attributing

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<sup>130</sup> Freud, S. and Strachey, J. (transl.) 'The Standard Edition of the Complete Psychological Works of Sigmund Freud' (24 Vols, Hogarth 1953-74). Freud's theory referred to the repression and return of primal sexual instincts.

<sup>131</sup> Clemens, V. 'The Return of the Repressed: Gothic Horror from The Castle of Otranto to Alien' (State University of New York Press 1999), 3-4.

<sup>132</sup> Dickens, C. 'Oliver Twist; or, the Parish Boy's Progress' (Richard Bentley 1839).

<sup>133</sup> Ainsworth, W.H. 'Rookwood; A Romance' (John Macrone 1836).

<sup>134</sup> Doyle, A.C. 'A Study in Scarlet' (Beeton's Christmas Annual: Ward Lock and Co. 1887).

<sup>135</sup> Poe, E.A. 'The Murders in the Rue Morgue' (Graham's Magazine 1841).

<sup>136</sup> Collins (n42).

<sup>137</sup> Ibid.

responsibility and laying down the resulting sentence for criminal action. They both incorporate elements of writing from legal genres, including witness statements, confessions and testimony at trial. Although these engage with notions relating to *mens rea* as they focus on an investigation into who has the motive to commit a crime, I would argue that detective novels focus less on this interior aspect and more on the retrospective, procedural investigation. In contrast (as Rodensky posits for Victorian novels),<sup>138</sup> I suggest that Gothic fiction allows the reader into the criminal mind and thus actively engages with the internal, *mens rea*-related aspects of crime, not just the procedural element after the fact.

The shift across literature and law of the nineteenth century may be attributable to changes across the British empire during this time. The industrial revolution, which took place during the eighteenth century and first half of the nineteenth, meant mass migration from rural towns into the urban environments of big cities to find work. Increasing overpopulation in the cities, coupled with poor working conditions, despite the technological advancements of industry, led to an increasingly wide gulf between the classes during a time in which the social status quo was rigidly enforced. David Cannadine observes that '[d]uring the early nineteenth century, [Parliamentary reformer William] Cobbett depicted a nation polarised between "the People" and "the Thing"'; Cannadine suggests that '[t]he struggle between the bourgeoisie and the proletariat, or capital and labour' popularised by Karl Marx and Friedrich Engels 'was but another version of the same dichotomous model' proposed by Cobbett, noting that this 'us' and 'them' schism continued well on into the next century.<sup>139</sup> The class-based discontent and social struggle articulated by Marx and Engels had been building for decades before they proclaimed in *The Communist Manifesto* that '[w]hat the bourgeoisie therefore produces, above all, are its

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<sup>138</sup> Rodensky (n63).

<sup>139</sup> Cannadine, D. 'Beyond class? Social structures and social perceptions in modern England' (1998) *Proceedings-British Academy*, 97, 95-118, 102.

own grave-diggers'.<sup>140</sup> The plight of the proletariat, illuminated by Marx and Engels, was arguably characterised by the rising turmoil between the classes across Britain and Europe during the first half of the nineteenth century,<sup>141</sup> notably the Peterloo Massacre in 1819,<sup>142</sup> the brief resurgence of Chartism mid-century<sup>143</sup> and the 1848 revolutions.<sup>144</sup>

The expansion of the British empire became so normalised during the latter half of the nineteenth century that, as Ruth Watts observes, imperial memorabilia became standard in the middle-class British home during the period, which included 'material artefacts such as the spoils of empire filling the homes of aristocrats', as well as 'tales of war and derring-do' and 'popular art, music hall songs and show business'.<sup>145</sup> This 'imperial gaze' had a divergent effect in Watts' view: whilst '[a]nti-slavery and missionary activities could arouse humanitarian sympathies and sentiments of brotherhood and sisterhood', this was 'generally... within a framework of acceptance of the superiority of white people, their "civilization" and religion'.<sup>146</sup> The duality of empire is apparent in the evidence Watts presents: the portrayal of British Colonialism in its memorabilia as a triumph of so-called 'civilised' powers was a façade that concealed its true nature as a deeply brutal, exploitative and inhumane regime.

As the nineteenth century progressed, a tension appears to have arisen between, on the one hand, increasingly fluid binaries, and on the other, rigid enterprises like empire, militarism and law. John Corrigan suggests that Victorian-constructed binaries such as 'masculine/feminine and private/public' were in reality 'fluid, highly flexible categories, imbricated at some points, bleeding in to each other at others'.<sup>147</sup> For example, Corrigan

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<sup>140</sup> Marx, K. and Engels, F. 'The Communist Manifesto of the Communist Party/*Manifest der Kommunistischen Partei*' (Floating Press 2008, from 1888 edition; 1848), 27.

<sup>141</sup> See Osborne, P. 'Remember the future? The Communist Manifesto as historical and cultural form' (1998) *Socialist Register*, 34, 190-204.

<sup>142</sup> Poole, R. "'By the law or the sword": Peterloo revisited' (2006) *History*, 91(302), 254-276.

<sup>143</sup> Taylor, M. 'The 1848 Revolutions and the British Empire' (2000) *Past and Present*, 166(1), 146-180.

<sup>144</sup> *Ibid.*

<sup>145</sup> Watts, R. 'Education, empire and social change in nineteenth century England' (2009) *Paedagogica Historica*, 45(6), 773-786, 775.

<sup>146</sup> *Ibid.*, 778.

<sup>147</sup> Corrigan, J. 'Business of the Heart: Religion and Emotion in the Nineteenth Century' (University of California Press, 2002), 9.

notes that, initially, 'the nineteenth century had constructed women as the emotional sex' and men the opposite, but notes there was a 'fluidity to gender roles' throughout the period which manifested in '[m]ale emotionality [being] progressively reconstructed as expressive' and increasing 'support for an expansion of the role during the latter half of the century'.<sup>148</sup> The tension between the public and private self, also highlighted by Corrigan,<sup>149</sup> may arguably find expression in the art of the era, for example the painting *How They Met Themselves* (1851) by Pre-Raphaelite artist Dante Gabriel Rossetti.<sup>150</sup> Heather Braun notes that the painting depicts the 'spectral moment when a man and woman meet their doubles and swoon in horror at this discovery',<sup>151</sup> arguing that 'Rossetti's "doubled" art reflects contradictions of the Victorian period that apply directly to his depictions of the Doppelgänger figure'.<sup>152</sup>

However, as noted above, there is a tension between this fluidity and the more inflexible enterprises of empire, governance and law: for example, the latter half of the nineteenth century in particular saw the closing down of sexuality in conservative legislation like the Offences Against the Person Act 1861 which criminalized abortion<sup>153</sup> and homosexuality.<sup>154</sup> Though commentators like Carl Degler and Ellen Rothman have questioned the accuracy of the image of the repressed Victorian,<sup>155</sup> legislation like the above and the Criminal Law Amendment Act 1885 (S.11 of which had the effect of prosecuting homosexual men, including Oscar Wilde, for what the bourgeois Victorian legislature puritanically deemed 'acts of gross indecency with male persons')<sup>156</sup> suggests

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<sup>148</sup> Ibid, 128.

<sup>149</sup> Ibid, 149, 253.

<sup>150</sup> Rossetti, D.G. 'How They Met Themselves' (1851).

<sup>151</sup> Braun, H. 'Research Report for Victorian Doppelgängers' (2014), 1-5, 2, accessed 22 January 2018 from <[https://library.columbia.edu/content/dam/libraryweb/about/awards/Braun\\_2014\\_CUL\\_Libawards.pdf](https://library.columbia.edu/content/dam/libraryweb/about/awards/Braun_2014_CUL_Libawards.pdf)>

<sup>152</sup> Ibid.

<sup>153</sup> S. 58, S. 59 Offences Against the Person Act 1861.

<sup>154</sup> Ibid, S.61, S.62.

<sup>155</sup> Seidman, S. 'The Power of Desire and the Danger of Pleasure: Victorian Sexuality Reconsidered' (1990) *Journal of Social History*, 24(1), 47-67. See also Miller, A.H. and Adams, J.E. (eds) 'Sexualities in Victorian Britain' (Indiana University Press 1996).

<sup>156</sup> S.11, Criminal Law Amendment Act 1885.

a shift towards conservative, reactionary social mores that arguably speaks to a society preoccupied with sex and sexual repression.

The anxieties of this socially, politically and culturally fraught climate were expressed in the literature of the age, particularly in the Gothic novel, which could mask politically commentary in fantasy, hyperbole and high drama. The conventions of the genre, developed in the late eighteenth century by Radcliffe, Lewis and Walpole, were repurposed and reinterpreted by writers like James Hogg, Charlotte Brontë and Charles Dickens in the mid-nineteenth century, with for instance Dickens' use of doubles in *A Tale of Two Cities*<sup>157</sup> and ghosts in *A Christmas Carol*,<sup>158</sup> tropes which were then evolved by writers like Stevenson, Wilde and Stoker by the *fin-de-siècle*. Dickens was positioned at a moment where the Victorian capitalist order was thickening its disciplinary regime through a strict hierarchy of the classes, and can be viewed as a bridge between Shelley at the beginning of the century and Stevenson and Wilde at the end. Theresa Atchison observes how Dickens 'intimate[s] certain aspects of his characters' interiority by creating a performative exterior' through the use of accessories.<sup>159</sup> In relation to the Gothic conventions of *Great Expectations*, for example, Atchison posits that:

Dickens utilizes Miss Havisham's dramatic, gothic exterior in order to convey an unspeakable trauma within her past. By revisiting the overlooked female accessories Dickens uses to describe her, namely her footwear, her interiority within a Victorian context reveals a subtext pertaining to her loss of chasteness.<sup>160</sup>

In this way, a literary character's internal mind is manifested externally by an object (as opposed to a person), which acts as a double for the protagonist. This would appear to complement Julian Wolfreys' assessment that literary doubling is 'not simply a rhetorical device but is the figure of haunting par excellence';<sup>161</sup> it similarly echoes William

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<sup>157</sup> See, for example, Gallagher, C. 'The Duplicity of Doubling in "A Tale of Two Cities"' (1983) *Dickens Studies Annual*, 12, 125-145.

<sup>158</sup> See, for example, Smith, A. 'Dickens' Ghosts: Invisible Economies and Christmas' (2005) *Victorian Review*, 31(2), 36-55.

<sup>159</sup> Atchison, T. 'Accessories to the Crime: Mapping Dickensian Trauma in *Great Expectations* and *A Tale of Two Cities*' (2016) *Fashion Theory*, 20(4), 461-473, 461.

<sup>160</sup> *Ibid*, 463.

<sup>161</sup> Wolfreys, J. 'Victorian Hauntings: Spectrality, Gothic, the Uncanny and Literature' (Palgrave Macmillan 2002), 15.



Greenslade's observation that 'doubles or mirrored identity, where subject and "other" are brought into troubling relationship' – of which he cites Holmes and Moriarty, and Van Helsing and Dracula as prime examples – 'proliferated in the literature of the period'.<sup>162</sup> He also contends that *Jekyll and Hyde* presents 'a commanding figure of the divided self'.<sup>163</sup>

Doubles fiction, as I have termed it in this thesis, is referred to by Carl Keppler as 'the literature of the second self',<sup>164</sup> noting that '[t]he more one sees of the double in literature the more it appears that he is the product not of tradition but of individual experience, and a new experience on the part of each writer who has made use of him'.<sup>165</sup> Keppler suggests that the image of Narcissus and his reflection from Greek mythology is a microcosm of the double as 'a mystery of contradiction, of simultaneous distinction and identity, of an inescapable two that are at the same time an indisputable one'.<sup>166</sup> Keppler posits that 'physical duplication... is not necessarily a feature of the relationship' between protagonist and double, nor is 'psychological duplication'.<sup>167</sup> The term 'second self', according to Keppler, allows for an understanding of the double that is not 'purely internal', as '[l]ike "Double" it suggests twofoldness without implying duplication; like "inner self" it suggests a deeper relationship but not one that is confined to a state of mind'.<sup>168</sup> Crucially for Keppler, 'second self' suggests an important distinction in his understanding of the double: that '[a]utomatically, in being "second", the second self presupposes and is differentiated from the "first self", a relationship I refer to as protagonist ('first self') and double (Keppler's 'second self')'.<sup>169</sup> These two characters are

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<sup>162</sup> Greenslade, W. 'Degeneration, Culture and the Novel, 1880-1940' (Cambridge University Press 1994), 72.

<sup>163</sup> *Ibid.*

<sup>164</sup> Keppler, C.F. 'The Literature of the Second Self' (University of Arizona Press 1972), x.

<sup>165</sup> *Ibid.*, xii-xiii.

<sup>166</sup> *Ibid.*, 1.

<sup>167</sup> *Ibid.*, 2.

<sup>168</sup> *Ibid.*, 2 [sic].

<sup>169</sup> *Ibid.*, 3.

'distinct in a particular way' to Keppler in that the 'first self... is the one whose viewpoint the reader shares' whereas the 'second self is the intruder'.<sup>170</sup>

This interplay between first and second selves (to use Keppler's terminology), or protagonists and doubles (to use mine), was a frequent feature in nineteenth century fiction according to John Herdman, who appears to echo Keppler in describing the double as:

a second self, or alter ego, which appears as a distinct and separate being apprehensible by the physical senses (or at least by some of them), but exists in a dependent relation to the original. By 'dependent' we do not mean 'subordinate', for often the double comes to dominate, control, and usurp the functions of the subject; but rather that... [the double] has its *raison d'être* in its *relation* to the original. Often, but not always, the subject and his double are physically similar, often to the point of absolute identity.<sup>171</sup>

Therefore, the double is not only a figure of duality, which Karl Miller notes means that 'there are two of something' simultaneously and that 'some one thing or person is to be perceived as two',<sup>172</sup> but a figure of interdependence in which the subject and their double are distinct but interconnected. This can mean 'the clinical phenomenon of a multiple identity', which Miller appears to understand in the psychoanalytic sense of the term, and also 'the cultural phenomenon of a multiple identity which opens itself to the world and to the experience of others, which both enhances and annihilates the self'.<sup>173</sup> He suggests that '[I]ate Victorian duality may be identified with the dilemma, for males, of a choice between male and female roles, or of a possible union of such opposites'.<sup>174</sup> 'Odd', 'queer', 'dark', and 'nervous', Miller observes, 'are the bricks which had built the house of the double'.<sup>175</sup> Drawing on the queer, disruptive methods of Butler and Wetlaufer, as discussed in the last chapter, Miller's framing of the double as a figure of

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<sup>170</sup> Ibid.

<sup>171</sup> Herdman, J. 'The Double in Nineteenth-Century Fiction' (Macmillan 1990), 14.

<sup>172</sup> Miller (n91), 122.

<sup>173</sup> Ibid, 121-22.

<sup>174</sup> Ibid, 216.

<sup>175</sup> Ibid, 241.

instability is of importance to this thesis as I use doubles in my three texts to destabilise problems relating to *mens rea*.

As noted above, the double was a figure in myth, legend and folklore long before it haunted the literary text. Miller suggests that although 'dualistic lores and philosophies' evolved long before the Romantic period (essentially back to 'antiquity'), pre-eighteenth and nineteenth century fiction did a great deal to reinvent and revitalise themes of duality through the figure of the double.<sup>176</sup> Indeed, Miller describes the last two decades of the nineteenth century as 'duality's heyday',<sup>177</sup> framing the 'fictional double' as the 'hypothesis known to Victorians as the essential duality of man'.<sup>178</sup> The *fin-de-siècle* was thus an especially potent time for duality in the Gothic novel, as Kelly Hurley observes:

In place of a human body stable and integral... the *fin de siècle* Gothic offers the spectacle of a body metaphoric and undifferentiated; in place of the possibility of human transcendence, the prospect of an existence circumscribed within the realities of gross corporeality; in place of a unitary and securely bounded human subjectivity, one that is both fragmented and permeable.<sup>179</sup>

I would extend this beyond the *fin-de-siècle* Gothic to works at the start of the nineteenth century, as the creature in *Frankenstein* is not only a reflection of Victor but is a 'fragmented' and 'permeable' figure (to use Hurley's terms) in and of himself – a being literally constructed out of the body parts of multiple corpses. The permeable boundaries of the double that Hurley identifies have also been observed by Katherine H. Burkman, who suggests that 'the doubling of the self does not pertain to a foreign entity; rather, it articulates something deeply familiar to the psyche that has merely become unfamiliar owing to repression',<sup>180</sup> which resonates especially with the conservative Victorian *fin-de-siècle* society. Though Burkman's focus is primarily on the double in theatre, her notion of the 'true double' arising when 'the boundaries between self and other are

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<sup>176</sup> Ibid, 21.

<sup>177</sup> Ibid, vi.

<sup>178</sup> Ibid, 22.

<sup>179</sup> Hurley, K. 'The Gothic Body: Sexuality, Materialism and Degeneration at the Fin de Siècle (Cambridge University Press 1996), 3.

<sup>180</sup> Burkman, K.H. 'The Drama of the Double: Permeable Boundaries' (Palgrave Macmillan 2016), 2.

permeable<sup>181</sup> not only complements Hurley's understanding of the double but also the interconnected nature of subject and double that recurs in literary criticism, as discussed in this chapter.

The prevalence of the double in the Victorian Gothic of the end of the nineteenth century is viewed by Masao Miyoshi as representing psychological struggles between imagination and reason, personal faith and social responsibility at the *fin-de-siècle*.<sup>182</sup> Bridget Marshall would appear to complement this view, positing that 'the nature of justice and the nation's legal and penal systems' are a focus in Gothic novels of this era,<sup>183</sup> and that '[t]he power of the Gothic lies not in its ability to make us fear imaginary things, but to make us fear very real things, and more importantly, to do something about those fears'.<sup>184</sup> Extending this, I would argue that this shift is reflected in doubles narratives of the nineteenth century, which tend to focus on individual action and personal responsibility; for example James Hogg's *Private Confessions and Memoirs of a Justified Sinner* which focuses on the immoral, unlawful and criminal actions of its antiheroic protagonist (I will briefly return to this text later in the chapter).

#### 4.3.5) Doubles fiction and mens rea

Having described the criminal aspects of Doubles fiction, I now explore *mens rea*, which I argue is manifested in the literary double. Hidden and duplicated selves feature throughout the criminal law, with the defendant's behaviour being objectively compared against the behaviour of a (fictional) reasonable person fabricated by the court, as I discussed in chapter two. Equally, claims about defendants such as 'he wasn't acting like himself', 'he seemed as though he was possessed', and 'it doesn't sound like the kind of thing he'd do' all involve doubling and othering the defendant, blaming his actions

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<sup>181</sup> Ibid, 2.

<sup>182</sup> Miyoshi, M. 'Dr Jekyll and the Emergence of Mr Hyde' (1966) *College English*, 27(6), 470-480, 479.

<sup>183</sup> Marshall, B.M. 'The Transatlantic Gothic Novel and the Law, 1790-1860' (Ashgate 2011), 1.

<sup>184</sup> Ibid, 161.

on a double of some kind. For example, Masao Miyoshi appreciates the Gothic's potential for exploring humanity's 'sharply personal sense of the war within'.<sup>185</sup>

The 'literature of duality', as Linda Dryden describes it, 'is, at its most obvious level, a literature about identity, or even lack of identity... This identity is further compromised in the literature of duality with the recognition of the self's "other"'.<sup>186</sup> She contends the 'London labyrinth was a physical manifestation of the double life that many metropolitan citizens were perceived to be leading',<sup>187</sup> and suggests that '[t]o be haunted by another, by a spectre, is uncanny enough, but to be haunted by yourself strikes at the foundations of identity'.<sup>188</sup>

In eighteenth century literature, Stephanie Barbé Hammer observes that 'a law-abiding double is used frequently in conjunction with the criminal protagonist',<sup>189</sup> for example Barnwell and Trueman in George Lillo's *The London Merchant*, as a way for the author to undertake 'complex critiques of the dichotomy criminality/compliance'.<sup>190</sup> I extend this by arguing that in nineteenth century literature, specifically Gothic/Doubles fiction, these law-abiding/law-breaking characters merge and move inward via the literary figure of the double, thus representing the duality of good and bad behaviour of which a human being is capable. This argument is supported by Nicola Lacey, who notes that:

[f]rom the mid-18th Century on, as the novel gradually claimed a place in polite society and high culture, the description and analysis of criminality which had formed a place in the work of early writers like Defoe and Richardson were rapidly evacuated from the 'Realist' tradition and displaced onto the 'Gothic' novels of Walpole, Lewis, Radcliffe, and others.<sup>191</sup>

This thesis essentially reads supernatural texts of Gothic fiction as Realist fiction; Lacey notes the Gothic passed on the internal mind to the Realist novel, and my work in effect

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<sup>185</sup> Miyoshi, M. 'The Divided Self: A Perspective on the Literature of the Victorians' (New York University Press 1969), xiv.

<sup>186</sup> Dryden (n4), 39-40.

<sup>187</sup> *Ibid.*, 43.

<sup>188</sup> *Ibid.*, 41.

<sup>189</sup> Hammer, S.B. 'The Sublime Crime: Fascination, Failure, and Form in Literature of the Enlightenment' (Southern Illinois University Press 1994), 80.

<sup>190</sup> *Ibid.*

<sup>191</sup> Lacey, N. 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) *Criminal Law and Philosophy*, 4(2), 109-133, 114-15.

hands it back to Gothic literature. By viewing the double in my chosen texts as verifiably present (as opposed to products of the subconscious seen in Freud, Jung and others above) I am reading the supernatural elements of *Jekyll*, *Dorian* and *Frankenstein* within a Realist frame. Following on from that, I argue Gothic novels in the nineteenth century became the courtroom for the criminal protagonist, and the double became the figure through which they could express and externalise their guilty minds. Tony Fonseca argues that the double 'comes to represent those parts of the self that the society, and perhaps the individual as well, find unacceptable',<sup>192</sup> as well as representing 'a mirror version of the self whose behaviour reveals all the original would prefer remain hidden'.<sup>193</sup> This is arguably true of the double in James Hogg's *The Private Memoirs and Confessions of a Justified Sinner* and Edgar Allan Poe's *William Wilson*, where the double seems to represent the immoral desires of the protagonist.

In this section I have demonstrated how problems of proof relating to *mens rea* can be personified by the double in Gothic fiction manifesting the qualities the protagonist is capable of but has suppressed (subjective); they are also personified by the double acting as the reasonable man and comparator against which the protagonist is judged (objective). I suggest that the interplay between internal/external and subjective/objective in *mens rea* is manifested through the interconnected relationship of the protagonist and double. Just as Mikhail Bakhtin argues that 'languages throw light on each other: one language can, after all, see itself only in the light of another language'<sup>194</sup> (an observation I mentioned in the last chapter), I suggest that, in a similar vein, the Gothic double can be read as illuminating, critiquing and destabilizing the binaries of problems relating to *mens rea* which I discussed in chapter two.

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<sup>192</sup> Fonseca (n92), 190.

<sup>193</sup> Ibid.

<sup>194</sup> Bakhtin, M.M. 'Epic and Novel: Toward a Methodology for the study of the Novel' in Holquist, M. (ed) 'The Dialogic Imagination: Four Essays' (University of Texas Press 1981), 43-62, 51.

Combining these elements of literary criticism, my model of the literary double is as follows: this thesis takes Keppler's understanding of Doubles fiction as the literature of the second self, Herdman's notion of the double as a distinct and separate being, but one which exists *because of* the protagonist, and Miller's concept of the double as a queer, uncanny, destabilising figure. I add Webber's notion of the double manifesting the protagonist's internal desires and combine that with Shraddha Pal's 'self as other' theory and her categorisation of the internal and external double; but as mentioned above, I add a third category, the constructed double, which combines elements of the two. I suggest that the double is a product of the character's unconscious or repressed self, either literally in the text or metaphorically through subtext, which can be read as externally revealing the hidden interior self. My understanding of the double is that it is a fluid, destabilising concept that facilitates multiple readings, queer readings, and fluid readings due to its flexibility as a (literary, for my purposes) concept.

#### **4.4) Justifying My Choice of Texts**

Having developed this critical framework, I now outline the three key examples of Doubles fiction which manifest the inner mind as outer self: Oscar Wilde's *The Picture of Dorian Gray*, Robert Louis Stevenson's *Strange Case of Dr Jekyll and Mr Hyde*, and Mary Shelley's *Frankenstein; or, The Modern Prometheus*. Jack Halberstram argues that the 'dialectic between monster and maker' is engaged in *Frankenstein* and resolved... as a conflict staged in a single body' in *Jekyll and Hyde* and *Dorian Gray*.<sup>195</sup> It is the differences in doubling between the texts that I propose suit each of the three problems in *mens rea* which I outlined in earlier chapters. Elements of the internal and external are common to all three, and each protagonist is responsible in some way for their creation of their double. It is for these reasons that I view each as a type of constructed double, as described earlier in this chapter.

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<sup>195</sup> Halberstram, J. 'Skin Shows: Gothic Horror and the Technology of Monsters' (Duke University Press 1995), 53.

These three texts have been considered together before, however briefly, for example by Linda Dryden, who highlights the ways in which the subjects have a hand in the creation of their monsters, and whose narratives end in the destruction of one or both parties:

Frankenstein creates his monster using a perverted science, just as Jekyll creates his own monster, Hyde, and the fates of Jekyll and Hyde are similarly intertwined... Jekyll's Gothic dilemma, just like Frankenstein's, is the anxiety from which there is no escape: having created their monsters, Jekyll and Frankenstein are bound to them until death. In the same way, once he has embarked on his hedonistic life, Dorian Gray is bound to the dreadful picture that absorbs and reflects his guilt and corruption, and as with other tales of duality, the only release is death.<sup>196</sup>

The active role they play in the creation of their doubles is of central importance to why I chose these three texts, and not for example Dostoyevsky's *The Double*; added to this only Golyadkin Sr. appears to notice the 'resemblance' between himself and Golyadkin Jr., with the Doppelgänger nature of their likeness never confirmed by a third party, whilst in my chosen texts there are objective third-party witnesses who confirm the existence of each double. The instability of identity Dryden highlights between Frankenstein, Dorian and Jekyll also influenced my selection: Dryden suggests that '[i]n each case identity proves to be a more and more problematic issue as the narratives progress. It becomes linked to class and morality, to pleasure and pain, to beauty and ugliness, and to evolution and degeneracy';<sup>197</sup> she concludes that '[t]he transformations and Doppelgängers of the modern Gothic exemplify this slippage of identity, this fragmentation of the self. Identities merge or are masked; individuals hide dark secrets that speak of another self',<sup>198</sup> which is useful in terms of my understanding of the double as a figure that can destabilize the criminal law's binaries.

My chosen texts also have advantages over nineteenth century Doubles fiction like James Hogg's *The Private Memoirs and Confessions of a Justified Sinner*.<sup>199</sup> Although it shares features with *Dorian Gray*, *Jekyll and Hyde* and *Frankenstein*, the double here

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<sup>196</sup> Dryden (n4), 39.

<sup>197</sup> Ibid, 40.

<sup>198</sup> Ibid, 40-41.

<sup>199</sup> Hogg (n40).



is confirmed by an objective third-party witness, and it engages with *mens rea*-related notions of culpability and responsibility through its confession-like structure. It is the absence of a clear moment of creation between subject and double that makes it unsuitable for the purposes of this thesis. In *Private Memoirs*, the double mysteriously appears in the subject's life rather than the subject being involved in the double's creation. In contrast, *Dorian Gray*, *Jekyll and Hyde* and *Frankenstein* each have a clear moment of (co)creating their respective doubles, and a clearer narrative linking the two sides of the divided selves. This, in my view, offers weight to reading these Gothic novels as Realist texts. The deliberate act of creation or binding is critical to my understanding of the double, because questions of agency, culpability and responsibility are central to this thesis.

The double in *Private Memoirs* is therefore not a constructed double as described in this thesis, because the novel lacks the responsible subject featured in my chosen texts. However, literary criticism on Hogg's text does offer interesting insight regarding narrative unreliability to be used in later chapters. The narratives of *Dorian Gray*, *Jekyll and Hyde* and *Frankenstein* are unreliable in a similar fashion to *Private Memoirs*, as indicated by Martin Kayman, who suggests that '[i]n a literary sense, the text itself suffers from a... paradox: it looks like what it seems to be, a true "confession" of actual events; but to the empirically-minded Editor the presence of a monster makes its veracity unlikely. The text itself is monstrous, unclassifiable'.<sup>200</sup> The narrative style of both *Frankenstein* and *Jekyll and Hyde* in particular are reminiscent of *Private Memoirs*, notably the epistolary form of *Frankenstein* and the piecemeal nature of Jekyll's pseudo-legalistic collection of testimony and investigative work. Kayman describes *Private Memoirs* as a 'double text in which the hero of the parable is an image of the author himself, it is, in the end, probably *both* a parable *and* a deranged vision'.<sup>201</sup> Therefore,

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<sup>200</sup> Kayman, M.A. 'From Bow Street to Baker Street: Mystery, Detection and Narrative' (Macmillan 1992), 153.

<sup>201</sup> *Ibid* [sic].

*Private Memoirs* 'is at least, a text constituted by doublings: of subjects and of characters... of readings... of sources... and of authors' in which '[t]radition and court records can only provide a partial, incomplete account of events'.<sup>202</sup> Kayman's notion of a 'double text' is particularly intriguing, especially in probing *Private Memoirs*' narrative unreliability, which is also at issue in my three chosen books – just because Jekyll, Dorian, and Frankenstein and his creature all give confessions of sorts does not mean that their testimony is accurate.

Nineteenth century detective fiction was considered for this thesis, including Wilkie Collins' *The Moonstone*<sup>203</sup> and *The Woman in White*,<sup>204</sup> and Edgar Allan Poe's Detective Dupin stories such as *The Murders in the Rue Morgue*.<sup>205</sup> However, I decided against focusing on these because, although detective stories often involve a confession from the guilty party, they focus on the retrospective investigation into criminal action as opposed to the in-progress look at committing crimes that is afforded by *Dorian Gray*, *Jekyll and Hyde* and *Frankenstein*, which allow the readers insight into the mental processes during the commission of crimes, as discussed earlier in this chapter.

As for the three texts themselves, I firstly chose *Dorian Gray* because, although it was published at the end of the nineteenth century, I suggest that the double motif most convincingly articulates the potential risks in character as a means of attributing responsibility, the *pre-mens rea* method for much of the period. The superficiality of the picture mirrors the superficiality of character, and I will demonstrate that the picture's accumulation of Dorian's sins represents the cumulative, permanent effect of prior convictions on sentencing. I chose *Jekyll and Hyde* because, in my view, it instantiates the instability between the subjective and objective approaches to determining *mens rea*. Just as Jekyll and Hyde are two distinct but intertwined identities, the subjective and

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<sup>202</sup> Ibid, 156.

<sup>203</sup> Collins (n42).

<sup>204</sup> Ibid.

<sup>205</sup> Poe (n135).

objective approaches are supposedly separate in theory but are far more complexly commingled in practice. I will show that *Jekyll and Hyde* performs this instability.

I will finally look to *Frankenstein* in investigating the gendered conceptualisation of reasonableness, which for a time was known as the reasonable man. As the creature commits both male-coded crimes and female-coded crimes, I will show that *Frankenstein* calls into question gendered concepts of (defences to) criminal action. *Frankenstein* is a text populated by doubles, and as such there are multiple possible readings of the text. Martin Kayman for example has argued that Captain Walton is Victor's double, his 'other eye', suggesting that 'Walton "creates" Frankenstein in similar language to that in which the latter created his monster' when reviving him from the cold in the novel's early chapters.<sup>206</sup> Similarly, Paul Coates not only reads the creature as a double for his author – the 'literariness of the creature's language and allusions... are also in a sense Mary Shelley's, as she uses the creature as a mouthpiece for her own protests against the isolation suffered by the intellectual woman'<sup>207</sup> – but also views Victor as Shelley's double, with the 'processes of transposition at work in the book also implicat[ing] its author in the fate and guilt of its hero',<sup>208</sup> describing her as 'the prototype of Frankenstein', and thus 'the one who is also two'.<sup>209</sup>

Though multiple readings of the doubled text are not only valid but, aligning with Wetlauffer, welcome, my reading of *Frankenstein* takes the creature as Victor's double, following Maurice Hindle's argument that 'the fates of both Creator and Creature become more and more intertwined, their identities merging as they approach death: hence the so-called Doppelgänger motif of the story'.<sup>210</sup> In describing the nature of this doubling, Coates posits that 'the moral ugliness of the hero is personified in the form of the

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<sup>206</sup> Kayman (n200), 148.

<sup>207</sup> Coates, P. 'The Double and the Other: Identity as Ideology in Post-Romantic Fiction' (Macmillan 1988), 40.

<sup>208</sup> Ibid, 42.

<sup>209</sup> Ibid 45.

<sup>210</sup> Frankenstein (n38), xxxvii.

monster',<sup>211</sup> and suggests that the 'otherness that is also sameness' in Victor's relationship with Elizabeth – his 'more than sister' – 'is reiterated in Victor's relationship with his creature'.<sup>212</sup> Linda Dryden detects 'a palpable connection between the Gothic, the literature of duality and modernity' which she views as 'at one level... the modernist preoccupation with the self, and with individual identity', which makes 'Gothic and identity... an integral part of the narrative of duality'.<sup>213</sup> Regarding literary doubling in *Frankenstein*, she notes how:

Victor Frankenstein, like God, creates a man 'in his own image'. The monster is often described as Frankenstein's 'other' with a complex duality of his own: a murderous evil is coupled with a child-like innocence in the orphaned monster. In fact, *Frankenstein* offers a useful crossover point between the Gothic novel and the literature of duality, for it is probably the most obvious early nineteenth-century novel that weaves themes of duality into a Gothic context.<sup>214</sup>

Dryden is therefore arguing that *Frankenstein* is an important early source of Gothic/Doubles fiction in a similar vein to my understanding of the genre, and following her argument here, *Frankenstein* is the lynchpin for my interpretation of Gothic/Doubles fiction.

#### **4.5) Conclusion**

In this chapter, I have shown how Gothic/Doubles fiction can be read in order to historicise and dramatize the problems relating to *mens rea* outlined in chapter two. I have described how the 'family resemblances' between texts might suggest the genre(s) in which they may be read, as well as demonstrating the fluidity and intertextuality of genres and subgenres, and the importance of their permeable boundaries. I have demonstrated that Gothic/Doubles fiction was a key genre for the nineteenth century, how it reflected the socio-political dichotomies of the British empire and how it is useful in reading the instabilities of criminal law. I have shown that legal conceptions of culpability shifted during the era from external conceptions of character at the century's

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<sup>211</sup> Coates (n207), 16.

<sup>212</sup> Ibid, 44.

<sup>213</sup> Dryden (n4), 41.

<sup>214</sup> Ibid, 38.

start to a more interior-focused sense of individual responsibility beyond the superficial. The double is a figure of instability, fragmentation, contradiction, paradox; as two fractured binaries representing one whole self, I suggest the double not only represents the unstable binaries of criminal law but can be used to illuminate and destabilize those binaries even further, as I will show in the next chapter. The first of three chapters, which each focus on a different Gothic double and *mens rea*-related problem, will analyse the criminal law concept of character in relation to Oscar Wilde's *The Picture of Dorian Gray*.

**Chapter V:**  
**The External Double – Oscar Wilde’s *The Picture of Dorian Gray***

**5.1) Introduction**

In the last chapter I laid out my critical framework for analysing problems of proof in *mens rea* through doubles in Gothic fiction. I now turn to the first text that illuminates such issues. Oscar Wilde’s *The Picture of Dorian Gray*<sup>1</sup> demonstrates, this chapter will argue, the potential weaknesses and instabilities of character as a means of attributing responsibility for criminal action, which relates to *mens rea* in that it demonstrates an internal propensity for a certain type of external conduct. In the nineteenth century, responsibility was attributed to defendants largely based on a ‘holistic judgment of wrongful conduct and dangerousness’ as opposed to the current ‘analytical separation of (external) conduct from (internal) “*mens rea*”’.<sup>2</sup> The chapter will conclude that Dorian’s picture, which externally manifests a permanent accumulation of his sinful deeds, may help to expose how the relevance of previous convictions and reprehensible behaviour in sentencing harkens back to eighteenth and nineteenth century ideas about character.

In *The Picture of Dorian Gray* the protagonist (Dorian) and his double (the picture) inhabit separate forms (a human body versus oil on canvas). Unlike Drs Henry Jekyll and Victor Frankenstein, Dorian is not actively involved in the creation of his double – it is created by a third party (Basil Hallward) – but Dorian is its subject and he develops a connection with it immediately after its completion. This is why it has been categorised here as an external double. I will use the figure of Dorian’s double (the picture) to illuminate and illustrate problems surrounding proof in *mens rea*, in conjunction with literary criticism of the text and Doubles fiction. Through this, I will read Dorian’s picture as the embodiment of character in the criminal law and its struggle to create a true likeness of the defendant in a criminal trial. I will conclude that the picture’s superficial representation of its subject

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<sup>1</sup> Wilde, O, ‘The Picture of Dorian Gray (Wordsworth Classics 1992; reprinted 2011; Lippincott’s Monthly Magazine 1890).

<sup>2</sup> Lacey, N. ‘Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility’ (2010) *Criminal Law and Philosophy*, 4(2), 109–133,117.

– along with its externalising of Dorian’s internal criminality – demonstrates the failings of character as a means of attributing responsibility.

This chapter is structured as follows: the first section summarises the plot of the novel and engages with a number of literary readings of the text, including queer readings and the use of the double. I will then provide a historical overview of the concept of character as a precursor to *mens rea* in determining culpability at trial. I will argue that although the law has made great strides in distancing character as a means of attributing responsibility, traces of the old system return in a limited but relevant fashion, manifesting in the strictly-regulated bad character gateways in the Criminal Justice Act, previous convictions contributing to the calculation of a sentence which harkens back to eighteenth and nineteenth century conceptions of punishing a defendant’s wickedness and moral blameworthiness, and *mens rea* slipping back into the sentencing through the relevance of motive in the mandatory life sentence for murder in Schedule 21 of the Criminal Justice Act 2003. Subsequently, I will show that *Dorian Gray* can offer a metaphor for the past state of the criminal law’s attitude towards the internal mind, particularly the nineteenth century’s superficial emphasis on character as a means of judging defendants. I will conclude by arguing that Dorian’s picture represents the permanent, cumulative, and backward-looking nature of character in sentencing.

## **5.2) Plot Overview**

The book begins when Basil Hallward completes a portrait of his muse, Dorian Gray – a beautiful young man whose image captures the attention of Basil’s wealthy friend Lord Henry Wotton. Henry immediately befriends Dorian and compliments his beauty but reminds him that his looks will one day fade. Horrified at the thought, Dorian wishes that his picture will age instead of him.

Dorian is enamoured with a young actress named Sibyl Vane, who calls him her ‘Prince Charming’ and whose acting he praises – until he brings Henry and Basil to watch a

performance of hers in which she acts poorly. Dorian immediately calls off their engagement. When he returns home afterwards, he finds that his picture has changed, and now bears a horrible sneer. When he decides to reconcile with Sibyl, he learns she has killed herself. This leads Dorian to conclude that beauty and pleasure are the only things worth pursuing, and he spends the next eighteen years indulging in every vice, guided by Henry's hedonistic tutelage.

When Basil visits Dorian, he remarks that the latter has not aged since last he saw him. Basil confronts Dorian with the rumours of his debauched lifestyle, which Dorian fails to refute. Basil longs to look on the picture again, and Dorian complies, only to brutally stab Basil after he sees the corrupted image, refusing his friend's pleas to pray for salvation. Dorian blackmails Alan Campbell, an old friend who is versed in science and medicine, to dispose of Basil's body, which Alan does shortly before taking his own life. Fleeing to a brothel, Dorian is confronted by Sibyl's brother James, who has vowed to kill the man responsible for his sister's death. Dorian argues he is too young to have known a girl who died eighteen years ago, and James lets him go. However, James' suspicions are subsequently confirmed when a woman at the brothel refers to Dorian as 'Prince Charming', an alias bestowed on him by Sibyl. James proceeds to stalk Dorian, until he is accidentally killed while spying on Dorian's shooting party.

Dorian vows to lead a moral life, but when he views the picture, he finds the corruption has not lessened as a result of his 'good' deeds but rather has grown even worse. In a fit of rage, he seizes the knife with which he murdered Basil and stabs the picture, intending to destroy the last piece of evidence that could incriminate him. However, instead of destroying the picture, the act kills Dorian, transforming him into a decrepit old man and restoring the image of Dorian back to his youthful beauty.

### **5.3) Literary Readings of *Dorian Gray***



I will first explore Dorian as an example of doubles fiction in light of the critical framework developed in the last chapter before considering a range of literary criticism on the novel and a discussion of Wilde as author of the text and defendant at a trial for gross indecency in 1895.

### 5.3.1) Doubling Dorian – viewing Dorian Gray as a work of Doubles fiction

The picture possesses the essence of three souls: Basil's, who painted his soul with Dorian's visage; Dorian, who wishes for his likeness to age while he remains young; and Henry's, whose hedonistic influence bleeds into Dorian's psyche. Interestingly, Wilde revealed that the three primary characters reflect three distinct facets of his own identity, suggesting a metatextual doubling between author and text: 'Basil Hallward is what I think I am: Lord Henry what the world thinks me: Dorian what I would like to be — in other ages, perhaps'.<sup>3</sup> Wilde's identification with Basil, whom Henry Alley describes as 'the gay artist as tragic hero', gains resonance when considering that Basil's description of Dorian was read out in court<sup>4</sup> as 'evidence of Wilde's power to corrupt'.<sup>5</sup>

The novel has been regarded by Samir Elbarbary as an example of the late nineteenth century 'fascination with primordial darkness', a shift which he suggests 'reflect[s] a belief in man's primitive origins' and manifests in literature and periodicals of the time as tales of 'unvarnished truth about the ugly and frightening realities of man's nature hidden behind an attractive façade'.<sup>6</sup> Basil finds the picture's 'surface... to be quite undisturbed', suggesting that '[i]t was from within, apparently, that the foulness and horror had come'.<sup>7</sup> The fact that his painted image is 'constantly aging and betraying the marks of sin' leads Otto Rank to view the picture as 'the visible conscience of Dorian'.<sup>8</sup> Rank suggests that

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<sup>3</sup> Wilde, O. and Hart-Davis, R. (ed). 'The Letters of Oscar Wilde' (Hart-Davis 1962), 352. See also Dawson, T. 'Dorian Gray as Symbolic Representation of Wilde's Personality', updated 8 June 2007, accessed 22 January 2018 from <<http://www.victorianweb.org/authors/wilde/dawson16.html>>

<sup>4</sup> Testimony of Oscar Wilde on Cross Examination, 3<sup>rd</sup> April 1895 (Literary Part), accessed 17 February 2020 from <<https://famous-trials.com/wilde/346-literarypart>>

<sup>5</sup> Alley, H. 'The Gay Artist as Tragic Hero in The Picture of Dorian Gray' (2009) *Comparative Literature and Culture*, 11(2), 1-9, 3.

<sup>6</sup> Elbarbary, S. 'Heart of Darkness and Late-Victorian Fascination with the Primitive and the Double' (1993) *Twentieth Century Literature*, 39(1), 113-128, 113.

<sup>7</sup> *Dorian Gray* (n1), 125.

<sup>8</sup> Rank, O. 'The Double: A Psychoanalytic Study' (University of North Carolina Press 1971), 18.

the picture ‘teaches [Dorian], who loves himself inordinately, to despise his own soul’ so much that he cannot bear to look at it.<sup>9</sup> Henry particularly narrows in on the dichotomy of humanity: ‘soul and body, body and soul – how mysterious they were!’<sup>10</sup> This encapsulates the duality of *mens rea*: *actus reus* governs the actions of the body, *mens rea* the soul – or, at least, the inner self, that internal action that the law has struggled to legislate. Henry believes that ‘there was animalism in the soul, and the body had its moments of spirituality... who could say where the fleshy impulse ceased, or the psychical impulse began?’<sup>11</sup> He wonders where to draw the line between the inner and outer self: ‘was the soul a shadow seated in the house of sin? Or was the body really in the soul?’<sup>12</sup> This question links Dorian with Jekyll: Dorian, like Jekyll, is searching for a way to indulge in the darker desires of one half of the self while the other half remains untainted by the act: ‘[o]ur weakest motives were those of whose nature we were unconscious. It often happened that when we thought we were experimenting on others we were really experimenting on ourselves’.<sup>13</sup> I return to *Jekyll and Hyde* in the next chapter.

