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Citation for final published version:

Hughes-Moore, Barbara 2021. 'Ten thousand times more malignant than her mate': Destabilising gendered assumptions underlying the defences of provocation and loss of control through a reading of Mary Shelley's Frankenstein. *Journal of Law and Society* 48 (4) , pp. 690-712. 10.1111/jols.12324

Publishers page: <https://doi.org/10.1111/jols.12324>

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‘Ten thousand times more malignant than her mate’: Destabilising gendered assumptions underlying the defences of provocation and loss of control through a reading of Mary Shelley’s *Frankenstein*

BARBARA HUGHES-MOORE

This article explores how Mary Shelley’s Frankenstein engages with notions relating to mens rea. It constructs a reading of the creature as Victor’s double, and therefore a manifestation of his guilty mind. Utilising interdisciplinary literary-legal methods, the article employs the central relationship in Frankenstein as a means of illuminating and critiquing 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. It concludes that Frankenstein helps expose these gaps in legal discourse and ultimately destabilises binaries of gendered criminality.

INTRODUCTION

‘I do not wish [women] to have power over men; but over themselves’.¹

The feminist legacy of *Frankenstein; or, The Modern Prometheus*² is one which paints unfettered male ambition and the systemic subjugation of women in shades of horror. Given the preponderance of male characters in the text, and the layers of male testimony within it, it is notable that *Frankenstein* was written by a woman, Mary Shelley, whose mother, Mary Wollstonecraft, was a pioneering feminist and writer of one of the earliest feminist texts in British literature.³ The tale of *Frankenstein*’s creation is almost as famous as that of its titular scientist, dreamt up on a dark and stormy night in the Villa Diodati while in the company of other young radicals like Lord Byron and Percy Bysshe Shelley. Walter Scott assumed, as many of his contemporaries did, that *Frankenstein* could only have been conceived by Percy – an impression which Mary was only too happy to correct.⁴

Frankenstein has long been the subject of feminist discourse in the work of Anne Mellor and Eve Kosofsky Sedgwick. This paper uses the text as a lens through which to examine gendered interpretations of *mens rea*, specifically in relation to the provocation and loss of control defences in English and Welsh common law. This will entail conducting a reading of the creature as Victor’s double, the physical manifestation of Victor’s mind, and interpreting the quasi-sexual subtext between them in relation to spousal infidelity and mariticide case law. It is important to note that although I will be using he/him pronouns for the creature so as to be consistent with the novel, the fluidity of his

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This paper draws on my PhD thesis, ‘Inner Mind as Outer Self: Addressing Problems of Proof relating to *Mens Rea* through the Literary Figure of the Double in Gothic Fiction’ (Cardiff University, 2020). I am grateful to my supervisors, John Harrington and Ambreena Manji, and to my examiners, David Gurnham and Martin Kayman, for galvanizing discussion and guidance.

¹ M. Wollstonecraft, *A Vindication of the Rights of Woman with Strictures on Political and Moral Subjects* (1792) 139.

² M.W. Shelley, *Frankenstein; or, the Modern Prometheus* (2003; 1818).

³ id.

⁴ A. Mercer, *The Collaborative Literary Relationship of Percy Bysshe Shelley and Mary Wollstonecraft Shelley* (2020) xxvii.

gender is a key discussion point. Relatedly, this thesis extends to transgender women,⁵ and will be discussed in future work should a trans woman defendant invoke the loss of control defence.

The article is structured as follows: the first section introduces the problem in the current law, namely the divide between masculinised and feminised forms of crime and the gendering of the reasonable person in the provocation defence, where the law creates its own doubles between the conceptual and the actual. Here I analyse how crimes of passion were historically gendered as male-perpetrated, and premeditated spousal killing predominantly as female-perpetrated. The next section explores readings of duality and gender in *Frankenstein*. I subsequently examine the problem of gendered defences to homicide through the lens of insights drawn from analysis of the *Frankenstein* text. My intention here is not to read law in *Frankenstein* in a literal sense; rather, I consider how the types of violence the creature exhibits reflect gendered conceptions of criminality and defendants' lived experiences. That both feminised and masculinised forms of crime are displayed by the creature demonstrates the instability of these concepts, and I conclude that the novel calls into question the binaries of masculinised and feminised (criminal) action.