The self-obsessed title character has roots in mythology; Christopher Craft for example identifies Ovid’s Narcissus as Dorian’s mythic predecessor,<sup>14</sup> observing how both fixate on ‘a reflective surface that relays the object of desire as a divided figure of self and same’.<sup>15</sup> We see the portrait of Dorian Gray before we ever see the man himself,<sup>16</sup> and our first impression of the title character is based on his painted likeness, the sway he holds over the artist,<sup>17</sup> and the image we get of him from his admirer(s).<sup>18</sup> When a distraught Dorian agonises over the notion that he will age while the picture will not, Basil

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<sup>9</sup> Ibid.

<sup>10</sup> Dorian Gray (n1), 48.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid, 49.

<sup>14</sup> Craft, C. ‘Come See About Me: Enchantment of the Double in *The Picture of Dorian Gray*’ (2005) *Representations*, 91(1), 109-136, 110.

<sup>15</sup> Ibid, 113.

<sup>16</sup> Dorian Gray (n1), see 5, 16. The picture appears in chapter one (5), whereas Dorian himself does not appear in person until chapter two (16).

<sup>17</sup> Ibid, 6, per Basil, referring to the picture: ‘I have put too much of myself in it’.

<sup>18</sup> Ibid, 6, per Henry: ‘this young Adonis... looks as if he was made out of ivory and rose-leaves’.

offers to destroy it in order to soothe his distress – but Dorian stops him, claiming that to do so ‘would be murder’.<sup>19</sup> Dorian thus views the picture as a living thing, even as the real Dorian is compared to the long-dead, mythical ‘Adonis’ – the ‘Narcissus’ that his painted likeness evokes.<sup>20</sup> ‘I have put too much of myself into it’, Basil bemoans, to which Henry replies that the painter is being vain, but Basil responds that ‘every portrait that is painted with feeling is a portrait of the artist, not of the sitter... it is rather the painter who, on the coloured canvas, reveals himself’, and he refuses to exhibit the picture because he feels he has ‘shown in it the secret of [his] own soul’.<sup>21</sup> The picture, therefore, is not only Dorian’s double in a visual sense, it also functions as Basil’s double, bearing Dorian’s visage but Basil’s essence. In some contrast to Basil’s assertion, Wilde’s cryptic preface to the text suggests instead that ‘[i]t is the spectator, and not life, that art, really mirrors’.<sup>22</sup>

When Dorian finally gives in to his rage and stabs the picture, it is he who receives the wound he has inflicted; he takes on the aged and ugly visage while the portrait absorbs his youth and beauty, restored once again to the day it was painted. In this final act of doubling, Dorian assumes the external evidence of his inward immorality and in essence becomes his double by exchanging likenesses. The doubling of ‘picture and book’ is ‘[c]entral to the novel’s structure, according to John Paul Riquelme, ‘both the book within the narrative that Lord Henry gives Dorian, and the book we read that is also a *Picture*’.<sup>23</sup> The in-text doublings include Basil and Henry Wotton ‘as fraternal collaborators in the production of the painting and as doubles of different kinds for Dorian himself’, with Riquelme suggesting that ‘[a]s a detached experimenter with human lives, Wotton is an avatar of Victor Frankenstein, who produces an ugly, destructive double of himself’.<sup>24</sup> There are ‘parallel[s]’ between Dorian and Sibyl, Dorian and Basil, and Henry and Dorian,

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<sup>19</sup> Ibid, 25.

<sup>20</sup> Ibid, 6, per Henry: ‘Why, my dear Basil, he is a Narcissus’.

<sup>21</sup> Ibid, 8

<sup>22</sup> Ibid, 3.

<sup>23</sup> Riquelme, J.P. ‘Oscar Wilde’s Aesthetic Gothic: Walter Pater, Dark Enlightenment, and The Picture of Dorian Gray’ (2000) *Modern Fiction Studies*, 46(3), 609-631, 615-16.

<sup>24</sup> Ibid, 616.

the formers standing as ‘revealer of something harsh and damaging’ to the latter’s, and Dorian ‘stands in that same destructive relation to himself’ by the novel’s close.<sup>25</sup> Christopher Nassaar subsequently posits that some of the main characters ‘objectify aspects of [Dorian’s] personality’, casting Sibyl, Wotton and Basil as ‘voices within Dorian, calling him to two different kinds of life’, and arguing that ‘there is only one character in *The Picture of Dorian Gray*, and that all the other leading characters are fragments of a complex personality’.<sup>26</sup> Donald Dickson suggests that Dorian’s ‘petulance causes Basil a good deal of pain long before Lord Henry whispers his poisonous theories about sensation and pleasure’,<sup>27</sup> implying that Dorian is not initially as innocent as he is painted. Dorian attests to the fact that Henry has ‘a curious influence’ over him, admitting ‘[i]f I ever did a crime, I would come and confess it to you. You would understand me’;<sup>28</sup> yet, as the book draws to a close, Henry detects Dorian is in trouble and offers his help, to which Dorian replies ‘I can’t tell you’<sup>29</sup> – suggesting that Henry’s influence has dissipated. Riquelme further suggests that ‘[s]o many doublings and shifts of position undermine the possibility of reading the book as realistic’,<sup>30</sup> which mirrors Kayman’s description of the narrative unreliability of the doubled text as discussed in the last chapter.<sup>31</sup>

Dorian’s parents died before he ever got to know them, and to him they remain eternally young and beautiful, as ageless and immortal as his picture. Dorian is mirrored by his mother, Margaret Devereux. Henry’s uncle describes her as an ‘extraordinarily beautiful girl’<sup>32</sup> who ‘could have married anybody she chose’,<sup>33</sup> but who ran away with a penniless nobody. Dorian’s romance with Sibyl seems to mirror this, as he falls in love with a

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<sup>25</sup> Ibid.

<sup>26</sup> Nassaar, C.S. ‘Oscar Wilde’s Lord Arthur Savile’s Crime and *The Picture of Dorian Gray*: Point Counterpoint’ (2014) *A Quarterly Journal of Short Articles, Notes and Reviews*, 27(3), 137-143, 140.

<sup>27</sup> Dickson, D. ‘“In a mirror that mirrors the soul”: Masks and Mirrors in *Dorian Gray*’ (1983) *English Literature in Transition: 1880-1920*, 26(1), 5-15, 6.

<sup>28</sup> *Dorian Gray* (n1), 43.

<sup>29</sup> Ibid, 162.

<sup>30</sup> Riquelme (n23), 616.

<sup>31</sup> Kayman, M.A. ‘From Bow Street to Baker Street: Mystery, Detection and Narrative’ (Macmillan 1992), 153-56.

<sup>32</sup> *Dorian Gray* (n1), 29.

<sup>33</sup> Ibid, 30.

penniless actress whom he has known for three weeks. James Vane discovers that his and Sibyl's mother and father were not married, and that the latter was a 'highly connected... gentleman',<sup>34</sup> echoing Sibyl's relationship with Dorian. Dorian first sees Sibyl in a performance of *Romeo and Juliet*, a tragic love story that perhaps foreshadows theirs. Moved to tears by her beauty, Dorian declares that '[s]he is everything to [him] in life',<sup>35</sup> but the fact that he has fallen in love with her whilst she is performing as a fictional character suggests that he loves Sibyl only when she is inhabiting a role: he describes her as 'all the great heroines of the world in one. She is more than an individual'.<sup>36</sup> Indeed, Nassaar suggests that Sibyl's surname 'indicates... that Dorian's love for her is a kind of self-love'.<sup>37</sup> Sibyl's affection for Dorian also involves a type of doubling, viewing him as the 'Prince Charming' who 'rules life for [her] now'.<sup>38</sup>

### 5.3.2) Dorian Gray, queer theory and disrupting binaries

As discussed in chapter three, the destabilising and subverting aims of queer theory comprise a critical element of this thesis,<sup>39</sup> and starts here in the novel which most overtly engages with queer themes and identities, both in-text and metatextually when considering Wilde's real-life indecency trial in 1895.<sup>40</sup> In the last chapter it was argued that the double may be regarded as a figure of instability, whose very presence disrupts binaries and illuminates the ways in which they have been constructed and can evolve over time. Jonathan Alexander and Deborah Meem highlight the destabilising nature of the double as a queer figure in *Dorian Gray*, noting the novel's 'queer sensibility'<sup>41</sup> and stating that "'Dorian" [became] a late-Victorian code word for "homosexual"', citing the 'commonplace' theory that 'part of Dorian's pursuit of pleasure... has to do with his

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<sup>34</sup> Ibid, 58.

<sup>35</sup> Ibid, 43.

<sup>36</sup> Ibid, 44.

<sup>37</sup> Nassaar (n26), 140.

<sup>38</sup> *Dorian Gray* (n1), 50.

<sup>39</sup> See Butler, J. 'Gender Trouble: Feminism and the Subversion of Identity' (Routledge 1999) and Wetlaufer, G.B. 'Rhetoric and Its Denial in Legal Discourse' (1990) *Virginia Law Review*, 76(8), 1545-1597.

<sup>40</sup> Oscar Wilde v Marquess of Queensberry, April 1895.

<sup>41</sup> Alexander, J. and Meem, D. 'Dorian Gray, Tom Ripley, and the Queer Closet' (2003) *Comparative Literature and Culture*, 5(4), 1-15, 3.

interest in young men'.<sup>42</sup> They appear to cross reference notions of queerness in the novel, through Wilde's emphasis on 'multiple personalities' in the text, with 'the image of the "double"' which they suggest 'has often been used in literature to demarcate the tenuous boundary between reality and the imaginary, the real and the fantastic, even the sacred and the profane and the licit and the illicit'.<sup>43</sup> They describe *Dorian Gray* as an example of a 'portrait of lives – of criminal lives, and of lives with more than a hint of "queerness" – [which] ask[s] us to identify with them'.<sup>44</sup> 'For Dorian', they suggest, 'the double "split[s] off" the ethical "conscience", allowing him to pursue his pleasures, his multiplication of personalities, with little thought of the consequences'.<sup>45</sup> It is Dorian's doubling which 'open[s] up spaces in which [he] can be queer',<sup>46</sup> and they identify *Dorian Gray* as a new type of 'Doppelgänger tradition – one that uses the figure of the double to see in itself the possibilities of its own queerness'.<sup>47</sup>

The image may therefore be said to represent both connection and disconnection. Basil remarks that it represents 'the harmony of soul and body' and that '[w]e in our madness, have separated the two' by 'invent[ing] a realism that is vulgar, an ideality that is void'.<sup>48</sup> Indeed, when Basil reprimands Henry for saying terrible things in front of Dorian, Henry replies 'Before which Dorian? The one who is pouring out tea for us, or the one in the picture?'<sup>49</sup> When Dorian and Henry make plans without Basil, the latter replies 'I shall stay with the real Dorian', referring to the picture.<sup>50</sup> Wilde's preface describes the 'nineteenth-century dislike of Realism [as] the rage of Caliban seeing his own face in a glass', with the 'nineteenth-century dislike of Romanticism [as] the rage of Caliban not seeing his own face in the glass',<sup>51</sup> both of which are true of Dorian at the novel's end –

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<sup>42</sup> Ibid, 2.

<sup>43</sup> Ibid, 6-7.

<sup>44</sup> Ibid, 9.

<sup>45</sup> Ibid, 11.

<sup>46</sup> Ibid, 12.

<sup>47</sup> Ibid, 14.

<sup>48</sup> *Dorian Gray* (n1), 12.

<sup>49</sup> Ibid, 26.

<sup>50</sup> Ibid, 26.

<sup>51</sup> Ibid, 3.

he is the Caliban who rages at not seeing his youthful beauty in the painting whilst simultaneously raging at the sight of the true face of his soul. For Jonathan Dollimore, *Dorian Gray* 'dramatizes a question – a dilemma – central to Western culture', namely: 'what happens when we struggle free of the repressions which not only constrain, but constitute us as social beings?'<sup>52</sup> Dollimore interprets repression as 'a kind of violence against the self',<sup>53</sup> which is evidenced in the novel by Henry's advice to 'yield to temptation'.<sup>54</sup> In breaking free of social constructs, Dollimore suggests that Henry and Dorian might have been viewed as 'heroic precursors of the sexual revolution' of the twentieth century if not for the 'disastrous' repercussions that 'lifting of repression' has for Dorian and others.<sup>55</sup>

Notions of character, I suggest, are engaged in a metatextual fashion when considering the libel case Oscar Wilde brought against the Marquess of Queensbury in 1895.<sup>56</sup> Wilde accused John Douglas of defamation when Douglas, having heard rumours of Wilde's relationship with his son Lord Alfred 'Bosie' Douglas, left a calling card at Wilde's gentlemen's club reading, 'For Oscar Wilde, posing as a sodomite'.<sup>57</sup> This is the wider context within which we must understand the double in *Dorian Gray*, especially as the Queensberry Trial arguably engaged in notions of what constituted good and bad character during the late-Victorian period. Queensberry's attorney Edward Carson may also serve as a double for Wilde, as both were Anglo-Irish contemporaries at Trinity College, but Carson was a conservative unionist in contrast to Wilde.<sup>58</sup> Morris Kaplan suggests that Carson 'blurred the boundaries between literature and life, using Wilde's

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<sup>52</sup> Dollimore, J. 'Sexual Dissidence' (OUP 2018), 6.

<sup>53</sup> Ibid, 7.

<sup>54</sup> *Dorian Gray* (n1), 25.

<sup>55</sup> Dollimore (n52), 8.

<sup>56</sup> *Oscar Wilde v Marquess of Queensberry* (n40). See also Transcript of the Libel Trial Prosecuted by Oscar Wilde (April 3-5, 1895), accessed 17 February 2020 from <<https://famous-trials.com/wilde/330-libel>>

<sup>57</sup> Pine, R. 'Oscar Wilde' (Gill and Macmillan 1997), 146. The Marquess originally misspelled this as 'sodomite'.

<sup>58</sup> Ulick O'Connor's play 'A Trinity of Two' (1988) presents Wilde and Carson as the main protagonists in the Queensberry trial.

writing to cast him as a corrupt poseur from whom Douglas's father strived to save the young nobleman'.<sup>59</sup>

As 'proof' of Wilde's supposed corrupting influence on young men, passages from *Dorian Gray* were read out in court, and Simon Stern notes how Henry's words seem to have the capacity not merely to influence Dorian, but to 'reshape his personality completely'.<sup>60</sup> Dorian's character changes to align with the person he most admires at any given time – first Basil, then Henry. Stern argues that Dorian embodies the impressionable youth whose mind would be altered by the 'immoral influences' of Wilde's work, as argued by the lawyers who sought to prosecute him on indecency charges.<sup>61</sup> Those who condemned the work believed the book had the capacity to affect and alter the character of its readers.<sup>62</sup> Indeed, literary critic Walter Pater, in his 1891 review of *Dorian Gray*, suggests that '[t]o lose the moral sense therefore, for instance, the sense of sin and righteousness, as Mr. Wilde's heroes are bent on doing as speedily, as completely as they can, is to lose, or lower, organization, to become less complex, to pass from a higher to a lower degree of development'.<sup>63</sup>

Although the judge in the *Queensberry* case urged jurors not to 'confound [an author] with the characters of the persons he creates',<sup>64</sup> the fact that Queensbury's allegations about Wilde were true meant they could not be deemed defamatory, and Wilde's lawyer withdrew the case. Wilde was subsequently arrested on charges of gross indecency, based on the damning evidence raised about his relationships with men. In *R v Wilde*,<sup>65</sup> Wilde pleaded not guilty to twenty-five counts of gross indecency as laid down in S.11 Criminal Law Amendment Act 1885, which had criminalized all sex acts between men

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<sup>59</sup> Kaplan, M.B. 'Literature in the Dock: The Trials of Oscar Wilde' (2004) *Journal of Law and Society*, 31(1), 113-130, 116.

<sup>60</sup> Stern, S. 'Wilde's Obscenity Effect: Influence and Immorality in The Picture of Dorian Gray' (2017) *The Review of English Studies*, New Series, 68(286), 756–772, 765.

<sup>61</sup> *Ibid.*, 763.

<sup>62</sup> *Ibid.*

<sup>63</sup> Pater, W. 'A Novel by Mr. Oscar Wilde', *The Bookman* (November 1891) in Bloom, H. (ed) 'Selected Writings of Walter Pater' (New American Library 1974), 264.

<sup>64</sup> Stern (n60), 761 referencing the *Queensberry* case (n40).

<sup>65</sup> *R v Wilde* (1895). See also Holland, M. 'The Real Trial of Oscar Wilde' (HarperCollins 2004).



as 'gross indecency',<sup>66</sup> and Stern argues that Wilde's trial for gross indecency 'served in effect as an obscenity trial' in which *Dorian Gray* was used as evidence of immorality.<sup>67</sup> The contemporary test for obscenity had been laid down in the 1868 case of *Hicklin*: 'whether the tendency of the matter... is to deprave and corrupt those whose minds are open to such immoral influences',<sup>68</sup> which Stern suggests Carson had 'implicitly invoked' during Queensberry's defamation trial.<sup>69</sup> Stern would later suggest that 'Dorian's dual mode of existence... exemplifies the means by which [the obscenity] standard operates':

He serves the same mirror-like function within the plot that the novel claims for itself. He embodies the Janus face that we saw in the *Hicklin* test, figuring both as the object of the law's concern and the abstracted subject that deploys a test for discerning others' tendencies.<sup>70</sup>

At his trial, Wilde was questioned about the last line of Lord Alfred Douglas' 1894 poem *Two Loves*, 'I am the love that dare not speak its name'.<sup>71</sup> Wilde explained it as 'the noblest form of affection', which 'repeatedly exists between an older and a younger man, when the older man has intellect, and the younger man has all the joy, hope and glamour of life before him'.<sup>72</sup> The jury were unable to reach a verdict, but Wilde was convicted for gross indecency on retrial three weeks later, and was given the maximum sentence for the crime: two years of hard labour. The scandalised 'public response' to Wilde's trial has been interpreted by Ed Cohen as being part of 'the Victorian bourgeoisie's larger efforts to legitimate certain limits for the sexual deployment of the male body and, in Foucault's terms, to define a "class body"'.<sup>73</sup> Wilde's trial, in Cohen's view, can be viewed as 'a spectacle in which the state, through the law and the press, delimited legitimate male sexual practices... by proscribing expressions of male experience that

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<sup>66</sup> S.11 Criminal Law Amendment Act 1885. Homosexual activity between men was not de-criminalised until the Sexual Offences Act of 1967, enacted on recommendation of the Wolfenden report in 1957. See Wolfenden, J. 'Report of the committee on homosexual offences and prostitution' (HM Stationery Office 1957).

<sup>67</sup> Stern (n60), 756.

<sup>68</sup> R v Hicklin (1868) LR 3 QB 360 at [371].

<sup>69</sup> Stern (n60), 763.

<sup>70</sup> Stern S. 'Literary Analysis of Law' in Dubber, M.D. and Tomlins, C. (eds) 'The Oxford Handbook of Legal History' (OUP 2018), 63-78, 76.

<sup>71</sup> Douglas, A. 'Two Loves' (The Chameleon 1894).

<sup>72</sup> R v Wilde (n65).

<sup>73</sup> Cohen, E. 'Writing Gone Wilde: Homoerotic Desire in the Closet of Representation' (1987) Publications of the Modern Language Association of America, 102(5), 801-813, 801.

transgressed these limits'.<sup>74</sup> The legal proceedings against Wilde were 'not anomalous; rather, they crystallized a variety of shifting sexual ideologies and practices'.<sup>75</sup>

This chapter suggests that Wilde's conviction for gross indecency, and his response to targeted questioning at the Queensberry trial which led to his arrest, may be viewed as having framed his homosexuality as an instance of bad character, whereas today societal attitudes have evolved. This shift is particularly resonant when considering Wotton's assertion in the novel that 'modern morality consists in accepting the standard of one's age'.<sup>76</sup> This chapter argues, therefore, that character is era-specific, transitory, transformative, and ever-changing. What was a sign of bad character in one era may not be regarded as such in another, given the argument here that Wilde was tried on the basis of who he was or, perhaps more accurately, was *not*. Joseph Bristow reads Dorian's divided 'public' and 'private' self as representing 'art in opposition to the increasing power of the state – a state that was for the first time making condign judgments about what constituted a homosexual danger to the perceived moral well-being of the nation'.<sup>77</sup> The novel, for Bristow, 'raises questions – rather than making assertions – about how and why such an aesthetically ennobled image as Dorian's is, at one and the same time, "gross" in its "indecency"', through which 'Wilde was transgressing the dichotomy of public and private worlds'.<sup>78</sup> Bristow notes that '[l]ike Dorian's portrait, [the Criminal Law Amendment Act] sought to preserve the face of British youth' but argues that 'this law created the corruption it was designed to eradicate'.<sup>79</sup>

Wilde's response to criticism of his book was that '[e]ach man sees his own sin in Dorian Gray. What Dorian Gray's sins are no one knows. He who finds them has brought

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Dorian Gray (n1), 64.

<sup>77</sup> Bristow, J. 'Wilde, Dorian Gray, and gross indecency' in Bristow, J. (ed) 'Sexual Sameness: Textual Differences in Lesbian and Gay Writing' (Routledge 1992), 44-63, 44.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid, 48.

them'.<sup>80</sup> This reflects, I suggest, the notion that character is a malleable concept that evolves as the law shifts into different constructions. The chapter argues that character persists but is unstable, and that Wilde critiques the notion of stable character through *Dorian Gray*. Stern examines the seductive, 'absorptive' quality of the painting, which may itself be influencing the characters, just as Henry and Basil in turn influence Dorian.<sup>81</sup> I would extend this further: the portrait, though not a living, breathing double of the sort in *Jekyll and Hyde* or *Frankenstein*, nevertheless exerts a corrosive, destructive effect on the characters that is coded within the genre of Doubles fiction; it is not an active antagonist, as in Dostoyevsky's *The Double*<sup>82</sup> or Jose Saramago's *O Homem Duplicado*,<sup>83</sup> but the picture's passive tyranny wreaks havoc on the lives of the characters without the need for any persuasion or encouragement on its part. It is used by Dorian as a way of justifying and excusing his excessive debauchery; it is the cypher for his shame, and a manifestation of the guilt he does not feel; and it remains the only proof of his crimes. His friends have grown old, died or been murdered, and for all his wealth, beauty and immortality, Dorian cannot escape justice forever.

The only criminal act we witness Dorian commit is the killing of Basil, which occurs when they are looking at the picture, and 'suddenly an uncontrollable feeling of hatred for Basil Hallward came over him, as though it had been suggested to him by the image on the canvas'.<sup>84</sup> 'The mad passions of a hunted animal stirred within' Dorian and he grabs the nearest weapon he can find and plunges it into Basil's skull.<sup>85</sup> As soon as Basil is dead, he becomes distanced from Dorian, even in a narrative sense: he is referred to thenceforth as 'the thing... in the chair', 'the dead thing' and 'the murdered man'.<sup>86</sup> Dorian's reaction is 'strangely calm' and he immediately begins to work out how he can

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<sup>80</sup> Wilde, O. 'To the Editor of the Scots Observer', 9 July 1890. Referenced in Merlin Holland, M. and Hart Davis, R. (eds.) 'The Complete Letters of Oscar Wilde' (2000), 439.

<sup>81</sup> Stern (n70), 73.

<sup>82</sup> Dostoyevsky, F. 'The Double: A St Petersburg Poem' (Dover Thrift 1997; *Otechestvennye Zapiski/Fatherland Notes* 1846).

<sup>83</sup> Saramago, J. '*O Homem Duplicado/ The Double*' (Caminho 2002).

<sup>84</sup> *Dorian Gray* (n1), 125.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, 126-7.

evade blame for Basil's death.<sup>87</sup> He provides himself with an alibi by discretely leaving the house in a dress coat and hat, and returning through the front door, waking his valet and rendering him an unwitting witness.<sup>88</sup> The next day, Dorian makes Alan Campbell an accessory to Basil's killing.<sup>89</sup> When Alan initially refuses to help dispose of the body, Dorian blackmails him with a letter, the contents of which are never revealed to us.<sup>90</sup>

Crucially, Dorian is never caught and punished for his crimes by the law. Dorian persuades Sibyl's brother that he has blamed the wrong man for his sister's suicide. He kills Basil to protect the secret of his immorality. He blackmails an old classmate to dispose of Basil's body for him. Dorian's final retribution comes at his own hand – when, in a fit of rage, he stabs the portrait, only to die of the wound himself. How the public and the authorities react to the discovery of Dorian's body, now so unrecognisable that it is identifiable only by the rings on his fingers, we will never know. The law, as also illustrated by the other two novels in the subsequent chapters, is never the place to find true, moral justice in the tales of these literary doubles: that is the task of vengeance – biblical in nature, and far from the authorities' reach.

#### **5.4) Reading *Dorian Gray* as a Critique of Character**

Having identified the potential for the double in *Dorian Gray* to act as a queering, destabilising and disrupting influence on constructed binaries, not least due to the metatextual interplay between author and text, it will now be utilised to critique and destabilise certain features of criminal law that continue to engage in the same questions that used to pertain to character in the eighteenth and nineteenth centuries. This issue was addressed in relation to *Jekyll and Hyde* by Nicola Lacey, who read the text as a metaphor for 'the hope... that criminality and innocence, right and wrong conduct, good and evil character [could] readily be distinguished'.<sup>91</sup> This chapter extends her work by

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid, 127.

<sup>89</sup> Ibid, 133.

<sup>90</sup> Ibid, 135-6.

<sup>91</sup> Lacey (n2), 110.

arguing that *Dorian Gray* demonstrates the instabilities of character in attributing responsibility, and that traces of the old system remain in the continued relevance of character to law. Although this has been strictly regulated at the substantive trial through the seven narrow gateways under the Criminal Justice Act through which bad character may be adduced at trial, I suggest that issues relating to *mens rea* slip back in at the sentencing stage. Although *mens rea* is not engaged as such during sentencing, as it has already been established during the trial, I suggest that certain aspects of it remain relevant to sentencing, including the way in which a lack of planning speaks to *mens rea* in some way. In doing so, I will observe changing notions of character from the nineteenth century to now, and how the impact of previous convictions at the sentencing stage means that character is still being used to attribute responsibility (and calculate proportionate punishment).

#### 5.4.1) The picture as proof

The adversarial trial as we know it today was shaped during the eighteenth and nineteenth centuries, during which time responsibility was 'premised in whole or in part on an evaluation or estimation of the quality of the defendant's (manifested or assumed) disposition as distinct from his or her conduct'.<sup>92</sup> It was not so much a question of 'did the defendant commit the crime?' as 'was the defendant *the kind of person who would* have done such a thing?' Lacey shows these were arbitrary judgments. In the eighteenth century, character was invoked as a personal narrative, as an internal state of mind derived from external states of mind. Lisa Rodensky observes disagreement in this era around 'questions pertaining to criminal states of mind and to the relations between states of mind and acts' which 'meant (and means) judging an external and an internal element'.<sup>93</sup>

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<sup>92</sup> Lacey N. 'The resurgence of character: Criminal responsibility in the context of criminalisation' in Duff, A. Duff and Green, S. (eds) 'Philosophical Foundations of Criminal Law' (OUP 2011), 151-178, 155.

<sup>93</sup> Rodensky, L. 'The Crime in Mind: Criminal Responsibility and the Victorian Novel' (OUP 2003), 3.

This shift from character-based judgments to a seeking of individual responsibility is reflected in Victorian jurist Sir James Fitzjames Stephen's assertion, in his 1883 text *A History of the Criminal Law of England*, that '[t]he general rule is, that people are responsible for their actions'.<sup>94</sup> The literature of the time played a substantial role in helping to shape notions of internal criminality. Rodensky observes that 'the novel can enter the mind, and the Victorian novel explored the interior life of its characters as never before', thus 'invit[ing] readers to imagine that they are in the mind of the criminal'.<sup>95</sup> The reader experiences the events of *Dorian Gray* as a witnesses and is not granted access to first hand testimony as in *Jekyll and Hyde* or *Frankenstein*. Instead the picture manifests Dorian's interior immorality in external, visible form, and engages in notions of character via the interplay of internality and externality embodied in the painting, which literalises Basil's declaration that 'sin is a thing that writes itself across a man's face. It cannot be concealed'.<sup>96</sup> Dorian's sinful actions, from his rejection of Sibyl<sup>97</sup> to his murder of Basil,<sup>98</sup> are indeed externalised on the face of the painting. This suggests the painting functions as a record of Dorian's reprehensible behaviour and criminal misconduct,<sup>99</sup> and a manifestation of his character. The book also appears to demonstrate the superficiality of character-based conceptions of responsibility when Basil initially diagnoses Dorian with 'a simple and beautiful nature' even though in the next scene he admits that 'Dorian's whims are laws to everybody, except himself';<sup>100</sup> their mischaracterising of Dorian continues through to the end of the book, when Basil, eventually confronted with Dorian's 'soul', cannot believe it is '[his] picture',<sup>101</sup> and when Henry declares that '[i]t is not in you, Dorian, to commit a murder'.<sup>102</sup> But it is, as shown by Dorian's murder of Basil, which Christopher Nassaar calls 'the ultimate sin' and 'pivotal turning point',<sup>103</sup> suggesting that

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<sup>94</sup> Stephen, J.F. 'A History of the Criminal Law of England, Volume II: Criminal Responsibility' (William S. Hein 1883), 4.

<sup>95</sup> Rodensky (n93).

<sup>96</sup> *Dorian Gray* (n1), 119.

<sup>97</sup> *Ibid*, 70-72.

<sup>98</sup> *Ibid*, 125-26.

<sup>99</sup> More on the legal meanings of these terms in the next subsection.

<sup>100</sup> *Dorian Gray* (n1), 15, 17.

<sup>101</sup> *Ibid*, 124.

<sup>102</sup> *Ibid*, 168.

<sup>103</sup> Nassaar (n26), 139.

‘after the murder of Basil, conscience springs out of the portrait and re-enters [Dorian], poisoning his existence and finally destroying him...But conscience cannot be destroyed: Dorian simply kills himself’.<sup>104</sup>

By the late nineteenth century, the development of ‘what we would now call the medical and psychological sciences had rendered plausible and, presumptively, practicable a trial process which set up the state of a defendant’s mind as an object of proof’.<sup>105</sup> Lacey maps these developments to ‘a deeper set of changes in ideas of human identity or selfhood’, shifting from surface-level judgments of character in the eighteenth century to ‘the more mobile, urbanised world of the nineteenth Century’, buoyed by the Romantic movement’s shift towards ‘see[ing] the essence of human identity as residing not in the external markers of conduct but rather in the inner recesses of the mind or soul’.<sup>106</sup> By the end of nineteenth century, criminal law had begun to distance itself from character, with S.1 Criminal Evidence Act 1898 establishing a general exclusionary rule to the defendant’s bad character, and increasingly incorporating the interior, with for example S.1(f)(ii) of the above Act which allowed defendants to give testimony for the first time, which opened up the internal side of liability by specifically allowing the cross-examination of a defendant’s bad character where the ‘nature or conduct of [their] defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution, or the deceased victim of the alleged crime’.<sup>107</sup> This provision blends external notions of character with an increasing internality in allowing the defendant to explain their motivations, which Wilde seems to predict in Wotton’s meditation on whether ‘the soul [was] a shadow seated in the house of sin’ or ‘was the body really the soul?’<sup>108</sup> Wilde also seems to anticipate the more analytical separation of the physical and mental fault of *actus reus* and *mens rea* with Wotton reflecting on

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<sup>104</sup> *Ibid.*

<sup>105</sup> Lacey, N. ‘In Search of Criminal Responsibility’ (OUP 2016), 130.

<sup>106</sup> *Ibid.*, 118.

<sup>107</sup> S. 1(f)(ii) Criminal Evidence Act 1898.

<sup>108</sup> *Dorian Gray* (n1), 48.

‘where the fleshly impulse ceased, or the psychical impulse began’.<sup>109</sup> The painting cannot sustain an external, superficial image of Dorian, but must give way to expressing his internal criminality, which similarly predicts the bleeding in, fluidity and unstable overlaps between binaries like internal/external and character/*mens rea*.

Although the ‘purpose of a criminal trial... is to determine whether a person committed a criminal act, not whether a person is good or bad in the abstract’,<sup>110</sup> it has been argued that ‘perceptions of an actor’s moral character and motive [act] together [to] affect our intuitions of blame, responsibility, and ultimately criminal liability’.<sup>111</sup> Lacey for example identifies ‘significant traces’ of the character-based approach in ‘aspects of criminal law’s liability standards’ in current law,<sup>112</sup> suggesting that reasonableness standards ‘may assume the meaning of an imposition of character liability through an *inference* from conduct to character’.<sup>113</sup> Lacey highlights the case of *Caldwell* discussed in chapter two<sup>114</sup> as viewing the inadvertent risk-taker ‘just as dangerous as the advertent risk-taker’ but also ‘just as culpable’, framing a ‘failure to maintain a basic level of care and attentiveness’ for other people as ‘a defect of character’.<sup>115</sup> She suggests the law therefore ‘possesses a deterministic view of character, seeing it as a stable concept as opposed to an ever-evolving identity influenced by a wide variety of internal and external factors’.<sup>116</sup>

The rest of this section argues that although character does not return in substantive *mens rea*, and that its continued existence may indeed look small in relation, it appears as three sub-issues: through the carefully-regulated admissibility of bad character

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<sup>109</sup> Ibid.

<sup>110</sup> Nadler, J. and McDonnell, M. ‘Moral Character, Motive, and the Psychology of Blame’ (2012) Cornell Law Review, 97(2), 255-304, 256.

<sup>111</sup> Ibid, 258.

<sup>112</sup> Lacey, N. ‘Space, time and function: intersecting principles of responsibility across the terrain of criminal justice’ (2007) Criminal Law and Philosophy, 1, 233-250, 241.

<sup>113</sup> Lacey (n105), 150 [sic].

<sup>114</sup> MPC v Caldwell [1982] AC 341.

<sup>115</sup> Ibid. The Caldwell verdict will be analysed in greater depth in relation to subjective and objective approaches to determining *mens rea* in the next chapter.

<sup>116</sup> Lacey (n112), 9.



evidence under the Criminal Justice Act 2003;<sup>117</sup> through the relevance of previous convictions at the sentencing stage; and through motive as a proxy for character during the sentencing stage via the relevance of motive in determining the minimum life sentence for murder according to the Criminal Justice Act. This section will suggest that invoking character is like invoking a personal narrative, and that character might be regarded as a cumulative record of wrongdoing which returns to a lesser but still important extent during the sentencing stage.

#### 5.4.2) Bad character

Whereas the common law had operated on the general inadmissibility of bad character unless deemed sufficiently similar on the facts,<sup>118</sup> the Criminal Justice Act provisions appear to instate a general rule of admissibility for bad character, as long as it falls under one of the seven gateways.<sup>119</sup> Andrew Choo notes the difficult balancing act between ‘prejudicial effect of bad character evidence’ (‘reasoning prejudice’), and that failing to establish guilt beyond a reasonable doubt might lead to a guilty verdict as ‘punishment for the previous misconduct’ (‘moral prejudice’).<sup>120</sup> As bad character can speak to propensity and disposition,<sup>121</sup> this chapter suggests character either implies the feasibility of the defendant having committed the current alleged offence by reference to past misconduct (likelihood), or that the defendant is the type of person who should be punished (deservedness). I contend that Dorian embodies both.

##### *5.4.2.i) S.112 and reprehensible behaviour*

The Criminal Justice Act defines bad character as ‘evidence of, or a disposition towards, misconduct on his part’ other than that which is to do with the alleged offence,<sup>122</sup> describing ‘misconduct’ as ‘the commission of an offence or *other reprehensible*

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<sup>117</sup> Criminal Justice Act 2003.

<sup>118</sup> DPP v P [1991] 2 AC 447 and limited circumstances prescribed by Criminal Evidence Act 1898.

<sup>119</sup> Criminal Justice Act 2003 (n117), S.101.

<sup>120</sup> Choo, A. ‘Evidence’ 4<sup>th</sup> ed. (OUP 2015), 246-47.

<sup>121</sup> Redmayne, M. ‘Character in the Criminal Trial’ (OUP 2015), 12-13.

<sup>122</sup> Criminal Justice Act 2003 (n117), S.98.

*behaviour*.<sup>123</sup> This provision was widely drawn in order 'to cover evidence that shows that a person has committed an offence, or has acted in a reprehensible way (or is disposed to do so) as well as evidence from which this might be inferred'.<sup>124</sup> A loophole seems to arise in S.98(a) which exempts from the bad character gateways evidence of misconduct that 'has to do with the alleged facts of the offence with which the defendant is charged', meaning that if the evidence relates to 'reprehensible behaviour' and does not constitute an offence on its own, then, per Scott Baker LJ in *R v Edwards*, 'the evidence will be admissible without more ado',<sup>125</sup> i.e. provided that it is relevant and not subject to any other exclusionary rule, it can be admitted whilst avoiding the admissibility rules under S.101.<sup>126</sup>

That the 'other reprehensible behaviour' element 'is not defined in the Act in effect', per Simon Parsons, gives 'carte blanche to prosecutors and judges to develop bad character evidence beyond its current limits' and could be 'to the disadvantage of defendants'.<sup>127</sup> Roderick Munday was 'surprise[d] to encounter the very expression, "reprehensible behaviour" in what purports to be a modernising statute', finding the term, which seems to evoke a highly concentrated form of blameworthiness, to be 'more evocative of Victorian social moralising than representation of the more neutral traits of a statute designed to set the creaking rules of criminal evidence on a modern footing'.<sup>128</sup> The expression would not seem out of place in either the libel case *Wilde* brought against *Queensberry* or the criminal trial brought against *Wilde*, and this manifests the difficulty in 'assign[ing] a particularly distinct meaning' to the term 'reprehensible', as it covers 'misdoings of a widely varying magnitude'<sup>129</sup> from serious misdoings' to 'minor detours

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<sup>123</sup> *Ibid*, S.112(1) [emphasis added].

<sup>124</sup> Explanatory Notes to the Criminal Justice Act 2003, para. 353. See also CPS, 'Bad Character Evidence', revised January 2019, accessed 17 February 2020 from <<https://www.cps.gov.uk/legal-guidance/bad-character-evidence>>

<sup>125</sup> *R v Edwards* [2005] EWCA Crim 3244, per Scott Baker LJ.

<sup>126</sup> Criminal Justice Act 2003 (n117), S.98(a).

<sup>127</sup> Parsons, S. 'The Criminal Justice Act 2003 – Do the Bad Character Provisions Represent a Move Towards an Authoritarian Model of Criminal Justice?' (2007) Southampton Solent University, 181-197, 182-83.

<sup>128</sup> Munday, R. 'What constitutes "other reprehensible behaviour" under the bad character provisions of the Criminal Justice Act 2003' (2005) *Criminal Law Review*, 24-43, 25.

<sup>129</sup> *Ibid*, 43.

from the perceived path of righteousness'.<sup>130</sup> This difficulty is compounded by the broad discretionary powers afforded by the Act to judicial interpretation.<sup>131</sup>

Though Kennedy LJ in *R v Weir (Manister)* acknowledges that the 'definition of "misconduct" in S.112(1) is very wide',<sup>132</sup> Sir Igor Judge in *R v Renda* notes that reprehensible 'as a matter of ordinary language... carries with it some element of culpability or blameworthiness'.<sup>133</sup> The court in *Weir* suggested that a thirty-nine-year old man making a 'sexually laced remark' to a fifteen year old was 'unattractive' but not 'reprehensible' behaviour, though 'offered no explicit guidance' on when the former 'lapses into' the latter,<sup>134</sup> but this decision sits uncomfortably alongside *R v Sutton* which held that grooming young children did constitute reprehensible behaviour.<sup>135</sup> *R v V* established that 'embellishing a schoolyard incident involving a teacher so as to suggest that the teacher had committed an assault' did not constitute reprehensible behaviour,<sup>136</sup> but 'fabricating a complaint of sexual assault', in *R v Hanson (P)*, did.<sup>137</sup> James Goudkamp suggests this means the ambit of the expression 'reprehensible behaviour' is not static but varies with the seriousness of the charge,<sup>138</sup> finding these distinctions 'inconsistent', and I would add unstable, because the broadness of the term 'reprehensible' invites arbitrary distinctions such as the ones between *V* and *Hanson*, even though both look sufficiently similar as to constitute the same meaning.

Even where the meaning of 'reprehensible behaviour' has been directly addressed in case law, the distinctions often seem arbitrary and unstable in effect due to the scope of the term, and leaves 'reprehensible' largely up to interpretation. The remit of reprehensibility is similarly broad in *Dorian Gray*, with the picture manifesting not only

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<sup>130</sup> *Ibid.*

<sup>131</sup> Redmayne (n121), 169.

<sup>132</sup> *R v Weir* [2006] 1 WLR 1885 per Kennedy LJ.

<sup>133</sup> *R v Renda and others* [2006] 1 WLR 2948 per Sir Igor Judge at [2953].

<sup>134</sup> Goudkamp, J. 'Bad character evidence and reprehensible behaviour' (2008) *The International Journal of Evidence and Proof*, 116-140, 123, referencing *Weir* (n132) at [87] and [97].

<sup>135</sup> *R v Sutton* [2007] EWCA Crim 1387. Notably, *Weir* was not cited in the *Sutton* judgment despite the similarity of the alleged offences in both cases.

<sup>136</sup> Goudkamp (n134), 133-34, referencing *R v V* [2006] EWCA Crim 1901.

<sup>137</sup> *Ibid.*, referencing *R v Hanson and others* [2005] 2 Cr App R 21.

<sup>138</sup> Goudkamp (n134), 126-27.

criminal acts like Dorian's murder of Basil,<sup>139</sup> but also acts of cruelty in a general, non-legal sense such as Dorian's 'callous' rejection of Sibyl.<sup>140</sup> Reprehensible behaviour therefore seems to be drafted as broadly as sin is in *Dorian Gray*. This notion of sin as a stain appears to be reflected in 'both law and literature in [the] nineteenth-century' which, as Laura Appleman observes, 'were focused on how to determine and isolate moral blameworthiness', 'anxieties' of which were displayed on the Gothic and legal page.<sup>141</sup> I suggest that this anxiety of moral blameworthiness is displayed in the concept of character, and that the picture in Dorian embodies this concept most persuasively. Therefore, not only does the term 'reprehensible behaviour' harken back to the era in which *Dorian Gray* was inappropriately invoked as evidence of indecency, it also appears to define bad character broadly while giving the impression of narrowness and thus risks bringing back the broad character inferences that populated the nineteenth century. The next section will consider the practical implications of this in case law, particularly in the gateways that have faced the most scrutiny, namely gateways (d) and (g).

#### 5.4.2.ii) Gateways (d) and (g)

The interpretation of the seven gateways, outlined in chapter two, have all faced a degree of criticism in their interpretation, but especially the two of note in this section: gateways (d), 'relevant to an important matter in issue between the defendant and the prosecution'<sup>142</sup> and (g), 'if the defendant has attacked another person's character'.<sup>143</sup> The court has the discretion not to admit evidence that falls under gateways (d) or (g) if doing so 'would have such an adverse effect on the fairness of proceedings that the court ought not to'<sup>144</sup> and to 'have regard... to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged'.<sup>145</sup> The

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<sup>139</sup> *Dorian Gray* (n1), 126.

<sup>140</sup> *Ibid*, 73. When Dorian returns from this, the 'whole expression had altered' into one of 'intensified' cruelty.