UNEQUAL BEFORE THE LAW: GENDER RELATIONS AND THE LAW OF PROVOCATION

During the seventeenth century, 'the man of honour was not expected to retaliate reluctantly, out of a sense of duty or a fear of shame', Jeremy Horder suggests, but rather in anger.⁶ This is embodied in the 1670 case of *John Manning*, which held that 'there could not be greater provocation' than discovering one's wife committing adultery, and thus downgraded the sentence from death to a 'gentl[e]' branding on the hand.⁷ Exemplified by *R v Mawgridge*,⁸ Horder argues that 'the seduction of a man's wife was thought to be very high indeed in the catalogue of offences against honour' in this era.⁹ The absence of a loss of self-control in seventeenth century case law is significant because law at this time 'was founded on a quite different conception of anger'.¹⁰ 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'.¹¹

It was during the eighteenth and nineteenth centuries that 'a new conception of anger emerged', a development Horder suggests originated 'in a change in the law's conception of the relationship between reason and the passions in the human soul', embodied by contemporary case law which reframed anger as a loss of self-control.¹² One such case was *R v Hayward* in 1833,¹³ which 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*

⁵ A. Sharpe, 'Scary monsters: the hopeful undecidability of David Bowie (1947–2016)' (2017) 11 *Law and Humanities* 228.

⁶ J. Horder, *Provocation and Responsibility* (1992) 27.

⁷ *John Manning (1670)* 83 E.R. 112. Referenced in L.A. LaCroix et al., *Fatal Fictions: Crime and Investigation in Law and Literature* (2017) 126.

⁸ *R v Mawgridge (1707)* Keil 119.

⁹ Horder, op. cit., n.6, p. 39.

¹⁰ id.

¹¹ K. Callahan, 'Women Who Kill: An Analysis of Cases in Late Eighteenth- and Early Nineteenth-Century London' (2013) 46 *J. of Social History* 1013, at 1015.

¹² Horder, op. cit., n.6, p. 72.

¹³ *R v Hayward (1833)* 6 C. & P. 157, 172 E.R. 1188.

cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder.¹⁴

Although this still connotes an element of reactive hot-blooded violence, it also ushered in a nascent version of loss of control through the defendant not being master of his own understanding.¹⁵ This moves away from the justification in *Mawgridge* that ‘jealousy is the rage of man and adultery... the highest invasion of property’,¹⁶ and towards justifying a more reasonable, and crucially *temporary*, loss of control. This shift was reaffirmed in *R v Kirkham* in 1837.¹⁷ While ‘the law makes allowances’ when ‘certain things... so stir up in a man’s blood that he can no longer be his own master’,¹⁸ Coleridge J stated that ‘the law condescends to human frailty, [but] 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’.¹⁹ Keating J in *R v Welsh* in 1869 held that provocation comprised ‘something which might naturally cause an ordinary and reasonably minded man to lose his self-control’.²⁰ The constant nagging of one’s wife was sufficient to constitute a sudden and temporary loss in this case, even though it suggests not a sudden ‘snap’ but a *series* of provoking acts over a period of time. The is especially noteworthy when considering that years of trauma suffered by battered wives who killed their abusers, arguably a more compelling incitement to violence, was not considered sufficient provocation for the defence to apply.

Hot blood remained critical to quasi-legislative understandings of provocation, described in 1877 by Sir James Fitzjames Stephen as something ‘done in the heat of passion’.²¹ Circumstances which may amount to provocation include ‘[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’,²² but Stephen notes that ‘[n]either words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation’.²³ Stephen did not mention the *Welsh* case, but it appeared in some form in the 1879 Draft Criminal Code, 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’.²⁴ Devlin J in *R v Duffy* later confirmed that provocation was to be judged objectively: 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’.²⁵

Defendants in these cases have historically been judged against the legal fiction of the reasonable man.²⁶ Perhaps the first mention of the ‘reasonableness of the defendant’s belief’ occurs in Sir Edward Hyde East’s 1803 *Pleas of the Crown* regarding self-defence.²⁷ This comprised ‘such a provocation as the law presumes might in human frailty *heat the blood* to a proportionable degree of resentment, and

¹⁴ *id.* Emphasis added.

¹⁵ *id.*, p. 159.

¹⁶ *Mawgridge*, *op. cit.*, n.8.

¹⁷ *R v Kirkham* (1837) 8 C. & P. 115.

¹⁸ *id.*, p. 117.

¹⁹ *id.*, p. 119.

²⁰ *R v Welsh* (1869) 11 Cox CC 336, p. 339.

²¹ J.F. Stephen, *Digest of the Criminal Law* (1887, 4th edn.) 168.

²² *id.*, p. 169.

²³ *id.*

²⁴ s.176 Draft Code, appended to Report of the Criminal Code Commission (1879). Emphasis added.

²⁵ *R v Duffy* [1949] 1 All ER 932. Emphasis added.

²⁶ J. Gardner, ‘The Many Faces of the Reasonable Person’ (2015) 131 *Law Q. Rev.* 563.

²⁷ E.H. East, *A Treatise of the Pleas of the Crown*, Vol. 1 (1803).