<sup>141</sup> Appleman, L. 'Gothic Stories, Mens Rea, and Nineteenth-Century American Criminal Law' in Goodman, N. and Stern, S. (eds) *The Routledge Research Companion to Law and Humanities in Nineteenth-Century America* (Routledge 2017), 356-68, 364.

<sup>142</sup> Criminal Justice Act 2003 (n117), S.101(3)(d).

<sup>143</sup> *Ibid*, S.101(3)(g).

<sup>144</sup> *Ibid*, S.101(3).

<sup>145</sup> *Ibid*, S.101(4).

more recent and serious a past offence is, the more likely it will be adduced under this gateway: for example, a previous conviction for illegal shotgun possession twenty years ago was not admissible in *R v Murphy*,<sup>146</sup> but a decade old previous conviction for child sex in *Woodhouse* was.<sup>147</sup> Redmayne posits a discrepancy between the way in which the courts have treated gateways (d) and (g) in regards to S.101(4), in that ‘time-lapse is seen as eroding propensity to offend [but] it is rarely seen as diminishing a lack of credibility’.<sup>148</sup>

He finds this demonstrated in the case of *R v Lewis*, in which the judge suggests that propensity to offend, but not propensity to lie, ‘fades over time’.<sup>149</sup> Even if a person’s ‘violent nature’ might diminish over time, there is ‘probably still a comparative propensity to be violent’ at least in comparison to other people.<sup>150</sup> This means that ‘previous convictions’ are admissible under gateway (g) whereas they are considered mostly ‘irrelevant’ under gateway (d).<sup>151</sup> An attack is made according to gateway (g) if ‘the person in question committed an offence or engaged in reprehensible behaviour’,<sup>152</sup> which faces similar issues regarding the interpretation of reprehensibility as discussed above.<sup>153</sup> Redmayne ultimately finds gateway (g) problematic as it allows for character evidence to be used in what essentially becomes a ‘moral contest’, especially as there is very little restriction against whom the attack may be made.<sup>154</sup>

Gateway (g) also controversially retains the nineteenth-century rule on credibility – also known as the ‘tit for tat’ rule – from the Criminal Evidence Act mentioned above, only it is not restricted to cross-examination as was the case in the pre-Criminal Justice Act common law. The court in *Hanson*<sup>155</sup> suggested that pre-2003 case law ‘would provide

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<sup>146</sup> *R v Murphy* [2006] EWCA Crim 3408, per Lord Justice Keene at [16-17].

<sup>147</sup> *R v Woodhouse* [2009] EWCA Crim 498 at [15].

<sup>148</sup> Redmayne (n121), 207.

<sup>149</sup> *R v Lewis* [2007] EWCA Crim 3030.

<sup>150</sup> Redmayne (n121), 207.

<sup>151</sup> *Ibid.*, 210.

<sup>152</sup> Criminal Justice Act 2003 (n117), S.106(2).

<sup>153</sup> For example, a witness accusing someone of being an offender out of spite constituted reprehensible behaviour in *R v Littlechild* [2006] EWCA Crim 2126.

<sup>154</sup> Redmayne (n121), 212.

<sup>155</sup> *Hanson* (n137).

useful guidance on when an attack had been made', as Redmayne attests, noting that in the old law the mere denial of the prosecution's case would not trigger the 'tit for tat' and now gateway (g), but 'explicitly suggesting lies probably would'.<sup>156</sup> The old law only allowed 'tit for tat' evidence to speak to defendant's credibility and not to a 'propensity for violence', but Redmayne explains that under the new law, once admitted under gateway (g) the evidence can be used 'for any purpose to which it is relevant'.<sup>157</sup>

However, there is an important restriction on the admission of prior convictions as evidence of propensity (to commit offences of the kind with which he is charged or to be untruthful) through gateway (d), which is found in S.101(3). This section provides that 'if, on an application *by the defendant* to exclude the evidence of bad character, it appears that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, the court must not admit it'.<sup>158</sup> In particular, the court 'must have regard to the length of time between the previous crime and crime under consideration'.<sup>159</sup> Parsons contends '[t]hese changes to the law of bad character represent an escalation of the criminal justice process in that the Government is indicating that it wants more bad character evidence before the courts so that more defendants will be convicted, with many of them being sent to prison'.<sup>160</sup> The next section focuses on the effect of previous convictions at the sentencing stage, but the fact that they also have relevance during the substantive trial suggests a person's conviction(s) may haunt them in the same way Dorian's past crimes haunt him.

Another credibility-related matter can be found in gateway (d), which includes 'whether the defendant has a propensity to be untruthful'.<sup>161</sup> In practice, Redmayne suggests that bad character evidence adduced regarding the defendant's credibility 'will almost involve

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<sup>156</sup> Ibid at [14], Redmayne (n121), 204.

<sup>157</sup> Redmayne (n121), 205. See R v Highton and Others [2006] 1 Cr App R 28.

<sup>158</sup> Criminal Justice Act 2003 (n117), S.101(3).

<sup>159</sup> Ibid, S.101(4).

<sup>160</sup> Parsons (n127), 189.

<sup>161</sup> Criminal Justice Act 2003 (n117), S.103(1)(a).

previous convictions’, engendering an ‘assumption... that there is a connection between criminality – or certain types of criminality – and credibility’,<sup>162</sup> a link which Redmayne contends ‘the courts have long accepted’.<sup>163</sup> As to the admissibility of the defendant’s previous convictions as regards their credibility, the court of appeal in *Hanson* distinguished between a ‘propensity for untruthfulness’ and a ‘propensity for dishonesty’, and held that:

Previous convictions, whether for offences of dishonesty or otherwise, are therefore only likely to be capable of showing a propensity to be untruthful where... truthfulness is an issue and... either there was a plea of not guilty and the defendant gave an account, on arrest, in interview, or in evidence, which the jury must have disbelieved, or the way in which the offence was committed shows a propensity for untruthfulness, for example, by the making of a false representation.<sup>164</sup>

Therefore, *Hanson* established a narrow reading for gateway (d) which focuses on the particulars of each case and defendant so as not to risk a conviction based on prejudice. This was further confined by the court of appeal in *Campbell*, which held that a ‘propensity for untruthfulness will not, of itself, go very far to establishing the commission of a criminal offence’,<sup>165</sup> and that a defendant’s ‘propensity for telling lies’ is only ‘likely to be significant if the lying is in the context of committing the criminal offence’<sup>166</sup> noting the ‘distinction’ between propensity and credibility ‘is usually unrealistic’.<sup>167</sup> This verdict garnered controversy for ‘dubious logic’ because, as Redmayne summarises, ‘the argument that the guilty will tend to lie and the innocent tell the truth, irrespective of their propensity to be honest, would seem to apply to all credibility uses of character evidence’.<sup>168</sup>

The admissibility of non-previous convictions bad character evidence was recently considered in *R v Mitchell*,<sup>169</sup> in which the Supreme Court held that, in cases where evidence of propensity was based on a number of incidents, it is not necessary ‘to prove

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<sup>162</sup> Redmayne (n121), 196.

<sup>163</sup> *Ibid*, 198.

<sup>164</sup> *Hanson* (n137), at [13].

<sup>165</sup> *R v Campbell* [2007] 2 Cr App R 28, at [57].

<sup>166</sup> *Ibid*.

<sup>167</sup> *Ibid* at [28].

<sup>168</sup> Redmayne (n121), 200.

<sup>169</sup> *R v Mitchell* (2016) UKSC 55.

beyond reasonable doubt that each incident happened in precisely the way that it is alleged to have occurred',<sup>170</sup> but that it should be determined based on 'whether all that testimony, taken in combination, proved the claimed propensity'.<sup>171</sup> Therefore evidence relating to those past incidents 'should have been considered cumulatively, not as separate aspects of the case for a propensity, isolated one from the other'.<sup>172</sup> The court did stress that although 'cumulative past incidents... may indeed illuminate the truth of the currently indicted allegations', it warned that 'excessive recourse to such history may skew the trial in a way which distracts attention from the central issue'.<sup>173</sup> Despite this attempt to mitigate the potential for propensity-related evidence to unfairly prejudice the jury, the decision in *Mitchell* would appear to demonstrate the potential cumulative nature of establishing propensity in practice, because – much like Dorian's picture – the accumulated number of incidents of negative conduct, culpability of which did not need to be proven beyond reasonable doubt, was enough to constitute bad character in this instance.<sup>174</sup> This judgment arguably veers closer to eighteenth and nineteenth century notions of character as a personal narrative.

The new Act still appears to punish character traits, such as 'virtues and vices' and 'honesty and dishonesty', identified by Antony Duff in the pre-2003 regime,<sup>175</sup> which he notes are 'not merely dispositions to behave in particular ways [but] also dispositions to be motivated in certain ways, by certain kinds of consideration'.<sup>176</sup> Duff objects to the 'false dichotomy' between choice ('what a person "does"') and character ('what a person "is"') as differing ways of assigning liability:<sup>177</sup> he argues that '[i]n the eyes of the criminal

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<sup>170</sup> Ibid, at [39].

<sup>171</sup> Ibid, at [46].

<sup>172</sup> Ibid, at [52].

<sup>173</sup> Ibid, at [53].

<sup>174</sup> See also Stockdale, M. and Engleby, E. 'Non-conviction Bad Character Evidence and Directions to the Jury on Use to Show Propensity: R v Mitchell [2016] UKSC 55' (2016) *Journal of Criminal Law*, 81(2), 94-98.

<sup>175</sup> Duff, R.A. 'Choice, Character and Criminal Liability' (1993) *Law and Philosophy*, 12(4), 345-383, 364.

<sup>176</sup> Ibid, 365.

<sup>177</sup> Ibid, 346.



law, what a person “is” is constituted precisely by what she “does”: her “character” is constituted by the character of her actions’.<sup>178</sup>

[w]hat makes a person criminally liable is thus not ‘choice’ as distinct from ‘character’; nor ‘character’ as distinct from ‘choice’ or action: but a wrongful action which, as the action of a responsible moral agent, manifests in and by itself some inappropriate attitude towards the law and the values it protects.<sup>179</sup>

Similar issues are stimulated in *Dorian Gray*: what Dorian does and what Dorian is are both manifested by the painting, and the delineation between who he is as a person and what he has done is blurry at best. The notion of punishing a person based, in part, on a tapestry of past crimes, occurs both in the law and on Wilde’s page.

#### 5.4.2.iii) Good character

The admissibility of good character still appears to be primarily governed by common law, and was considered in *R v Vye*<sup>180</sup> and *R v Aziz*<sup>181</sup> which determined that evidence of good character is significant to credibility and (lack of) propensity, and appeared to suggest that good character in practice essentially meant lack of previous convictions.<sup>182</sup> Indeed, Lord Steyn in *Aziz* questioned whether a defendant with no previous convictions could ‘lose his good character by reason of other criminal behaviour’.<sup>183</sup> The applicability of a *Vye* direction was clarified recently in *R v Hunter (Nigel)*, in which a defendant with no previous convictions and no evidence of reprehensible behaviour is to be treated as a case of ‘absolute good character’, while the defendant with previous convictions that are old, minor and irrelevant may be treated as ‘effective good character’ at the judge’s discretion’.<sup>184</sup> However, the broad discretion of the judge as to whether to admit evidence of good character even where bad character, misconduct or other reprehensible behaviour has been adduced leaves some uncertainty in this area. Good character can mitigate but the guidelines are less clear; however, Dorian does not give himself the

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<sup>178</sup> *Ibid*, 379.

<sup>179</sup> *Ibid*, 380.

<sup>180</sup> *R v Vye* [1993] 1 WLR 471.

<sup>181</sup> *R v Aziz* [1995] 3 All ER 149.

<sup>182</sup> Choo (n120), 250-52.

<sup>183</sup> *Aziz* (n181).

<sup>184</sup> *R v Hunter (Nigel)* [2015] EWCA Crim 631, at [77]-[80].

opportunity for such mitigation. Approximately one week following Basil's murder, Dorian confesses to Henry, 'I have done too many dreadful things in my life. I am not going to do any more. I began my good actions yesterday', claiming 'I am going to alter. I think I have altered'.<sup>185</sup> His one 'good action' was to deliberately not break the heart of Hetty Merton, a young naïve girl 'not one of [his] own class', by 'determin[ing] to leave her as flower-like as [he] found her'.<sup>186</sup> Henry, and likely the reader, does not 'think much of [Dorian's] great renunciation'.<sup>187</sup>

That good character remains judged by common law rules and is not particularly focused on in the Act suggests an imbalance between the focus on a defendant's negative and positive expressions of character, with an emphasis on the former. Bad character, in Robinson's view, 'shows both a moral shortcoming in itself and a predisposition toward future antisocial conduct'.<sup>188</sup> The criminal law proceeds on the basis that a 'person has the power to choose how he or she will act at any given moment, no matter what his or her character may be',<sup>189</sup> but it would appear that their choice from moment to moment is curtailed by the admissibility of their prior misconduct, once again rooting a discernment of present conduct in relation to a past offence. Where Robinson notes character may predict future misconduct, I suggest it also has the potential to retrospectively punish past misconduct, which *Dorian Gray* anticipates in the seeming-irreversibility of previous misconduct on the painting.

In conclusion, the admissibility of bad character is strictly defined under the seven gateways, but remnants of nineteenth century conceptions of character remain in the ambiguous definition of 'reprehensible behaviour' and its inconsistent interpretation in case law, and the vague common law rules governing good character.

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<sup>185</sup> *Dorian Gray* (n1), 166.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*, 167.

<sup>188</sup> Robinson, P.H. 'Hate Crimes: Crimes of Motive, Character, or Group Terror' (1992) *Annual Survey of American Law*, 4, 605-616, 610.

<sup>189</sup> *Ibid.*

#### 5.4.3) Previous convictions in sentencing

In 1895, eugenicist Francis Galton foregrounded the retributive aspects of the criminal justice system, referring to ‘the orderly distribution of punishment in conformity with penal deserts’.<sup>190</sup> This means punishment is meted out according to what a defendant deserves for committing the offence, a notion of proportionality that still underlies current sentencing practices. When lawyers refer to a person of ‘bad character’, Simon Parsons notes ‘they normally mean someone with a criminal record’;<sup>191</sup> having discussed previous convictions in relation to bad character admissibility during the substantive trial, I will now explore what effect previous convictions have at the sentencing stage. Lacey argues that ‘[w]hether in the guise of pleas in mitigation, pre-sentence reports, psychiatric reports, reports by probation officers or prison staff, a welter of information about the convicted person’s character becomes central to the decision-making process’ and ‘stretches well beyond past criminal record, encompassing judgments or information about lifestyle, attitudes, compliance with probation or prison discipline’.<sup>192</sup> Redmayne notes that character most often manifests as ‘previous convictions’ and a ‘disposition which persists over time’, noting that character and risk ‘are intertwined’.<sup>193</sup> Janice Nadler and Mary-Hunter McDonnell suggest that ‘prior crimes [might] serve as a proxy for moral character information so that prior crimes is simply a subset of the set of information that gives rise to inferences about moral character’.<sup>194</sup> In *Dorian Gray*, Wotton describes one’s ‘worst habits’ as ‘such an essential part of one’s personality’.<sup>195</sup> The relevance of previous convictions therefore engages in questions of the defendant’s character and, it will be shown, risk punishing the person for an accumulation of negative behaviour, an accumulation of bad character.

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<sup>190</sup> Galton, F. ‘Terms of Imprisonment’ (1895) *Nature*, 52(1338), 174–76, 175.

<sup>191</sup> Parsons (n127), 181.

<sup>192</sup> Lacey (n112), 245.

<sup>193</sup> Redmayne (n121), 4.

<sup>194</sup> Nadler and McDonnell (n110), 303.

<sup>195</sup> *Dorian Gray* (n1), 168.

English Magistrate Edward William Cox published in 1877 what appears to be the first authoritative sentencing text, *The Principles of Punishment*.<sup>196</sup> Cox 'urge[d] leniency' in the treatment of first-time offenders through framing their offence as 'a lapse from virtue the result more of weakness than wickedness'.<sup>197</sup> He distinguishes the occasional criminal and habitual criminal from the 'professional criminal' who 'commit[s] crimes systematically, deliberately, with malice aforethought', '[i]n [whose] mind crime is no sin',<sup>198</sup> and for whom '[r]eformation... is hopeless'.<sup>199</sup> A comparison can be drawn between Cox's distinctions and the distinction between defendants of 'absolute' good character and 'effective' good character discussed in a previous section, as well as the mitigating effect that instances of good character may have at sentencing.<sup>200</sup> They appear to be inversions or refractions of each, but the bleed in between occasional, habitual and professional criminals mirrors the difficulty in distinguishing defendants of absolute and effective good character, and judicial discretion means there is a bleeding in between such delineations.

Certain crimes, according to Cox, such as burglary, 'require an education for their successful accomplishment'<sup>201</sup> which may be evidenced or refuted by reference to 'his past history' through questioning people regarding 'their knowledge of him: Does he associate with thieves? Has he any honest calling?'<sup>202</sup> Therefore an assessment of the defendant's character could be regarded as bearing on their culpability during this time. Cox posits repeat offender's 'criminality is, indeed, very largely increased by the fact that he is an old offender, even [though] the particular crime with which he is now charged may be in itself a lesser crime in degree than that of which he was formerly convicted'.<sup>203</sup> He suggests 'the law properly makes the fact of the committing of a crime after a previous

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<sup>196</sup> Cox, E.W. 'The Principles of Punishment, as Applied in the Administration of Criminal Law by Judges and Magistrates' (Law Times Office 1877).

<sup>197</sup> *Ibid*, 133.

<sup>198</sup> *Ibid*, 135.

<sup>199</sup> *Ibid*, 136.

<sup>200</sup> See Vye (n180), Aziz (n181), Hunter (n184).

<sup>201</sup> Cox (n196), 137.

<sup>202</sup> *Ibid*, 137-38.

<sup>203</sup> *Ibid*, 147.

conviction *an offence in itself*, apart from the particular character of the new offence', which warrants 'a severe punishment, in addition to the punishment that would have been awarded to the crime of which the offender is now convicted'.<sup>204</sup> Previous convictions can still have an aggravating effect, and I suggest that echoes of this cumulative approach to judging a person rather than their conduct still appears in some form today. However, Cox does temper this with the notion that 'careful inquiry should be made into the nature of the former charge, the length of time that has since elapsed', whether the offender has been 'pursuing an honest calling, or otherwise' in the interim, and whether either the present or past offence(s) 'wea[r] the complexion rather of accidental or occasional, than of professional or habitual crime'.<sup>205</sup>

This section will argue that sentencing involves the same questions that used to do with character, and that although there is strict statutory guidance, the relevance of previous convictions to determining sentence risk being cumulative, backward looking and instilling a kind of permanence. This chapter posits that Dorian stabbing his portrait and it transferring the decay to him while being restored itself suggests the permanence of character, at least to an extent, in calculating culpability (during the trial through bad character gateways) and in determining a proportionate sentence (through previous convictions and relevance of motive). The relevance of previous convictions may diminish over time but the possibility of invoking them remains – suggesting that previous convictions can never be erased, only transferred either into irrelevance or probative value. I propose that *Dorian Gray* demonstrates the potentially damaging and backward-looking effects that conceptions of character can have in drawing on past offences to punish present crimes.

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<sup>204</sup> *Ibid*, 147 [emphasis added].

<sup>205</sup> *Ibid*, 147-48.

The court must have regard to the purposes of sentencing when determining punishment,<sup>206</sup> including ‘the punishment of offenders’,<sup>207</sup> ‘deterrence’,<sup>208</sup> ‘the reform and rehabilitation of offenders’,<sup>209</sup> ‘the protection of the public’,<sup>210</sup> and a kind of restorative justice through ‘making amends’.<sup>211</sup> S.143(2) directs the court to ‘treat each previous conviction as an aggravating factor’,<sup>212</sup> having regard to the ‘nature’ and ‘relevance’ of,<sup>213</sup> and the time that has elapsed between,<sup>214</sup> the past conviction and the current offence, which suggests that each previous conviction may be deemed an aggravating factor if it is ‘*recent* and *relevant* to the current offence’.<sup>215</sup> In determining the seriousness of an offence, S.143(1) directs the court to ‘consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused’,<sup>216</sup> which calculates proportionality by reference to seriousness.<sup>217</sup>

Cumulative sentencing is far from a recent innovation; Ashworth observes that ‘[s]ince at least the mid-nineteenth century there has been support for the cumulative principle of sentencing persistent offenders’ as a means of deterring ‘persistent’ offenders from repeating their crimes with increasingly severe sentences.<sup>218</sup> However, he notes that today as in the nineteenth-century ‘some [offences] stemmed from human weakness or poverty rather than “wickedness”’; indeed, in modern accounts of recidivism, ‘most of these [repeat] offences are towards the lower end of the scale of criminality: the high rates of recidivism are for lesser... crimes, and a cumulative principle therefore tends to heap punishment on minor and relatively non-threatening offenders’ in a process

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<sup>206</sup> Criminal Justice Act 2003 (n117), S.142(1).

<sup>207</sup> Ibid, S.142(1)(a).

<sup>208</sup> Ibid, S.142(1)(b).

<sup>209</sup> Ibid, S.142(1)(c).

<sup>210</sup> Ibid, S.142(1)(d).

<sup>211</sup> Ibid, S.142(1)(e).

<sup>212</sup> Ibid, S.143(2).

<sup>213</sup> Ibid, S.143(2)(a).

<sup>214</sup> Ibid, S.143(2)(b).

<sup>215</sup> Ashworth, A. and Player, E. ‘Criminal Justice Act 2003: The sentencing provisions’ (2005) *Modern Law Review*, 68(5), 822–838, 827.

<sup>216</sup> Criminal Justice Act 2003 (n117), S.143(1).

<sup>217</sup> Ashworth, A. ‘Sentencing and Criminal Justice’ 5<sup>th</sup> ed. (Cambridge University Press 2010), 105.

<sup>218</sup> Ibid, 198.

Ashworth describes as ‘significantly disproportionate’.<sup>219</sup> Such a system is ‘counterproductive’ in that it results in ‘offenders [being] less able to live law-abiding lives and more likely to reoffend on release’, meaning that a cumulative sentencing principle based on the rationale of deterrence may be ‘self-defeating’.<sup>220</sup> Sentencing therefore has the potential to ignore socio-political or non-legal contextualising factors if it persists in a cumulative sentencing approach. Although Dorian is indeed culpable for the actions he commits, the wide remit of negative behaviour that the picture displays – from his rejection of Sibyl to his murder of Basil – displays the broadness of factors which can accumulate and be relevant for calculating sentence.

Before the Criminal Justice Act 2003, there had been in England and Wales since 1965 a mandatory sentence for all offenders aged 21 and over who were convicted of murder: life imprisonment.<sup>221</sup> The Act retains life imprisonment as the maximum sentence for murder but also allows for a minimum sentence to be determined by the courts, therefore allowing for judicial discretion in sentencing that the previous law did not.<sup>222</sup> Kate Fitz-Gibbon observes that the Act reduces judicial discretion and sets up ‘a formulaic approach to sentencing’ which she doubts ‘can recognise and allow for this range of culpabilities’, including ‘the gender differences’ in male and female perpetrated violence.<sup>223</sup> For example, the mandatory 25 year starting point for murder involving a weapon ‘fails to reflect that the majority of persons, namely women, who kill in response to prolonged family violence do so with a knife or other weapon’.<sup>224</sup> Redmayne observes ‘the Act in particular expands the admissibility of previous convictions used to show propensity to commit the currently charged crime’,<sup>225</sup> and seems to be largely in favour of the 2003 reforms but notes ‘[t]he difficult thing, though, is to see what sort of rule can

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<sup>219</sup> *Ibid.*, 199.

<sup>220</sup> *Ibid.*, 200.

<sup>221</sup> S. 1(1) Murder (Abolition of the Death Penalty) Act 1965.

<sup>222</sup> Criminal Justice Act 2003 (n117), S.269.

<sup>223</sup> Fitz-Gibbon, K. ‘Minimum sentencing for murder in England and Wales: A critical examination 10 years after the Criminal Justice Act 2003’ (2016) *Punishment and Society*, 18(1), 47-67, 54.

<sup>224</sup> *Ibid.*, 54-55.

<sup>225</sup> Redmayne (n121), 108.

be used to prevent weak cases being propped up by unimpressive character evidence, without going back to the unnecessarily strict standards of the old law'.<sup>226</sup>

The Coroners and Justice Act 2009 requires that a judge 'must' follow relevant sentencing guidelines except where 'it is contrary to the interests of justice to do so',<sup>227</sup> which Julian Roberts argues 'permits a relatively broad degree of discretion' that is 'less restrictive than other statutory provisions'.<sup>228</sup> It is the view of this thesis that using previous convictions as a primary means of calculating liability brings character in as a tacit judge of *mens rea* in the sentencing stage. It can thus allow the court to make a moral judgment of the kind that *mens rea* was supposed to replace and prevent, and risks engaging in the same questions as nineteenth-century conceptions of character.

Therefore, previous convictions speak to propensity, but also to the character of a defendant who, in the law's eyes, deserves a harsher sentence for an accumulation of bad behaviour, which amass in a way similar to how Dorian's immoral acts deform his picture. The sentencing guidelines may slip back into moral judgements of character that determine what a defendant 'deserves' based on an accumulation of misconduct – i.e. even though character is strictly regimented in the *mens rea* portion of the trial, their sentencing turns to an extent on an internal accumulation of guilty acts. Tony Fowles argues that the Criminal Justice Act seems to express the view 'that the victim's lot can be improved somehow by making things worse for the offender', and he takes particular issue with '[t]he loss of what have traditionally been regarded as civil liberties, such as freedom from double jeopardy and the admission of previous convictions', particularly that they have been 'adopted almost unnoticed'.<sup>229</sup> Indeed, when Basil sees Dorian's picture after years of misbehaviour, he is disgusted by the twisted image; 'if it is true... and this is what you have done with your life, why, you must be worse even than those

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<sup>226</sup> Ibid, 109.

<sup>227</sup> Coroners and Justice Act 2009, S.125(1).

<sup>228</sup> Roberts, J. 'Sentencing guidelines and judicial discretion: Evolution of the duty of courts to comply in England and Wales' (2011) *British Journal of Criminology*, 51(6), 997–1013, 1007.

<sup>229</sup> Fowles, T. 'The Criminal Justice Act 2003 – The End of an Era' (2006) *The Howard Journal*, 45(1), 71-78, 72-73.



who talk against you fancy you to be!’<sup>230</sup> The accumulation of those sins appears to be more repulsive to Basil than Dorian’s capacity for criminality, the notion that his character is so horrible that he has committed even more ‘sins’ than rumours suggest reflects the increasing relevance of past conduct in determining a ‘proportionate’ sentence.

Basil does not initially believe it is in Dorian’s character to commit an immoral act: ‘People like you... don’t commit crimes’.<sup>231</sup> He believes in Dorian’s goodness of character at a fundamental level: ‘he is not like other men’, Basil tells Henry, ‘[Dorian] would never bring misery upon anyone. His nature is too fine for that’.<sup>232</sup> However, Dorian’s subsequent criminal actions disprove Basil’s belief in his morality, which may be regarded as a demonstration of the superficiality of character in assigning responsibility. Dorian identifies a ‘delightful contrast’ between Henry and Basil,<sup>233</sup> which is arguably encapsulated in Basil giving away the painting to Dorian for free – ‘it’s yours’ – whilst Henry ‘would seek to dominate [Dorian]... [and] make that wonderful spirit his own’.<sup>234</sup> The dichotomy also manifests in their respective approaches to sin. Henry trivialises sin, arguing that ‘the body sins once, and has done with its sin, for action is a mode of purification... it is the brain, and the brain only, that the great sins of the world take place’.<sup>235</sup> In contrast, Basil, when he sees the picture, tells Dorian ‘[y]ou have done enough evil in your life’, referencing the crimes that accumulate as stains on the soul until purged by prayer and a commitment to refrain from further sin. He implores Dorian to repent as ‘it is never too late’ to do so and quotes the verse ‘[t]hough your sins be as scarlet, yet I will make them as white as snow’.<sup>236</sup>

There appears to be a tension, noted by Andrew von Hirsch, in ‘decid[ing] how much weight the offender’s criminal record should carry, and why’, between approaches in

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<sup>230</sup> Dorian Gray (n1), 125.

<sup>231</sup> Ibid, 43.

<sup>232</sup> Ibid, 63.

<sup>233</sup> Ibid, 17.

<sup>234</sup> Ibid, 32.

<sup>235</sup> Ibid, 18.

<sup>236</sup> Ibid, 125.

which the record is the 'primary determinant of [the defendant's] sentence' and approaches in which the 'sentence chiefly reflect[s] the seriousness of his current crime'.<sup>237</sup> The overarching sentencing guidelines of both Magistrates Court and Crown Court note that, in determining a provisional sentence, the 'seriousness' of the offence is 'assessed by considering the culpability of the offender and the harm caused by the offending', and that '[t]he initial assessment of harm and culpability should take no account of plea or previous convictions'.<sup>238</sup> The guidelines note that 'the court should consider which of the five purposes of sentencing... it is seeking to achieve through the sentence that is imposed', referring to the five in S.142(1), noting that '[m]ore than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence'.<sup>239</sup>

Furthermore, the court 'should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation', outlining potential aggravating and mitigating factors.<sup>240</sup> Statutory aggravating factors include previous convictions, considering which the court should have regard to 'the nature of the offence to which the conviction relates', 'its relevance to the current offence' and 'the time that has elapsed since the conviction',<sup>241</sup> referencing S.143 of the Criminal Justice Act 2003 which deals with the protocol regarding previous convictions. The guidelines suggest that previous convictions 'are normally relevant to the current offence when they are of a similar type', but those 'of a type different from the current offence may be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders'.<sup>242</sup> There appear to be circumstances in

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<sup>237</sup> Von Hirsch, A. 'Proportionality and Progressive Loss of Mitigation: Further Reflections' in Roberts, J.V. and von Hirsch, A. 'Previous Convictions at Sentencing: Theoretical and Applied Perspectives' (Hart 2010), 1-16, 1.

<sup>238</sup> Sentencing Council, General guideline: overarching principles (Magistrates Court), effective from 1 October 2019, accessed 1 February 2020 <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>> and Sentencing Council General guideline: overarching principles (Crown Court), effective from 1 October 2019, accessed 1 February 2020, < <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/>>

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid, see number 3 and 4 under Factors Increasing Seriousness – statutory aggravating factors – previous convictions.

which '[n]umerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary'.<sup>243</sup> For example, regarding threats to kill,<sup>244</sup> the guidelines advise the court to determine the category (and resultant sentence) through reference to culpability and harm. Higher culpability may be 'demonstrated' by a range of factors, including 'significant planning and/or sophisticated offence', 'use of a weapon' and 'history of and/or campaign of violence towards the victim' whilst harm is 'assessed by weighing up all the factors of the case' such as 'very serious distress' and 'significant psychological harm' to the victim<sup>245</sup>. I suggest that planning somewhat relates to *mens rea* and use of a weapon suggests foresight and speaks to *mens rea* in a way.

Character in the current law, according to Mike Redmayne, 'can take various forms' but now manifests in the criminal trial most often as 'evidence of previous offending (typically previous convictions)' as a way of proving the likelihood of the defendant having committed the offence.<sup>246</sup> Evidence of previous convictions therefore operate 'comparatively', comparing past behaviour to present alleged conduct.<sup>247</sup> He suggests that 'there are reasons to think that character does play a role in grounding criminal responsibility', and that, for example, '[w]hile criminal conduct is thought to be essential to punishment, ultimately we punish people, not conduct', and that '[s]ome notion of character may play a role in forging the link between offenders and their conduct... because conduct is a product of a person's ongoing agency' 'it is fair to hold the person responsible for her conduct'.<sup>248</sup> Ashworth identifies a conflict between 'sentencing based on the intrinsic gravity of the conduct itself, taking account of the offender's fault, and

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<sup>243</sup> Ibid.

<sup>244</sup> S.16 Offences Against the Person Act 1861.

<sup>245</sup> Sentencing Council Guidelines (n238).

<sup>246</sup> Redmayne (n121), 16.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid, 232.

sentencing based to some extent on the unexpected and unfortunate result' of their actions.<sup>249</sup>

In determining the seriousness of an offence, S.143 advises 'the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused',<sup>250</sup> i.e. the court must consider the *mens rea* of the defendant established at trial. This section also established that when the defendant 'has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated',<sup>251</sup> and the court 'must have regard' to 'the nature of the offence to which the conviction relates and its relevance to the current offence',<sup>252</sup> and 'the time that has elapsed since the conviction'.<sup>253</sup> An offence 'committed while the offender was on bail' may also be regarded as 'an aggravating factor'.<sup>254</sup> Offences that demonstrate the defendant's 'hostility' towards, and 'motivated by', the victim's sexual orientation,<sup>255</sup> disability<sup>256</sup> or transgender identity,<sup>257</sup> as well as racially and religiously aggravated offences<sup>258</sup> may be regarded as 'aggravating factors'<sup>259</sup> that may lead to increased sentences.

Sentencing, according to Redmayne, 'is the domain of criminal justice where the defendant's previous, and likely future, behaviour has most impact' because it is at this stage where 'previous convictions are widely seen as relevant to sentence' even as 'the precise impact that criminal history should have is controversial'.<sup>260</sup> For example, when making decisions about bail, the Bail Act 1976 states that regard should be had to the

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<sup>249</sup> Ashworth (n217), 123.

<sup>250</sup> Criminal Justice Act 2003 (n117), S.143(1).

<sup>251</sup> Ibid, S.143(2).

<sup>252</sup> Ibid, S.143(2)(a).

<sup>253</sup> Ibid, S.143(2)(b).

<sup>254</sup> Ibid, S.143(3).

<sup>255</sup> Ibid, S.146(2)(a)(i) and (2)(b)(i).

<sup>256</sup> Ibid, S.146(2)(a)(ii) and (2)(b)(ii).

<sup>257</sup> Ibid, S.146(2)(a)(iii) and (2)(b)(iii).

<sup>258</sup> Ibid, S.145(2)(a).

<sup>259</sup> Ibid, S.146(3)(a).

<sup>260</sup> Redmayne (n121), 221.

'defendant's record as respects the fulfilment of his obligations under previous grants of bail' as well as their 'character, antecedents, associations and community ties'.<sup>261</sup> Redmayne finds that 'character has a very significant impact on sentences' in England and Wales, in that '[g]ood character mitigates and bad character aggravates', but he questions whether this is 'justifiable' in a broader sense,<sup>262</sup> citing, for example, the finding that 'sanction severity has no effect on crime levels'.<sup>263</sup> Redmayne suggests that as the criminal justice system 'punish[es] people, not conduct', character 'does play a role in grounding criminal responsibility' and perhaps should – to an extent.<sup>264</sup> If character is relevant to culpability in the way it can mitigate and aggravate sentences, Redmayne posits the possibility of a sentencing process 'which involves a wide-ranging moral audit of the defendant's life', but he counters this with the governing factors in the 2003 Act regarding the relevance of character:<sup>265</sup> '[j]ust as character provides the link between the offender and the crime, so character may influence the amount of punishment which is fitting'.<sup>266</sup>

Although the extent of all crimes except Basil's murder remains undefined, that Dorian is the perpetrator of the crimes is distinctly unambiguous.<sup>267</sup> The divided protagonist of the civilised façade (Dorian) and the immoral interior (manifested by the picture) performs the complexity between internal and external means of assigning individual responsibility. The characters' opinions of the goodness or importance of others rests heavily on their outward appearance: this is the case primarily for Dorian and Henry, though it is present in others as well – for example, it is Dorian's youth and beauty that initially convince James Vane that he could not have known Sibyl, let alone been responsible in some way for her death.<sup>268</sup> This resonates with the weakness of character

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<sup>261</sup> The Bail Act 1976, Schedule 1.

<sup>262</sup> Redmayne (n121), 227.

<sup>263</sup> *Ibid.*, 228.

<sup>264</sup> *Ibid.*, 232.

<sup>265</sup> *Ibid.*, 239.

<sup>266</sup> *Ibid.*, 248.

<sup>267</sup> *Dorian Gray* (n1), 126.

<sup>268</sup> *Ibid.*, 151.

as a determinant in assigning responsibility, given that external factors can be as deceiving as Dorian's youthful appearance is to James. He blames Dorian for Sybil's death even though she did not die directly by Dorian's hand, and although Dorian claims that he is not responsible for this particular crime, the picture appears to agree with James in holding Dorian culpable. After his rejection of Sibyl, Dorian becomes aware that the picture is 'a visible emblem of conscience', realising that '[f]or every sin that he committed, a stain would fleck and wreck its fairness'.<sup>269</sup> Even if a defendant does make a conscious decision to change, their past transgressions can still be brought to bear against them. When Dorian tries to 'be better'<sup>270</sup> and live a more moral lifestyle, his picture's (and, therefore, his soul's) degradation continues unchanged.<sup>271</sup> Like Dorian's painting, a defendant's past crimes remain a cumulative and permanent record of past transgressions. That past wrongdoing can be relevant in determining punishment for a present offence arguably engages with character as a factor in punishing culpability.

We experience the denouement not from Dorian's perspective but rather from the eyes of the servants and nearby constables who hear a 'cry' of 'horrible agony' and a 'crash',<sup>272</sup> and when they enter the room they find:

a splendid portrait of their master as they had last seen him, in all the wonder of his exquisite youth and beauty'. Lying on the floor was a dead man, in evening dress, with a knife in his heart. He was withered, wrinkled, and loathsome of visage. It was not till they had examined the rings that they recognized who it was.<sup>273</sup>

This mirrors the permanence of bad character in some form, and how attempting to revoke it may rebound on the defendant. Mirko Bagaric argues that 'imposing harsher penalties on offenders for what they have done in the past... amounts to the unacceptable view that people should be punished for their character in distinction from what they have done'.<sup>274</sup> This appears to embody Ekow Yankah's argument that the

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<sup>269</sup> Ibid, 74.

<sup>270</sup> Ibid, 167.

<sup>271</sup> Ibid, 176.

<sup>272</sup> Ibid

<sup>273</sup> Ibid, 177.

<sup>274</sup> Bagaric, M. 'Double punishment and punishing character: The unfairness of prior convictions' (2000) *Criminal Justice Ethics*, 19(1), 10-28, 10.

offender can be viewed as 'possessing the sum of all the moral faults we condemn' who 'represents all our immoral temptations'.<sup>275</sup> This means that '[c]haracter judgments turn this separation [of offender] from society into a permanent banishment' and that '[j]udgments about the criminal become fixed, an image of permanent immoral character'.<sup>276</sup> *Dorian Gray* manifest this as the picture. The cumulative approach to character is arguably a retrospective punishing of past crimes, where it should be focused on the present offence. When sentencing defendants, the law continues the nineteenth century practice of punishing the person for their objective 'wickedness' rather than assigning a punishment proportionate to the offence committed.

In this subsection I have argued that character involves external judgment of defendants, including an accumulation of their misconduct. Although character as it relates to *mens rea* has been strictly regulated by the seven gateways, prior convictions can be taken into account at the sentencing stage. This harkens back to nineteenth century ideas about character, as it punishes the person for an accumulation of wrongdoing, essentially penalizing them for their character, rather than for the specific offence.

#### 5.4.4) Motive

Although motive is technically irrelevant to determining *mens rea*,<sup>277</sup> issues about 'motive and the ensuing moral judgments of right and wrong re-emerge' at the sentencing stage 'if the law's crude judgments of individual fault are to be tempered by a genuine regard for individual wrongdoing'.<sup>278</sup> That defendants 'of very different moral colour can be convicted of the same offence, since their motives are irrelevant to criminal responsibility' is 'compensated for by compassion at the sentencing stage and beyond, when motive finally does come into the picture'.<sup>279</sup> The role of motive in sentencing is therefore 'to

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<sup>275</sup> Yankah, E.N. 'Good Guys and Bad Guys: Punishing Character, Equality and the Irreverence of Moral Character to Criminal Punishment' (2004) *Cardozo Law Review*, 25(3), 1019-1067, 1021.

<sup>276</sup> *Ibid.*

<sup>277</sup> Hall, J. 'General Principles of Common Law' 2<sup>nd</sup> ed. (Bobbs-Merill 1960), 1.

<sup>278</sup> Fowles (n229), 76. Evidence of motive may be admissible as bad character under the 'explanatory evidence' via Gateway C S.101(3)(c), as in *R v Sule* [2012] EWCA Crim 1130. See CPS (n124).

<sup>279</sup> Norrie, A. 'Crime, Reason and History: A Critical Introduction to Criminal Law' (Weidenfeld and Nicolson 1993), 55.

distinguish between the relative blameworthiness of individuals who are liable for the same criminal offense',<sup>280</sup> and operates in a similar way to previous convictions in demonstrating 'comparative propensity' between past and present behaviour.<sup>281</sup> This section will demonstrate that motive returns in sentencing as a proxy for character, in which the relevance of 'sadistic motive' in Schedule 21<sup>282</sup> engages in similar questions regarding moral evaluation of character as in nineteenth century conceptions of wickedness.

Although motive is irrelevant in the substantive trial regarding *mens rea*, this section argues that motive, as a proxy for character, tacitly returns through the new mandatory life sentence for murder under Schedule 21 of the Criminal Justice Act. Previous convictions are probative because people with them are 'more likely to commit crime than those without previous convictions', and '[a]s evidence of guilt, previous convictions work in a similar way to motive evidence', Redmayne argues.<sup>283</sup> Regarding the general relevance of motive in sentencing, Smith and Hogan observe that:

[m]otive is important again when the question of punishment is in issue. When the law allows the judge a discretion in sentencing, he will obviously be more leniently disposed towards the convicted person who acted with a good motive. When the judge has no discretion (as in murder) a good motive may similarly be a factor in inducing the Home Secretary to grant an early release on license.<sup>284</sup>

Motive in a general legal sense, has been described as 'an *internal* cause of volition', and Hitchler observes that 'the idea becom[es] a motive as soon as it solicits the will',<sup>285</sup> but notes that the 'law ordinarily judges a man by what he does, not by the reasons for which he does it'.<sup>286</sup> This raises the common conflation of 'motives' and 'intentions' within orthodox criminal legal scholarship,<sup>287</sup> with Husak observing that motive helps delineate

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<sup>280</sup> Hessick, C.B. 'Motive's Role in Criminal Punishment' (2006) *Southern California Law Review*, 80(1), 89-150, 101.

<sup>281</sup> Redmayne (n121), 39.

<sup>282</sup> Schedule 21, Criminal Justice Act 2003.

<sup>283</sup> Redmayne (n121), 17.

<sup>284</sup> Smith, J.C. and Hogan, B. 'Criminal Law' 9<sup>th</sup> ed. (Butterworths 1999), 79.

<sup>285</sup> Hitchler, W.H. 'Motive as an Essential Element of Crime' (1930) *Dickinson Law Review*, 35(3), 105-118, 105.

<sup>286</sup> *Ibid*, 109-10.

<sup>287</sup> Husak, D. 'The Philosophy of Criminal Law: Selected Essays' (OUP 2010), 55-56. This chapter originated as Husak, D.N. 'Motive and Criminal Liability' (1989) *Criminal Justice Ethics*, 8(1), 3-13.



between what are considered either 'positive actions or omissions',<sup>288</sup> and that motive is similarly 'crucial' to defences, particularly those 'based on non-voluntariness'.<sup>289</sup> Robinson similarly notes that a defendant's 'anti-race, anti-religion, anti-sexual-preference, or other anti-group motive' is taken into account in hate crime cases,<sup>290</sup> and Heidi Hurd and Michael Moore's research on the topic suggests that 'in punishing a defendant for hating or being prejudiced against his victim because of his victim's membership in a particular group, hate/bias crimes... necessarily punish a defendant for having bad character' and '[i]n fact, they punish a defendant *solely* for bad character'.<sup>291</sup> The emotions that fuel the commission of hate crimes, in their view, are 'not occurrent states of mind' as in *mens rea*, but rather 'character traits possessed by defendants over time'.<sup>292</sup>

In effect, motive is the force which 'induc[es] intention and action', and yet it is the term motive which is so often excluded from legislated forms of *mens rea* such as intention, recklessness and negligence. Norrie argues that by '[s]eparating motive from intention, and focusing on the latter' in the seventeenth, eighteenth and nineteenth centuries, 'the law was able to focus on the question of "how" acts came to be committed, and to exclude the question of "why" they were done'.<sup>293</sup> Norrie posits that although 'motive is legally irrelevant' in a technical sense, he believes that 'motive cannot so easily be expunged from the law or the legal process', and he emphasises the 'relevance of motive to human conduct and its judgments'.<sup>294</sup> This distinction between motive and intent began to emerge in the second half of the nineteenth century according to Guyora Binder,<sup>295</sup> with the irrelevance of motive gaining particular traction in legal scholarship at the *fin-de-*

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<sup>288</sup> *Ibid.*, 62-63.

<sup>289</sup> *Ibid.*

<sup>290</sup> Robinson, P.H. 'Hate Crimes: Crimes of Motive, Character, Or Group Terror?' (1992) *Annual Survey of American Law*, 4, 605-616, 605.

<sup>291</sup> Hurd, H.M. and Moore, M.S. 'Punishing Hatred and Prejudice' (2004) *Stanford Law Review*, 56(5), 1081-1146, 1128.

<sup>292</sup> *Ibid.*, 1127.

<sup>293</sup> Norrie (n279), 46.

<sup>294</sup> *Ibid.*

<sup>295</sup> Binder, G. 'The Rhetoric of Motive and Intent' (2002) *Buffalo Criminal Law Review*, 6(1), 1-96, 94, 34.

*siecle*.<sup>296</sup> This is exemplified by the distinction made by nineteenth century jurist, James Fitzjames Stephen, between motive as 'desire' and intention as 'the result of deliberation upon motives'.<sup>297</sup>

The Criminal Justice Act sets out different starting points for defendants:<sup>298</sup> 30 years if the court considers 'seriousness of the offence... is particularly high',<sup>299</sup> 25 years if the defendant committed an offence 'normally to be regarded as sufficiently serious',<sup>300</sup> and 15 years if the offence does not fall within any of the above descriptions of seriousness.<sup>301</sup> The Schedule also lists a number of aggravating factors (including significant premeditation and victim vulnerability, the former of which seems to speak to *mens rea* in some way due to an increased notion of mental fault and foresight)<sup>302</sup> and mitigating factors (including an intention to cause serious bodily harm rather than kill and if the defendant was provoked)<sup>303</sup> which can be taken into account at the sentencing stage. Ashworth finds these factors fail to 'indicate the weight that they should bear... nor indicate how they should interact when there are both aggravating and mitigating factors in a case',<sup>304</sup> and is similarly critical of the Schedule's 'variable degrees of seriousness' for murder which 'can sometimes be less serious than manslaughter', and the lack of a 'dangerousness' requirement to distinguish between offenders and their proportionate sentences.<sup>305</sup> He is however generally in favour of Schedule 21 given that the criteria as to the different sentences are 'expressed as factors' not requirements,<sup>306</sup> and the flexibility of judicial discretion in light of the Schedule being emphasized by Lord Woolf CJ in *R v Sullivan*.<sup>307</sup>

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<sup>296</sup> *Ibid*.

<sup>297</sup> Stephen, J.F. 'A History of the Criminal Law of England' (William S. Hein 1883), 110.

<sup>298</sup> Defendants aged 18 or over, as 12 years is the starting point for offenders under 18 years old under S.7 of Schedule 21 (n282).

<sup>299</sup> Schedule 21 (n282), S.5(1)(a) and (b).

<sup>300</sup> *Ibid*, S.51(1A)(c), introduced by the Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010.

<sup>301</sup> Schedule 21 (n282), S.6.

<sup>302</sup> *Ibid*, S.10(a)-(g).

<sup>303</sup> *Ibid*, S.11(a)-(g).

<sup>304</sup> Ashworth (n217), 193.

<sup>305</sup> *Ibid*, 118-19.

<sup>306</sup> *Ibid*, 118.

<sup>307</sup> Lord Woolf CJ in *R v Sullivan* [2005] 1 Cr App R (S) 308.

The Act engages in notions of motive regarding their outlining of several specific offences that would normally garner a life sentence including the murder of ‘two or more persons’ which involves either ‘a substantial degree of premeditation or planning’ or ‘sexual or sadistic conduct’;<sup>308</sup> the murder of a child’ if involving ‘abduction’ or ‘sexual or sadistic *motivation*’;<sup>309</sup> a murder committed ‘for the purpose of advancing a political, religious or ideological cause’;<sup>310</sup> and a murder ‘by an offender previously convicted of murder’.<sup>311</sup> These presumptive minimum sentencing provisions have been dubbed an ‘ill-thought out and overly prescriptive policy’,<sup>312</sup> which ‘unduly increas[e] minimum sentences imposed for murder’.<sup>313</sup> Fitz-Gibbon criticises the ‘failure [of Schedule 21] to allow for proportionality’ as concerning, ‘given that Section 143(1) of the same Act establishes the importance of achieving proportionality in sentencing’,<sup>314</sup> suggesting that the Schedule ‘undermines’ the Act.<sup>315</sup> The specific wording of S.4(2)(b) regarding sadistic motivation might be viewed as an instance of motive bearing not in the substantive trial but in determining the level of culpability and the proportionate sentence for that act. It suggests that motive – even in such limited, specific terms – can be considered an aggravating factor in determining the length of a sentence and invites motive as a relevant factor in assigning proportionate punishment for criminal liability. In other words, motive is not relevant to liability but it can be now be used in determining sentence, which is calculated based on liability.

The picture in *Dorian Gray* thus anticipates the instabilities in delineating between motives and intentions, the blurring between motive and character as bearing on liability, and the interplay between internal and external aspects of these differing mental states of culpability. The picture itself is a product of Basil’s motives, as Basil tells Wotton that

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<sup>308</sup> Schedule 21 (n282), S.4(2)(a)(i)-(iii).

<sup>309</sup> *Ibid.*, S.4(2)(b) [emphasis added].

<sup>310</sup> *Ibid.*, S.4(2)(c).

<sup>311</sup> *Ibid.*, S.4(2)(d).

<sup>312</sup> Ministry of Justice Green Paper ‘Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders’ (2010), CM 7972 of 2010, para [170], 50-51.

<sup>313</sup> Fitz-Gibbon (n223), 52.

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

Dorian was 'the dominant motive of his art',<sup>316</sup> and the picture also manifests not only Dorian's bad character in terms of reprehensible behaviour and misconduct, but also his motives. This is demonstrated when an ostensibly repentant Dorian wonders whether his misdeeds are 'irretrievable' and decides to see if the picture has accounted for his internal change, and a new desire to 'be good'.<sup>317</sup> But when Dorian looks at the picture, he 'could see no change, save that in the eyes there was a look of cunning, and in the mouth the curved wrinkle of the hypocrite'; it seems 'more loathsome, if possible, than before' and dripping blood infuses the painting more than ever.<sup>318</sup> It dawns on Dorian that it may have been 'merely vanity' or 'the desire for a new sensation' or the 'passion to act a part that sometimes makes us do things finer than we are ourselves', or a combination of the three, that had compelled his 'one good deed':<sup>319</sup>

For [the picture] was an unjust mirror, this mirror of his soul that he was looking at. Vanity? Curiosity? Hypocrisy? Had there been nothing more in his renunciation than that? There had been something more. At least he thought so. But who could tell? ... No. There had been nothing more. Through vanity he had spared her. In hypocrisy he had worn the mask of goodness. For curiosity's sake he had tried the denial of self. He recognized that now.<sup>320</sup>

The picture is therefore not only a receptacle of Dorian's accumulated bad character and criminal acts, but also an external manifestation of his internal motivations – he even believes the picture 'had been like a conscience to him'.<sup>321</sup> The picture specifically reflects aspects relating to Dorian's character, not only criminal actions (which resonate with previous convictions) or reprehensible behaviour (which forms part of the Criminal Justice Act definition of bad character), but also his motives (which bear a strong similarity to the Schedule 21 provisions). These, in my view, suggest the cumulative nature that culpability for past misconduct and a moralistic evaluation of 'wicked' motives may have on present offences. Dorian's picture accumulates negative action; that his character is in part derived from an evaluation of wicked motives demonstrates the

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<sup>316</sup> Dorian Gray (n1), 168.

<sup>317</sup> Ibid, 174.

<sup>318</sup> Ibid, 175-76.

<sup>319</sup> Ibid, 176.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

instability of the character provisions, as the picture represents not just misconduct but motive.

Therefore, the inconsistent treatment of motive, suggests a troubling imbalance in the approach towards issues of internal culpability. I argue this demonstrates the potential arbitrariness, and resultant instability, of the law's inconsistent approach to internal culpability, distinguishing between subjective states of mind such as motive and intention, motive and character, character and *mens rea*. This in effect criminalises an accumulation of wrongful conduct, rather than judging a specific state of mind for a specific crime. I would suggest, then, that motive arguably carries within it the potential of harkening back to nineteenth century conceptions of moral wickedness and wickedness of character, as it was then conceived. *Mens rea* eliminated its relevance, but it reappears in certain elements of defences and offences, and at the sentencing stage. The fact that motive slips back in through Schedule 21, just as negative intentions and actions are manifested in Dorian's picture, has the potential to create ambiguity in the law.

In this section I have provided sufficient analysis of relevant primary legal sources such as sentencing guidelines, illustrative case law examples and evidential rules on the admissibility and specific application of bad character. Although I acknowledge that sentencing does not actually engage notions of *mens rea* (as that has already been found by the jury during the substantive trial), I contend that issues regarding motive can be important at the sentencing stage, and have demonstrated this through an examination of the provisions for setting the minimum term for a life sentence for murder according to the convicted person's motive in the Criminal Justice Act 2003.

## **5.5) Conclusion**

In this chapter I have argued that *Dorian Gray* is an anticipatory critique of Wilde's own trial and the continued relevance of character in determining culpability and calculating

proportionate sentences. However, as this chapter has demonstrated, *Dorian Gray* historicises legal conceptions of character, highlights the weaknesses of character as an inchoate means of responsibility-attribution, and shows how the diminished but still significant relevance of previous convictions in determining supposed proportionate punishment brings character back in at the sentencing stage. Character is not a fundamentally negative aspect of criminal law, but it is unstable, temporal and fluid, as demonstrated by the inconsistent approach to what constitutes reprehensible behaviour. I have demonstrated how *Dorian Gray* can be used to illuminate the sheer instability of binaries such as internal/external, character/*mens rea* and the persistent return of the repressed in law (i.e. character).

The chapter has argued that Dorian's picture can be read as embodying the concept of character, which is both an internal and an external judgement, though it relies on the latter as a means of determining the former. Character returns at the sentencing stage, and I have argued that the relevance of previous convictions in determining an appropriate sentence suggests that character is cumulative and backward-looking in practice, as it in effect judges a defendant's present conduct based on an accumulation of 'bad' behaviour. It entails a moral evaluation of the perceived wickedness of a defendant but comes to that conclusion through external value judgments based on superficial criteria. The external aspects of the defendant, much as with Dorian's picture, were the signifiers of criminal responsibility.

Judging present allegations via past actions risks the potential for legal concepts and meanings to become temporally entangled. In addition to the superficiality of character, there is the problem of the fluid and changeable notions of what constitutes good and bad character. Crimes reflect social mores, values and ideologies (as well as prejudices, blind spots and biases), and Dorian's picture represents changing notions of what constitutes bad character.

This chapter has argued that the picture represents both the superficial externality of character and anticipates the coming of *mens rea* as the primary means of judging culpability. *Dorian Gray* reveals that the objective external assessment of moral character is not an accurate reflection of the defendant's internal self, and not an accurate or desirable way to prosecute crime. That sentencing depends largely on evidence of bad character and past offences accumulates these prior convictions as blots on the defendant's character, in the same way that Dorian's picture accumulates permanent evidence of his moral disfigurement. Whereas Lacey posits that *Jekyll and Hyde* represents fears of recognising criminality,<sup>322</sup> I have proposed that *Dorian Gray* represents the fears of mischaracterising criminality.

In the next chapter, I will be looking at character's successor in responsibility attribution by building on the concept of *mens rea*, and arguing that *Jekyll and Hyde* instantiates the continuing instability and complexity between the internal/external aspects of the subjective and objective approaches to judging mental fault.

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<sup>322</sup> Lacey (n2).

**Chapter VI:**  
**The Internal Double – Strange Case of Dr Jekyll and Mr Hyde**

**6.1) Introduction**

The previous chapter demonstrated the value of *Dorian Gray* in analysing the concept of character in criminal law. This chapter will show that Robert Louis Stevenson's 1886 novella *Strange Case of Dr Jekyll and Mr Hyde*<sup>1</sup> illuminates the oscillation between subjective and objective approaches to determining the *mens rea* of recklessness. I will demonstrate how *Jekyll and Hyde* engages with notions of the guilty mind, particularly how the commingled nature of their identities illustrates the arbitrariness of the delineation between the subjective and objective approaches regarding recklessness.

Set against the backdrop of late-Victorian London, though likely inspired by the 'windy gaslit streets and forbidding tenements of Stevenson's Edinburgh hometown,<sup>2</sup> *Jekyll and Hyde* tells the story of a respected doctor's descent into depravity after unleashing his darker side. In contrast to *Dorian Gray* and *Victor Frankenstein*, whose doubles are external and physically separate entities, *Henry Jekyll and Edward Hyde* are two distinct personalities that occupy a single (albeit physically altered) body. As we saw in the last chapter, Nicola Lacey views *Jekyll and Hyde* as an allegory for way in which character could mask capacity – a view I applied to *Dorian Gray*.<sup>3</sup> In this chapter, I will argue that *Jekyll and Hyde* can also be productively utilised in demonstrating the instability between subjective and objective approaches to determining the *mens rea* of recklessness. This chapter will demonstrate the bleeding in, as discussed in chapter three, between subjective and objective approaches in determining the *mens rea* of recklessness, and argue that the instabilities that proceed from these often arbitrary and confusing distinctions are embodied in the split self of *Jekyll and Hyde*. It will also demonstrate that

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<sup>1</sup> Stevenson, R.L. 'Strange Case of Dr Jekyll and Mr Hyde' in Stevenson, R.L. 'Dr Jekyll and Mr Hyde with The Merry Men and Other Stories' (Wordsworth Classics 1993; reprinted 1999; Longmans, Green and Co. 1886), 3-54.

<sup>2</sup> Gibson, J.S. 'Deacon Brodie: Father to Jekyll and Hyde' (Paul Harris Publishing 1977; reprinted by The Saltire Society 1993), 134.

<sup>3</sup> Lacey, N. 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) *Criminal Law and Philosophy*, 4(2), 109–133.



such distinctions may be inevitable in practice as they are the supposed opposite and contrasting notions of subjective and objective, like Jekyll and Hyde, and are needed to illuminate and clarify the other; for example, in the way the defendant's perception of a risk (subjective) may be assessed against a judgment of whether the risk was obvious (objective).

The chapter is structured as follows: I will first provide a detailed summary of the plot of *Jekyll and Hyde* before discussing how it may be regarded a work of doubles fiction; I will be exploring readings of the criminal mind and masculinity relating to the text; building on my earlier analysis of *mens rea*, this chapter will return to those elements of the divide in subjective/objective approaches to recklessness. The chapter is structured around the interpretations of (in)advertent action in three key cases relating to recklessness: self-induced intoxication in *DPP v Majewski*,<sup>4</sup> self-induced temper in *R v Parker*,<sup>5</sup> and inadvertent recklessness in *MPC v Caldwell*.<sup>6</sup> I will argue that *Jekyll and Hyde* illustrates the contradictions, tensions and instabilities the subjective/objective divide in recklessness, including intoxication and anger, and the broader instabilities of *actus reus* and *mens rea*.

## 6.2) Plot Overview

The novella opens with Gabriel Utterson, a lawyer, learning about a disturbing incident witnessed by his cousin, Richard Enfield, some months earlier. Enfield saw a man named Edward Hyde trample a young girl on the street and discovered that a Dr Henry Jekyll signed the cheque given in reparation to the girl's family in order to avoid a scandal. Utterson, an old friend of Jekyll's, determines to investigate the matter further, especially given Jekyll's recent amendment of his will to make Hyde the sole beneficiary.

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<sup>4</sup> DPP v Majewski [1977] AC 443.

<sup>5</sup> R v Parker [1977] 1 WLR 600.

<sup>6</sup> MPC v Caldwell [1982] AC 341.

When confronted by Utterson, who suspects Hyde of blackmailing his client, an anxious Jekyll refuses to discuss the matter. Sometime later, a gentleman named Sir Danvers Carew is beaten to death on the street and Utterson, suspecting Hyde, leads the police to his apartment where Utterson finds a cane he gifted to Jekyll some years before. Jekyll shows the suspicious Utterson a note purportedly from Hyde apologising for the trouble he has caused, but with handwriting so similar to Jekyll's that Utterson suspects Jekyll forged it to protect his strange acquaintance.

Two months pass without incident before Dr Hastie Lanyon, Jekyll and Utterson's mutual friend, gives Utterson a note to be opened if Jekyll disappears or dies. Lanyon is found dead soon after. A couple of months later Jekyll starts isolating himself in his laboratory. When Utterson breaks in he finds Hyde dead wearing Jekyll's clothes. The third person narration is then replaced by two first-hand accounts from Lanyon and Jekyll respectively, explaining what has happened. Lanyon's account details how he witnessed Hyde drink a potion and turn into Jekyll before his very eyes, and how his health deteriorated from the shock of this event.

In Jekyll's account, he confesses to having suffered from dark desires for much of his life, though the nature and extent of them are left ambiguous. He recounts having concocted a potion that would allow him to indulge in these vices without detection or legal reproach by turning him into Hyde. The transformations are successful at first, until he starts turning into Hyde involuntarily in his sleep. He leaves off the potion for a while, until a moment of weakness leads him to take it again, and a pent-up Hyde kills Carew. After another period of resisting temptation, Jekyll begins to transform into Hyde involuntarily whilst awake, at which point he seeks help from Lanyon, as the police investigation closes in. With his original serum low and a new batch ineffective in reversing the transformations, Jekyll decides to write his confession and take his own life rather than face remaining as Hyde forever.

### 6.3) Readings of *Jekyll and Hyde*

Much of the law and literature scholarship surrounding *Jekyll and Hyde* has engaged with the characters' capacity to act and the attribution of responsibility, primarily whether Jekyll is 'legally responsible for Hyde's crimes',<sup>7</sup> how the characters symbolise dissociative identity disorder,<sup>8</sup> and whether Jekyll could rely on the insanity defence to homicide.<sup>9</sup> My interpretation of the novella accords more with the view proposed by Scott Veitch, who reads the text as reflecting the 'changing nature of responsibility attribution in the law, from a character- to intent-based liability that was central to the putative consolidation of a new paradigm in the criminal law',<sup>10</sup> which is a key theme in this thesis as a whole. Veitch argues that the novel is primarily concerned with 'the underlying matter of a tension or transition into the modern era', which 'takes the form of a dynamic between technological and scientific' and I would add legal 'development and possibility, and on the other, the pull of past ethical norms and expectations'.<sup>11</sup> Veitch notes that the extent to which 'the past bind[s] the present and future or to what extent is it possible to leave the past behind, to break free of it', is a question 'that lies at the heart of this story'.<sup>12</sup> I will discuss the portrayal of law in the novel, my focus is on what *Jekyll and Hyde* can illuminate about the subjective and objective approaches to determining the *mens rea of recklessness*.

#### 6.3.1) *Jekyll and Hybrid: reading Jekyll and Hyde as a work of Doubles fiction*

Duality was 'present in almost all his writing' and in Stevenson's life generally, with Claire Herman noting that he was bilingual and ambidextrous.<sup>13</sup> Stevenson suffered from poor health throughout his life, periods of 'high fever had made him aware of having "two

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<sup>7</sup> Hitchler, W.H. 'Literature and the Criminal Law' (1932) *Dickinson Law Review*, 37(1), 1-15, 6.

<sup>8</sup> Saks, E.R. and Behnke, S.H. 'Jekyll on trial: Multiple personality disorder and criminal law' (NYU Press 2000).

<sup>9</sup> Ganz, M.J. 'Carrying On Like a Madman: Insanity and Responsibility in Strange Case of Dr. Jekyll and Mr. Hyde' (2015) *Nineteenth-Century Literature*, 70(3), 363-397; Mitchell, E.W. 'Culpability for Inducing Mental States: The Insanity Defense of Dr. Jekyll' (2004) *Journal of the American Academy of Psychiatry and the Law Online*, 32(1), 63-69.

<sup>10</sup> Veitch, S. 'Binding precedent: Robert Louis Stevenson's *Strange Case of Dr Jekyll and Mr Hyde*' in Wan, M. (ed) 'Reading the Legal Case: Cross-Currents between Law and the Humanities' (Routledge 2012), 217-230, 218.

<sup>11</sup> *Ibid.*, 219.

<sup>12</sup> *Ibid.*

<sup>13</sup> Herman, C. 'Robert Louis Stevenson: A Biography' (Harper Collins 2012), xviii.

consciousnesses” which he characterised as “Myself” and “the other fellow”.<sup>14</sup> Although set in London, *Jekyll and Hyde*’s urban locale has been interpreted as an allegorical Edinburgh, Stevenson’s birthplace, with the city itself divided between the ‘cloudy inner life’ of the crime-riddled Old Town ‘shielded by [the] genteel exterior’ of New Town, that similarly represents the duality of its ‘two tongues’ (Scots and English) and nationalities (Scottish and British).<sup>15</sup> Stevenson’s (rather brief) tenure as a lawyer appears to have directly informed the structuring of *Jekyll and Hyde* as a legal case, including testimony from an eyewitness (Lanyon) and defendant (Jekyll), and the lawyer Utterson who acts a double for Stevenson in investigating and collating material. His use of legal genres in exploring deeper themes relating to the guilty mind and the interplay between the internal and external is of thematic importance to this thesis, as the work conducted here is very much in the spirit of Stevenson in this regard.

As with Dorian Gray and his picture,<sup>16</sup> we learn of Hyde before we learn of Jekyll, when Enfield relays to Utterson the story of the ‘little man’, less a man than ‘some damned Juggernaut’, who ‘trampled’ a young girl in the street.<sup>17</sup> In Jekyll’s statement of his case, he confesses to the impetus behind his actions: throughout his life, he has found it ‘hard to reconcile’ his ‘gaiety of disposition’ with the act of ‘conceal[ing] [his] pleasures’ from the rest of the world.<sup>18</sup> As a result of this, Jekyll commits himself to ‘a profound duplicity of life’ in which ‘both sides of [him] were in dead earnest’.<sup>19</sup> His pursuit results in the discovery that ‘all human beings, as we meet them, are commingled out of good and evil’,<sup>20</sup> and that ‘man is not truly one, but truly two’.<sup>21</sup> Jekyll describes the complex

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<sup>14</sup> Ibid.

<sup>15</sup> Campbell, J. ‘The beast within’, *The Guardian*, 13 Dec 2008, accessed 1 March 2020 from <<https://www.theguardian.com/books/2008/dec/13/dr-jekyll-mr-hyde-stevenson>>

<sup>16</sup> Wilde, O, ‘The Picture of Dorian Gray (Wordsworth Classics 1992; reprinted 2011; Lippincott’s Monthly Magazine 1890), 6.

<sup>17</sup> *Jekyll and Hyde* (n1), 4-5.

<sup>18</sup> Ibid, 42.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, 45.

<sup>21</sup> Ibid, 42.

dichotomy of his two-sided nature when regarding himself – both literally and symbolically – in the mirror:

The evil side of my nature ... was less robust and less developed than the good which I had just deposed... Evil besides (which I must still believe to be the lethal side of man) had left on that body an imprint of deformity and decay. And yet when I looked upon that ugly idol in the glass, I was conscious of no repugnance, rather of a leap of welcome. *This, too, was myself.*<sup>22</sup>

Although Jekyll is careful to identify Hyde as the author of these crimes, noting how he would stand ‘at times aghast before the acts of Edward Hyde’, he frequently slips into the first person when discussing Hyde’s actions, for example he recalls ‘when I would come back from these excursions’, like Dorian in the East End, ‘I was often plunged into a kind of wonder at my vicarious depravity’.<sup>23</sup> Hyde therefore represents not only the subjective self, but uncivilised man, our primal self, as Lacey observes.<sup>24</sup> Carl Keppler suggests that ‘[t]here is never more than one mind, though it alters strikingly as it shifts from its Jekyll-state to its Hyde-state; there is never more than one body, though by means of the chemical mixture (a modern version of the old magic potion), it is altered no less strikingly’.<sup>25</sup> For Keppler, it is ‘[t]he mechanics of the situation [that] make it impossible that Jekyll and Hyde should ever separate, let alone confront each other,’ resulting only in ‘the internal contention of the split-personality halves’.<sup>26</sup>

Though Jekyll keeps the precise nature of his crimes ambiguous, Masao Miyoshi observes that his desires run so counter to Victorian notions of morality that ‘the self and society are enemies to the death’,<sup>27</sup> noting that Stevenson gave the world a ‘convenient epithet (“Jekyll-and-Hyde”) for the post-Freudian with an unhappy double self’.<sup>28</sup> Miyoshi’s appraisal of Hyde’s crimes as flouting the social mores of Victorian society is given resonance by Nils Clausson’s observation that the novella was published in the

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<sup>22</sup> Ibid, 44 [emphasis added].

<sup>23</sup> Ibid, 46.

<sup>24</sup> Lacey (n3), 114.

<sup>25</sup> Keppler, C.F. ‘The Literature of the Second Self’ (University of Arizona Press 1972), 8.

<sup>26</sup> Ibid, 8-9.

<sup>27</sup> Miyoshi, M. ‘Dr Jekyll and the Emergence of Mr Hyde’ (1966) *College English*, 27(6), 470-480, 473.

<sup>28</sup> Ibid, 480.

same month that *The Criminal Law Amendment Act* went into effect.<sup>29</sup> Clausson argues that it is no coincidence that Jekyll's appetites are described as 'criminal in the sight of the law',<sup>30</sup> and indicates that '[m]any homosexual readers of the novel in early 1886 must have linked it to the public debate on criminalising private male-to-male sexual acts and to their own double lives'.<sup>31</sup> *Jekyll and Hyde* therefore arguably exemplifies Elaine Showalter's casting of Stevenson as 'the fin-de-siècle laureate of the double life'.<sup>32</sup>

The notion of Jekyll as a man of good reputation with a secret inner life that flouts moral convention gains further meaning when considering the real-life case of William Brodie, which served as an inspiration for *Jekyll and Hyde*. According to Hillel Schwartz, Brodie was not only a Scottish deacon but a 'gamester, cheat, bigamist, and chieftain of a gang of thieves'.<sup>33</sup> Hanged in 1788, Brodie was 'restored to double life' by Stevenson in *Jekyll and Hyde*.<sup>34</sup> The influence of the Brodie case and the notion of the double life on Stevenson's writing can be seen in his novella *Markheim*,<sup>35</sup> published a year before *Jekyll*, which Joseph Egan regards as 'a moral fable in the form of an exploration of his main character's mind'.<sup>36</sup> The sheer number of mirrors in the story is significant in Egan's view because they 'gradually becomes the central character's own mind', and he finds that the mirrors serve to 'accuse Markheim of his evil and become suggestive of the many depths and faces within his own soul'.<sup>37</sup> Markheim's reflection disgusts him: '[L]ook at yourself! Do you like to see it? No! Nor I – nor any man'.<sup>38</sup> Keppler observes that 'the mirrors on all sides catch his reflection: once more the old device of the mirror, placing the self outside the self, as though independent of its original'.<sup>39</sup> Markheim kills the pawn

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<sup>29</sup> The Criminal Law Amendment Act 1885.

<sup>30</sup> Clausson, N. "Culture and Corruption": Paterian Self-Development versus Gothic Degeneration in Oscar Wilde's *The Picture of Dorian Gray* (2003) *Papers on Language and Literature*, 39(4), 339-364.

<sup>31</sup> *Ibid.*, 351-52.

<sup>32</sup> Showalter, E. 'Sexual Anarchy: Gender and Culture at the Fin de Siècle' (Bloomsbury 1991), 106.

<sup>33</sup> Schwartz, H. 'The Culture of the Copy: Striking Likenesses, Unreasonable Facsimiles' (MIT Press: Zone Books 1996), 80.

<sup>34</sup> *Ibid.*

<sup>35</sup> Stevenson, R.L. 'Markheim' in Stevenson, R.L. 'Dr Jekyll and Mr Hyde with The Merry Men and Other Stories' (Wordsworth Classics 1993; reprinted 1999; Pall Mall Gazette 1884), 119-132.

<sup>36</sup> Egan, J.J. "'Markheim': A Drama of Moral Psychology' (1966) *Nineteenth-Century Fiction*, 20(4), 377-384, 377.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Markheim* (n35), 120.

<sup>39</sup> Keppler (n25), 107.

broker<sup>40</sup> and we learn that the latter's 'money' was 'Markheim's concern'.<sup>41</sup> In the process of stealing from his victim, Markheim is greeted by a 'creature' that was 'not of the earth and not of God',<sup>42</sup> who Egan describes as the 'voice of Markheim's conscience [as] another self which assumes the role of a demon tormentor in order to draw forth the last vestiges of goodness from the murderer's heart'.<sup>43</sup> For Egan, this marks the 'first of Stevenson's tales in which the alter-ego appears as a distinct personality, and the mysterious visitor who enters the door of the drawing-room is thus the figure of Markheim's better self come to confront the evil in his soul'.<sup>44</sup> The creature 'help[s] Markheim restore his soul', and his subsequent 'confession of guilt moves from an interior to an exterior level of consciousness'<sup>45</sup> when Markheim acknowledges his crime to the maid.<sup>46</sup>

The eponymous 'dual personality' in *Jekyll and Hyde* is viewed by Edward Sagarin and Robin Kelly as a 'frightening, literary invention' which embodies 'a conflict that arises not infrequently in courtroom scenes, especially with a murderer in the dock'.<sup>47</sup> They propose that:

All of the popular metaphors of good and evil are embodied in Jekyll/Hyde. Jekyll is a successful, middle-class physician, a genial, shy, handsome man with an abiding interest in science that makes him a bit eccentric in the genteel bourgeois society of his day. Hyde, in contrast, is physically deformed, dwarfish, callous, and secretive – a diabolical and murderous character. They are the two sides of each other, physically, emotionally, morally, and in their actions as well, but *they are nonetheless one and the same person, so that that person is responsible for both parts of himself*.<sup>48</sup>

They posit that '[b]ecause Jekyll is Hyde, he is accountable for Hyde's crimes',<sup>49</sup> yet they argue that 'Hyde's acts are those of a man Jekyll hardly knows...and thus Jekyll pleads that he not be held accountable'.<sup>50</sup> In doing so 'Jekyll requests that we think of his alter

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<sup>40</sup> Markheim (n35), 121.

<sup>41</sup> Ibid, 124.

<sup>42</sup> Ibid, 127.

<sup>43</sup> Egan (n35), 382.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid, 384.

<sup>46</sup> Markheim (n34), 132.

<sup>47</sup> Sagarin, E. and Kelly, R.J. 'Responsibility and Crime in Literature' (1985) *The Annals of the American Academy of Political and Social Science*, 477(12): The Insanity Defense, 12-24, 16.

<sup>48</sup> Ibid, 17 [emphasis added].

<sup>49</sup> Ibid, 16.

<sup>50</sup> Ibid, 17.

ego as an example of dissociative response for which the respected and respectable person should not be held answerable'.<sup>51</sup> They conclude that '[g]uilt drove Jekyll to death at his own hands, but it was a guilt without the need for a public accuser. It was a verdict imposed by himself for deeds that had occurred and for which he was at least partially, if not fully, responsible'.<sup>52</sup> There is a Calvinist, and broader Christian dimension to this self-examination of the conscience, as Michel Foucault's work suggests, which involves a kind of splitting,<sup>53</sup> but the focus of this thesis restricts itself to reading the Jekyll/Hyde divide into specific instances of recklessness.

This sharing of responsibility is of particular import when delineating between the titular two selves in *Jekyll and Hyde*. Irving Saposnik observes the popular tendency to misread the story, originally conceived as 'a fable of Victorian anxieties', as 'a myth of good-evil antithesis, a simplistic dichotomy rather than an imaginative exploration of social and moral dualism'.<sup>54</sup> 'As the mirror of Jekyll's inner compulsions [Hyde] represents that shadow side of man which civilization has striven to submerge', Saposnik insists, describing Hyde as 'a creature of primitive sensibilities loosed upon a world bent on denying him'.<sup>55</sup> In representing this, Saposnik argues that:

Hyde is usually described in metaphors because essentially that is what he is: a metaphor of uncontrolled appetites, an amoral abstraction driven by a compelling will unrestrained by any moral halter. Such a creature is, of necessity, only figuratively describable, for his deformity is moral rather than physical.<sup>56</sup>

I agree with Saposnik's observation that '[t]he major characters are all professional gentlemen because their respectability provides the façade behind which their *essential selves* are allowed to masquerade',<sup>57</sup> though in this context I would prefer the term 'inner selves' to 'essential selves', especially as the notion of an inner self is socially

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> See Foucault, M. *'Du Gouvernement des Vivants. Cours au Collège de France, 1979–1980'* (Gallimard 2012) 284, and further discussion by Heinämäki, E. 'Re-examining Foucault on confession and obedience: Peter Schaefer's Radical Pietism as counter-conduct' (2017) *Critical Research on Religion*, 5(2), 133-150.

<sup>54</sup> Saposnik, I.S. 'The Anatomy of Dr. Jekyll and Mr. Hyde' (1971) *Studies in English Literature 1500-1900*, 11(4): *Nineteenth Century*, 715-731, 715.

<sup>55</sup> Ibid, 728.

<sup>56</sup> Ibid, 730.

<sup>57</sup> Ibid [emphasis added].



constructed, and reflects the shift towards the interior at the nineteenth century *fin-de-siècle*.

6.3.2) 'Man is not truly one, but truly two':<sup>58</sup> Hyde, masculinity and the criminal brain

The late-nineteenth century understanding of the brain was quite different than our current understanding, as Anne Stiles observes when she argues that '[t]he opposites embodied in the Jekyll and Hyde binary conform to late-Victorian ideas about the brain as a double organ' comprised of two independent spheres:

the left brain was seen as the logical seat of reason and linguistic ability, contrasting with the emotional right brain. Predictably, most versions of dual-brain theory mediate Victorian race and gender biases. The left brain was associated with masculinity, whiteness, and civilization, while the right brain was the supposedly inferior or feminine seat of emotions, instincts, and the unconscious. The right hemisphere supposedly dominated in brains of women, savages, children, criminals, and the insane [...] While *Jekyll exhibits left-hemisphere attributes* (masculinity, whiteness, logic, intelligence, humanness), *Hyde embodies right-hemisphere traits* (femininity, racial indeterminacy, madness, emotion, and animality).<sup>59</sup>

The binaries suggested here in medical terms, right/left, male/female, logic/emotion, resonate with the *mens rea* of recklessness, and complements the shift from (external) character to (interior) *mens rea* that was evolving by the end of the nineteenth century, as discussed in the last chapter. The mostly male cast of *Jekyll and Hyde* allows for a focused interrogation into male criminality; though it seems exclusionary, the focus on men, and particularly on Jekyll's criminality, results in men who exhibit more of the female-attributed right-hemisphere traits Stiles discusses above (including emotion, madness and animality) than the male-coded left-hemisphere reason and rationality.<sup>60</sup> Jekyll believes that he can separate criminal desires and action from his moral self, but I argue that the inexorable and increasing power of Hyde demonstrates that separating these sides of himself is impossible. The personalities begin to bleed into one another

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<sup>58</sup> Jekyll and Hyde (n1), 43.

<sup>59</sup> Stiles, A. 'Robert Louis Stevenson's Jekyll and Hyde and the Double Brain' (2006) *Studies in English Literature 1500-1900*, 46(4): The Nineteenth Century, 879-900, 884-5.

<sup>60</sup> Ibid.

as Jekyll begins involuntarily transforming into Hyde – that he does so during sleep, the realm of the unconscious, is no coincidence.

The preponderance of male characters in the text could be interpreted as facilitating a focused interrogation of male criminality, a notion which Martin Danahay has observed. Danahay views the novel as ‘a cautionary tale about the increasing emphasis on the appetites of the masculine body in late Victorian culture’ that warns against ‘such indulgence of bodily appetites, which in *Jekyll and Hyde* leads to the complete loss of manly self-control.’<sup>61</sup> He identifies a dichotomy of class within the text that manifests when ‘Dr. Jekyll loses his social standing as a result of his indulgence of his desires and inhabits a working-class body to seek gratification of unseemly appetites’, noting that ‘Dr. Jekyll wears a working-class body as if it were a suit of clothing’ and arguing that ‘[t]he different bodies encode at the corporeal level the geographical, class-based division of London into East and West’.<sup>62</sup>

This ‘corporeal duality’, as Danahay terms it, ‘registers the conflict between competing versions of manliness’, the ‘decent’ body of the ‘respectable’ Jekyll and the ‘indecent’ body of the ‘working-class’ Hyde.<sup>63</sup> That ‘Mr Hyde is still dressed as a gentleman... leads to cognitive dissonance for all those who look at him as they register the contrast between the working-class, muscular body and the rich fabrics in which he is dressed’.<sup>64</sup> Danahay’s argument that Jekyll’s body becomes ‘a piece of clothing that he believes he can put on or tak[e] off at will, so that bodily identity itself is unstable’<sup>65</sup> is an intriguing one when considering his discussion of the Victorian gentlemanly ideal, an archetype that was under attack from the increasing accessibility of clothes to the lower classes due to new and improved production techniques.<sup>66</sup> Danahay’s casting of Hyde as

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<sup>61</sup> Danahay, M. ‘Dr Jekyll’s Two Bodies’ (2013) *Nineteenth-Century Contexts*, 35(1), 23–40, 23.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, 23–4.

<sup>65</sup> *Ibid.*, 25.

<sup>66</sup> *Ibid.*

clothing brings another layer to the general theory of the double discussed in chapter four, i.e. its necessary corporeality.

Danahay also compares Utterson to Jekyll in terms of class through their drinking habits: 'The emphasis on [Utterson] not drinking wine underscores his difference from Dr. Jekyll, who drinks a potion that makes him lose all self-control... Utterson's self-control is a class marker in that his restraint makes him a gentleman, in contrast to Mr. Hyde'.<sup>67</sup> Danahay therefore appears to argue that, although Utterson possesses certain external hallmarks of a nineteenth-century gentleman, it is his internal character that truly earns him gentleman status in contrast to Hyde. For Danahay '[t]he mark of a gentleman is control over his body and to lose this control is to lose one's class status and to sink from a "Dr." to a "Mr."'<sup>68</sup> Hyde is coded as working class because:

he expresses overtly desires that are repressed in respectable society. Stevenson is drawing upon images here of the working classes as closer to the 'animal' and as lower down the social scale, and thus able to express desires that were off limits to the respectable man. Mr. Hyde is masculine desire made visible.<sup>69</sup>

This resonates with readings of the creature as the proletariat in *Frankenstein* (of note in the next chapter)<sup>70</sup> and Osborne's Gothic reading of the Communist Manifesto discussed in chapter four.<sup>71</sup> Jekyll treats Hyde 'as if he were a suit that he could assume or discard at will... To become Mr. Hyde is, at least in these initial descriptions, simply to assume a disguise, as if Jekyll were simply an actor upon the stage switching from one role to another'.<sup>72</sup> Danahay argues that in the book Jekyll is 'a hypocrite who transgresses moral boundaries', in contrast to Richard Mansfield's stage adaptation of the character in which Jekyll is 'a noble man who falls victim to contradictory male desires that he struggles manfully to overcome' (in the latter 'the audience is invited to focus on the male body as

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<sup>67</sup> Ibid, 28.

<sup>68</sup> Ibid, 29.

<sup>69</sup> Ibid, 31.

<sup>70</sup> Moretti, F. 'The Dialectic of Fear' (1982) *New Left Review*, 136(1), 67-85.

<sup>71</sup> Osborne, P. 'Remember the future? The Communist Manifesto as historical and cultural form' (1998) *Socialist Register*, 34, 190-204.

<sup>72</sup> Danahay (n61), 31.

the spectacular site of this inner conflict between desire and restraint').<sup>73</sup> Danahay ultimately sees *Jekyll and Hyde* as a text which 'registers class conflict that it is played out at the level of the "social body" as inscribed on a single man's body'.<sup>74</sup>

In order to encompass the fall from gentleman to working-class man Dr. Jekyll had to change not just consciousness, but bodies as well. It is for this reason that Stevenson's *Jekyll and Hyde* is *a tale about two bodies and not just two identities*. To become Mr. Hyde, Dr. Jekyll had to enter a different body and suffer a fall in social status in order to indulge his "indecent" physical desires. This aspect of the story is lost in adaptations of *Jekyll and Hyde* which approach it as a psychological drama of conflicted desires.<sup>75</sup>

The notion of English masculinity in crisis is remarked on by E.D. Cohen, who finds 'the novel's insistent focus on its male characters as a screen for fears about the failure of masculinity as a coherent subject'; in focusing on this, Cohen considers 'the narrative's doubling of the male body in the "dual person" Jekyll/Hyde as a symptom of the antinomies that destabilize male "character"'.<sup>76</sup> Cohen argues the novel 'literalizes a struggle between normative and transgressive embodiments of late nineteenth-century English masculinity, thereby making visible and intelligible some of the contradictions that permeate these opposing configurations of male gender'.<sup>77</sup> By 'narrating masculinity as an unstable subjectivity' through the divided protagonist, Cohen argues that novels like *Jekyll and Hyde* 'helped reproduce the conditions of possibility for imagining and embodying new middle-class masculinity'.<sup>78</sup>

Cohen describes the mutually transformative effect that real-life cases and *Jekyll and Hyde* had on one another: 'the literary work has come to embody the meanings of the very historical phenomena to which it helped give shape'.<sup>79</sup> This reinforces the value of law and literature, as discussed previously. Drawing on this mutual connection, Cohen observes how the veracity of Jekyll's strange account is ensured by structuring the novel

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<sup>73</sup> Ibid, 33.

<sup>74</sup> Ibid, 36.

<sup>75</sup> Ibid, 37 [emphasis added].

<sup>76</sup> Cohen, E.D. 'Hyding the Subject?: The Antinomies of Masculinity in *The Strange Case of Dr. Jekyll and Mr. Hyde*' (2003) *Novel: A Forum on Fiction*, 37(1)(2), 181-199, 181.

<sup>77</sup> Ibid, 181-2.

<sup>78</sup> Ibid, 183.

<sup>79</sup> Ibid, 184.

as a legal case – complete with police-like investigative work, witness testimonials and a confession as well as its chosen narrator(s).<sup>80</sup> Cohen illustrates that:

within the legal purview, personhood is metonymically signified by a stable body that simultaneously serves to organize both a man's identity and his life story. Concomitantly and conversely, 'the law' constitutes this temporal/narrative coincidence as *the somatic site of a subjectivity* around and within which it organizes its province.<sup>81</sup>

Cohen posits that the novella's 'rhetorical structure and its enumerated attributes might seem to provide a model opening to an ideal autobiography of a bourgeois Victorian man', and yet the text 'immediately swerves away' from having 'explicitly evoke[d] this class-determined, masculine ideal' in describing Jekyll's duplicitous desires.<sup>82</sup> Describing *Jekyll* as a 'self-divided vision of male subjectivity' which 'envisions the "space" of subjectivity as a political articulation',<sup>83</sup> Cohen surmises that the novel:

provides a late-Victorian narrative that prises apart the contradictory determinants that bourgeois masculinity sought to portray as a "natural" coincidence of gender and person – in both the grammatical and descriptive senses – while simultaneously engendering contexts that would continue to fiction its integrity.<sup>84</sup>

Cohen concludes that the novel represents 'male subjectivity in question by manifesting antinomies where an ideologically determined "identity" should have appeared'.<sup>85</sup> It does this by 'demonstrat[ing] th[e] inability' of law and medicine 'to account for the narrative complexity that inheres in the representations of Victorian subjects'.<sup>86</sup> In this context, Cohen finds that the novel 'offers the notion of a split subject as a narrative solution to the problem of representing the fictive "coherence" of a male life and thereby reproduces the discursive conditions that displace social and historical contradictions "into" male subject "himself"'.<sup>87</sup>

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<sup>80</sup> Ibid, 186.