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’.²⁸ The reasonable person remained rather abstract until *DPP v Camplin*, where it was characterised by Lord Diplock as a person with the self-control ‘of an ordinary person of the sex and age of the accused’.²⁹ This age and sex qualification was later codified in s.54(1)(c) Coroners and Justice Act 2009.³⁰ Diplock claimed that the reasonable man ‘has never been confined to the adult male. It means 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’.³¹ Dolores Donovan and Stephanie Wildman suggest however that it is ‘the reasonableness part of the standard that is faulty, not merely the sex or class of the mythical person’.³² 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’.³³ They maintain that *Camplin* still ‘ignores the social reality of the individual which has significantly contributed to the alienation and violence which she or he has acted out’.³⁴ It may in effect be more harmful because, as Mayo Moran pinpoints, it represents, ‘under the guise of a gender-neutral standard, a problematic enshrinement of the male point of view’.³⁵ Marcia Baron fears reasonableness remains entrenched in masculinised forms of violence,³⁶ but feels that to establish a reasonable woman standard would only ‘enshrin[e] in law the inequality in traditional expectations of men and women’.³⁷

Their concerns are borne out in cases of battered wives trying, and failing, to invoke the provocation defence, as in *R v Ahluwalia*, *R v Thornton*, and *R v Humphreys*.³⁸ The appellate court found the trial judge’s direction in *Ahluwalia* to be ‘fair and correct in law’ but felt any legal change should be left to Parliament.³⁹ A pre-trial diagnosis that would have proven diminished responsibility, was not raised at the first trial.⁴⁰ Chris Morgan observes that ‘unlike provocation, diminished responsibility was introduced into the law to deal with... mental abnormalities’, and so ‘the aim and rationale of the defences are different’.⁴¹ 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 years of accumulated abuse. Provocation therefore justifies the violent ‘boiling over’ contemporaneity of male defendants while excluding the ‘cooling down’ periods experienced by female defendants. Although the provocation defence ‘purports to be a concession to human frailty’, Baron describes it as ‘a concession primarily just to certain sorts of frailties... often thought to be part and parcel of

²⁸ *id.*, 238. Emphasis added.

²⁹ *DPP v Camplin* [1978] UKHL 2, 5.

³⁰ Coroners and Justice Act 2009, s.54(1)(c).

³¹ *Camplin*, *op. cit.*, n.29, p. 4. Emphasis added.

³² D.A Donovan and S.M. Wildman, ‘Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation’ (1981) 14 *Loyola of L.A. Law Rev.* 435, at 437.

³³ *id.*, p. 448.

³⁴ *id.*, p. 465.

³⁵ Moran, M. ‘The Reasonable Person: A Conceptual Bibliography in Comparative Perspective’ (2010) *Lewis and Clark Law Rev.* 1233, at 1260.

³⁶ M. Baron, ‘Gender Issues in the Criminal Law’ in *The Handbook of Philosophy of Criminal Law*, eds. J. Deigh and D. Dolinko (2011) 352.

³⁷ *id.*

³⁸ *R v Ahluwalia* (1993) 96 *Cr. App. R.* 133; *R v Thornton* (No. 1) (1992) 1 *All ER* 306; *R v Humphreys* (Emma) [1995] 4 *All ER* 1008.

³⁹ *Ahluwalia*, *op. cit.*, n.38, p. 142.

⁴⁰ *id.* pp. 142-43.

⁴¹ C. Morgan, ‘Loss of Self-Control: Back to the Good Old Days’ (2013) 77 *J. of Criminal Law* 119, at 123.

masculinity’, rooted in the ‘insidious[ly] sexism[t]’ belief that ‘aggression is admired’ in men but not in women.⁴² Sexism may therefore be the effect, if not the cause, of these doctrinal issues.⁴³

Similarly, in *Thornton*, Lord Taylor stated that even a defendant suffering from battered woman syndrome cannot rely on provocation unless the sudden and temporary provision is established.⁴⁴ He conceded that ‘[t]he severity of such a syndrome and the extent to which it may have affected a particular defendant’ may be relevant as important background information on a ‘last straw’ basis,⁴⁵ or as medical evidence.⁴⁶ In addition, the trial judge had not adequately explained the defendant’s personality disorder and battered woman syndrome,⁴⁷ which were deemed relevant characteristics on appeal and resulted in a charge of manslaughter.⁴⁸ 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.⁴⁹ The defence is unpalatable because it builds in the reasonable man ‘a value system that views women as the property of their male partners’, one which treats ‘resorting to deadly violence as “understandable” or “excusable” in circumstances of infidelity’.⁵⁰ This complements Meda Chesney-Lind’s view that ‘both the construction of women’s defiance and society’s response to it are colored by women’s status as male sexual property’: 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’.⁵¹ Women defendants who kill are thus regarded as ‘doubly deviant’ for transgressing both legal and gender norms.⁵²