<sup>81</sup> Ibid, 188 [emphasis added].

<sup>82</sup> Ibid, 191.

<sup>83</sup> Ibid, 193.

<sup>84</sup> Ibid, 196.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

There is an intriguing interplay between Jekyll's perceptions of himself, seeing himself simultaneously as possessing the 'respect of the wise and good among [his] fellow-men' and the man who needed to have 'concealed [his] pleasures' for most of his life.<sup>88</sup> Masao Miyoshi observes that the 'important men of the book, then, are all unmarried, intellectually barren, emotionally stifled, joyless. Nor are things much different in the city as a whole... The setting hides a wasteland behind that secure and relatively comfortable respectability of its inhabitants'.<sup>89</sup> In this 'Victorian wasteland', as he terms it, Miyoshi observes that 'gaiety and respectability are not easily reconciled. Dr Jekyll, in particular, sees the two as mutually exclusive: a respectable pleasure would be a contradiction in terms' and noting that '[t]he exacting nature of his moral ambition was such that the most innocent delight resulted in shame'.<sup>90</sup> Dr Jekyll therefore chooses to 'enjoy' his 'suppressed' desires 'in the person of a totally new identity, Edward Hyde'.<sup>91</sup> It is only after the point of no return, which Miyoshi views as the murder of Sir Danvers Carew, that the:

metamorphosis [becomes] completely involuntary and the magic drug virtually ineffectual. There are no longer any marks to distinguish the two. The hideous face is forever joined to the social mask. The joining, however, is in no sense a reconciliation of the Jekyll-Hyde duality. Rather, it signals a return to the starting point of Jekyll's whole experience. Only the annihilation of one of the two selves 'reconciles' them.<sup>92</sup>

The unsustainable duality Jekyll feels between his two selves may be attributable to a repression of his sexuality, as Elaine Showalter suggests. Calling Henry Jekyll 'the odd man of fin-de-siècle literature', she suggests that, seemingly '[u]nable to pair off with either a woman or another man, Jekyll divides himself, and finds his only mate in his double, Edward Hyde', rendering Jekyll 'both odd and even, both single and double'.<sup>93</sup> His internal struggle, she suggests, stems from the inability to balance 'his need to pursue illicit sexual pleasure' with 'liv[ing] up to the exacting moral standards of his bleak

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<sup>88</sup> Jekyll and Hyde (n1), 42.

<sup>89</sup> Miyoshi, M. 'The Divided Self: A Perspective on the Literature of the Victorians' (New York University Press 1969), 297.

<sup>90</sup> Ibid, 298.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Showalter (n32), 109.

professional community' during an era in which sexuality was strictly policed.<sup>94</sup> The other male characters in the novel appear to be similarly repressed, with narrator Utterson endeavouring 'to stay within the boundaries of masculine propriety'.<sup>95</sup> There are seeming commonalities in this regard between *Jekyll and Hyde* and *Dorian Gray*, and likewise Stevenson and Wilde, and divergences with *Frankenstein* and Mary Shelley that will be touched upon in the next chapter.

As mentioned above, *Jekyll and Hyde* contains many legal features, terms and scenarios that would make it an appropriate and accessible object for legal study. Although the criminal justice system features only tangentially in the novel (in terms of the police investigation into Hyde's crimes) the novel does deal with legal themes of responsibility and guilt. Stevenson utilises legal writing frameworks in the telling of a literary work, and we are shown both an objective assessment of the case from Dr Lanyon and a subjective assessment from Jekyll himself. According to Iker Nabaskues, Utterson investigates and assembles the evidence as the novel's 'representative of the law',<sup>96</sup> whose investigation into Hyde's immoral actions and his mysterious connection with Jekyll forms much of the novella. That the 'strange reality of the case exceeds [Utterson's] capacity of legal discernment' – a discernment which 'represent[s] reason and social establishment' – indicates to Nabaskues 'the limits of legal reasoning'.<sup>97</sup> The judging here is done not by Stevenson, Nabaskues posits, but by Jekyll himself against 'his peculiar strict sense of morality'; he concludes that 'Stevenson shows that whatever the fact, at the end, we must always confront our personal jury' – namely, our own conscience.<sup>98</sup>

Although a number of crimes are hinted at, the precise nature of most remains ambiguous, with Jekyll using intentionally nonspecific terms such as 'my dark deeds' to

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<sup>94</sup> Ibid.

<sup>95</sup> Ibid, 110.

<sup>96</sup> Nabaskues, I. 'Law, Science, Facts and Morals in Robert Louis Stevenson's The Strange Case of Dr. Jekyll and Mr. Hyde' (2014) *Oñati Socio-legal Series – Justice in Literature: New Perspectives on European Legal Culture*, 4(6), 1173-1184, 1180.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid, 1182.

describe his actions.<sup>99</sup> There are a number of implied criminal acts but, as Stern notes, the novel focuses on specific instances of assault (of the girl in the street) and murder (of Sir Danvers Carew).<sup>100</sup> Stern compares Jekyll's carefully-composed scientific potion recipe to Victorian criminal law's 'increasingly refined and precise' approach to bases for liability, burdens of proof, and distinctions between offences and defences,<sup>101</sup> and especially the separation of general and specific intent, in relation to which Stern calls Jekyll 'thoroughly a creature of such distinctions'.<sup>102</sup> He notes that Jekyll initially 'takes pains to distance himself from Hyde, emphatically designating him, at one point in the manuscript, in the third person', but also refers to Hyde in the first person and shares the same handwriting style.<sup>103</sup>

I have therefore developed a reading of *Jekyll and Hyde* that considers subjective and objective standards of behaviour, building a perspective based on literary criticism but moving beyond it, through a consideration of Victorian ideals of masculinity and idealised male behaviour. The novel illustrates the anxieties and antinomies of masculinity and the challenge of reaching the Victorian standard of the ideal gentleman. This gender binary is reflected in the *fin-de-siècle* understanding of the male brain as logical and rational, and Jekyll's demonstration of the falsity of this assumption.

#### **6.4) Reading *Jekyll and Hyde* as a Critique of the Subjective/Objective Divide in Recklessness**

This section will develop a reading of *Jekyll and Hyde* which argues that the eponymous doctor of Stevenson's tale, like the subjective/objective divide to discerning the *mens rea* of recklessness, is a split being comprised of two manifestations of the same entity. Neither the subjective or objective approach can penetrate into the mental processes of a defendant, but they comprise different methods of calculating approximate mental fault

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<sup>99</sup> Jekyll and Hyde (n1).

<sup>100</sup> Stern, S. 'Law and Literature' in Dubber, M.D. and Hörnle, T. (eds) 'The Oxford Handbook of Criminal Law' (OUP 2014), 111-130, 126-8.

<sup>101</sup> Ibid, 125.

<sup>102</sup> Ibid, 126.

<sup>103</sup> Stern, S. 'Review of the Strange Case of Dr Jekyll and Mr Hyde' (2008) Special Issue: Legal Fiction, 18(4), 356-359, 356-57.



for criminal action: the subjective looks to the defendant himself; the objective to a so-called 'reasonable person', a morally upright law-abiding comparator who provides the moral standard against which the defendant is judged. Jekyll's superficial persona of the law-abiding, professional doctor would seem to fit this objective standard of reasonableness, a paragon of nineteenth century male virtue and professionalism. In this context, Hyde might be read as the subjective self, a being that unleashes and enacts Jekyll's inner immoral desires. In truth, their connection is more complex and commingled, as Veitch observes:

Jekyll is not a split personality in the sense that the story is often misunderstood. There is not a prior unitary subject who is split in two, and there is not straightforwardly Jekyll who is good and Hyde who is bad. The point is rather that Jekyll is Jekyll *and* Hyde.<sup>104</sup>

In my view, therefore, *Jekyll and Hyde* demonstrates the instabilities of the subjective/objective divide. Hyde is both Jekyll's inner self externalised and an objectively true representation of who Jekyll is – his subjectivity made flesh. The subjective standard, though it purports to investigate the defendant's mental processes, must primarily be gleaned from objective means. The objective standard (upstanding moral character, the reasonable person) is not only shaped by the values of the era in which it operates, but the very idea of an objective standard is itself historical. *Jekyll and Hyde* therefore instantiates in literary form the complexity and instability between the subjective and objective approaches in determining recklessness.<sup>105</sup> I highlight three key cases that discuss recklessness, namely *Majewski*, *Parker* and *Caldwell*, and the tensions they raise between subjective and objective approaches.

This chapter focuses on one example of the law's dichotomies, the subjective/objective divide as regards recklessness. Alan Norrie 'see[s] criminal law as involving a series of false splits, or antinomies, between for example motive and intention, direct and indirect

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<sup>104</sup> Veitch (n10), 221.

<sup>105</sup> This proceeds from deeper social instabilities in discourses around class, gender and race, which *Jekyll and Hyde* also dramatizes. These may form the basis of future work, as this chapter focuses on the legal instabilities between subjective/objective approaches to recklessness.

intention, subjective and objective recklessness', which he suggests 'can be traced to deeper splits between "factual" and "normative" accounts of basic legal categories, between "internal" and "external" accounts of criminal law and between questions of individual and social justice'.<sup>106</sup> These 'splits', Norrie contends, 'derive from the abstract concept of the individual at the law's core'.<sup>107</sup> Norrie argues that:

what lawyers essentially think of as two distinct and separable domains and sets of questions are not ultimately separable at all. The problems which dog the criminal law can be traced finally to a false but primal separation within the law between individual and social justice, such that the latter is taken to involve extraneous issues. My large, and not necessarily obvious, claim is that it is this *ultimately unsustainable separation* between two concepts of justice which constitutes the deep structure underlying the problems of provocation, recklessness and intention.<sup>108</sup>

#### 6.4.1) 'Swallow[ing] the transforming draught':<sup>109</sup> self-induced intoxication and Majewski

The tension between subjective and objective becomes unstable when applied to instances of unconscious intention, such as cases where an intoxicated defendant intends without realising, like Hyde. This is demonstrated in the case of *Majewski*, in which the defendant had taken a significant amount of drugs over a two-day period, and got into a fight at a pub, which resulted in several counts of causing actual bodily harm (ABH). The defendant said that 'for some time he had been taking a mixture of drugs and on that evening he had drunk a fair amount of alcohol while under the influence of drugs', and 'claimed to have no recollection at all of what had happened in the public house or at the police station, until he woke up there and found himself handcuffed'.<sup>110</sup> A medical doctor called as expert witness testified 'that the drugs he had been taking when followed by alcohol would lead to rapid intoxication and uninhibited aggressive paranoid behaviour and that afterwards there would be a loss of memory as to what had happened'.<sup>111</sup>

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<sup>106</sup> Norrie, A. 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) *The Modern Law Review*, 65(4), 538-555, 540-41.

<sup>107</sup> *Ibid*, 541.

<sup>108</sup> *Ibid*, 539 [emphasis added].

<sup>109</sup> *Jekyll and Hyde* (n1), 49.

<sup>110</sup> *R v Majewski* [1975] 3 W.L.R. 401, per Lawton J at [404].

<sup>111</sup> *Ibid*.

This appears, on the facts, to accord with Jekyll concocting a potion that will allow the 'two natures that contended in the field of [his] consciousness' to be 'housed in separate identities'<sup>112</sup> so that his 'life would be relieved of all that was unbearable'.<sup>113</sup> Jekyll resolves to cease taking the potion, but gives into temptation one night, unleashing his 'devil'.<sup>114</sup> He compares his Hyde-state to that of a 'drunkard', and argues that 'no man morally sane could have been guilty of that crime [i.e. Carew's murder] upon so pitiful a provocation'.<sup>115</sup> Despite his seemingly overcome state of mind, Jekyll confesses 'I had voluntarily stripped myself of all those balancing instincts by which even the worst of us continues to walk with some degree of steadiness among temptations'.<sup>116</sup> Jekyll deliberately conceals the exact nature of the potion,<sup>117</sup> but its immediate effect seems similar to that of the drink and drugs Majewski consumed, with Jekyll describing the 'racking pangs, deadly nausea' and 'agonies' that swiftly gave way to him feeling 'younger, lighter, happier in body'.<sup>118</sup> Indeed, Stevenson even invokes the term 'recklessness' in describing Jekyll's immediate reaction to the potion, noting how he felt 'conscious of a heady recklessness, a current of disordered sensual images running like a mill race in my fancy, a solution of the bonds of obligation, an unknown but not innocent freedom of the soul'.<sup>119</sup> Thomas L. Reed Jr notes that this sort of 'extravagant disregard for consequences is... a stereotypical effect of alcohol', describing Jekyll's draught as 'clearly in the bailiwick of something very close to alcohol as the promote of physical vitality'.<sup>120</sup>

The effect of the potion on Jekyll results in him committing various violent crimes (most of which we are not party to, save for the trampling of the child in the street and the

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<sup>112</sup> Jekyll and Hyde (n1), 42.

<sup>113</sup> Ibid, 43.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid 48.

<sup>116</sup> Ibid, 49.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid, 43-44.

<sup>119</sup> Ibid, 44.

<sup>120</sup> Reed, T.L. 'The Transforming Draught: Jekyll and Hyde, Robert Louis Stevenson and the Victorian Alcohol Debate' (Social Science 2006), 35.

murder of Sir Danvers Carew), just as the defendant in *Majewski* caused ABH while intoxicated. *Majewski*'s conviction was upheld on appeal, with Lord Elwyn-Jones holding that:

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases.<sup>121</sup>

He concludes that '[t]he drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim' which '[t]ogether... add up to criminal recklessness'.<sup>122</sup> *Majewski* therefore establishes a sort of culpable inadvertence in which the defendant may be deemed reckless in committing a crime of basic intent without possessing an element of mental fault towards the commission of the offence; instead, the mental fault requirement is satisfied by voluntarily putting oneself into an intoxicated state. It is the intoxication which is the advertent act, as the commission of the offence itself was inadvertent, and a defendant may be found culpable for recklessness on this basis. The reckless action which is punishable here appears to be deliberately and knowingly becoming intoxicated, not the commission of the criminal offence itself. After all, Jekyll admits that '[t]he drug has no discriminating action; it was neither diabolical nor divine; but it shook the doors of my disposition and... that which stood within ran forth'.<sup>123</sup> This is perhaps why the law punishes the intoxicated person rather than the substance they consume. This is even more vividly demonstrated in Veitch's reading that 'Stevenson turn[s] our gaze not to pure evil but to... the inhuman in the human',<sup>124</sup> seeing the message of the novel as the 'horror' of the 'insider' who is '[r]espectable, bourgeois, professional; but also, and at the same time, wild, pitiless,

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<sup>121</sup> DPP v *Majewski* [1977] AC 443, per Lord Elwyn-Jones LC at [474-75], citing R v *Vena* [1976] QB 421 per Lames LJ at [429].

<sup>122</sup> *Majewski* (n121) at [475].

<sup>123</sup> *Jekyll and Hyde* (n1), 45.

<sup>124</sup> *Veitch* (n10), 228.

frenetic'.<sup>125</sup> Extending this, the court in *Majewski* is punishing the 'wild, pitiless, frenetic' insider, the Hyde within Majewski himself who was awakened by the alcohol he knowingly consumed, in much the same way as Jekyll imbibed his potion. Jekyll does appear to be aware of his actions while under the influence of the potion, noting that on returning from his 'excursions, [he] was often plunged into a kind of wonder at [his] vicarious depravity', claiming that 'Henry Jekyll stood at times aghast before the acts of Edward Hyde', and protesting that '[i]t was Hyde, after all, and Hyde alone, that was guilty'.<sup>126</sup> When Jekyll finally gives in after a period of abstention from the potion, he notes, 'I do not suppose that when a drunkard reasons with himself upon his vice, he is one out of five hundred times affected by the dangers that he runs through his brutish physical insensibility; neither had I'.<sup>127</sup>

The distinction between crimes of basic/general and specific/ulterior intent remains fairly ambiguous following the *Majewski* judgment. The dichotomy between these forms of intent regarding recklessness stems from *DPP v Beard*,<sup>128</sup> which held that '[i]f [the defendant] was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved', but that drunkenness could be a defence to offences where 'specific intent is an essential element'.<sup>129</sup> In short, drunkenness was no defence to crimes of basic/general intent, but might be in crimes of specific/intent. What constitutes crimes of basic and specific intent remains largely unclear, though their lordships did provide some guidance, noting that crimes of basic intent include rape<sup>130</sup> and offences relating to self-induced intoxication,<sup>131</sup> and that 'self-induced intoxication can only provide a defence to an offence that requires an ulterior intent'.<sup>132</sup> Lord Simon of Glaisdale mentioned that the '*mens rea* in a crime of

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<sup>125</sup> *Ibid.*, 221.

<sup>126</sup> Jekyll and Hyde (n1), 46.

<sup>127</sup> *Ibid.*, 49.

<sup>128</sup> *DPP v Beard* [1920] AC 479.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*, per Lawton LJ at [459], citing Lord Birkenhead LC at [499] and [504-05] in *Beard* (n128).

<sup>131</sup> *Ibid.*, per Lawton LJ at [407], citing Lord Simon of Glaisdale in *R v Morgan* [1975] 2 WLR 913 at [938-39].

<sup>132</sup> *Majewski* (n121), 461-62.

specific intent requires proof of a purposive element', for which self-induced intoxication is 'not equivalent',<sup>133</sup> i.e. the *mens rea* goes beyond the *actus reus*. Therefore, intoxication may only be adduced as a mitigating factor in crimes of specific intent. However, the 'purposive element' was also discussed by Lord Simon in relation to crimes of ulterior intent, which suggests they are 'synonymous', as S.J. Cavender argues, noting the potentially 'dubious' nature of these distinctions.<sup>134</sup>

For offences of basic intent such as assault and manslaughter, they held that there 'is no excuse in law that, because of drink or drugs which the accused himself had taken knowingly and willingly, he had deprived himself of the ability to exercise self-control, to realise the possible consequences of what he was doing, or even to be conscious that he was doing it', rendering intoxication no defence to crimes of basic intent.<sup>135</sup> Child and Ormerod suggest that court seemed 'to treat offences that can be satisfied by recklessness as ones of basic intent, and those requiring intention as specific intent', but express concern over the potential ambiguity and lack of clarity in the distinction;<sup>136</sup> a concern which Lord Edmund-Davies addresses in the case: '[i]llogical though the [distinction] may be', he argues, 'it represents a compromise between the imposition of liability upon inebriates in complete disregard of their condition (on the alleged ground that it was brought on voluntarily), and the total exculpation required by the defendant's actual state of mind at the time he committed the harm in issue', appearing to justify the decision in the furtherance of '[t]he universal object of a system of law... [namely] the establishment and maintenance of order'.<sup>137</sup>

Though ostensibly made in the furtherance of 'order', as Edmund-Davies argues here, their lordships' interchangeable use of specific/ulterior and basic/general intent has in fact destabilised the law, as it conflates specific/ulterior intent which do not, on the face

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<sup>133</sup> Ibid, per Lord Simon of Glaisdale at [480].

<sup>134</sup> Cavender, S. J. 'The Lords against Majewski and the Law' (1989) Bracton Law Journal, 21, 9-20, 9-10.

<sup>135</sup> Majewski (n121), per Lord Elwyn-Jones LC at [476].

<sup>136</sup> Child, J. and Ormerod, D. 'Smith, Hogan, and Ormerod's Essentials of Criminal Law'. 2nd ed. (OUP 2017), 525.

<sup>137</sup> Majewski (n121), per Lord Edmund-Davies at [495].

of it, seem identical. This instability is compounded by the lack of definition regarding what constitutes specific as opposed to basic intent, aside from a few examples of offences on either side. Lord Simon in *DPP v Morgan* described basic intent as ‘those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus*’, which ‘generally consists of an act and a consequence’ and ‘does not extend’ beyond this.<sup>138</sup> Mark Thornton suggests this leads to an understanding of specific/ulterior intent crimes as those involving ‘an intention to bring about some further consequence apart from the *actus reus*’.<sup>139</sup> Thornton extrapolates that ‘specific intent is, then, a particular intention which is required for the particular offence to have been committed... as opposed to a general intent or recklessness’,<sup>140</sup> but criticizes the judges in *Majewski* for employing the terms ‘in a confusing manner’, especially in the way in which they seemed to be conflating specific and ulterior intent, and essentially ‘suggesting that drunkenness actually constitutes recklessness’.<sup>141</sup> Instead, Thornton proposes ‘contrast[ing] basic ‘only with ulterior intent’, and specific intent with general intent, i.e. ‘intention or recklessness’.<sup>142</sup> He also suggests that because recklessness ‘implies advertence to risk’, it was ‘false’ of the judges in *Majewski* to say ‘that drunkenness imports recklessness’.<sup>143</sup> Tim Quigley notes that ‘specific intent did apparently mean something over and above “ordinary *mens rea*”, hence, “ordinary *mens rea*” could be considered a rough form of general or basic intent’, so whereas *mens rea* could mean ‘simply a general intention to break the law, specific intent referred to an additional intent stipulated by the legislature or through case law’.<sup>144</sup> *Jekyll and Hyde* destabilises these distinctions.

#### 6.4.2) ‘My devil had long been caged, he came out roaring’.<sup>145</sup> wilful blindness and Parker

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<sup>138</sup> *DPP v Morgan* [1975] 2 All ER 347, per Lord Simon at [363].

<sup>139</sup> Thornton, M.T. ‘Making Sense of *Majewski*’ (1981) *Criminal Law Quarterly*, 23(4), 464-491, 466.

<sup>140</sup> *Ibid.*, 465.

<sup>141</sup> *Ibid.*, 466.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Quigley, T. ‘A Shorn Beard’ (1987) *Dalhousie Law Review*, 10(3), 167-194, 192.

<sup>145</sup> *Jekyll and Hyde* (n1), 49.

The case of *R v Parker* raised similar notions of self-induced states which could be considered reckless.<sup>146</sup> *R v Briggs* held that a defendant was to be considered reckless if 'he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act'.<sup>147</sup> The court in *Parker* established the notion of wilful blindness, establishing that a 'man is reckless in the sense required when he carried out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act'.<sup>148</sup> Glanville Williams interpreted this to mean that '[a] person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter'.<sup>149</sup>

The defendant in *Parker* allegedly broke a telephone by violently smashing it in a temper after a series of personal mishaps (oversleeping on the train and missing his stop) caused him to be overcharged and needing to secure alternative means of travel.<sup>150</sup> The court surmised that 'quite plainly the appellant was in a great temper and quite plainly the explanation of the situation was partly his frustration at the series of events which had befallen him that evening and partly in anger at the telephone for failing to operate according to his wishes'.<sup>151</sup> The defendant claimed that '[i]t did not occur to [him] that what [he] was doing might damage it' and that he 'was simply reacting to the frustration which [he] felt'.<sup>152</sup> However, Geoffrey Lane LJ stated that 'if he did not know, as he said he did not, that there was some risk of damage, he was, in effect, deliberately closing his mind to the obvious — the obvious being that damage in these circumstances was inevitable'.<sup>153</sup> Lane argues that this 'type of deliberate closing of the mind, is the

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<sup>146</sup> *R v Parker* [1977] 1 WLR 600.

<sup>147</sup> *R v Briggs* [1977] 1 WLR 605.

<sup>148</sup> *Parker* (n143), per Geoffrey Lane LJ at [604].

<sup>149</sup> Williams, G. 'Textbook of Criminal Law' (Stevens & Sons Ltd 1978), 79.

<sup>150</sup> *Parker* (n146).

<sup>151</sup> *Ibid*, per Geoffrey Lane LJ at [602].

<sup>152</sup> *Ibid*, at [602].

<sup>153</sup> *Ibid*, at [604].



equivalent of knowledge and a man certainly cannot escape the consequences of his action in this particular set of circumstances by saying, “I never directed my mind to the obvious consequences because I was in a self-induced state of temper.”<sup>154</sup>

The concept of a self-induced state of temper appears to echo the notion of self-induced intoxication in *Majewski* above, and resonates with Jekyll who, after a two-month period of abstaining from the potion, gives in and drinks it, seemingly releasing Hyde into a more overtly violent state than ever before: ‘My devil had long been caged, he came out roaring’, and this time Jekyll is ‘conscious... of a more unbridled, a more furious propensity to ill’.<sup>155</sup> He confesses that ‘the spirit of hell awoke in [him] and raged’,<sup>156</sup> which results in him killing Sir Danvers Carew. Ostensibly, it did not occur to him that taking the potion would result in Carew’s death, just as the defendant in *Parker* claimed the damage to the phone did not occur to him, as both were arguably ‘closing their mind’ to the obvious as Geoffrey Lane describes. The notion of a self-induced state of temper also points to the law’s contradictory treatment of anger – here, in regard to wilful blindness, the anger can be regarded self-induced, which suggests a deliberate action on the defendant’s part; whereas in provocation and loss of control, as discussed in the next chapter, anger conceptualised as temper is lost in response to a provoking act.

#### 6.4.3) ‘The animal within me licking the chops of memory’:<sup>157</sup> objective recklessness and Caldwell

The case of *Cunningham* established a subjective test for recklessness, which arises when a defendant foresees a particular type of harm arising from his action and continues to act regardless of the risk.<sup>158</sup> Whereas recklessness required a form of advertent action on behalf of the defendant, *MPC v Caldwell* added an objective component: in which a defendant may be deemed reckless even if he ‘has not given any

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<sup>154</sup> Ibid.

<sup>155</sup> Jekyll and Hyde (n1), 49.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid, 51.

<sup>158</sup> R v Cunningham [1957] 2 Q.B. 396, at [400-01] per Byrne J.

thought'.<sup>159</sup> The defendant, nursing a grudge about his employer, consumed a significant amount of alcohol and set fire to the employer's business.<sup>160</sup> This interpretation was upheld in *R v Lawrence*.<sup>161</sup> The court in *Caldwell* also referred to *Majewski*, noting that '[r]educing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off was held to be a reckless course of conduct and an integral part of the crime'.<sup>162</sup> Therefore arson was decided by majority to be a crime of basic intent, and thus intoxication was no defence – but Lords Wilberforce and Edmund-Davies, dissenting, believed that arson should be considered a crime of specific intent because the reckless endangerment of life went beyond the *mens rea* of the offence.<sup>163</sup>

The decision in *Caldwell* was widely criticised, not least by Sir John Smith who problematises the judgment's over-objectivism by claiming that 'the decision sets back the law concerning the mental element in criminal damage in theory to before 1861'<sup>164</sup> – a reference, it appears, to the *Malicious Damage Act* of 1861 which defined recklessness by reference to 'malice'.<sup>165</sup> L.H. Leigh and J. Temkin criticised the court in *Caldwell* and *Lawrence* for 'install[ing] a regime of *mens rea* based upon concepts of moral wickedness, subjective in some respects, objective in others, difficult to apply consistently and for that reason alone more objectionable than the definition which [it] partially replaces'.<sup>166</sup> At the very least, Leigh and Temkin object to the *Caldwell* ruling for 'upset[ting] settled doctrine in favour of a solution which introduces uncertainty, if not worse, into the law'.<sup>167</sup> Subsequent case law only intensified the general discontent with *Caldwell*. For example, *Elliott v C* established that if the risk would have been obvious to 'a reasonably prudent person', then a defendant will be culpable if they gave no thought

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<sup>159</sup> MPC v Caldwell [1982] AC 341, at [354].

<sup>160</sup> Ibid.

<sup>161</sup> R v Lawrence (Stephen) [1982] AC 510.

<sup>162</sup> Caldwell (n159).

<sup>163</sup> Ibid.

<sup>164</sup> Smith, J. 'Comment on Caldwell' (1981) Criminal Law Review 393.

<sup>165</sup> S.58 Malicious Damage Act 1861.

<sup>166</sup> Leigh, L.H. and Temkin, J. 'Recklessness Revisited' (1982) The Modern Law Review, 45(2), 198-206, 198.

<sup>167</sup> Ibid, 205.

to the possibility of a risk – even if the defendant was of limited intelligence.<sup>168</sup> The decision appeared to centre the recklessness question on conduct rather than states of mind, as demonstrated in subsequent cases such as *Chief Constable of Avon and Somerset v Shimmen*<sup>169</sup> and *R v Merrick*.<sup>170</sup> This culminated in *R v Reid*, in which Lord Keith established that an absence of mental state was just as significant as a present mental state, and which seemingly codified the notion of inadvertent recklessness incepted in *Caldwell*.<sup>171</sup>

Objective recklessness as conceptualised in *Caldwell* draws recklessness in a way that renders it closer to negligence, which is essentially a form of omissions liability and is judged objectively. As Child and Ormerod explain, negligence is ‘not concerned with [the defendant’s] state of mind’ but refers to ‘a certain type of *behaviour* from [them] that drops below the standards that we expect from reasonable people’.<sup>172</sup> The test for negligence requires that the defendant owes a duty of care and that they breached that duty; as such, negligence assumes the defendant is ‘aware of the risks’ and subsequently questions whether their ‘behaviour in relation to [said risks] is reasonable’.<sup>173</sup> Ultimately, negligence-based offences involve the defendant falling below the standard of the reasonable person, regardless of the defendant’s state of mind.<sup>174</sup> James Brady argues that although there are similarities between recklessness and negligence of *mens rea* (such as failing to act in a way that meets the standard of the reasonable person), the primary distinction between them is ‘awareness of risk’ – recklessness requires this, negligence does not.<sup>175</sup> The former therefore is a type of subjective liability, and the latter objective liability, and the difference in culpability between the two is important because ‘recklessness manifests’, Brady notes, ‘a trait of

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<sup>168</sup> *Elliott v C* [1983] 1 WLR 939.

<sup>169</sup> *Chief Constable of Avon and Somerset v Shimmen* (1986) 84 Cr App R 7.

<sup>170</sup> *R v Merrick* [1996] 1 Cr App R 130.

<sup>171</sup> *R v Reid* (1992) 3 AER 673.

<sup>172</sup> Child and Ormerod (n136), 117 [sic].

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*, 118.

<sup>175</sup> Brady, J.B. ‘Recklessness, Negligence, Indifference, and Awareness’ (1980) *The Modern Law Review*, 43(4), 381-99, 381.

the person that is not present to the same degree in negligence' – namely, 'indifference'.<sup>176</sup> With the decision in *Caldwell*, this distinguishing element of indifference has essentially been nullified, conflating objective recklessness and negligence in a way which does not appreciate the nuanced differences between the two states of mind. As Eric Colvin notes, where recklessness was once conceived as 'the unjustifiable taking of a known risk',<sup>177</sup> *Caldwell* 'held that recklessness can be present even though no thought is given at the time of acting to the existence of a risk', which might 'inappropriate[ly]' criminalise a defendant who 'never thought of a risk at all'.<sup>178</sup> Recklessness is a more active term that suggests rash action despite a risk of potential danger (foreseeing a risk and carrying on regardless), whereas negligence is an omission and therefore is more of a (passive) failure than an (active) disregard (failing to foresee a risk at all), and *Caldwell*'s correlating of these very different standards of culpability has the potential to criminalise people unjustly.

Alan Norrie suggests that although the *Caldwell* 'test is presented as a unity', it in effect 'does no more than bring together two tests that remain distinct in what they require': in cases of inadvertence, when a defendant has genuinely failed to foresee a risk, 'the risk foreseen by the reasonable person must be of a certain standard', namely an "obvious" risk of a criminal consequence', but if the defendant 'is aware of risk, there is no requirement that the risk be "obvious"'.<sup>179</sup> That *Caldwell* validates and combines notions of both advertent and inadvertent recklessness under the same test presents an unstable blending of differing states of mind. Norrie finds the 'objective limb' of the *Caldwell* test to be 'incompatible with the subjective limb', meaning that the judgment ultimately 'conjoins but does not synthesise the objective and subjective tests of recklessness'.<sup>180</sup> This created a loophole which meant that a defendant who doesn't realise the risk may

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<sup>176</sup> Ibid, 399.

<sup>177</sup> Colvin, E. 'Recklessness and Criminal Negligence' (1982) University of Toronto Law Journal, 32(3), 345-73, 345.

<sup>178</sup> Ibid, 368.

<sup>179</sup> Norrie, A. 'Crime, Reason and History: A Critical Introduction to Criminal Law' (Weidenfeld and Nicolson 1993), 63.

<sup>180</sup> Ibid.

be found culpable, but one who realises the risk but doesn't perceive it as such will not be culpable. *Caldwell* only applied to criminal damage cases whereas *Cunningham* applied to all offences for which recklessness was the standard of *mens rea* required.<sup>181</sup> This echoes, I suggest, the unstable conjoining of the Jekyll and Hyde personas which never truly synthesise. In a moment of inadvertence, Jekyll 'had gone to bed Henry Jekyll, [and] had awakened Edward Hyde' – an involuntarily transformation into his 'second self' during the subconscious hours of sleep.<sup>182</sup> He realises 'I was slowly losing hold of my original and better self, and becoming slowly incorporated with my second and worse', though he notes the 'secret pleasures that [he] had enjoyed in the disguise of Hyde'.<sup>183</sup>

I suggest the interplay between the subjective and objective in these cases demonstrates their closeness both conceptually and in practice. *Cunningham* exculpates the defendant who genuinely does not perceive a risk, but *Majewski* may deem a defendant reckless not for the offence itself but for becoming inebriated. It seems to be a punishment of a person's reckless state of mind that *led* to the commission of an offence, rather than punishment of a reckless state of mind that *committed* the offence. Stiles observes that 'in Jekyll's last confession, the doctor hopelessly confuses the boundaries between objective observation and subjective experience',<sup>184</sup> and Jekyll protests 'he, I say – I cannot say I'.<sup>185</sup> Stiles argues that in *Jekyll and Hyde*, 'the doctor is the patient whose split subjectivity overwhelms his "Full Statement of the Case," making it difficult to tell whether it is Jekyll or Hyde who inscribes the "I" or the "he" of this document'.<sup>186</sup> Stiles observes that Stevenson 'anticipates Freud's methods' by a decade through 'exploring

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<sup>181</sup> *Ibid.*, 64.

<sup>182</sup> *Jekyll and Hyde* (n1), 47.

<sup>183</sup> *Ibid.*, 48.

<sup>184</sup> Stiles (n59), 169.

<sup>185</sup> *Jekyll and Hyde* (n1), 47.

<sup>186</sup> Stiles (n59), 895.

how a patient's split subjectivity might be incorporated into an ostensibly objective clinical report'.<sup>187</sup>

*R v G and R* eventually replaced *Caldwell* with a subjective test regarding criminal damage (*Cunningham* still applies to all other offences), as Lord Bingham of Cornhill acknowledged the 'obvious unfairness' of *Caldwell*'s objective recklessness.<sup>188</sup> The test requires the defendant to be 'aware' that a 'risk exists or will exist', and that he also be aware that it is '*in the circumstances known to him, unreasonable to take the risk*'.<sup>189</sup> Although *R v G and R* has 'merely restored the law to its originally intended position' in reinstating an orthodox subjective approach to recklessness,<sup>190</sup> Kumaralingam Amirthalingam takes the opposite view to the critique of *Caldwell*, suggesting that the verdict leaves the 'nature of [the] doctrine of *mens rea*' in an 'unsatisfactory state', largely due to what he terms a 'blind adherence to subjectivism' which 'often result[s] in a disparity between the legal test of *mens rea* and the community's sense of moral wrong'.<sup>191</sup> This 'insistence on subjectivism' is 'problematic' in Amirthalingam's view because recklessness 'often finds itself on the precarious cusp that divides subjective and objective liability'.<sup>192</sup> Findlay Stark posits that the English courts 'view important *mens rea* concepts such as intention and recklessness as mere words – empty vessels to be filled with whatever meaning courts think the context calls for', which risks confusion for lawyers, legal commentators and laypeople alike.<sup>193</sup> David Gurnham notes that "[o]bjective" recklessness does however live on in cases where the defendant's failure to appreciate an obvious risk was due to his intoxication' as in *Majewski* or due to a 'deliberate "closing of his mind" due to rage or excitement' as in *Parker*.<sup>194</sup> That reckless

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<sup>187</sup> *Ibid*, 896.

<sup>188</sup> *R v G and R* [2003] UKHL 50, per Lord Bingham of Cornhill at para [33].

<sup>189</sup> *Ibid* [emphasis added].

<sup>190</sup> Amirthalingam, K. 'Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness' (2004) *The Modern Law Review*, 491-507, 493.

<sup>191</sup> *Ibid*, 492.

<sup>192</sup> *Ibid*, 491.

<sup>193</sup> Stark, F. 'It's Only Words: On Meaning and Mens Rea' (2013) *The Cambridge Law Journal*, 72(1), 155-177.

<sup>194</sup> Gurnham, D. "'Hell has no flames, only windows that won't open": justice as escape in law and literature' (2019), *Law and Humanities*, 13(2), 269-93, 20 (n75).

action is now supposedly stabilised by three different interpretations co-existing at the same time echoes Jekyll's delusion that by separating his good and evil side 'the unjust might go his way ... and the just could walk steadfastly and securely on his upward path'.<sup>195</sup>

6.4.4) 'The very fortress of identity':<sup>196</sup> actus reus, mens rea and the spectrum of will and agency

As seen in chapter two, Duff notes the difficulty in drawing a clear distinction between *actus reus* and *mens rea*, particularly the loss of agency, physicality and momentum in arbitrarily dividing guilty mind from guilty act.<sup>197</sup> Robinson observes that *actus reus* is inherently objective but takes into account the subjective, while *mens rea* is inherently subjective but measured often against objective standards, and suggests the distinction should be abolished entirely.<sup>198</sup> Robinson takes the opposite approach to Duff in asserting the same conclusion (i.e. that the distinction between *actus reus* and *mens rea* is an unstable one). *Actus reus* and *mens rea* are arguably useful in practice because both point to a need to establish individual responsibility through a combination of guilty minds and guilty acts – a positive change from external notions of character discussed in the previous chapter. However, these mind/body binaries problematise the finding of culpability if their interconnectedness fails to be addressed.

How can the *actus reus* and *mens rea* of Jekyll and Hyde be separated, if at all? However, Hyde may also be viewed as an objective portrait of who Jekyll is, given that Jekyll is the one to wear a mask of civility whereas Hyde is his inner self manifested, unencumbered by social anxieties. A useful perspective on this is offered by Carl Keppler, though it must be noted that he is discussing the terms 'subjective' and 'objective' in relation to their ordinary, non-legal meanings. He delineates between the

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<sup>195</sup> Jekyll and Hyde (n1), 43.

<sup>196</sup> Ibid.

<sup>197</sup> Duff R.A. 'Answering for Crime: Responsibility and Liability in the Criminal Law' (Hart Publishing 2007), 202.

<sup>198</sup> Robinson, P.H. 'Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?' in Shute, S., Gardner, J. and Horder, J. (eds). 'Action and Value in Criminal Law' (Clarendon Press 1993), 187-211, 187.

double as 'the objective second self' and the protagonist 'the subjective', and suggests that 'neither of them, alone, constitutes a true self at all'.<sup>199</sup> Instead, he argues that '[t]he objective counterpart of the self and the subjective component of the self are both susceptible of being explained, which means being explained away, as something other than the second selves they appear to be'.<sup>200</sup> The complexity between the subjective and objective approaches, the danger of viewing the subjective only through objective terms, and viewing the defendant as an uncomplicatedly evil Hyde (a misreading of the text Saposnik feared),<sup>201</sup> as opposed to the morally complex Jekyll that is both Jekyll-and-Hyde. Veitch considers whether the 'most troubling aspect of the story is ... the possibility of a failed morality, of morality as failure'.<sup>202</sup> Because of this Veitch describes how 'age of transition Veitch refers to, I argue, is the nineteenth century shift from the exterior to the interior in legal reasoning, as discussed earlier.

Jekyll's fragmented, twisted culpability not only represents the instability between subjective and objective approaches to judging culpability, it also points to a deeper problem in *mens rea*, and its distinction with *actus reus*. Jekyll often frames Hyde as the culprit – 'he, I cannot say I' – but Hyde is merely the guise in which Jekyll enacts his crimes. To separate Jekyll and Hyde into *mens rea* and *actus reus*, because the former intends the crimes and the latter commits them, is to misunderstand the nuanced criminality of the book: that Hyde commits Jekyll's crimes is one of Jekyll's major arguments in favour of his being the more moral of the two, but he is deceiving himself; that Jekyll originates the intent and Hyde enacts the crime makes little difference when observing that Hyde *is* Jekyll, merely with a different name and physical appearance. As Duff noted previously, separating the *actus reus* and *mens rea* removes the agency from the mental element, and rationale from the physical action;<sup>203</sup> and I would argue Jekyll

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<sup>199</sup> Keppler (n25), 6.

<sup>200</sup> Ibid.

<sup>201</sup> Saposnik (n54).

<sup>202</sup> Veitch (n10), 227.

<sup>203</sup> Duff (n197), 202.



and Hyde in all their fractured subjectivity instantiate this complex commingling of internal/external, intention and action, guilty mind and guilty act – and ultimately demonstrate that separating the two is impossible.

#### 6.4.5) Splicing Jekyll with Hyde: strange case for a mixed approach

Instabilities in the subjective and objective approaches may stem from the different types of behaviour, as Lacey suggests. Lacey describes the subjective elements as premised on ‘capacity as choice’, which ‘guarantee[s] respect for agency by making intention, knowledge, or foresight the paradigm conditions for criminal liability’; this is in contrast to objective elements (including ‘objective recklessness’ and negligence) which are based on ‘capacity as fair opportunity’, and gives the defendant ‘a fair chance to conform his or her behaviour to the requirements of criminal law’.<sup>204</sup> Therefore notions of subjective/advertent recklessness and objective/inadvertent recklessness also represent the extent to which the law respects the agency of a person to make the ‘right’ choice.

The more ‘realistic’ view of subjective and objective, according to David Ormerod, is ‘that there are shades of subjectivism and objectivism along a spectrum’.<sup>205</sup> In fact, the creation of a mixed test for *mens rea* (i.e. containing both subjective and objective elements) has steadily grown support in recent years, confirmed by Richard Tur and R. George Wright. Wright argues that:

[w]hat is thought by the law to be subjective actually pervades and informs, in multiple ways, what is thought to be objective, and vice versa. The objective and the subjective, in effect, *unavoidably help define and comprise each other*. The law’s attempts, in various contexts, to differentiate or combine objective and subjective tests are thus inevitably fruitless.<sup>206</sup>

Wright therefore takes issue with the ‘incoherence of the distinction between [the] objective and subjective test[s]’ in criminal law,<sup>207</sup> and the inconsistencies therein,<sup>208</sup> but

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<sup>204</sup> Lacey, N. ‘In Search of Criminal Responsibility’ (OUP 2016), 28.

<sup>205</sup> Child and Ormerod (n136), 117.

<sup>206</sup> Wright, R.G. ‘Objective and Subjective Tests in the Law’ (2017) University of New Hampshire Law Review, 16(1), 121-146, 124 [emphasis added].

<sup>207</sup> *Ibid*, 130.

<sup>208</sup> *Ibid*, 132.

does not clearly describe the ways in which the courts ‘continually fail to construct, or coherently distinguish between, objective and subjective tests’.<sup>209</sup> Instead of oscillating between subjective and objective tests, Wright advocates the crafting of ‘judicial tests that crucially deliver at least minimally acceptable degrees of procedural and substantive fairness to all affected parties’.<sup>210</sup> One such approach to this, according to Wright, would be to start ‘with a properly critical focus on the historically familiar reasonable person’ which, he argues, can in some ways ‘affirmatively contribute to the important constitutional and moral value of the idea of equality’, which also has the potential to ‘promote and legitimize inequality’.<sup>211</sup> The reasonable person standard will be discussed in greater detail in the next chapter.

Although there are issues with a mixed approach, Tur argues that synthesis is ‘an altogether clearer, more coherent and ethically more acceptable reconstruction of criminal law’.<sup>212</sup> He finds the subjective approach a burden on the prosecution and the objective too rigid and impersonal. Tur mediates between over-subjectivism and over-objectivism by combining them in order to carefully balance and reconcile their opposing and conflicting principles. As with differing categories of *mens rea* for different offences, concepts of right and wrong are organised into different categories and levels of moral blameworthiness in the study of ethics. Tur believes that there is a middle ground between a subjective approach – which is ‘unacceptable on practical, doctrinal, conceptual and ethical grounds’<sup>213</sup> – and an objective approach – which ‘impose[s] fixed rules of law’ that render the ‘actual states of mind of real human beings wholly irrelevant’<sup>214</sup> – from which decision-makers should shape their judgments. The main problem with *mens rea*, accurately summarised by Tur, is as follows:

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<sup>209</sup> Ibid, 133.

<sup>210</sup> Ibid, 144.

<sup>211</sup> Ibid.

<sup>212</sup> Tur, R.H.S. ‘Subjectivism and Objectivism: Towards Synthesis’ in Shute, S., Gardner, J. and Horder, J. (eds). ‘Action and Value in Criminal Law’ (Clarendon Press 1993), 213-237, 237.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

Philosophically, the very existence of other minds may be problematic as no-one has privileged access to the mind of another. The only person who knows what the accused's mental processes were is the accused [themselves] – and probably not even [they] can recall... accurately.<sup>215</sup>

I would cross reference this argument with the theory developed by Thomas Nagel in his essay '*What is it like to be a bat?*', concerned as Nagel is with the 'mind-body problem' of consciousness.<sup>216</sup> Admitting that 'at present we are completely unequipped to think about the subjective character of experience without relying on the imagination',<sup>217</sup> he proposes the creation of a phenomenology that would allow us to broach the gap between subjectivity and objectivity similar to the task of explaining to a blind person 'what it [is] like to see'.<sup>218</sup> The 'specific subjective character' of one's own experience is, Nagel notes, 'beyond our ability to conceive',<sup>219</sup> and Tur believes that this particularly problematic element of criminal procedure is 'truly a burden' for the prosecution to prove in criminal trials, balanced out by the objective approach that effectively allows the prosecution to compile their case without having to rely solely on proving what is near-impossible in practice.<sup>220</sup> Conversely, the criminal legal system could not rely solely on an objective standard of proof, or rules would become terribly rigid and impersonal.<sup>221</sup> Tur concludes that a careful balance between a subjective and objective approach is the best way forward for the criminal law, particularly in the judging of *mens rea*. He is also of the belief that both subjectivism and objectivism are highly problematic approaches to legal decision-making<sup>222</sup> – the former arguably 'unacceptable' in practice<sup>223</sup> and the latter being 'condemned as random and unfair'<sup>224</sup> – and instead proposes a new approach of synthesis in order to 'reconcile the apparently opposing demands of conflicting moral

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<sup>215</sup> Ibid, 277-278.

<sup>216</sup> Nagel, T. 'What is it like to be a bat?' (1974) *Philosophical Review*, 83(4), 435-450, 435.

<sup>217</sup> Ibid, 439.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Tur (n212), 278.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid, 237.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid, 213.

principles' which are in constant and mutual conflict throughout the criminal legal system.<sup>225</sup>

The 'fortress of identity' to which Jekyll refers<sup>226</sup> aptly conveys the limitations of the subjective approach: that the defendant's true self can never be discerned and thus relies on objective indicators. When taking an objective approach, the reasonable person – the defendant's double – can take on many of their traits, as Hyde takes on Jekyll's violent impulses. The subjective/objective divide is a falsehood, or at least a misleading distinction – to me, it seems as if the subjective is more about showing mercy to the defendant, and the objective is more about reinforcing social mores and standards. To decide between the two is to make a holistic value judgment about the moral blame worthiness of the defendant, and their worthiness for mercy.

The subjective/objective divide points to a related problem: namely the false dichotomy of the *actus reus/mens rea* distinction, discussed in a previous section. In commenting on the interconnectedness of the subjective/objective approach, *Jekyll and Hyde* also reveals the false distinction of *actus reus* and *mens rea*. Due to the fractured subjectivity between Jekyll and Hyde, it is impossible to distinguish whose hand committed the murder, or whose thoughts propelled the action. I propose that Jekyll and Hyde exemplify the mind/body distinction identified by Duff and Nagel, yet also demonstrate the false divide between the two; they also demonstrate the illusory divide between *actus reus* and *mens rea*, and the fundamental relatedness of the mind and body in the commission of an offence. *Actus reus* and *mens rea* are regarded as distinct but related, intertwined in a nuanced way, just as Jekyll and Hyde seem separate but are different manifestations of the same being. Therefore, *Jekyll and Hyde* underwrites Tur's approach; though some risk remains that the 'commingling' of these elements may be as volatile as the 'commingling of good and evil' which Jekyll detects in 'all human beings'.<sup>227</sup> This volatility

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<sup>225</sup> Ibid, 214.

<sup>226</sup> *Jekyll and Hyde* (n1), 43.

<sup>227</sup> Ibid, 45.

stems, I suggest, from the arbitrary delineation between 'good' and 'evil'. Drawing on Jekyll and Hyde's 'commingling' allows for a reading that destabilises the binaries discussed here and acknowledges the bleeding in between them.

## 6.5 Conclusion

In this chapter I have developed a reading of the novel in which Jekyll and Hyde embody the instabilities of the dichotomies drawn by the law, such as subjective/objective, *actus reus/mens rea*, self-induced intoxication/wilful blindness, which are not two different entities in conflict with each other but rather are fluid and changeable aspects, and part of a shifting spectrum. My reading of the novel instantiates the unstable and complex relationship between subjective and objective approaches to determining recklessness. A purely subjective approach focuses on individual agency but may unfairly burden the prosecution, whereas an objective approach may punish wrongdoing but may also unfairly prejudice those defendants who genuinely didn't foresee harm. *Jekyll and Hyde*, in my view, predicts the instability we see in *Cunningham* and *Caldwell*, and the back and forth between subjective and objective approaches, anxiety regarding intoxication and anger, and the arbitrary and ambiguous delineations between basic/general and specific/ulterior intent.

Crucially, the interwoven identities of Jekyll and Hyde reflect the interconnectedness of the subjective and objective approaches and how they bleed into each other, which suggests that any attempt to adequately delineate between these and related elements – including *actus reus* and *mens rea*, intoxication and wilful anger – is complex and unstable. Whether the test leans more towards the subjective or the objective, or arbitrarily delineates between the two, those elements remain interconnected. I have shown how *Jekyll and Hyde* demonstrates that all three approaches (over-subjectivism, over-objectivism, and a hybrid of subjectivism-objectivism) fail despite and arguably because of the ways in which the courts oscillate between subjective and objective approaches. I argue, therefore, that Jekyll and Hyde instantiate this because they

embody the antinomies and instabilities of the subjective/objective divide. Jekyll is afraid of being subsumed by one side of himself, but he is both parts, just as a 'wholly' subjective recklessness test still includes a component of 'unjustified risk' which is objective.

The reading of *Jekyll and Hyde* conducted here raises further questions regarding homosociality,<sup>228</sup> an element of note in the next chapter. Having explored the potential arbitrariness of delineating between subjective and objective behaviour as regards *Jekyll and Hyde*, the next chapter will draw on *Frankenstein* to discuss gendered perceptions of behaviour regarding 'reasonable' and 'justified' responses to provoking actions in relation to the historical defence of provocation and new defence of loss of control.

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<sup>228</sup> Sedgwick, E.K. 'Between Men: English Literature and Male Homosocial Desire' (Columbia University Press 1985).

## Chapter VII: The Constructed Double – Frankenstein; or, the Modern Prometheus

### 7.1) Introduction

The previous chapter argued for the usefulness of Robert Louis Stevenson's *Strange Case of Dr Jekyll and Mr Hyde* as a way of analysing the *mens rea* of recklessness. This chapter will show that Mary Shelley's *Frankenstein*<sup>1</sup> engages with notions relating to *mens rea*, and that a reading of the text will illuminate and critique the ways in which criminal law reproduces and perpetuates gendered notions of behaviour in relation to what is deemed a justified emotional response in the partial defences of provocation and loss of control. Literature, such as *Frankenstein*, will help expose these gaps in legal discourse, destabilise these binaries, and show nuance, complexity and blurring across the boundaries.

The protagonist (Victor) and his double (the creature) inhabit separate forms, just as Dorian Gray and his portrait do. However, the difference here is that Victor and his double are not similar in their physical features or personalities, and they are in two separate living bodies. Also, Victor constructed his double himself, like Jekyll, while Dorian did not – his double was constructed by a third party (Basil Hallward) and only once it was completed did Dorian develop an active connection with it. Like Jekyll's double (Hyde) Victor's double (the creature) assigns some responsibility for his actions to the main character. However, the creature, though connected emotionally to Victor, inhabits a separate physical form to his creator, whereas Jekyll and Hyde occupy the same (albeit transformed) body. *Frankenstein* has rarely been given detailed consideration in legal scholarship beyond discussions as to whether responsibility for the offences lie with Victor or his creature.<sup>2</sup> My intention is to rectify this and show that the neglect of the text by legal scholars overlooks how a reading of Victor's double as the physical

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<sup>1</sup> Shelley, M. 'Frankenstein; or, the Modern Prometheus' (Penguin Classics 2003; Lackington, Hughes, Harding, Mavor and Jones 1818).

<sup>2</sup> Levine, G. "Frankenstein" and the Tradition of Realism' (1973) *Novel: A Forum on Fiction*, 7(1), 14-30, 24.

manifestation of his internal mind enables us to clarify problems relating to gendering *mens rea*. *Frankenstein* has been the subject of gender-focused scholarship in the work of Anne Mellor and Debra Best, and gendered experience of male and female defendants by Katharine Baker, and I will conclude that the novel calls into question the binaries of masculinised and feminised criminal action. Although I will be using he/him pronouns for the creature so as to be consistent with the novel, the fluidity of his gender is a key discussion point in a later section.

The chapter is structured as follows: in the first section I will provide a detailed overview of the events in *Frankenstein*,<sup>3</sup> before explaining why *Frankenstein* can be categorised as a work of doubles fiction. I will examine investigate themes of duality in *Frankenstein* and examine how its use of doubling differs from *Jekyll and Hyde* and *Dorian Gray*. Building on my earlier evaluation of the criminal law, and a thorough interrogation of the *mens rea* component of the criminal trial, the third section will return to those elements to focus on gendered aspects of *mens rea*. My approach here is not to read the law in *Frankenstein* in a literal sense; rather, it raises similar issues and delves into mindsets I find analogous to defendants who invoke the provocation/loss of control defence. Gendering the law's 'reasonable person' will form the first part of this section, particularly the divide between masculinized and feminized forms of crime: for example, how 'crimes of passion' were historically gendered as male, with the courts associating sudden impulses with the male psyche, and premeditation attributed more to female defendants. This theme will continue through the remainder of the chapter which I will discuss provocation and loss of control as gendered defences to homicide, where the law creates its own doubles in the conceptual and the actual. That both feminised and masculinised forms of crime are displayed by the creature (a figure of duality) demonstrates, I will argue, the instabilities of these concepts.

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<sup>3</sup> *Frankenstein* (n1).



## **7.2) Plot Overview**

*Frankenstein* tells the story of the eponymous ambitious young scientist in late eighteenth century Geneva who is driven to create life through the reanimation of dead tissue. Frightened by his own creation, Victor Frankenstein swiftly abandons his progeny, and the inconsolable creature embarks on a quest for connection and companionship.

In the course of his wanderings, the creature stumbles across the De Lacey family who are living in the woods. He attaches himself to them, but when they reject him for his frightening appearance, he burns down their cottage in a fit of rage, though it is unclear whether they survive the blaze. His next target, and the first to explicitly die at the creature's hand, is William Frankenstein, Victor's brother. As Justine, the family maid, is subsequently hanged for William's murder, the creature is also indirectly responsible for her death. Victor has strong reason to believe in her innocence and the creature's guilt, yet does nothing to alert the authorities, and thus he too plays a part in Justine's execution.

As the rest of humanity judges and fears the creature, he begs Victor to construct him a mate, in exchange for which he will disappear from Victor's life forever. Victor initially recoils at the thought of bringing another 'monster' into the world, but eventually agrees. He constructs the mate, but instead of reanimating her, he destroys his second creation in front of his first, contemplating the havoc they may wreak on the world. The creature swears revenge and is as good as his word: his next victims are Henry Clerval, Victor's best friend, and Elizabeth Lavenza, his fiancée. Victor's father dies of grief shortly after. The creature's final victim is Victor himself, who dies pursuing his creation over the icy tundra of the Arctic.

## **7.3) Readings of *Frankenstein***

Frankenstein raises intriguing questions about morality and legal culpability in law and literature scholarship. Thomas Dutoit observes how the book explores 'traditional ethical

issues of duty, justice and law', and concludes that it expresses the concern that 'justice is a mockery... because lies can look like truths'.<sup>4</sup> In considering the fractured nature of responsibility between Victor and the creature, Valdine Clemens<sup>5</sup> and Leslie Moran<sup>6</sup> posit that Victor is (un)consciously involved in the commission of the creature's crimes. They neglect perceptions of gendered criminal behaviour, so I will look at how *Frankenstein* illustrates the complexities therein, in both theory and practice.

### 7.3.1) Franken-Double: reading Frankenstein as a work of Doubles fiction

Of the three texts chosen for this study, *Frankenstein* is the least overt instance of doubling – Jekyll splits his soul in two, and Dorian's painted likeness takes on his sins, but Victor and his counterpart are non-identical separate entities. Some commentators, such as Martin Kayman<sup>7</sup> and J.M. Hill,<sup>8</sup> have argued that Captain Walton, rather than the creature, is Victor's double, with the latter viewing Walton 'as a potential Frankenstein who remains redeemed'.<sup>9</sup> Yet, as Basil Hallward says of Dorian's picture, has Victor 'put too much of [himself] into the creature',<sup>10</sup> and in doing so revealed 'the secret of [his] own soul'?<sup>11</sup>

The secret of Victor's soul, in a Dorian fashion, is displayed externally as the creature's repulsiveness, as Thomas Dutoit argues that, in literature, 'the face functions as transparent reflection of the moral character, and as the chosen medium for interpersonal communication',<sup>12</sup> which perhaps echoes George Orwell's axiom that '[a]t 50, everyone has the face he deserves'.<sup>13</sup> This relates to notions of character in law as discussed in

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<sup>4</sup> Dutoit, T. 'Re-specting the Face as the Moral (of) Fiction in Mary Shelley's *Frankenstein*' (1995) *Modern Language Notes*, 26, 847-71, 857.

<sup>5</sup> Clemens, V. 'The Return of the Repressed: Gothic Horror from The Castle of Otranto to Alien' (State University of New York Press 1999), 104.

<sup>6</sup> Moran, L.J. 'Law and the Gothic Imagination' in Botting, F. (ed) 'Essays and Studies 2001: The Gothic' (D.S. Brewer 2001), 87-110.

<sup>7</sup> Kayman, M.A. 'From Bow Street to Baker Street: Mystery, Detection and Narrative' (Macmillan 1992), 148.

<sup>8</sup> Hill, J.M. 'Frankenstein and the Physiognomy of Desire' (1975) *American Imago*, 32(4), 335-358, 356.

<sup>9</sup> Ibid. Other endorsers of this reading include Markley, A. A. 'Mary Shelley's "New Gothic": Character Doubling and Social Critique in the Short Fiction' (2001) *Gothic Studies* 3(1), 15-23 and Levine (n2).

<sup>10</sup> Wilde, O, 'The Picture of Dorian Gray (Wordsworth Classics 1992; reprinted 2011; originally printed 1895), 6.

<sup>11</sup> Ibid, 8.

<sup>12</sup> Dutoit (n4), 850.

<sup>13</sup> Orwell, G. Orwell, S. and Angus, I. (eds) 'The Collected Essays: Journalism and Letters of George Orwell, Volume IV: In Front of Your Nose, 1945-1950' (Penguin 1970), 579.

conjunction with Dorian Gray, and underlines the argument in this chapter regarding what is viewed as a reasonable or justified response to provoking acts. Dutoit notes that the creature's ugliness anticipates his moral downturn, and that initially 'the outside – his face – does not reflect the inside'.<sup>14</sup> Not only is Victor terrified by his double, the creature himself is repelled by his own image, so much so that he cannot believe that his face is his own.<sup>15</sup> The creature may be regarded, as David Ketterer suggests, as 'both a psychological double and an independent character leading a realistic existence';<sup>16</sup> Ketterer highlights the 'false splitting of the apparently good and the apparently evil', and asserts that Victor and the creature are neither wholly good nor wholly evil but a complex mixtures of the two.<sup>17</sup> I would extend this with the notion that the creature is Victor's constructed double, much as Victor constructed him out of various body parts. Susan Stryker uses similar terminology in describing Victor's relationship to his creation:

It is a commonplace of literary criticism to note that Frankenstein's monster is his own dark, romantic double, the alien Other he constructs and upon which he projects all he cannot accept in himself.<sup>18</sup>

I would extend this by describing the creature as the criminal or legal other, echoing the courts construct an objective reasonable man onto which the defendant's characteristics are projected and against which they are judged. In criminal trials, a subjective approach to the defendant involves assembling an image of the defendant from the evidence and witness testimony, thus manifesting them in the courtroom. Chris Baldick sees the creature as dramatizing the body politic in times of rebellion as 'fragmented', 'misshapen' and 'monstrous'.<sup>19</sup> This insight can be extended by characterizing the legal system, particularly the criminal law, as a patchwork of fragmented concepts (such as *mens rea*), which have been twisted and shaped by the courts over the years, as covered previously.

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<sup>14</sup> Dutoit (n4), 853.

<sup>15</sup> Ibid, 854.

<sup>16</sup> Ketterer, D. 'Frankenstein's Creation: The Book, the Monster, and Human Reality' (English Literary Studies 1979), 56.

<sup>17</sup> Ibid, 57.

<sup>18</sup> Stryker, S. 'My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage' (1994) GLQ: A Journal of Lesbian and Gay Studies, 1(3), 237-254, 238. See also Ketterer (n16), 56-65.

<sup>19</sup> Baldick, C. 'In Frankenstein's Shadow: Myth, Monstrosity, and Nineteenth-Century Writing' (Clarendon Press 1987), 14.

The creature's constructed patchwork body is a manifestation of the patchwork law in the criminal legal system.

*Frankenstein* explores the implications of the act of doubling more than *Dorian Gray* or *Jekyll & Hyde*. A.A. Markley views the creature as 'the embodiment of any one of a variety of aspects of Victor's own psyche, the repressed returned',<sup>20</sup> and notes that their 'outward forms are extreme opposites' so as to 'reiterat[e] questions regarding outer appearance versus inner virtues.'<sup>21</sup> George Levine describes Victor and the creature as 'two aspects of the same being' who 'haunt and hunt each other', suggesting that the novel itself is a 'modern metaphor' for 'the divided self', and arguing that '[t]he civilized man or woman contains within the self a monstrous, destructive and self-destructive energy'.<sup>22</sup> Levine views Victor and the creature as 'fragments of a mind in conflict with itself, as extremes unreconciled, striving to make themselves whole'; a 'symbiotic' bond in which 'the destruction of one is... the destruction of the other'.<sup>23</sup> This thematic circularity characterises the National Theatre's 2011 staging of *Frankenstein*, with Benedict Cumberbatch and Jonny Lee Miller alternating the roles of Victor and the creature throughout the play's theatrical run.<sup>24</sup> Director Danny Boyle explained that '[i]n terms of the performance, Frankenstein and the Creature literally create each other: every other night they re-inhabit each other'.<sup>25</sup> Victor dies one night only to be reborn as his creature the next, whilst the creature takes on his inheritance as Frankenstein, only for the cycle to alternate and repeat. This reinforces Daniel Cottom's argument that 'in seeking to represent himself, man makes himself a monster',<sup>26</sup> and resonates with Eve Kosofsky Sedgwick's concept of the homosocial love triangle.<sup>27</sup> She reads *Frankenstein*

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<sup>20</sup> Markley (n9), 16. Markley notes that Shelley's use of doubling 'owes much' to her father William Godwin's use of duality in 'Things as They Are; or, The Adventures of Caleb Williams (B. Crosby 1794).

<sup>21</sup> *Ibid.*, 15.

<sup>22</sup> Levine, G. 'The Ambiguous Heritage of Frankenstein' in Levine, G. and Knoepfelmacher, U.C. 'The Endurance of Frankenstein: Essays on Mary Shelley's Novel' (University of California Press 1979), 3-30, 14-15.

<sup>23</sup> *Ibid.*, 16.

<sup>24</sup> Dear, N. 'Frankenstein, based on the novel by Mary Shelley' (Faber & Faber 2011).

<sup>25</sup> Costa, M. 'Frankenstein: Man or Monster?' *The Guardian*, 17 January 2011, accessed 1 March 2017 <<https://www.theguardian.com/culture/2011/jan/17/a-monster-role-frankenstein-danny-boyle>>

<sup>26</sup> Cottom, D. 'Frankenstein and the Monster of Representation' (1980) *SubStance*, 9(28), 60-71, 60.

<sup>27</sup> Sedgwick, E.K. 'Between Men: English Literature and Male Homosocial Desire' (Columbia University Press 1985), 116.

as a work ‘in which a male hero is in a close, usually murderous relation to another male figure, in some respects his “double”, to whom he seems to be mentally transparent’.<sup>28</sup> In Sedgwick’s opinion, ‘Victor and his creature/double are engaged in the classic homosocial dyad gone horribly wrong so that the murderous rejection of the bond between them can only end in both their deaths’.<sup>29</sup> James McGavran highlights the ‘unconscious “homoerotic desire”’ between the two,<sup>30</sup> and George Haggerty interprets the creature as Victor’s ‘real mate, and the fury with which [Victor] destroys the female creature he was constructing (and the vindictive fury with which the creature destroys Victor’s own Elizabeth) only underlines their devotion to one another’.<sup>31</sup>

7.3.2) “She might become ten thousand times more malignant than her mate”: gender, reasonableness and misogyny in *Frankenstein*

Given the preponderance of male characters in the text, and the layer upon layer of male testimony, it is notable that *Frankenstein* was written by a woman, Mary Shelley, whose mother Mary Wollstonecraft was a pioneering feminist.<sup>32</sup> The creature’s destruction of Elizabeth gains significance in U.C. Knoepfmacher’s interpretation of those characters as ‘aggressive and passive components’ of Mary Shelley herself: ‘a raging Monster and a “yielding” Elizabeth’.<sup>33</sup> Just as Victor and the creature can be viewed as ‘feuding halves of a single personality’, he argues that ‘the beautiful and passive Elizabeth and the repulsive, aggressive Monster who will be her murderer are also doubles – doubles who are in conflict only because of Victor’s rejection of the femininity’:<sup>34</sup>

The fluidity of relations in *Frankenstein*, which converts each character into another’s double and makes a male Monster not only a counterpart of Victor and Walton but also of little William, Agatha, Safie, Caroline, Justine and Elizabeth, stems from the

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<sup>28</sup> Ibid, 186.

<sup>29</sup> Ibid. Referenced in Hoeveler, D.H. ‘Frankenstein, Feminism and Literary Theory’ in Morton, T. ‘The Cambridge Companion to Mary Shelley’ (Cambridge University Press 2004), 45-62, 58.

<sup>30</sup> McGavran, J.H. “Insurmountable barriers to our union”: Homosocial male bonding, homosexual panic, and death on the ice in *Frankenstein*’ (2000) *European Romantic Review* 11(1), 46-67, 58.

<sup>31</sup> Haggerty, G. ‘Gothicism’ in Summers, C.J. (ed) ‘The Gay and Lesbian Literary Heritage’ (Henry Holt and Co. 1995), 336.

<sup>32</sup> Wollstonecraft’s ‘A Vindication of the Rights of Woman with Strictures on Political and Moral Subjects’ (J. Johnson 1792) is arguably one of the earliest radical feminist texts in British literature.

<sup>33</sup> Knoepfmacher, U.C. ‘Thoughts on the Aggression of Daughters’ in Levine, G. and Knoepfmacher, U.C. ‘The Endurance of *Frankenstein*: Essays on Mary Shelley’s Novel’ (University of California Press 1979), 88-119, 94.

<sup>34</sup> Ibid, 109.

common denominators that can be traced back... to Mary Shelley's childhood and to her threatened identity as [an] adult daughter, wife and mother.<sup>35</sup>

*Frankenstein* was published at a time when gender roles were shifting and crystallising, with Lacey noting a change from the 'strong, active and dominant' heroines of the eighteenth century like Moll Flanders into the 'image of female powerlessness' in nineteenth century heroines such as Tess of the D'Urbervilles.<sup>36</sup> This chapter suggests that *Frankenstein* predicts the crystallising of gender roles in the nineteenth century, the effects of which are still apparent in loss of control case law like *Clinton* and *Dawes*.<sup>37</sup> Most characters in *Frankenstein* act within narrowly prescribed gender roles: Victor is the student, the scientist, the career man; Elizabeth is the sister, the fiancée, the matriarch. Although the creature is referred to using he/him pronouns in the text, he does not easily fit into a binary gender type, as Judith Butler notes.<sup>38</sup> The novel, she argues, 'manages to keep women in their place, and yet the monster may well be carrying that excess of gender that fails to fit properly into "man" and "woman" as conventionally defined'.<sup>39</sup> She suggests that:

If the monster is really what a 'man' looks like when we consider his aggressive form, or if this is really what a 'woman' looks like when her own gendered place is destabilized ... then the 'monster' functions as a liminal zone of gender, not merely the disavowed dimensions of manhood, but the unspeakable limits of femininity as well.<sup>40</sup>

This is corroborated by Alison Milbank's interpretation of the creature as 'not only literally a physical and gender hybrid in his body parts that are taken from different corpses, but equally an aesthetic one in which the harmony of proportion... is at odds with the integrity of feature'.<sup>41</sup> The fluid, destabilising, uncategorizable aspects of the creature's gender are directly related, in Peter Brooks' view, to his perceived monstrousness. Although the novel 'never for a moment suggests that the Monster is anything but a male', he 'never

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<sup>35</sup> Ibid 112.

<sup>36</sup> Lacey, N. 'From Moll Flanders to Tess of the D'Urbervilles: Women, Autonomy and Criminal Responsibility in Eighteenth and Nineteenth Century England' (2007) LSE Working Papers 5/2007, 1-32, 3-4.

<sup>37</sup> R v Clinton, Parker and Evans [2012] EWCA CRIM 2 and R v Dawes, Hatter and Bowyer [2013] EWCA Crim 322.

<sup>38</sup> Butler, J. 'Afterword, Animating Autobiography: Barbara Johnson and Mary Shelley's Monster' in Johnson, B. (ed) 'A Life with Mary Shelley' (Stanford University Press 2014), 37-50, 47-48.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Milbank, A. 'Bleeding Nuns: A Genealogy of the Female Gothic Grotesque' in Wallace, D. and Smith, A. (eds) 'The Female Gothic: New Directions' (Palgrave Macmillan 2009), 76-97, 83.

is given the chance to function sexually, and we are never given a glimpse of those parts of the body that would assure us that he is male'.<sup>42</sup> As the creature is constructed 'in the place of the absent mother', Brooks suggests a reading of the creature as 'a woman who is seeking to escape from the feminine condition into recognition by the fraternity'.<sup>43</sup> Brooks describes a monster as a being which 'exceeds the very basis of classification, language itself'<sup>44</sup> and also as 'that which eludes gender definition', which may 'call into question socially defined gender roles and transgress the law of castration that defines sexual difference'.<sup>45</sup> When viewed in such a way, it may be argued that Victor's creation is deemed a monster because he defies stable, binary categorisation.

The creature's ragged anatomy also instantiates the 'othering' of the working-class body, with Franco Moretti noting that '[l]ike the proletariat, the monster is a collective and artificial creature' who 'is denied a name and an individuality'.<sup>46</sup> This is contrasted with Victor's social power as a privileged man, which Anne Mellor suggests he exerts through 'usurping the female'.<sup>47</sup> She argues that '[o]ne of the deepest horrors of this novel is Frankenstein's implicit goal of creating a society for men only: his creature is male; he refuses to create a female' and in doing so he 'eliminated the female's primary biological function and source of cultural power'.<sup>48</sup> 'In constituting nature as female', Mellor argues that Victor 'participates in a gendered construction of the universe' in which the 'exploitation of female nature is only one dimension of a patriarchal encoding of the female as passive and possessable, the willing receptacle of male desire'.<sup>49</sup> Donna Heiland thus views *Frankenstein* as 'a novel about patriarchy' that centres on 'interrogating its fantasy of a world without women',<sup>50</sup> and extending her assertion may

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<sup>42</sup> Brooks, P. 'Body Work: Objects of Desire in Modern Narrative' (Harvard University Press 1993), 219.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, 218.

<sup>45</sup> Ibid.

<sup>46</sup> Moretti, F. 'The Dialectic of Fear' (1982) *New Left Review*, 136(1), 67-85, 69. See also Michie, E.B. 'Frankenstein and Marx's Theories of Alienated Labor' in Behrendt, S.C. (ed) 'Approaches to Teaching Mary Shelley's "Frankenstein"' (Modern Language Association 1990), 93-98.

<sup>47</sup> Mellor, A.K. 'Mary Shelley: Her Life, Her Fiction, Her Monsters' (Methuen 1988), 115-26.

<sup>48</sup> Ibid, 115.

<sup>49</sup> Ibid.

<sup>50</sup> Heiland, D. 'Gothic and Gender: An Introduction' (Blackwell Publishing 2004), 100.

enable a reading of *Frankenstein* as a text which interrogates misogyny, a term which derives from the Ancient Greek “mīsoḡunīā” meaning hatred towards women’.<sup>51</sup> This hatred ‘has taken shape in multiple forms such as male privilege, patriarchy, gender discrimination, sexual harassment, belittling of women, violence against women, and sexual objectification’.<sup>52</sup> Although the criminal law may not intentionally disregarding the lived experiences of women defendants, it is contended here that criminal law may be regarded objectively misogynistic given the failure of women defendants to successfully invoke the provocation defence, which demonstrates the ways in which male wrongdoing is privileged. The same paradigm shapes *Frankenstein*, and its anti-misogyny themes can be seen through the fact that Walton, the ‘only surviving male speaker of the novel... possess[es] what the Monster lacks and Frankenstein denies, an internalized female complementary principle’, in the form of his sister, Margaret.<sup>53</sup>

Whereas *Jekyll and Hyde* lacks named female characters, and *Dorian Gray* features only one, women feature more prominently in *Frankenstein*, though, as Mary Jacobus observes, they are ‘[a]t best... the bearers of a traditional ideology of love, nurturance, and domesticity; at worst, passive victims’.<sup>54</sup> The women of *Frankenstein* die not of natural causes but by illness or execution: Elizabeth is strangled by the creature; Justine Moritz, the family maid, is executed for the creature’s murder of William; Victor’s mother Caroline dies of scarlet fever that she catches from adopted daughter, Elizabeth Lavenza (even Elizabeth’s surname, ostensibly invented by Shelley for this story, sounds eerily similar to ‘influenza’, heralding her role in Caroline’s untimely demise). The only woman to survive the story is the only one to not directly appear in it – Margaret Walton Saville, Captain Walton’s sister to whom he writes of Victor’s tribulations.<sup>55</sup> Margaret has a similar calming influence on her brother as Elizabeth has on Victor: Walton sends his ‘gratitude

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<sup>51</sup> Srivastava, K. et al. ‘Misogyny, feminism, and sexual harassment’ (2017) *Industrial psychiatry journal*, 26(2), 111-13, 111.

<sup>52</sup> *Ibid*

<sup>53</sup> Knoepfelmacher (n33), 107.

<sup>54</sup> Jacobus, M. ‘Is there a woman in this text?’ (1982) *New Literary History*, 14(1), 117-141, 132.

<sup>55</sup> It is worth briefly mentioning that Margaret Walton Saville bears the same initials as Mary Wollstonecraft Shelley.



for all [her] love and kindness'<sup>56</sup> and finds comfort in her letters when he 'need[s] them most to support [his] spirits'.<sup>57</sup> Victor and Walton are both ambitious young men who rely on the support of their care-giving 'sisters', Elizabeth and Margaret.

Elizabeth's dual role of mother and lover is made explicit when Victor dreams of his 'more than sister' transforming into his dead mother.<sup>58</sup> Mellor suggests that '[t]his separation of the sphere of public (masculine) power from the sphere of private (feminine) affection... causes the destruction of many of the women in the novel'.<sup>59</sup> Debra E. Best highlights the instability of the 'multivalence', or multiplicity, of roles played by each character.<sup>60</sup> In killing the people who best embody multiple important roles in Victor's life – Elizabeth (daughter, sister, mother, wife) and Henry (friend, fellow student, confidante, brother) – the creature can be read as the 'embodiment of the family's multivalence and its potential destruction'.<sup>61</sup> The creature, 'enacting Victor's darkest desires and destroying the sources of multivalence in his life, his family and friends', actively 'show[s] Victor's culpability in the murders by having him identify himself with the monster'.<sup>62</sup> Victor's connection with the creature is a twisted version of his deepest wish: he seeks a clear relationship with a creature 'like himself'.<sup>63</sup> However, Best warns of the very real differences which divide creation from creator:

The mirror, shadow, or double, however, may be seen either as an exact reflection of oneself or as the exact opposite in which everything is reversed. Hence, although Victor attempts to make him 'after his own image', the monster's form is instead 'a filthy type of [his], more horrid from its very resemblance'.<sup>64</sup>

Ultimately, Best's thesis culminates in the argument that the 'creature's search for a companion like himself is also a search for such defining terms' as a name and family role.<sup>65</sup> I would extend this by arguing that, despite his search for consistency, belonging

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<sup>56</sup> Frankenstein (n1), 18.

<sup>57</sup> Ibid, 22.

<sup>58</sup> Ibid.

<sup>59</sup> Mellor, A.K. 'Possessing Nature: The Female in Frankenstein' (1988) *Romanticism and Feminism*, 220-32, 222.

<sup>60</sup> Best, D.E. 'The Monster in the Family' (1999) *Women's Writing*, 6(3), 365-384.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, 373.

<sup>63</sup> Ibid, 375.

<sup>64</sup> Ibid, quoting Frankenstein (n1), 126.

<sup>65</sup> Best (n60), 377.

and purpose, the only role the creature is able to occupy during the story is that of a killer – because it is the only role which brings him into contact with other human beings; he willingly places himself in legal and moral peril to connect with humanity.

#### **7.4) Reading *Frankenstein* as a Critique of Gendered Defences to Criminal Action**

Although *mens rea* has played a 'central rhetorical role in ensuring respect for human agency in criminal law, Matthew Rollinson observes that the law 'has always tended to erase female agency'.<sup>66</sup> Shifting conceptions of reasonableness are interlinked with the inconsistent approach in provocation and loss of control defences. The 'reasonable person', though more universal on the surface, may be equally as harmful in its purportedly gender-neutral phraseology because of the gender biases which it may still to an extent contain. In this section I will argue that the creature's actions, particularly his killing of William in a sudden and temporary moment of rage, echoes the way in which violence in retaliation to a male-coded affront to honour has been viewed as a reasonable and justified response to provocation, and that the maleness of the 'reasonable man' still resides in the current loss of control defence, as shown in the case of *R v Clinton, Parker and Evans*.<sup>67</sup>

The general linguistic practice of the law in which 'references to the masculine were assumed unless otherwise indicated... often functioned', Joanne Conaghan argues, 'to conceal the conceptualization of a male subject as the a priori model of humanity'.<sup>68</sup> Conaghan proposes 'three ways of investigating the maleness of law': firstly, the historical claim that the law 'privileges male interests and concerns'; secondly, that the law is '*ideologically* male in that a masculine bias inheres in the values and assumptions law endorses; and thirdly that the law 'valorizes or is valorized through symbolic and metaphorical associations with maleness and masculinity'.<sup>69</sup> She notes the law 'is not

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<sup>66</sup> Rollinson, M. 'Re-Reading the Criminal Law: Gendering the Mental Element' in Nicolson and Bibbings (n91), 101-122.

<sup>67</sup> Clinton (n37).

<sup>68</sup> Conaghan, J. 'Law and Gender' (OUP 2013), 72.

<sup>69</sup> *Ibid*, 75.

simply a mirror of the real but rather an operative and constitutive feature thereof' and as such is 'directly involved in the processes by which gender and gender differences come into being and take effect'.<sup>70</sup> Conaghan describes this as 'a conceptualization of law not simply as gendered but as *gendering*, amounting to a claim that gendered dynamics of power are (at least in part) *produced by law* rather than simply reflected within or absorbed by it'.<sup>71</sup> The argumentation of this chapter is very much in the spirit of what Conaghan suggests here.

#### 7.4.1) 'In hot blood': provocation, crimes of passion and the 'sudden snap'

Historically, criminal law has looked to the figure of the 'reasonable man',<sup>72</sup> a legal fiction built by the courts as the ideal citizen, against whom the defendant's behaviour was judged.<sup>73</sup> The 1670 case of *John Manning* held that 'there could not be greater provocation' than that of man discovering his wife committing adultery, and downgraded the sentence from death to a 'gentl[e]' branding on the hand.<sup>74</sup> Perhaps the very first mention of the 'reasonableness of the defendant's belief as to the circumstances surrounding the killing'<sup>75</sup> occurs in Sir Edward Hyde East's *Pleas of the Crown* in 1803 regarding self-defence.<sup>76</sup> According to East, this should comprise 'such a provocation as the law presumes might in human frailty *heat the blood* to a proportionable degree of resentment, and keep it boiling to the moment of the fact', after which 'the party may rather be considered as having acted under a *temporary suspension of reason* than from any deliberate malicious motive'.<sup>77</sup>

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<sup>70</sup> Ibid, 102.

<sup>71</sup> Ibid [emphasis added].

<sup>72</sup> In tort law, the objective standard was, for some time, manifested as 'the man on the Clapham Omnibus' per Greer LJ in *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205. However, I am focusing on criminal law interpretations of 'reasonableness'.

<sup>73</sup> See Gardner, J. 'The Many Faces of the Reasonable Person' (2015) *Law Quarterly Review*, 131(1), 563-584.

<sup>74</sup> *John Manning* (1670) 83 E.R. 112, referenced in LaCroix, L.A., McAdams, R.H. and Nussbaum, M.C. 'Fatal Fictions: Crime and Investigation in Law and Literature' (OUP 2017), 126.

<sup>75</sup> Donovan, D.A and Wildman, S.M. 'Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation' (1981), 14 *Loyola of L.A. Law Review*, 14(3), 435-468, 443.

<sup>76</sup> East, E.H. 'A Treatise of the Pleas of the Crown', Volume 1 (A. Strahan, law printer to the King, 1803).

<sup>77</sup> Ibid, 238 [emphasis added].

From the seventeenth century in particular, Jeremy Horder suggests that ‘the man of honour was not expected to retaliate reluctantly, out of a sense of duty or a fear of shame, in the fact of a threat to his natural honour he was expected to resent the affront, and to retaliate in anger’.<sup>78</sup> Exemplified by the case of *Mawgridge*,<sup>79</sup> Horder argues that ‘[t]here can be no doubt that, in the early modern period, the seduction of a man’s wife was thought to be very high indeed in the catalogue of offences against honour’.<sup>80</sup> He therefore observes ‘an important link between honour and virtue’, suggesting that ‘the concept of anger that underpins the doctrine of provocation could not then and cannot now, be understood without an appreciation of the nature and significance of the virtue or virtues connected with it’.<sup>81</sup> *Frankenstein* similarly foregrounds male wrongdoing, and only its men are given the opportunity to express their ‘justified’ anger. Though sexual infidelity is not apparent in the facts of *Frankenstein*, I suggest there is a sexualised component to the violence Victor and the creature perpetrate against each other which echoes provocation and loss of control case law. Mellor highlights that Victor’s ‘obsession’ with his creature culminates in Victor ‘becoming himself a monster’.<sup>82</sup> This stimulates an interpretation of the unconscious sexual component to Victor’s destruction of the female creature (pre-reanimation) and the creature’s killing of Elizabeth. The creature tells Victor that ‘[t]his passion is detrimental to me; for you do not reflect that *you* are the cause of its excess’, thus identifying Victor as the root of his rageful violence.<sup>83</sup> Both present justified anger as a reasonable response to a sexualised affront to male honour.

In identifying ‘the criminal law’s shared concern with honour-violence, the preoccupation of men of honour themselves’, Horder suggests that ‘the law understood angry conduct in terms of proportionality of response with regard to both feeling and action’.<sup>84</sup> Horder

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<sup>78</sup> Horder, J. ‘Provocation and Responsibility’ (Clarendon Press 1992), 27.

<sup>79</sup> R v Mawgridge (1707) Keil 119.

<sup>80</sup> Horder (n78), 39.

<sup>81</sup> *Ibid.*, 40.

<sup>82</sup> Mellor (n47), 121-22.

<sup>83</sup> *Frankenstein* (n1), 148.

<sup>84</sup> Horder (n78), 42.

finds it significant that there appears to be ‘no mention whatsoever’ in seventeenth century case law of ‘the modern notion of “loss of self-control” to express the experience of feeling and action in anger ... because [early modern law] was founded on a quite different conception of anger’.<sup>85</sup> This is corroborated by Kathy Callahan’s observation that men of this era ‘trained for violence in ways women did not’ and ‘readily acted to protect their own honour which often led to altercations’.<sup>86</sup> It was during the eighteenth and nineteenth centuries that ‘a new conception of anger emerged that was premised on philosophical foundations that were different from those of early modern law’, a development which Horder suggests ‘lie[s] in a change in the law’s conception of the relationship between reason and the passions in the human soul’ and is ‘embodied’ by contemporary legal commentators and criminal cases, in reframing provocation ‘in terms of anger understood as a loss of self-control’.<sup>87</sup> This was confirmed by the 1833 case of *R v Hayward*,<sup>88</sup> in which Tindal CJ held that:

whether the mortal wound was given by the prisoner while smarting under provocation *so recent and so strong*, that the prisoner might not be considered at the moment *the master of his own understanding*; in which case the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or *whether there had been time for the blood to cool*, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder.<sup>89</sup>

Although this still connotes an element of the reactive ‘hot-blooded’ violence Horder mentioned, it also brings with it a nascent version of loss of control through the notion that the defendant was not ‘master of his own understanding’.<sup>90</sup> This verdict moves away from Holt CJ’s justification in *Mawgridge* that the ‘jealousy is the rage of man and adultery is the highest invasion of property’<sup>91</sup> and towards justifying a more reasonable, and crucially *temporary*, loss of control. This shift, identified by Horder, continues through cases like *R v Kirkham* in 1837.<sup>92</sup> Although it was noted that ‘the law makes allowances’

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<sup>85</sup> Ibid.

<sup>86</sup> Callahan, K. ‘Women Who Kill: An Analysis of Cases in Late Eighteenth- and Early Nineteenth-Century London’ (2013) *Journal of Social History*, 46(4), 1013-1038, 1015.

<sup>87</sup> Horder (n78), 72.

<sup>88</sup> *R v Hayward* (1833) 6 C. & P. 157, 172 E.R. 1188.

<sup>89</sup> Ibid [emphasis added].

<sup>90</sup> *Hayward* (n88), [159].

<sup>91</sup> *Mawgridge* (n79).

<sup>92</sup> *R v Kirkham* (1837) 8 C. & P. 115.

when 'certain things... so stir up in a man's blood that he can no longer be his own master',<sup>93</sup> Coleridge J in *Kirkham* states that 'though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions'.<sup>94</sup> Keating J in the 1869 case of *R v Welsh* held that provocation constituted 'something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act'.<sup>95</sup> The constant 'nagging' of one's wife was sufficient to constitute a sudden and temporary loss in this case, even though this suggests a *series* of provoking acts over a period of time rather than the sudden and temporary 'snap'. This is especially noteworthy when considering that the years of abuse suffered by battered wives who kill their violent partners was not considered sufficient provocation for the defence to apply, even though mental and physical abuse seems to me a more compelling incitement to violence than nagging.

This demonstrates Joanne Conaghan's argument that the 'sudden and temporary loss of control' requirement 'presupposes, and therefore privileges, the way in which men may respond to the threat of violence or grave insult by reacting in the heat of the moment'.<sup>96</sup> This foregrounds male wrongdoing in a similar way to *Frankenstein*, as well as the sexual aspects underscoring the creature's retaliatory actions following the female creature's destruction. He threatens to 'ravish from [Victor his] happiness forever' and tells him '[y]ou can blast my other passions, but revenge remains'.<sup>97</sup> A sexual element is evidenced, I suggest, by the notion that there appears to be a degree of sexual jealousy in the creature and Victor's 'killings' - they each kill the other's 'mate'.<sup>98</sup> Although this is not a literal case of sexual infidelity, Victor's destruction of the female creature may be

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<sup>93</sup> *Ibid*, per Coleridge J at [117].

<sup>94</sup> *Ibid*, at [119].

<sup>95</sup> *R v Welsh* (1869) 11 Cox CC 336, per Keating J at [339].

<sup>96</sup> Conaghan (n68), 90.

<sup>97</sup> *Frankenstein* (n1), 173.

<sup>98</sup> See further Davison, C.M. 'Monstrous Regiments of Women and Brides of Frankenstein: Gendered Body Politics in Scottish Female Gothic Fiction' in Wallace, D. and Smith, A. (eds) 'The Female Gothic: New Directions' (Palgrave Macmillan 2009), 196-214, 197.

described as a defilement of sorts, and certainly sexualised, especially when he notes that ‘the wretch saw me destroy the creature on whose future existence he depended for happiness’.<sup>99</sup> Victor’s motivation to destroy the female creature stem in large part from her reproductive capacity: ‘one of the first results of those sympathies for which the daemon thirsted would be children, and a race of devils would be propagated upon the earth’.<sup>100</sup> In response, the creature cries, ‘[s]hall each man... find a wife for his bosom, and each beast have his mate, and I be alone?’<sup>101</sup> Victor destroys the female creature before the creature can consummate the relationship, and the creature does the same to Victor, strangling Elizabeth before she and Victor can consummate their marriage. There is an evident sexual component to the creature’s threat to Victor, ‘I shall be with you on your wedding night’,<sup>102</sup> and it is significant that the ‘lifeless and inanimate’ Elizabeth, referred to by Victor as ‘the purest creature of earth’, is ‘flung by the murderer on its bridal bier’.<sup>103</sup> McGavran suggests that ‘their shared obsession also bespeaks attraction, parodies courtship, constitutes union — no matter how weird, how negatively expressed, how destructive to both’.<sup>104</sup>

Hot blood remained critical to quasi-legislative understandings of provocation, being described in 1877 by Sir James Fitzjames Stephen as something which is ‘done in the heat of passion’.<sup>105</sup> He outlines certain circumstances which may amount to provocation, such as ‘assault and battery that results in actual bodily harm’, ‘[t]he sight of the act of adultery committed with his wife [which] is provocation to the husband of the adulteress on the part both of the adulterer and of the adulteress’,<sup>106</sup> but notes that ‘[n]either words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation’.<sup>107</sup> Stephen did not mention the *Welsh* case, but it did appear in some form in S.176 of the

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<sup>99</sup> Frankenstein (n1), 171.

<sup>100</sup> Ibid, 170.

<sup>101</sup> Ibid, 172.

<sup>102</sup> Ibid, 173.

<sup>103</sup> Ibid, 199.

<sup>104</sup> McGavran (n30), 46.

<sup>105</sup> Stephen, J.F. ‘Digest of the Criminal Law’ 4th ed. (1887; originally published 1877), Article 224(a), 168.

<sup>106</sup> Ibid, Article 224(d), 169.

<sup>107</sup> Ibid, Article 224(f), 169.

1879 Draft Criminal Code, composed by judges including Stephen, which held that '[a]ny wrongful act or insult of such a nature as to be sufficient to deprive an *ordinary person of the power of self-control* may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool'.<sup>108</sup> Devlin J in *R v Duffy* later confirmed the use of the reasonable person as the standard for judging provocation as 'an act, or series of acts done (or words spoken)... which would cause in any reasonable person and actually causes in the accused, a *sudden and temporary* loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind'.<sup>109</sup>

This chapter does not engage in a literal reading of how the creature's actions might be judged in a criminal trial, but it does draw comparisons between the creature's behaviour and the type of anger that was once interpreted by the law as a reasonable and justified response to provocation. Although the creature's age and gender are so ambiguous that the age and sex provision in *DPP v Camplin*<sup>110</sup> (discussed later in this chapter) may fail to accurately reflect the creature, their actions appear to echo what Katharine K. Baker calls 'typically masculine emotional outbursts'.<sup>111</sup> I suggest therefore that the creature's killing of William Frankenstein echoes the crimes of passion committed in hot blood that Horder describes above. The creature was already in a vulnerable mental state following the De Laceys' rejection of him, arguing that '[t]here was none among the myriads of men that existed who would pity or assist me'.<sup>112</sup> When he first sees William, he supposes the boy to be 'unprejudiced' against the his 'deformity', and decides to 'seize and educate him as my companion and friend' so that he 'should not be so desolate in this peopled

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<sup>108</sup> S.176 of the Draft Code, appended to Report of the Criminal Code Commission (1879) [emphasis added]. See also Law Reform Commission Victoria, 'Provocation as a Defence to Murder', Working Paper 6 (Melbourne 1979), 8.

<sup>109</sup> *R v Duffy* [1949] 1 All ER 932 [emphasis added]. This approach was approved in *R v Whitfield* (Melvyn Thomas) [1992] 1 All ER 306.

<sup>110</sup> *DPP v Camplin* [1978] UKHL 2.

<sup>111</sup> Baker, K.K. 'Gender and Emotion in Criminal Law' (2005) *Harvard Journal of Law and Gender*, 28, 447-466, 447. Baker is not 'essentializ[ing] all emotional differences between men and women', but instead refers to these outbursts as socially constructed and ultimately unrepresentative of how men and women 'tend to experience emotion', 449.

<sup>112</sup> Frankenstein (n1), 138.



earth'.<sup>113</sup> 'Urged by this impulse', the creature seizes the boy, but when William screams, the creature responds 'Child, what is the meaning of this? I do not intend to hurt you; listen to me'.<sup>114</sup> However, when he learns the boy is Victor's brother, the creature declares 'you belong then to my enemy – to him towards whom I have sworn eternal revenge; you shall be my first victim'.<sup>115</sup> William's 'epithets... carried despair to my heart' the creature argues: 'I grasped his throat to silence him, and in a moment he lay dead at my feet'.<sup>116</sup> This bears a strong similarity to the killings in heated blood described in the eighteenth and nineteenth centuries, both the honour-coded anger and the loss of control that began to develop in the nineteenth century. The creature kills William out of a sense of being wronged by Victor, his 'enemy' and his sudden 'snap' bears a resemblance to the killing in *Hayward*, in which the defendant was not 'the master of his own understanding' and there had been no time 'for the blood to cool'.<sup>117</sup> It also accords with *Duffy* in being a 'sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind'.<sup>118</sup> This reasoning suggests that the sudden and temporary loss of control exhibited by the creature accords with the type of male emotional response that would mitigate wrongdoing in cases of provocation.

The reasonable person initially seemed rather abstract and ambiguous until the standard was particularised to an extent by Lord Diplock in *Camplin*, where he described the 'reasonable person' as 'a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused'.<sup>119</sup> This age and sex qualification of the reasonable man standard was later codified in S.54(1)(c) Coroners and Justice Act 2009.<sup>120</sup> Diplock also suggested that:

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<sup>113</sup> *Ibid.*, 144.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Hayward* (n88).

<sup>118</sup> *Duffy* (n109) [emphasis added].

<sup>119</sup> *Camplin* (n110), per Lord Diplock at [5].

<sup>120</sup> Coroners and Justice Act 2009, S.54(1)(c).

for the purposes of the law of provocation, the 'reasonable man' has never been confined to the adult male. It means to an *ordinary person of either sex*, not exceptionally excitable or pugnacious, but *possessed of such powers of self-control as everyone is entitled to expect* that his fellow citizens will exercise in society as it is today.<sup>121</sup>

Although Diplock might be correct in a general sense, Dolores A. Donovan and Stephanie M. Wildman suggest that it is 'the reasonableness part of the standard that is faulty, not merely the sex or class of the mythical person'.<sup>122</sup> They argue that 'the allegedly universal, classless, and sexless nature of the reasonable man was a device which promoted the myth of the objective, value-free nature of the criminal law'.<sup>123</sup> Although *Camplin* has individualized the reasonable person to an extent in sharing the defendant's age and sex, Donovan and Wildman maintain that it still 'ignores the social reality of the individual which has significantly contributed to the alienation and violence which she or he has acted out'.<sup>124</sup> The purported neutrality of the 'reasonable person' in modern criminal discourse may in effect be more harmful for concealing gendered biases and assumptions because, as Mayo Moran suggests, it 'seem[s] to represent, under the guise of a gender-neutral standard, a problematic enshrinement of the male point of view, and perhaps also male power to define gender relations'.<sup>125</sup> Although the criminal courts now refer to a 'reasonable person', Marcia Baron fears standards of reasonableness remain entrenched in masculinized forms of violence and criminal behaviour,<sup>126</sup> and that to attempt to offset the imbalance by distinguishing a 'reasonable woman' would serve only to 'enshrin[e] in law the inequality in traditional expectations of men and women'.<sup>127</sup> Ann McGinley similarly suggests that 'applying a reasonable man standard to male victims would establish a preferred standard of masculinity that may harm men, women, and society in general'.<sup>128</sup> Extending this, I argue that the reasonable person,

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<sup>121</sup> *Camplin* (n116), per Lord Diplock at [4] [emphasis added].

<sup>122</sup> Donovan, D.A and Wildman, S.M. 'Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation' (1981), 14 *Loyola of L.A. Law Review*, 14(3), 435-468, 437.

<sup>123</sup> *Ibid*, 448.

<sup>124</sup> *Ibid*, 465.

<sup>125</sup> Moran, M. 'The Reasonable Person: A Conceptual Bibliography in Comparative Perspective' (2010), *Lewis and Clark Law Review*, 1233-1283, 1260.

<sup>126</sup> Baron, M. 'Gender Issues in the Criminal Law' in Deigh, J. and Dolinko, D. (eds) 'The Handbook of Philosophy of Criminal Law' (OUP 2011), 335-402, 352.

<sup>127</sup> *Ibid*.

<sup>128</sup> McGinley, A. 'Reasonable Men?' (2012) *Connecticut Law Review*, 45(1), 1-40, 1.

or 'a person of ordinary tolerance and self-control' under loss of control, may still carry within it stereotypes of male-coded behaviour, as we will see later in the section.

#### 7.4.2) 'In cool blood': battered wives and the 'slow burn'

In the last section I argued that the creature's killing of William in a flare of rage echoes the mode of male anger encapsulated in the 'sudden and temporary' aspects of the old provocation defence. Here, I suggest that the creature's other killings resonate with the female-coded slow burn response, as seen in cases of battered wives, with an extended delay between the provoking act and retaliatory response. Instead of attempting to invoke the loss of control defence on behalf of the creature on a literal interpretation of the facts in *Frankenstein*, I examine how the type of behaviour the creature exhibits on some occasions shares qualities with battered wives who kill.

The defendant in *R v Ahluwalia* set fire to her abusive husband's bedclothes while he was asleep but had no intention of killing him; he died of his injuries a few days later. The court directed that the jury could take into consideration actions that had occurred over a period of time, but the jury felt the defence did not apply, and the defendant was charged with murder. On appeal, Lord Taylor CJ established that a jury could 'take account of the interval between the provocative conduct and the reaction of the defendant to it'.<sup>129</sup> He noted that:

Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained self-control or show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation. In some cases, such an interval may wholly undermine the defence of provocation; that, however, depends entirely on the facts of the individual case and is not a principle of law.<sup>130</sup>

The court in *Ahluwalia* attempted to include more of a female-coded 'slow burn' response (though their acceptance of it was less than emphatic), noting that the 'subjective element' of provocation 'would not as a matter of law be negated simply because of

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<sup>129</sup> *R v Ahluwalia* (1993) 96 Cr. App. R. 133, per Lord Taylor CJ at [138].

<sup>130</sup> *Ibid* at [138-39].

the delayed reaction in such cases, provided that there was at the time of the killing a “sudden and temporary loss of self-control” caused by the alleged provocation’.<sup>131</sup> However, they suggested that ‘the longer the delay and the stronger the evidence of deliberation on the part of the defendant’ the less likely it would render provocation to be established.<sup>132</sup> Although ‘there was much evidence that the appellant had suffered grievous ill-treatment’, they found ‘nothing to suggest that the effect of it was’ battered woman syndrome and no medical evidence to support it, so it could not be accepted as a characteristic that could be applied to the ‘reasonable person’.<sup>133</sup> When Victor dies, the creature howls, ‘[t]hat is also my victim!... in his murder my crimes are consummated; the miserable series of my being is wound to its close!’<sup>134</sup> It is a sentiment that is vividly demonstrated in cases like *Ahluwalia* where battered wives kill their abusers, as both stories involve a reclamation of power from an abusive male authority figure. The relationships are not identical but analogous; the multivalence of relationships between Victor and the creature, as described by Best,<sup>135</sup> means the power dynamic between them takes on a quasi-romantic subtext and blurs the binaries in gender roles.

The appellate court subsequently found the trial judge’s direction on provocation in *Ahluwalia* to be ‘fair and correct in law’ and the ‘criticisms’ levelled against his direction ‘unfounded’, preferring to leave what would amount to a change in the law to Parliament.<sup>136</sup> Diminished responsibility was not raised at the first trial, but a pre-trial report diagnosed the defendant with ‘endogenous depression’ which the court interpreted as a ‘major depressive disorder’ that was sufficient to prove diminished responsibility; a retrial was ordered in which the charge was reduced to manslaughter, and the defendant was released for time served.<sup>137</sup> Chris Morgan observes that ‘unlike provocation, diminished responsibility was introduced into the law to deal with... mental

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<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid* at [139] [sic].

<sup>133</sup> *Ibid* at [140].

<sup>134</sup> *Frankenstein* (n1), 221.

<sup>135</sup> Best (n60).

<sup>136</sup> *Ahluwalia* (n129), at [142].

<sup>137</sup> *Ibid* at [142-43].

abnormalities', meaning that 'the aim and rationale of the defences are different'.<sup>138</sup> It is unfortunate that the court characterised prolonged traumatic abuse as a mental condition rather than an accumulation of provoking acts. One instance of domestic violence might ordinarily be viewed as inducing a more 'justified response' than the discovery of spousal infidelity, and yet the 'sudden and temporary' requirement for provocation negated the persuasive weight of years of accumulated abuse. Provocation therefore justifies the violent 'boiling over' contemporaneity of male defendants while excluding the 'cooling down' periods in which time elapses between the provoking act(s) and the killing. Although the provocation defence 'purports to be a concession to human frailty', Marcia Baron describes it as 'a concession primarily just to certain sorts of frailties, those often thought to be part and parcel of masculinity',<sup>139</sup> which is rooted in 'insidious sexism' in the belief that 'aggression is admired' in men but not in women; these problems in legal doctrine may not be caused by sexism, Baron argues, but the provocation defence certainly 'tap[s] into the sexism noted, [and] generate[s] the problems'.<sup>140</sup>

In *R v Thornton*, the trial judge directed the jury to 'take into account the whole picture, the whole story', following *Ahluwalia*. Beldam LJ agreed 'the distinction drawn [in *Duffy*] by Devlin J between a person who has time to think and reflect and regain self-control and a sudden and temporary loss of self-control is no longer of significance', with the judge suggesting that the defendant could have 'walked out or gone upstairs' – which is never suggested in cases of men killing their partners.<sup>141</sup> If one minute was seen as time enough to negate the 'sudden and temporary' provision, then the days that elapse after the provoking act of his mate's destruction and the creature's killings of Henry, and the months until his murder of Elizabeth, certainly seem like they would.<sup>142</sup> The 'sudden and temporary' provision was viewed as one which the jury 'are well able to understand and

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<sup>138</sup> Morgan, C. 'Loss of Self-Control: Back to the Good Old Days' (2013) *The Journal of Criminal Law*, 77(2), 119-35, 123.

<sup>139</sup> Baron (n126), 341.

<sup>140</sup> *Ibid*, 343-44.

<sup>141</sup> *R v Thornton* (No. 2) [1996] 1 WLR 1174, per Gosforth CJ at [1180].

<sup>142</sup> *Frankenstein* (n1), 186. Victor spends three months in prison before sailing back to Geneva for his wedding.

to recognise as expressing precisely the distinction drawn by Devlin J'.<sup>143</sup> This judgment therefore focused on the understandability of 'sudden and temporary' rather than the appropriateness of its psychological underpinnings.

On appeal, Gosforth stated that a 'defendant, even if suffering from [battered woman] syndrome, cannot succeed in relying on provocation unless the jury consider she suffered or may have suffered sudden and temporary loss of self-control at the time of the killing'.<sup>144</sup> Gosforth did concede that '[t]he severity of such a syndrome and the extent to which it may have affected a particular defendant will no doubt vary and is for the jury to consider', as it may be 'relevant' either as 'important background [information] to whatever triggered the *actus reus*' on a "last straw" basis<sup>145</sup> or as medical evidence that may 'constitute a significant characteristic'.<sup>146</sup> This was necessary because the trial judge had not adequately explained what characteristics the jury 'might find proved and relevant' and had only directed them to judge her against a reasonable woman 'sharing her characteristics as you have been able to discover them'.<sup>147</sup> Her personality disorder and battered woman syndrome were deemed 'relevant characteristic[s]', her conviction quashed, and a retrial ordered, at which Thornton was convicted of manslaughter and released for time served.<sup>148</sup> That 'provocation is often successfully invoked by men who kill in response to their female partner's infidelity' but not by 'women who kill their male partners in response to long-term physical abuse', reveals 'severe...biases inherent in provocation' according to Mayo Moran.<sup>149</sup> The defence is unpalatable because 'it builds in the value system of the reasonable or ordinary man, a value system that views women as the property of their male partners' which treats 'resorting to deadly violence as "understandable" or "excusable" in circumstances of infidelity'.<sup>150</sup> This is compounded by

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<sup>143</sup> R v Thornton (No. 1) (1992) 1 All ER 306, per Beldam LJ at [313].

<sup>144</sup> Thornton (n141), per Gosforth at [1181].

<sup>145</sup> Ibid.

<sup>146</sup> Ibid at [1182].

<sup>147</sup> Ibid.

<sup>148</sup> Ibid at [1183-84].

<sup>149</sup> Moran (n125), 1255.

<sup>150</sup> Ibid.

Meda Chesney-Lind's contends that 'both the construction of women's defiance and society's response to it are colored by women's status as male sexual property', noting that a female offender's 'behavior is scrutinized for evidence that she is beyond the control of patriarchy and if this can be found she is harshly punished'.<sup>151</sup>

In *R v Humphreys*,<sup>152</sup> the defendant attempted suicide by slashing her wrists after her partner raped her, which he had done on several occasions, and subsequently used the knife on him in fear that he would rape her again.<sup>153</sup> Initially found guilty, she was acquitted on appeal on the grounds of the cumulative provocation she suffered at her partner's hands. The defendant's novel 'immature, explosive and attention-seeking traits' were deemed ineligible by the trial judge, but on appeal it was decided that the characteristics of immaturity and attention-seeking 'should [have been] left to the jury as eligible for attribution to the reasonable woman', with the latter constituting a psychological disorder which set her apart, though not the explosive trait which they found 'amounted merely to the fact that she did not have normal power of self-control'.<sup>154</sup> This upheld *R v Dryden*, in which the defendant's 'eccentricity and obsessiveness' were applicable characteristics to the reasonable person.<sup>155</sup> The court in *Humphreys* also noted the potential significance of the 'complex story' between defendant and victim 'with several distinct and cumulative strands of potentially provocative conduct building up',<sup>156</sup> which represents a tentative step towards taking into account cumulative effects of domestic abuse, and more of a delay between provoking acts and the retaliatory response.

The women of *Frankenstein* are framed not simply as law-abiding citizens, but as angelic martyrs or victims of violence or miscarriages of justice, which mirrors the portrayal of

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<sup>151</sup> Chesney-Lind, M. "'Women and Crime': The Female Offender' (1986) *Signs*, 12(1), 78-96, 96 [sic].

<sup>152</sup> *R v Humphreys* (Emma) [1995] 4 All ER 1008.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, at [1010].

<sup>155</sup> *R v Dryden* [1995] 4 All ER 987.

<sup>156</sup> *Humphreys* (n152), at [1009].

battered wives in the case law discussed above. Victor's mother, for example, is painted as stoic, humble and kind; not only does Victor speak highly of his mother's 'uncommon... mind' and 'courage', he also presents her in saint-like terms as caring for her ailing father, frequently visiting poor families (even adopting a child to save her from a life of poverty), and selflessly nursing her adopted daughter at the expense of her health (and, ultimately, life). The martyrdom of Madame Frankenstein is mirrored by Justine, the family maid, who is unjustly accused of William's murder: she is selfless to the point that she 'tried to comfort others and herself' and feels that she can 'die in peace, now that [her] innocence is acknowledged' by Victor and Elizabeth.<sup>157</sup> Elizabeth is the third female martyr in Victor's story – killed by the creature on her wedding night.<sup>158</sup> This corresponds with Catharine A. MacKinnon's assertion that 'law sees and treats women the way men see and treat women'<sup>159</sup> and that, extending this, the law may be misogynistic in effect if perhaps not in intention.

Killings done for 'considered revenge' are now and always have been treated in law as murder. Francis Bacon wrote that '[r]evenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office'.<sup>160</sup> But what was the provocation defence if not a form of man's justified revenge? Although provocation is only a partial defence that mitigates rather than exonerates, a potentially vengeful component does seem to recur in early cases like *Mawgridge*, *Hayward* and *Welsh*. 'The desire for vengeance,' according to Oliver Wendell Holmes in 1881, 'imports an opinion that its object is actually and personally to blame', which in effect, 'takes an internal standard, not an objective or external one, and condemns its victim by that'.<sup>161</sup> Holmes suggests that 'satisfy[ing] the desire for vengeance' has 'never ceased to be one

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<sup>157</sup> Frankenstein (n1), 89.

<sup>158</sup> *Ibid*, 199.

<sup>159</sup> MacKinnon, C.A. 'Towards a Feminist Theory of State' (Harvard University Press 1989), 161-2.

<sup>160</sup> Bacon, F. 'Essay IV: Of Revenge' in Bacon, F. and Whately, R. (ed) 'Bacon's Essays, with Annotations' (Lee, Shepherd and Dillingham 1875), 52-59, 52.

<sup>161</sup> Holmes, O.W. 'The Common Law' (Transaction Publishers 2005; Little, Brown and Company 1881), 35.



object of punishment',<sup>162</sup> and John Gardner later suggests that '[t]he spirit of the criminal law is... fundamentally in continuity with the vendetta' and argues that criminal punishment may be said to be 'closely connected with the justifiability of our retaliating (tit-for-tat, or otherwise) against those who wrong us'.<sup>163</sup> Although killing out of a desire for revenge is considered murder by the law,<sup>164</sup> aspects of revenge like 'actual and personal' blameworthiness (Holmes) and penal justifiability (Gardner) may be said to underlie assumptions about criminal law that prevail today. That the actions of the men in *Mawgridge* and *Hayward* were mitigated as provocation for reasons of spousal infidelity, but the women of *Ahluwalia* and *Thornton* were unable to invoke the same defence despite extended periods of verbal and physical abuse, may point to an instability in the law's understanding, and accession to, the emotional experiences of men and women – male vengeance may be justified but not female vengeance.

#### 7.4.3) 'Greater abhorrence... in the female form':<sup>165</sup> the 'doubly deviant' woman offender

The notion of 'double deviance', coined by Ann Lloyd, further illustrates the gender imbalance and misogyny demonstrated in battered wife cases,<sup>166</sup> and may be thought of as a 'gendered harm' as conceptualised by Conaghan. A 'gendered harm', Conaghan argues, arises when people suffer unequal treatment because their 'membership of [a] particular class, group, race or gender can significantly shape the nature and degree of the harm they sustain'; the law, she contends, 'fail[s] to recognize' or 'proper[ly] redress' this imbalance.<sup>167</sup> 'Double deviance' refers to the dichotomy of women's treatment during the sentencing stage: they are simultaneously treated more leniently for less serious crimes – Otto Pollak, for example, argued in 1961 that '[m]en hate to accuse women and thus indirectly to send them to their punishment, police officers dislike to arrest them,

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<sup>162</sup> Ibid.

<sup>163</sup> Gardner, J. 'Offences and Defences: Selected Essays in the Philosophy of Criminal Law' (OUP 2007), 213.

<sup>164</sup> This will be discussed in more depth regarding the revenge exclusion in S.54 Coroners and Justice Act 2009.

<sup>165</sup> Frankenstein (n1), 170.

<sup>166</sup> Lloyd, A. 'Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women' (Penguin Books 1995). See also Heidensohn, F. and Silvestri, M. 'Gender and Crime' in Morgan, R., Maguire, M. and Reiner, R. (eds) 'The Oxford Handbook of Criminology' (OUP 2012), 338-269, 351, and Callahan (n86).

<sup>167</sup> Conaghan, J. 'Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment' (1996) Oxford Journal of Legal Studies, 16(3), 407-431, 408.

district attorneys to prosecute them, judges and juries to find them guilty and so on<sup>168</sup> – while penalised more harshly when their crimes transgress legal and gender norms.<sup>169</sup> The Old Bailey online observes that the ‘prescribed gender role’ of men meant they were ‘expected to be violent and aggressive’ and thus ‘male deviance was perceived to be more threatening’, whereas the crimes of women, ‘generally perceived to be more passive ... were seen as unusual, rather than as part of a general pattern’, noting that ‘women who stepped far outside expected gender roles (through the use of violence towards children, for example) were prosecuted severely’:<sup>170</sup>

By the early nineteenth century, as serious crime came to be ‘masculinized’, most crime committed by women was seen as essentially a sexual rather than a criminal form of deviance, and those few women who were identified as serious criminals were sometimes punished more harshly than men. *In effect, such women suffered for transgressing their expected gender roles.*<sup>171</sup>

Although the cases discussed in this section do not necessarily relate to loss of control, they do centre on images of female criminality, and are relevant to the way in which women defendants who invoke the loss of control defence are perceived and treated by the courts. Lucia Zedner notes that in the nineteenth century, ‘[w]omen criminals were judged against a highly artificial notion of the ideal woman – an exemplary moral being’ and so ‘[w]omen’s crimes not only broke the criminal law but were viewed as acts of deviance from the “norm” of femininity’.<sup>172</sup> Zedner observes that men who committed less serious offences were seen as displaying positive masculine attributes such as: ‘entrepreneurial drive, initiative, vigor, and agility’, whereas ‘criminal women were seen to repudiate revered qualities of femininity’ and were considered to have offended not only against the law, but against their moral roles’.<sup>173</sup> The description of women criminals provided by English journalist and social investigator, Henry Mayhew, in 1862 is perhaps a microcosm of this double standard: ‘in them one sees the most hideous picture of all

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<sup>168</sup> Pollak, O. ‘The Criminality of Women’ (A. S. Barnes and Co. 1961), 151.

<sup>169</sup> See Callahan (n86) and Lloyd (n166).

<sup>170</sup> Old Bailey Online, ‘Gender in the Proceedings: Gender and Crime’, updated March 2018, accessed 1 March 2020 from <<https://www.oldbaileyonline.org/static/Gender.jsp#gendercrime>>

<sup>171</sup> Ibid [emphasis added].

<sup>172</sup> Zedner, L. ‘Women, Crime, and Penal Responses: A Historical Account’ (1991) *Crime and Justice*, 14, 307-362, 308.

<sup>173</sup> Ibid, 320.

human weakness and depravity – a picture the more striking because exhibiting the coarsest and rudest moral features in connection with a being whom we are apt to regard as the most graceful and gentle form of humanity'.<sup>174</sup>

The prevalence of this stereotype in law is corroborated by contemporary jurisprudence such as Edward William Cox's 1877 seminal sentencing text *Principles of Punishment*, which notes that '[a]lthough the crime may be the same, it is found in practice to be impossible to adjudge the same degree of punishment to women as to men', a 'difficulty' which Cox deems more 'sentimental than rational'.<sup>175</sup> He notes that 'while a third or fourth conviction properly consigns a male thief to penal servitude, many more convictions will not always suffice to bring down the like sentence upon a woman'.<sup>176</sup> A gendered distinction arises from Cox's characterising of 'hard labour' punishment as 'toilsome tasks' for men, and for women 'washing, sewing, cooking, and such employments as are suited to them and which honest and industrious women pursue as their ordinary daily duties at home'.<sup>177</sup> Indeed, Cox notes that hard labour constitutes 'such labour only as is adapted to her sex', and that 'the real punishment of female convicts is not the hardness of the labour but the restraint and discipline to which they are subjected'.<sup>178</sup> Callahan argues that '[w]hile the law gave judges substantial leeway in capital case sentencing, juries and judges focused their full convictions and harshest penalties, capital punishment, on women who violated important gender-based behavioral expectations'.<sup>179</sup> An additional charge occurred in some cases of wives allegedly killing their husbands, which took the form of petit treason,<sup>180</sup> and up until 1790 could be punishable by burning at the stake.<sup>181</sup> Petit treason, described by Sir Edward Coke in

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<sup>174</sup> Mayhew, H. 'The Criminal Prisons of London and Scenes of Prison Life' (Griffin and Bohn 1862), 464.

<sup>175</sup> Cox, E.W. 'The Principles of Punishment, as Applied in the Administration of the Criminal Law by Judges and Magistrates' (Law Times Office 1877), 145.

<sup>176</sup> *Ibid.*, 144-45.

<sup>177</sup> *Ibid.*, 145.

<sup>178</sup> *Ibid.*

<sup>179</sup> Callahan (n86), 1013 [sic].

<sup>180</sup> *Ibid.*, 1017.

<sup>181</sup> *Ibid.*, 1020.

1352 and valid from the Treason Act 1351<sup>182</sup> up until 1828, was a ‘manner of treason’ which occurs when a subordinate kills their master, such as ‘when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate to whom he oweth obedience’.<sup>183</sup> “‘Obedience,’ of course,” Callahan argues, ‘sums up the behavioral expectations of servants and women in one word’.<sup>184</sup> The creature in *Frankenstein* tells his creator:

thou hast made me more powerful than thyself; my height is superior to thine, my joints more supple. But I will not be tempted to set myself in opposition to thee. I am thy creature, and I will be even mild and docile to my natural lord and king if thou wilt also perform thy part, the which thou owest me.<sup>185</sup>

The ‘fatal altercation’ cases of *Phipoe* and *Godfry* lead Callahan to suggest that ‘[o]ther women when found guilty in these situations had their charges reduced from wilful murder to manslaughter, but [that] circumstances in the lives of these two women may have convinced juries that their behavior had to be dealt with forcefully’.<sup>186</sup> For example, in *Phipoe*,<sup>187</sup> the defendant was convicted for mortally stabbing her friend Mary Cox<sup>188</sup> under the influence of laudanum.<sup>189</sup> Phipoe had previously been tried and acquitted for robbery,<sup>190</sup> just as the defendant in *Godfry* had likely been charged previously with theft.<sup>191</sup> Evidence also suggests that both Phipoe and Godfry were prostitutes, and neither were married; Callahan notes that ‘juries found most of the women indicted alongside men not guilty or guilty of reduced charges’.<sup>192</sup> She suggests that their previous court appearances ‘may have propelled the jury to... [conclude] that since these women had transgressed before, as recidivists they did not deserve reduced convictions’<sup>193</sup>. She

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<sup>182</sup> Treason Act 1351.

<sup>183</sup> Coke, E. ‘The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes’ (Flesher, Lee and Pakeman 1644; reprint, W. Clarke and Sons 1817), 19. See also Blackstone, W. ‘Commentaries on the Laws of England, Vol. 4 (London: 1769; reprint, Chicago 1979), 203-4.

<sup>184</sup> Callahan (n86), 1017.

<sup>185</sup> *Frankenstein* (n1), 102-03.

<sup>186</sup> Callahan (n86), 1028.

<sup>187</sup> Mary Theresa Phipoe (alias Mary Benson). *The Times*, December 8, 1797 and *Annual Register*, 1797, 152-55.

<sup>188</sup> Phipoe (n187) referenced in Callahan (n86), 1013.

<sup>189</sup> Callahan (n86), 1023.

<sup>190</sup> OBSP, Trial of Maria Phipoe, 1794-95, case 268 and 1795-96, case 175. See Callahan (n86), 1028 and Durston, G.J. ‘Wicked Ladies: Provincial Women, Crime and the Eighteenth-Century English Justice System’ (Cambridge Scholars Publishing 2013), 2.

<sup>191</sup> Callahan (n86), 1028.

<sup>192</sup> *Ibid*, 1027.

<sup>193</sup> *Ibid*.

observes that 'all of the women who were sentenced to die defied gender roles understood by society' and that prostitutes (which both Godfrey and Phipoe probably were), 'further defied norms eschewing marital expectations and remaining independent guardianship'.<sup>194</sup>

Although the female creature is destroyed by Victor before she has been animated, and thus is not a murder victim in the literal sense nor a character whose motives could be discussed, she remains thematically important – not just in her destruction being the catalyst for the creature's actions in the rest of the novel, but in what she represents both inside and outside the text, and in relation to the other women in the novel. Even before she is constructed, the female creature is described in a way that marks her as property, with the creature listing specifications for her construction and demand: 'a creature of another sex, but as hideous as myself'; 'a female... with whom I can live in the interchange of sympathies necessary for my being'; his companion must be 'of the same species... and [with] the same defects'.<sup>195</sup> He explains, '[m]y companion will be of the same nature as myself, and will be content with the same fare',<sup>196</sup> and that 'my virtues will necessarily arise when I live in communion with an equal'.<sup>197</sup> Although the creature describes his prospective mate as an equal, he has already plotted out her life in accordance with his own wishes, and pre-emptively denies her autonomy while exercising his own.

Victor is very consciously and deliberately constructing a woman's body, and her potential criminality is crucial to the decisions Victor makes on her behalf. Even the vaguest notion that the female creature may be equally as violent as her male counterpart is more than Victor can stomach. The female creature is never given opportunity or agency to exert her free will. I suggest that the fact that she is destroyed

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<sup>194</sup> *Ibid.*

<sup>195</sup> Frankenstein (n1), 147-48.

<sup>196</sup> *Ibid.*, 148-49.

<sup>197</sup> *Ibid.*, 150.

before she can exercise a will of her own can be read as a comment on the fear of female criminality. Marie Mulvey-Roberts reads the (male) creature as a 'spectre of the maternal body as well as Frankenstein's monstrous child', and observes that 'the female body (monster) is more threatening to Victor than the male body (monster)', so much so that he destroys it before it can be given life and have desires of its own.<sup>198</sup>

The terror Victor feels when envisaging his female creation's potential wickedness, though not directly related to loss of control, expresses fears and misunderstanding about female criminality that might be relevant to a discussion of the defence. Having already created a 'fiend... [of] unparalleled barbarity', Victor is concerned that the female creature he is constructing 'might become ten thousand times more malignant than her mate and delight, for its own sake, in murder and wretchedness'.<sup>199</sup> He also suggests that she might not make the same oath as the creature to leave humanity untroubled:

she, who in all probability was to become a thinking and reasoning animal, might refuse to comply with a compact made before her creation. They might even hate each other; the creature who already lived loathed his own deformity, and *might he not conceive a greater abhorrence for it when it came before his eyes in the female form?* She also might turn with disgust from him to the superior beauty of man; she might quit him, and he be again alone, exasperated by the fresh provocation of being deserted by one of his own species.<sup>200</sup>

Victor's prediction that the creature's acts may appear more 'abhorrent' in female form evocatively recalls the notion of double deviance, in which women are punished more harshly for committing acts that transgress gender norms.<sup>201</sup> David Gurnham notes that the crimes of Myra Hindley (commonly referred to as 'the most evil woman in Britain')<sup>202</sup> were regarded as 'uniquely evil' by the court in her life tariff hearing,<sup>203</sup> which he argues 'implies an exceptionally high degree of malice and wickedness on the part of the criminal herself' despite the 'many examples of gross and shocking cruelty amongst those serving

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<sup>198</sup> Mulvey-Roberts, M. 'The Corpse in the Corpus: Frankenstein, Rewriting Wollstonecraft and the Subject' in Sinatra, M.E. (ed) 'Mary Shelley's Fictions: From Frankenstein to Falkner' (Macmillan, 2000), 199.

<sup>199</sup> Frankenstein (n1), 170.

<sup>200</sup> Ibid [emphasis added]. The Victor/creature/female creature of this passage may also be read as an analogy for God/Adam/Eve.

<sup>201</sup> See Callahan (n86), Lloyd (166).

<sup>202</sup> Cummins, I., Foley, M. and King, M. 'Serial Killers and the Media: The Moors Murders Legacy' (Palgrave Macmillan 2019), 115-134.

<sup>203</sup> R v Secretary of State for the Home Department, exp Hindley [2000] 2 All ER 385, per Lord Steyn at [392].

life sentences for murder, against whom Hindley looks decidedly ordinary'.<sup>204</sup> This reflects how women are punished more harshly for gender norm-breaking offences both in and outside the legal system.

When the creature confronts him for destroying his mate, Victor justifies his actions by vowing 'never will I create another like yourself, equal in deformity and wickedness'.<sup>205</sup> He argues that the female would have been the creature's 'companion in vice' and poses the question, '[s]hould I, in cool blood, set loose upon the earth a daemon whose delight is in death and wretchedness?'<sup>206</sup> Knoepfmacher suggests that 'above all Victor fears the possibility of a female creature not only more aggressive than the novel's remarkably passive female characters, but also capable of surpassing the sadistic and unparalleled barbarity of the killer of little William',<sup>207</sup> noting that 'Victor seems to acknowledge that the Monster's aggression has been partly justified, but a female who might delight in sadism "for its own sake" is a horror he cannot contemplate'.<sup>208</sup>

The women in *Frankenstein* certainly appear to conform to nineteenth-century notions of femininity which Lacey describes as 'passive rather than active, driven by emotion rather than reason; moved by impulses located in the body rather than the mind'.<sup>209</sup> This is the law's 'conventional' image of the 'female offender' in Lacey's view, and one to which *Frankenstein's* women appear to conform.<sup>210</sup> We see this with the hanging of the innocent Justine,<sup>211</sup> the destruction of the female creature,<sup>212</sup> and with the murder of Elizabeth on her and Victor's wedding night.<sup>213</sup> The strict delineation of gender and gender roles is one of the creature's earliest lessons:

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<sup>204</sup> Gurnham, D. 'The Moral Narrative of Criminal Responsibility and the Principled Justification of Tariffs for Murder: Myra Hindley and Thompson and Venables' (2003) *Legal Studies*, 23(4), 605-623, 618.

<sup>205</sup> *Frankenstein* (n1), 171.

<sup>206</sup> *Ibid.*

<sup>207</sup> Knoepfmacher (n33), 106.

<sup>208</sup> *Ibid.*, 107.

<sup>209</sup> Lacey, N. 'Women, Crime and Character' (2007) LSE Working Paper 5/2007, 1-31, 3.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Frankenstein* (n1), 91.

<sup>212</sup> *Ibid.*, 146.

<sup>213</sup> *Ibid.*, 198.

Other lessons were impressed upon me even more deeply. I heard of the difference of sexes, and the birth and growth of children, how the father doted on the smiles of the infant... how all the life and cares of the mother were wrapped up in the precious charge... and all the various relationships which bind one human being to another in mutual bonds.<sup>214</sup>

*Frankenstein* foregrounds male wrongdoing at the expense of exploring notions of female criminality. Justine is wrongly accused of William's murder, but states: 'I almost began to think that I was the monster that [my interrogator] said I was'; seemingly her only 'sin' is that she 'confessed a lie' to 'obtain absolution'.<sup>215</sup> This lie is the highest level of criminality that any woman in the book can be accused of; and far from framing it as an obstruction to the cause of justice, it is portrayed as a noble self-sacrifice. The female creature is destroyed before she can be reanimated. Mellor suggests this is because Victor 'is afraid of an independent female will, afraid that his female creature will have desires and opinions that cannot be controlled by his male creature'.<sup>216</sup> For Mellor, this points to a deeper 'fear of female sexuality', a misogynistic concern that is 'endemic to a patriarchal construction of gender' which 'threatens the foundation of patriarchal power'.<sup>217</sup> The female creature is not permitted to exist and explore her own (potential for) criminality, so we must look to the creature for feminised forms of criminal action in the novel.

#### 7.4.4) Loss of control: redressing the gendered imbalance

It is important to note that loss of control is an 'instanc[e] of murder where the application of the mandatory life sentence appears too draconic in comparison to the blameworthiness of the defendant's act'.<sup>218</sup> Though not related to the loss of control defence, that controlling or coercive behaviour in a family relationship is now a criminal offence under S.76 Serious Crime Act 2015, which includes causing a 'fear' of 'violence'

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<sup>214</sup> *Frankenstein* (n1), 85.

<sup>215</sup> *Ibid*, 88

<sup>216</sup> Mellor (n47), 119.

<sup>217</sup> *Ibid*, 120.

<sup>218</sup> Reed, A. and Bohlander, M. 'Introduction' in Reed, A. and Bohlander, M. (eds) 'Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives' (Ashgate 2011), 1-8, 1.



or 'serious alarm or distress',<sup>219</sup> marks a shift in the law to appreciating the situations of battered wives. Whilst there is no specific offence of domestic abuse, sentencing guidelines in cases relating to coercive or controlling behaviour 'recognis[e]... that one of the factors that can allow domestic abuse to continue unnoticed for lengthy periods is the ability of the perpetrator to have a public and a private face'.<sup>220</sup>

S.54(1) of the Coroners and Justice Act 2009 replaced provocation with the partial defence of loss of self-control, which downgrades a charge of murder to manslaughter.<sup>221</sup> There must be a loss of self-control,<sup>222</sup> which need not be sudden (thus taking female-coded aggression into account),<sup>223</sup> and requires a qualifying trigger that constitutes one of a narrow range of provoking acts,<sup>224</sup> including fear of serious violence from the victim to the defendant or another,<sup>225</sup> and a sense of being seriously wronged by things done or said.<sup>226</sup> It must also be established that a person 'of [the defendant's] sex and age, with a normal degree of tolerance and self-restraint and in [their] circumstances... might have reacted in the same or in a similar way'.<sup>227</sup> Regarding the fear trigger,<sup>228</sup> *R v Dawes, Hatter and Bowyer* established the defence will not apply if a defendant consciously acted to provoke violence.<sup>229</sup> Regarding the anger trigger,<sup>230</sup> the things done or said must be of an 'extremely grave character'<sup>231</sup> which 'caused the defendant to have a justifiable sense of being seriously wronged',<sup>232</sup> and the Act directly addresses criticism of the old provocation defence in stating that 'sexual infidelity is to be disregarded' and cannot

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<sup>219</sup> S.76(4)(a) and (b) Serious Crime Act 2015. The offence applies to all defendants regardless of gender or sexuality. See also CPS, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship', reviewed 30 June 2017, accessed 1 March 2020 from <<https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship>>

<sup>220</sup> Sentencing Council, 'Domestic abuse', effective from 24 May 2018, accessed 1 March 2020 from <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>>

<sup>221</sup> Coroners and Justice Act 2009 (n120), S.54(1).

<sup>222</sup> *Ibid.*, S.54(1)(a).

<sup>223</sup> *Ibid.*, S.54(2).

<sup>224</sup> *Ibid.*, S.54(1)(b), S.55.

<sup>225</sup> *Ibid.*, S.55(3).

<sup>226</sup> *Ibid.*, S.55(4).

<sup>227</sup> *Ibid.*, S.54(1)(c).

<sup>228</sup> *Ibid.*, S.54(1).

<sup>229</sup> *Dawes* (n37).

<sup>230</sup> Coroners and Justice Act 2009 (n120), S.54(1).

<sup>231</sup> *Ibid.*, S.55(4)(a).

<sup>232</sup> *Ibid.*, S.55(4)(b).

constitute a ‘thing done or said’.<sup>233</sup> The significant focus on objective elements is new to the 2009 Act, with *Dawes* establishing that both sub-provisions are to be judged objectively.<sup>234</sup> The circumstances to be taken into account are ‘all of [the defendant’s] circumstances other than those whose only relevance to [their] conduct is that they bear on [their] general capacity for tolerance and self-restraint’.<sup>235</sup> The defence ‘does not apply’ to those who kill out of a ‘considered desire for revenge’, which codifies *R v Ibrams and Gregory*,<sup>236</sup> and similarly excludes the defence from defendants whose acts are pre-meditated, thus upholding *R v Inglis*.<sup>237</sup> Sarah Sorial argues these changes ‘not only mark a significant departure from the previous law, but also attempt to shift the narrative about how self-control is lost [and] who loses it’.<sup>238</sup> Replacing the ‘reasonable person’ with ‘a person of ordinary tolerance and self-restraint’ also excludes those who have an ‘unusually short fuse’,<sup>239</sup> which codifies Lord Hoffmann’s assertion in *R v Smith* only eight years prior that ‘[m]ale possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover’.<sup>240</sup>

If taken literally, the creature’s killings may all be interpreted as premeditated acts and revenge killings, which negates the partial defence of loss of self-control discussed above. This is not, however, a literal interpretation of the defence as it may apply to the fictional creature, but rather a consideration of the type of violence he exhibits, and how it reflects gendered conceptions of criminality. The loss of control defence was established, as Child and Ormerod note, to directly address those defendants who kill ‘in circumstances of justified anger or acute fear’;<sup>241</sup> a direct response to concerns about

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<sup>233</sup> *Ibid.*, S.55(6)(c).

<sup>234</sup> *Dawes* (n37).

<sup>235</sup> Coroners and Justice Act 2009 (n120), S.54(3).

<sup>236</sup> *R v Ibrams and Gregory* (1982) 74 Cr. App. R. 154.

<sup>237</sup> *R v Inglis* [2011] 1 WLR 1110.

<sup>238</sup> Sorial, S. ‘Anger, Provocation and Loss of Self-Control: What Does “Losing It” Really Mean?’ (2019) *Criminal Law and Philosophy* 13(2), 247-269, 250.

<sup>239</sup> Taylor, R. ‘The Model of Tolerance and Self-Restraint,’ in Reed, A. and Bohlander, M. (eds) ‘Loss of control and Diminished Responsibility: Domestic, Comparative and International Perspectives’ (Routledge 2011), 51-64, 54.

<sup>240</sup> *R v Smith (Morgan)* [2001] 1 AC 146 per Lord Hoffmann at [169].

<sup>241</sup> Child, J. and Ormerod, D. ‘Smith, Hogan, and Ormerod’s Essentials of Criminal Law’ 2<sup>nd</sup> ed. (OUP 2017), 165.

'perceived unfairness' and 'inconsistent interpretations' of the old provocation defence.<sup>242</sup>

The provoking acts in the loss of control defence can be interpreted cumulatively, as held by Lord Judge CJ in *R v Dawes, Hatter and Bowyer*, who noted that:

loss of control may follow from the cumulative impact of earlier events ... [The] response to what used to be described as 'cumulative provocation' requires consideration in the same way as it does in relation to cases in which the loss of control is said to have arisen suddenly. Given the changed description of this defence, perhaps 'cumulative impact' is the better phrase to describe this particular feature.<sup>243</sup>

The notion of a 'cumulative impact' is even more vividly demonstrated in *Frankenstein*, because the creature experiences suffering on a significant scale over an extended period of time; he even calls his life 'an accumulation of anguish' at his creator's hand.<sup>244</sup>

This cumulative impact directly takes into account female-coded emotional responses and criticisms from commentators including Katherine K. Baker who suggests 'the law ha[d] been deficient in failing to recognize the different ways that women and men tend to experience emotion.'<sup>245</sup> Baker exposes the injustice that arises from '[t]he fact that the law holds women culpable for the physical violence they inflict on their former abusers' which 'is particularly troubling when one contrasts it with the legal treatment of men's violent emotional reactions', meaning that '[a]s long as men react immediately, thoughtlessly, and without emotional struggle, their violent acts are minimized or excused'.<sup>246</sup> Although she concedes that 'not all women exhibit typically female qualities, and not all men behave in typically male ways', the decision in *Dawes* goes some way to redress the gender imbalance.

#### 7.4.5) Loss of control in practice: one step forward, two steps back

Although the 2009 Act represents a positive step forward in attempting to encompass a greater range of emotional responses, aspects of provocation remain, primarily through the ambiguous meaning of 'extremely grave character' and 'a justifiable sense of being

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<sup>242</sup> Ibid.

<sup>243</sup> *Dawes* (n37), per Lord Judge CJ at [54].

<sup>244</sup> *Frankenstein* (n1), 102.

<sup>245</sup> Baker (n111), 447.

<sup>246</sup> Ibid, 460.

wronged'. Marcia Baron and Sarah Sorial respectively point out the inconsistency with which the law treats 'lenience to human frailty', viewing provoking acts as mitigation to murder, but not for the defendant who steals money for rent to prevent their family being evicted.<sup>247</sup> Sorial is also concerned that ideas from provocation case law will be used to interpret, and therefore undermine, the new provisions, and Susan S.M. Edwards notes the "justifiable" sense of being wronged may still mean the law interprets justifiable according to masculinist standards',<sup>248</sup> both of which are apparent in the controversial reopening of the sexual infidelity exclusion in *R v Clinton, Parker and Evans*.<sup>249</sup> The defendant in this case killed his partner after she told him that she had slept with another man, taunted him about his suicidal feelings, and threatened to leave him. On appeal, Lord Judge CJ found that the victim's taunts would satisfy both the fear and anger trigger provisions, reinstating the relevance of sexual infidelity:

[T]o seek to compartmentalise sexual infidelity and exclude when it is integral to the facts as a whole... is unrealistic and carries with it the potential for injustice. In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of sub-ss 55(3) and (4), the prohibition in s55(6)(c) does not operate to exclude it.<sup>250</sup>

Therefore, sexual infidelity can provide the *context* to the loss of control, if not the *substance* of it – but Dennis Baker and Lucy Zhao are concerned that this lets sexual infidelity back into the law 'via the back door'.<sup>251</sup> James Slater argues:

The fact that a qualifying trigger can be made up of several elements, and the contrast between the use of the plural in s 55(4) and the use of the singular in s 55(6)(c), would seem to result in the following literal meaning: whether by itself or amongst other factors, sexual infidelity is to be disregarded. This appears to be s 55(6)(c)'s plain meaning, requiring that sexual infidelity be ignored even when accompanied by other factors.<sup>252</sup>

Given that it was a factor in the killing, it is understandable that Lord Judge finds sexual infidelity in this case acceptable as a contextualising element. However, this

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<sup>247</sup> Sorial (n238), 253 and Baron (n126), 19.

<sup>248</sup> Sorial (n238), 253.

<sup>249</sup> Clinton (n37).

<sup>250</sup> Ibid, at [39].

<sup>251</sup> Baker, D. and Zhao, L. 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) *The Journal of Criminal Law*, 76, 254-275, 272.

<sup>252</sup> Slater, J. 'Sexual Infidelity and Loss of Self-Control: Context or Camouflage?' (2012) *Denning Law Journal*, 24, 153-168, 159.

interpretation would appear to undermine the foundations of (and motivation behind) the sexual infidelity exclusion. Slater suggests that Lord Judge's 'contextual approach' to the exclusion 'enables sexual infidelity to act as the main and indeed predominant qualifying trigger despite S.55(6)(c)'.<sup>253</sup> Although Slater concedes that interpreting S.55(6)(c) as excluding sexual infidelity 'from the equation without exception... perhaps does risk injustice',<sup>254</sup> he invokes the 'moral significance of violent reactions to sexual infidelity', to which he ascribes two schools of thought: firstly, that such behaviour is a 'moral evil' that speaks to the 'wider problem concerning the male use of violence against female partners'; secondly, articulated by Lord Judge in *Clinton*, that 'sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response'.<sup>255</sup> To ignore 'the context in which such words are used... represents an artificiality which the administration of criminal justice should do without'.<sup>256</sup> Although the change of law was aimed at 'minimizing gender bias in the law's operation',<sup>257</sup> Kate Fitz-Gibbon for example warns that 'the defence may still be formulated in a way that restricts the court's ability to adequately respond to women's experiences in this context'.<sup>258</sup> The Act is a 'major step forward' in constituting 'formal recognition that the emotion of fear can lead to the perpetration of lethal violence that warrants a manslaughter not murder conviction',<sup>259</sup> but Fitz-Gibbon remains concerned that cases like *Clinton* demonstrate that loss of control 'will do little to overcome gender bias historically associated with the provocation defence'.<sup>260</sup>

Relatedly, I suggest there is an intricate system of power imbalances in *Frankenstein*: the creature is physically strong enough to kill, but he does not do so until 'provoked'. He

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<sup>253</sup> *Ibid*, 160.

<sup>254</sup> *Ibid*, 163-64.

<sup>255</sup> *Clinton* (n37) at [16]

<sup>256</sup> *Ibid* at [23]

<sup>257</sup> Fitz-Gibbon K. 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' (2013) *Journal of Law and Society*, 40(2), 280-305, 282.

<sup>258</sup> *Ibid*, 305.

<sup>259</sup> *Ibid*.

<sup>260</sup> *Ibid*.

has all the typical (external and presumably internal) male attributes of a person who would invoke the (historical, old) provocation defence, even down to the affront on male conceptions of honour aspect in Victor 'defiling' the creature's female mate (which reads as sexualised on Victor's part because he fears her reproductive capacity); and all of the actual emotional triggers of someone who would invoke the (new) loss of control defence. In short, he has the honour-coded male aggression of the old provocation defence and the slow-burn triggers of the new loss of control defence. I also posit that the creature's gender, which lends itself to multiple nuanced sub-textual readings as a queer/female-coded/non-binary body, and the creature's fluid gender reflects the instabilities of delineating between 'male'-coded and 'female'-coded violence. Loss of control still invokes the language of a male-coded 'snap' while affording more protection to 'slow burn' female-coded violence – and it is an unstable blending of both the old and new approach which I suggest Frankenstein's creature embodies.

I argue that the creature's loss of control in response to provoking triggers demonstrates instabilities within loss of control, even in the phrasing and formulation of the defence as suggested in chapter two. Namely, that the law uses provocation-era language – loss of control, suggesting a sudden and temporary snap – to describe slow burn response to an accumulation of abuse over time. The latter scenario does not describe a loss of control as such but, I suggest, more a (re)gaining of control. The creature, like the battered women in cases like *Ahluwalia*, *Thornton* and *Humphreys*, arguably has no sense of his own power until provoked. The creature does not initially react to provoking acts, electing instead to hide from the De Laceys and the rest of humanity instead of, for example, tracking Victor down and killing him for abandoning him. He does not react violently to the first (multiple) instances of rejection and abuse. His immediate (or 'snap' response) is not initially violent; it requires an accumulation of triggers, including repeated hostility from numerous external sources for him to respond with violence.

A literal reading of the creature's killing of Elizabeth might, on the facts, may not be analogous to loss of control, given that the defence rules out killings done in a 'considered desire for revenge'.<sup>261</sup> The latter has always been treated by the law as murder. Instead, this thesis contends that the creature on some occasions exhibits behaviour that resonates with the slow burn response incorporated into the loss of control defence. The revenge exclusion in S.55(4) 'can also cause problems' according to Child and Ormerod because it is 'likely to present a significant hurdle for [abused women] defendants trying to rely on' loss of control when there is an 'element of planning', especially as the defence of loss of control was created partially in response to the failure of provocation to apply to 'victims of abuse who killed their abusers'.<sup>262</sup> Although revenge-motivated killings have always been treated by the law as murder, the fact that sexual infidelity, once excluded by the Act, is now relevant as a contextualising factor suggests a potential future imbalance between men and battered women attempting to invoke the defence. If sexual infidelity forms part of the context for the loss of control, it suggests an element of premeditation on the defendant's part, as in *Clinton*, and yet the defendant may still be able to invoke the loss of control defence. Although not referenced in the *Clinton's* decision, losing control and killing one's partner after learning of their sexual infidelity may naturally involve an element of vengeance. Revenge also involves premeditation, and may also be thought to naturally arise in cases where battered wives kill their abusive husbands – on such occasions, it is notable that the perpetrator-victim terminology is applicable in a doubled sense, as it describes the abusive domestic dynamic before the killing, and how those roles are reversed at trial. Using the phrasing from *Clinton*, if revenge is '*integral to and forms an essential part of the context*' of the killing,<sup>263</sup> it follows that it might be considered just as contextualising and mitigating a factor as sexual infidelity was held to be in that case. Both sexual infidelity and revenge

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<sup>261</sup> Coroners and Justice Act 2009 (n120), S.54(4)

<sup>262</sup> Child and Ormerod (n241), 167.

<sup>263</sup> *Clinton* (n37).

also similarly engage with notions of motive, the inconsistent treatment of which was critiqued in chapter five. The fate of battered wives invoking loss of control is yet to be proven, so while male vengeance can be let back in (sexual infidelity), female vengeance may be barred.

It was contended earlier in this chapter that, in privileging the male emotional responses at the expense of taking the female point of view into account, may suggest the law can be objectively misogynist in practice. The law has been contradictory and inconsistent, and *Frankenstein* captures most of these developments, including Victor's internalised misogyny. Despite the good intentions of S.54, the *Clinton* decision undermines the philosophy of the change in loss of control. It interpreted the exclusion in S.55(6)(c) as pertaining to cases in which the defendant relies *exclusively* on sexual infidelity as triggering their loss of control,<sup>264</sup> but Slater argues that this means that sexual infidelity 'can, on occasion, become part of the make-up of a qualifying trigger,<sup>265</sup> and that 'once the door to sexual infidelity is opened, there is the danger of drift towards the acceptance of unmeritorious cases', a drift which he argues is already demonstrated by *Clinton*.<sup>266</sup>

Sarah Sorial suggests that the inadequately defined loss of control defence is mischaracterised as a 'forc[e] that take[s] us by surprise, and over which we have no control'.<sup>267</sup> This chapter concludes that even at a lexical level, the phrasing of 'loss of self-control' seems steeped in gender bias and thus creates further instabilities in the modern operation of the criminal law. The formulation of the phrase 'loss of self-control' implies that before the killing the defendant was in command of their self-control; that the provoking act caused the defendant to lose that self-control; and that their self-control was broken, re-assembled and redirected towards a victim. The self-control is no longer a passive sovereignty over one's actions but now a weaponised, energised, angry mass

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<sup>264</sup> Ibid at [40].

<sup>265</sup> Slater (n252), 157.

<sup>266</sup> Ibid, 165.

<sup>267</sup> Sorial (n238), 58.



of emotions that led to the defendant taking someone's life. The very language of a loss of self-control appears to be entrenched in male-coded conceptions of power; the language is supposedly universal to all defendants, but instead describes a very specific case (as in *Mawgridge*, *Welsh* and recently *Clinton*) of men killing in hot-blooded anger provoked by a wife's adultery<sup>268</sup> or constant nagging.<sup>269</sup> Even if a battered wife can rely on the defence of loss of control in response to years of physical and mental abuse at the hands of their husband, then their killing of their abuser is not so much a loss of self-control as it is a reaction to a prolonged period of abuse. Loss of control presupposes that the defendant has both control over the situation and the capacity and opportunity to exert it against the victim – in the case of a battered wife, the control was never there in the first place. If anything, a battered wife taking action to prevent their abuser from causing further harm is more an *emergence* of control than the loss of it. Linguistically speaking, loss of self-control and provocation seem to describe opposite perspectives of the 'snap' killing: loss of control seems passive, suggesting a loss of what is already (supposedly) there; whereas provocation is active, suggesting the sudden emergence of anger and violence from a calm, deep controlled well. The law therefore still makes concessions to male frailties, which suggests that the defence is still, at least in part, honour-based.

### **7.5) Conclusion**

In this chapter I have argued that *Frankenstein* represents the constructed double, the patchwork form that obscures communication of the internal mind. I have considered the ways in which the creature can be said to perform the concept of *mens rea* through the narrative and the literary figure of the (constructed) double. I have argued that on some occasions the creature displays instances of male-coded anger that resonate with the

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<sup>268</sup> Mawgridge (n79).

<sup>269</sup> Welsh (n95).

old provocation defence, which still operates in some form through the weakening of the sexual infidelity exclusion by rendering it relevant as a contextualising factor in *Clinton*<sup>270</sup>.

Drawing on statutes, case law and feminist approaches to criminal law, I have demonstrated that binary and outdated concepts of gendered harm continue to (mis)shape legal doctrine to this day, and create instabilities due to the law perpetuating socially-constructed stereotypes of what constitutes male and female behaviour. I have argued that the creature on other occasions also displays feminised criminality through a slow burn response that resonates with battered wives in cases like *Ahluwalia*, *Thornton* and *Humphreys*, which represents less a loss of control and more a reclamation of power from an abusive male figure. I have argued that the creature embodies all of this, questioning the gendered assumptions underlying 'reasonableness'; and exhibits both male- and female-coded criminality, highlighting the instability of the arbitrary delineation between perceptions of what constitutes male and female coded behaviour. The reasonable person, now reconceptualised as a person of ordinary tolerance and self-control, still involves gendered perceptions of behaviour such as double deviance, and male honour-coded aspects of provocation. These remain in the more female-coded slow burn loss of control, as with sexual infidelity in *Clinton*, and the language used in the formulation of the defence recalling the sudden and temporary 'snap'. As Wetlaufer noted in chapter three, literature is more nuanced than law in that it can contain contradictions and instabilities, and *Frankenstein* as demonstrated here contains the sudden snap of provocation, the slow burn of loss of control, and the vengeance component that the law consciously excludes.

I suggest represents a delicate and unstable blend of male- and female-coded reactions to provoking acts. The creature enacts gendered crimes and has mitigating circumstances of social exclusion. The creature arguably plays the role of both battered

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<sup>270</sup> Clinton (n37).

wife and abusive husband. The creature does not fit within binary systems of the law; that he displays both feminised and masculinised forms of crime calls into question the utility of concepts of the feminine and the masculine. I suggest this points to the conclusion that criminal law underserves female offenders by catering to dated conceptions of male anger, male violence and male-coded crimes. Cases like *Phipoe* and *Godfry* demonstrate that women are capable of what has historically been regarded male-coded violence but appear to have been more harshly punished for having acted 'doubly deviant' in transgressing both legal and gender norms.

I suggest that the creature demonstrates both masculinised and feminised forms of loss of control – both the male-coded 'sudden and temporary' of provocation and the female-coded 'slow burn' of loss of control. In my view, the creature enacts both male-coded crimes of passion and female-coded crimes involving cumulative provoking acts over a long period of time (as in cases of battered wives): *Frankenstein* illustrates the inappropriateness of these concepts. The law in this regard subscribes to outdated binaries of what constitutes male and female behaviour. The creature embodies the instabilities within gendered perceptions of reasonableness, male-coded and hot-blooded provocation and the female-coded slow burn response of loss of control that still contains remnants of male-coded responses to crime. The creature embodies all this, and the intermingled nature of the gendered criminal action he takes demonstrates the instability of viewing sudden/slow burn killings as inherently male/female responses.

## **Chapter VIII:** **Conclusion**

*'He was soon borne away by the waves, and lost in darkness and distance'*<sup>1</sup>

~ Mary Shelley, *Frankenstein*

### **8.1) Revisiting the Research Question**

The introductory chapter posed the following research question: **How can Doubles fiction be used to illuminate, critique and destabilise problems of proof relating to *mens rea*?** Through an analysis of criminal law and literature, this thesis has argued that literary doubles in Gothic fiction can illuminate and instantiate problems related to *mens rea*. It has shown how *Dorian Gray* can point to weaknesses in character for attributing responsibility, not only in determining culpability but in the sentencing stages. It has demonstrated how *Jekyll and Hyde* illustrates the complexity and instability between the subjective and objective approaches to determining the *mens rea* of recklessness. It has shown that, in *Frankenstein*, the creature's enacting of both masculinised and feminised crimes challenges the relevancy of gendered assumptions underlying the provocation and loss of control defences, and illuminates the instability that remains in the operation of the loss of control defence through reinstating the relevancy of sexual infidelity.

### **8.2) Summary of Findings and Practical Implications**

This thesis has taken a purposefully constructivist, rather than essentialist, approach in diachronically exposing the ways in which the law produces (and genders) its subject. It is suggested, therefore, that there is no essential person in law. *Dorian Gray*, *Jekyll and Hyde*, and *Frankenstein* dramatize the moving of the dial of *mens rea* and point to the issues highlighted. Further research may be conducted into how the law queers, races and classes its subject. This thesis has shown that criminal law in the nineteenth century

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<sup>1</sup> Shelley, M. 'Frankenstein; or, the Modern Prometheus' (Penguin Classics 2003; Lackington, Hughes, Harding, Mavor and Jones 1818).

– a key era for development of the literary form, *mens rea*, and morals – shifted to different constructions of the internal mind, which statutes such as the *Criminal Justice Act 2003* and *Coroners and Justice Act 2009*, and cases like *Ahluwalia*, *Thornton*, *Clinton* (*Frankenstein*), *Caldwell*, *Majewski*, *Parker* (*Jekyll and Hyde*), and *Hanson*, *Renda* (*Dorian Gray*) reconstruct.

This points to the question of who the law is protecting and for whom it legislates; if the law operates on individual responsibility, as this thesis has shown, then who is the law's individual, the law's subject? Conceptions of character rely on an external value judgment that may often fail to reflect the defendant's internal state of mind. The subjective/objective divide in recklessness demonstrates the oscillation between the real and the ideal person, neither of which are definite, both of which are difficult to empirically prove. And the law's stereotyping of gender and the binaries into which certain behaviours must fall serves to demonstrate how women's agency has been misunderstood by legal doctrine. In all three novels the point of view and the 'moral centre' is a male character – and the key relationships are male to male. Women are minor characters, and are of far less concern to the narrative than their male counterparts; they are victimised, objectified, and largely incidental to the plot in which they are enmeshed, which relates to the perception of women defendants in the nineteenth century as the law was evolving, and still, now.

Where Nicola Lacey reads *Jekyll and Hyde* as instantiating the problems with character as a superficial means of responsibility attribution, this thesis has drawn further insights by engaging in a reading of *Dorian Gray* that suggests the novel predicts the possible external, cumulative and backward-looking effects of character that, though superseded by *mens rea*, still contribute to calculating individual responsibility and 'proportionate' punishment. This risks undermining, or at least failing to fulfil, the key tenets of a Hartian

legal system – retribution for wrongdoers, and a deterrent against further wrongdoing<sup>2</sup> - as well as falling into an unhealthy practice of conjecture as conviction. This thesis also explored how *Jekyll and Hyde* illustrates Alan Norrie's concerns about the courts' oscillation between subjectivism and objectivism in cases of recklessness, and the unstable bleeding in between these approaches, arguing in favour of the more hybridised approach advocated by Richard Tur. Finally, it demonstrated that the creature in *Frankenstein* displays both masculinised and feminised forms of crime described by Lacey, Joanne Conaghan and Catherine McKinnon, and questions the appropriateness of gendered harm, concluding that gendered assumptions still underscore culpability in the loss of control defence in practice and that some elements operating in practice harken back to masculinised aspects of the old provocation defences.

The nineteenth century was a pivotal era in the increasing understanding of the internal mind by both criminal law and Gothic/Doubles fiction, and the way it changed and evolved over time. This thesis has demonstrated the commonalities and divergences between Gothic/Doubles fiction, illuminating ways in which meanings can change over time and become re-contextualised and reconstructed, but shown that the genres remain recognisable. Just as the law progressed from character testimonials to the accused speaking in their own defence in court by the end of the nineteenth century,<sup>3</sup> the books all provide an opportunity for the protagonist to offer a defence of their actions through their own testimony – Dorian's confession to Basil, Jekyll's written account, Victor's and the creature's oral testimony. The law itself is no stranger to doubles, pitting the defendant against the reasonable person, and literature, shown in this thesis, can illuminate the gap between actual and fictional. The readings of these books undertaken across the last three chapters demonstrates the bleeding in between the binaries of *actus*

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<sup>2</sup> Hart, H.L.A. 'Punishment and Responsibility: Essays in the Philosophy of Law' (Clarendon Press 1968). See discussion in chapter two, at 7.

<sup>3</sup> S.1(f)(ii) Criminal Evidence Act 1898.

*reus/mens rea*, subjective/objective and internal/external, and the instability caused when the law tries to arbitrarily delineate between them.

The commonalities between the three texts have proven to be as useful as the varied instances of doubling (particularly in the way that the protagonist's *mens rea* is displayed as visible degradation on the double). *Jekyll and Hyde*'s doubling consists of two distinct selves (or two sides of a single self) sharing one (albeit altered) physical form. Dorian Gray's double is separate to him, and not a living being as such, but certainly an entity that is connected to his soul. Though the creature is not an obvious double in *Frankenstein*, as he is constructed by Victor as a separate being, the responsibility for the creature's actions is fragmented between himself and Victor. The double in each text accepts, manifests and performs responsibility in ways that the protagonist cannot, or will not. The double also represents the dichotomies prevalent in literature and the law, such as the larger themes of the inner and outer self and the gender binaries outside of which the law has failed to step – the latter of which is particularly evident in that masculinity drives the narrative of the three chosen texts.

Gothic/Doubles fiction engages with legal and literary constructions of the self in investigating the law's interior, and the thesis has shown that a reading of doubles in the three chosen texts in particular can historicise the problems relating to *mens rea*, predict the instabilities that arose from them, and critique and destabilise the binaries that still operate in practice. The methodology developed from this comprises what this thesis terms as the literary legality of Gothic fiction. The thesis has shown that the extent to which character continues to be a factor, even though it has been superseded in large part by the technical doctrines of *mens rea*, can be seen through case law on defences to criminal action. Conceptions of reasonableness originate, in part, from nineteenth century conceptions of what constituted good character, and are still underscored to an extent by assumptions regarding male-coded behaviour. This was revealed in cases like *Ahluwalia*, *Thornton* and *Humphreys* in which the male-coded defence of provocation for

crimes of passion were found to not apply to cases of battered wives. The courts had to develop a new defence of loss of control to apply to female defendants, and although it takes into account cumulative provoking acts over a long period of time, cases like *Clinton* have disrupted the potential reforms of the new defence by inviting sexual infidelity back in as a contextualising factor. More generally, the grouping of male- and female-coded crimes risks misunderstanding gender expressions that transcend the binary, and points to further readings pertaining to the intersections of gender, race, sexuality and class in relation to *mens rea*.

An emergent theme of this thesis, therefore, has been the intersectionality of the reasonable person standard. Coined by Kimberlé Crenshaw, intersectionality highlights the ways in which the 'intersectional experience is greater than the sum of racism and sexism', and works to develop 'a Black feminist criticism' in order to redress the 'tendency to treat race and gender as mutually exclusive categories of experience and analysis'.<sup>4</sup> Therefore, as Anna Carastathis adds, it centres on the argument that 'oppression is not a singular process or a binary political relation, but is better understood as constituted by multiple, converging, or interwoven systems',<sup>5</sup> and that people's, and particularly women's, 'lives are constructed by multiple, intersecting systems of oppression'.<sup>6</sup> Therefore, the intersectionality, or lack thereof, in criminal law theories of guilt, criminality and *mens rea* certainly warrants further research, building on and critiquing pre-existing work on intersectionality and the reasonable person in criminology by S.J. Creek and Jennifer L. Dunn,<sup>7</sup> and extending to criminal law research into intersectionality in sexual harassment law by Angela Onwuachi-Willig,<sup>8</sup> and Eileen Boris and Allison Louise Elias.<sup>9</sup>

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<sup>4</sup> Crenshaw, K. 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 1(8), 139-167, 139-40.

<sup>5</sup> Carastathis, A. 'The Concept of Intersectionality in Feminist Theory' (2014) *Philosophy Compass* 9(5), 304-314, 304.

<sup>6</sup> *Ibid.*

<sup>7</sup> Creek, S.J. and Dunn, J.L. 'Intersectionality and the Study of Sex, Gender and Crime' in Gartner, R. and McCarthy, B. (eds) *The Oxford Handbook of Gender, Sex, and Crime* (OUP 2014), 40-58.

<sup>8</sup> Onwuachi-Willig, A. 'What About #UsToo?: The Invisibility of Race in the #MeToo Movement' (2018) *Yale Law Journal Forum*, 105-120.

<sup>9</sup> Boris, E. and Elias, A.L. 'An Intersectional Approach' in *The Oxford Handbook of US Women's Social Movement Activism* (OUP 2017), 193-213.



### 8.3) Limitations

Having taken three important examples of the genre and shown what doubles therein can do, there remain three specific but justifiable limitations to this thesis which have the potential for further research based on the methodology developed in these chapters.

#### 8.3.1) Other areas of criminal doctrine relevant to the books

There is scope for exploring specific legal issues that occur in the three texts, for example joint enterprise in *Jekyll and Hyde*, negligence regarding Victor's culpability in the creature's actions as well as legal personhood in *Frankenstein*, and a chain of causation issue in *Dorian Gray* that is also common to the other two books. As the novels, particularly *Jekyll and Hyde*, lend themselves to readings of mental illness, there is scope for further study into various defences, like diminished responsibility and insanity, invoked by defendants with mental disorders. That the M'Naghten rules<sup>10</sup> were established in the mid-nineteenth century as the Gothic novel was exploring the interior may prove as significant for further research as it has done in this thesis, building on for example Pauline Prior's exploration of gender and the insanity defence in nineteenth century Ireland.<sup>11</sup> Apart from a few notable exceptions, the full extent of the crimes of Dorian, Jekyll and the creature are left fairly ambiguous, though it is hinted that sex workers are among the victims of Jekyll and Dorian, and therefore there is the possibility of future work here, building on the critical framework developed in this thesis. Relatedly, there are possible readings of rape and sexual assault in *Dorian Gray*, *Jekyll and Hyde* and *Frankenstein* that could be explored using this framework.

#### 8.3.2) Other Doubles/Gothic fiction relevant to mens rea

This thesis focuses on just three examples out of an exceptionally wide range of Gothic and Doubles texts, and further research can apply the methods developed in this thesis to other works within these genres that engage with similar notions relating to *mens rea*:

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<sup>10</sup> M'Naghten's Case [1843] 10 C & F 200.

<sup>11</sup> Prior, P.M. 'Murder and madness: Gender and the insanity defense in nineteenth-century Ireland' (2005) *New Hibernia Review/Iris eireannach nua* 9(4), 19.

for example, themes of murder and the duality of good and evil in James Hogg's *Private Memoirs and Confessions of a Justified Sinner*<sup>12</sup> and Bram Stoker's *Dracula*,<sup>13</sup> and the psychoanalytical paranoia of Fyodor Dostoyevsky's *The Double*<sup>14</sup> and Franz Kafka's *The Trial* and *Metamorphosis*.<sup>15</sup> This thesis focused on a specific understanding of the double, which leaves space for future work to focus on Doppelgänger narratives from the nineteenth century such as E.T.A. Hoffmann's *The Devil's Elixirs*,<sup>16</sup> Edgar Allan Poe's *William Wilson*,<sup>17</sup> Joseph Conrad's *The Secret Sharer*,<sup>18</sup> through to their twentieth and twenty-first century descendants like Daphne Du Maurier's *The Scapegoat*,<sup>19</sup> Christopher Priest's *The Prestige*,<sup>20</sup> and Jose Saramago's *O Homem Duplicado*.<sup>21</sup> Future work could also draw on the analysis of gendered defences in *Frankenstein* in this thesis to examine the less prevalent female double in nineteenth century literature, as in Charlotte Brontë's *Jane Eyre*<sup>22</sup> and Charlotte Perkins Gillman's *The Yellow Wall-Paper*,<sup>23</sup> building on the work of Heather Braun who argues that the 'female Doppelgänger is in hiding'.<sup>24</sup> It may also be beneficial to trace their portrayal in nineteenth century through to twentieth century works across various mediums, such as in Daphne Du Maurier's *Rebecca*,<sup>25</sup> Charles Williams' *Descent into Hell*<sup>26</sup> and Krzysztof Kieślowski's *The Double Life of Veronique*.<sup>27</sup>

### 8.3.3) Remakes and adaptations

<sup>12</sup> Hogg, J. 'The Private Memoirs and Confessions of a Justified Sinner' (Longman, Hurst, Rees, Orme, Brown and Green 1824).

<sup>13</sup> Stoker, B. 'Dracula' (Archibald Constable and Company 1897).

<sup>14</sup> Dostoyevsky, F. 'The Double: A St Petersburg Poem' (Dover Thrift 1997; *Otechestvennye Zapiski/Fatherland Notes* 1846).

<sup>15</sup> Kafka, F. 'The Essential Kafka: The Castle; The Trial; Metamorphosis and Other Stories' (Wordsworth Classics 2014).

<sup>16</sup> Hoffmann, E.T.A. 'The Devil's Elixirs' (W. Blackwood 1824; *Die Elixiere des Teufels* in 1815).

<sup>17</sup> Poe, E.A. 'William Wilson' (Burton's Gentleman's Magazine 1839).

<sup>18</sup> Conrad, J. 'The Secret Sharer' (Harper's Magazine 1910).

<sup>19</sup> Du Maurier, D. 'The Scapegoat' (Gollancz 1957).

<sup>20</sup> Priest, C. 'The Prestige' (Gollancz 2005).

<sup>21</sup> Saramago, J. 'O Homem Duplicado/The Double' (Caminho 2002).

<sup>22</sup> Brontë, C. 'Jane Eyre' (Smith, Elder & Co. 1847).

<sup>23</sup> Perkins Gilman, C. 'The Yellow Wall-Paper' (The New England Magazine 1892).

<sup>24</sup> Braun, H. 'Mary E. Coleridge, Androgyny, and the Spectral Doppelgänger' (2016) *Parlour: A Journal of Literary Criticism and Analysis*, accessed 21 January 2018 from < <https://www.ohio.edu/parlour/news-story.cfm?newsItem=066491D8-5056-A874-1DF4EF7EFA3EDC21> >

<sup>25</sup> Du Maurier, D. 'Rebecca' (Gollancz 1938).

<sup>26</sup> Williams, C. 'Descent into Hell' (Eerdmans 1937; reprinted 1993).

<sup>27</sup> Kieslowski, K. (Director). 'The Double Life of Veronique' (Sidéral Productions 1991).

Given that the three books of note in this thesis have been adapted numerous times across various mediums since their publication, it would be worthwhile to extend the analysis developed here by examining how issues of duality and legality are portrayed in adaptations, especially how they portray the dual selves in visual media, for example in Gothic mashups like *Penny Dreadful*<sup>28</sup> and *The League of Extraordinary Gentlemen*.<sup>29</sup> This would build on Megen de Bruin-Molé's research into remixed genres and 'monster mashups', dubbed 'Frankenfictions', tracing the multimedia translation of classic literary works into commercialised narratives.<sup>30</sup> The 2011 National Theatre adaptation of *Frankenstein* saw Benedict Cumberbatch and Jonny Lee Miller alternating between the dual roles of Victor and the creature',<sup>31</sup> and recent adaptations like Pemberley Digital's 2014 web series *Frankenstein, MD*<sup>32</sup> and ITV's 2007 version of *Frankenstein*<sup>33</sup> have gender-swapped portrayals of Victor, lending themselves to an extension of the gendered critique of the novel conducted in the preceding chapter.

Adaptations of *Jekyll and Hyde* might also warrant further study, not only in direct adaptations of the characters or the novella, but in terms of the proliferation of evil Doppelgängers in the media for which Stevenson's story seems at least partially responsible. Hyde commits the criminal acts, but the intention stems from Jekyll; and as Jekyll *is* Hyde, merely in a different form, his nefarious double is not the 'evil' version of him, but rather his true self made flesh. This notion of the two sides being merely different manifestations of the same being is reinforced by the general trend of one actor playing both Jekyll and Hyde in adaptations of the story.<sup>34</sup> It may therefore be interesting to dig deeper into the dual roles an actor plays: what does that say about the character and

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<sup>28</sup> Logan, J. (Creator). 'Penny Dreadful' (Showtime 2014-2016).

<sup>29</sup> Moore, A. and Gibbons, D. 'The League of Extraordinary Gentlemen' (DC Comics et al 2009-2019). Norrington, S. (Director). 'The League of Extraordinary Gentlemen' (New Line Cinema 2003).

<sup>30</sup> De Bruin-Molé, M. 'Gothic Remixed: Monster Mashups and Frankenfictions in 21st-Century Culture' (Bloomsbury 2019).

<sup>31</sup> Costa, M. 'Frankenstein: Man or Monster?' The Guardian, 17 January 2011, accessed 1 March 2017 from <<https://www.theguardian.com/culture/2011/jan/17/a-monster-role-frankenstein-danny-boyle>>

<sup>32</sup> Register, B. (Director). 'Frankenstein, MD' (Pemberley Digital 2014).

<sup>33</sup> Mecurio, J. (Director). 'Frankenstein' (ITV 2007).

<sup>34</sup> See Mamoulian, R. (Director). 'Dr. Jekyll and Mr. Hyde' (Paramount 1931), Fleming, V. (Director) 'Dr. Jekyll and Mr. Hyde' (MGM 1941), Weeks, S. (Director) 'I, Monster' (British Lion Films 1971), Mackinnon, D. and Lipsey, M. (Directors) 'Jekyll' (BBC ONE 2007), Teague, C. et al (Directors) 'Jekyll and Hyde' (ITV 2015).

narrative? Is it merely to capitalise on the skills of a talented performer, or does it speak to a deeper message in the story? I also find that when adaptations of *Jekyll and Hyde* gender-swap one of the roles, as in *Dr Jekyll and Sister Hyde*<sup>35</sup> and *Dr Jekyll and Ms Hyde*,<sup>36</sup> the gender-swap tends to occur primarily in the character of Hyde, with the immoral force of the character being framed less in violent terms and more in an overtly sexual manner. The 2017 film *Madame Hyde* seems to have been the first feature adaptation to cast a woman as both Jekyll and Hyde,<sup>37</sup> and Theodora Goss' *Athena Club* series foregrounds the women of male-centric Gothic narratives, and though some of whom are drawn from the original source, such as Justine Moritz from *Frankenstein* and Beatrice from *Rappaccini's Daughter*,<sup>38</sup> others are Goss' own creations, such as the daughters of Jekyll and Hyde, who interestingly adopt the surname of the version of their father they appear to favour: Mary Jekyll and Diana Hyde.<sup>39</sup> Therefore, the notion of examining the gendered conceptions of 'evil' in adaptations of *Jekyll and Hyde* warrants further study.

Of the three chosen texts, *Dorian Gray* has been adapted less often than *Frankenstein* or *Jekyll and Hyde*, which perhaps reflects the infamy of the story in the public consciousness. In some versions the queer-coded sexuality of the original story is made explicit, as in *Penny Dreadful*<sup>40</sup> and Matthew Bourne's 2008 ballet,<sup>41</sup> but in others, such as Albert Lewin's version,<sup>42</sup> it remains largely sub-textual. Oliver Parker's 2009 film straddles both sides, acknowledging the attraction between Dorian and Basil, but overall reinforcing heteronormativity by framing Dorian's romance with Henry's niece as the predominant romantic relationship of the film.<sup>43</sup>

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<sup>35</sup> Baker, R.W. (Director). 'Dr Jekyll and Sister Hyde' (MGM-EMI 1971).

<sup>36</sup> Price, D. (Director). 'Dr Jekyll and Ms Hyde' (Savoy Pictures 1995).

<sup>37</sup> Bozon, S. (Director). 'Madame Hyde' (Les Film Pelleas 2017).

<sup>38</sup> Hawthorne, N. 'Rappaccini's Daughter' in *Mosses from an Old Manse* (Wiley & Putnam 1846; originally published in The United States Magazine and Democratic Review 1844).

<sup>39</sup> Goss, T. 'The Strange Case of the Alchemist's Daughter' (Saga Press 2018).

<sup>40</sup> Logan (n28).

<sup>41</sup> Bourne, M. (Director). 'Matthew Bourne's Dorian Gray' (New Adventures 2008).

<sup>42</sup> Lewin, A. (Director). 'The Picture of Dorian Gray' (MGM 1945).

<sup>43</sup> Parker, O. (Director). 'Dorian Gray' (Alliance Films 2009).

#### 8.4) Recommendations for Further Research

The methodology developed here has scope for application to the practicalities of the criminal justice system, particularly the penal system and a more theoretical exploration of guilt, responsibility and culpability. Having briefly engaged with the theoretical underpinnings of criminal punishment, it may be productive to apply the critical reading of doubles in sentencing to prisons more generally, as incarceration is designed to punish the old offender, compel them to self-reflect, and return them to the world a changed person.

Having focused on doubling within the texts of this thesis, future work may benefit from exploring doubling *outside* of the text: namely, the doubling of author as judge/lawyer and reader as juror, drawing on Wayne Booth's theory of the author as a rhetorical persona separate from the narrator and the person who wrote the text.<sup>44</sup> The author facilitates the 'trial' of the character(s) by presenting the evidence of the events, and may even (as is the case with my chosen books) enable the character(s) to provide their own testimony in the form of written or oral confessions. The reader not only performs the role of judge and juror but may also identify with the protagonist via the device of empathy, which literature can foster and develop – though this was not the stance taken by this thesis.

The law and literature methodology developed in this thesis took a purposely critical view, deliberately distinguishing it from more orthodox humanistic interpretations, but there is potential to adapt the approach here for further study into the empathetic potentialities of law and literature. The ethical potential of the field has advocates in Toni Massaro and Lynn Henderson, who view literature as an empathetic tool in analysing and critiquing the law. Massaro calls for 'empathy, human stories, and different voices [to] be woven into the tapestry of legal scholarship',<sup>45</sup> something which Henderson feels

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<sup>44</sup> Booth, W.C. 'The Rhetoric of Fiction' (University of Chicago Press 1983).

<sup>45</sup> Massaro, T.M. 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?' (1989) Michigan Law Review 87, 2099-2127, 2101.

has largely been 'banished from the better legal neighbourhoods and from explicit recognition in legal discourse'.<sup>46</sup> Erika Rackley even frames empathy as being 'not only inevitably part of judgment but also a means of ensuring *better* judgment'.<sup>47</sup> However, this thesis is very much in the spirit of Martin Kayman's observation that 'read[ing] literary texts may appear to humanize the law, [but they do] so by reinforcing a traditional and gendered vision of literature as the privileged guardian of human insights and values'.<sup>48</sup>

In a similar vein, although this thesis did not draw methodology from rhetorical genre studies (RGS), further research could apply and extend the critical framework developed here to RGS, and studying the trial as a genre might enable us to investigate the social action it performs, and whether that maps onto the socio-legal underpinnings of the criminal trial as a concept. Duality is an expansive topic, which intersects with a variety of genres, mediums and fields of study, and which possesses a fascinating potential to externalise the inner mind as the outer self in ways that reveal more about both.

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<sup>46</sup> Henderson, L.N. 'Legality and Empathy' (1987) Scholarly Works, paper 870, 1574-1653, 1576.

<sup>47</sup> Rackley E. 'Narratives in judging. When Hercules met the Happy Prince: Re-imagining the Judge' (2005) Texas Wesleyan Law Review, 12, 213-232, 224.

<sup>48</sup> Kayman, M.A. 'Law-and-Literature: Questions of Jurisdiction' in Thomas, B. (ed), 'Law and Literature' (Gunter Narr 2002), 1-20, 7.

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