The Coroners and Justice Act 2009 s.54(1) replaced provocation with the partial defence of loss of control, which downgrades murder to manslaughter.⁵³ There must be a loss of self-control,⁵⁴ which need not be sudden (thus taking into account female-coded aggression),⁵⁵ and requires a qualifying trigger from one of a narrow range of provoking acts,⁵⁶ including fear of serious violence⁵⁷ and a sense of being seriously wronged by things done or said.⁵⁸ It must 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’.⁵⁹ *R v Dawes, Hatter and Bowyer* established the defence will not apply if the defendant consciously acted to provoke violence.⁶⁰ The things done or said must be of an ‘extremely grave character’ which ‘caused the defendant to have a justifiable sense of being seriously wronged’.⁶¹

⁴² Baron, op. cit., n.36, p. 341.

⁴³ id. pp. 343-44.

⁴⁴ *Thornton*, op. cit., n.38, p. 1181.

⁴⁵ id.

⁴⁶ id, p. 1182.

⁴⁷ id.

⁴⁸ id, pp. 1183-84.

⁴⁹ Moran, op. cit., n.35, p. 1255.

⁵⁰ id.

⁵¹ M. Chelsey-Lind, “‘Women and Crime’: The Female Offender’ (1986) 12 *Signs* 78, at 96.

⁵² A. Lloyd, *Doubly Deviant, Doubly Damned: Society’s Treatment of Violent Women* (1995).

⁵³ Coroners and Justice Act, op. cit., n.30, s.54(1).

⁵⁴ id. s.54(1)(a).

⁵⁵ id. s.54(2).

⁵⁶ id. s.54(1)(b), s.55.

⁵⁷ id. s.55(3).

⁵⁸ id. s.55(4).

⁵⁹ id. s.54(1)(c).

⁶⁰ *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322.

⁶¹ Coroners and Justice Act, op. cit., n.30, s.55(4)(a)-(b).

The Act addresses criticism of the old provocation defence in stating that sexual infidelity cannot constitute a ‘thing done or said’ and must be disregarded.⁶² The court must take into account 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’.⁶³ The defence does not apply to those who kill out of a ‘considered desire for revenge’, codifying *R v Ibrams and Gregory*,⁶⁴ and excludes pre-meditated offences, upholding *R v Inglis*.⁶⁵ Sarah Sorial argues these changes ‘mark a significant departure from the previous law’ by attempting to ‘shift the narrative about how self-control is lost [and] who loses it’.⁶⁶ Replacing the reasonable person with a person of ordinary tolerance and self-restraint also excludes those with an ‘unusually short fuse’,⁶⁷ codifying Lord Hoffmann’s assertion in *R v Smith* that ‘[m]ale possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide’.⁶⁸ However, the relevance of sexual infidelity was reinstated, this time as a ‘contextualising factor’, in the case of *R v Clinton, Parker and Evans*.⁶⁹ Therefore, sexual infidelity can provide the *context* to the loss of control, if not the *substance* of it, which Dennis Baker and Lucy Zhao are concerned lets sexual infidelity, and therefore male-coded honour violence, in ‘via the back door’.⁷⁰ I now turn to *Frankenstein*, which can provide a perspective and vocabulary through which to critique these persisting problems in law.

READINGS OF *FRANKENSTEIN*

Frankenstein tells the story of the eponymous scientist who is driven to create life through the reanimation of dead tissue. Frightened by his own creation, Victor abandons his progeny, and the inconsolable creature embarks on a quest first for companionship, and then for revenge. *Frankenstein* raises intriguing questions about culpability. Thomas Dutoit observes how the novel explores ‘traditional ethical issues of duty, justice and law’ and fears that ‘justice is a mockery... because lies can look like truths’.⁷¹ In considering the fractured responsibility between Victor and the creature, Valdine Clemens⁷² and Leslie Moran⁷³ posit that Victor is (un)consciously involved in the commission of the creature’s crimes. This section explores themes of duality in *Frankenstein* through the lens of misogyny and gender stereotypes.

1. *Franken-Double: Duality in Frankenstein*

The double in *Frankenstein* is perhaps less overt than its nineteenth century contemporaries, *Jekyll and Hyde*⁷⁴ and *Dorian Gray*.⁷⁵ Though this article is premised on literary over psychoanalytic

⁶² id. s.55(6)(c).

⁶³ id. s.54(3).

⁶⁴ *R v Ibrams and Gregory* (1982) 74 Cr. App. R. 154.

⁶⁵ *R v Inglis* [2011] 1 WLR 1110.

⁶⁶ S. Sorial, ‘Anger, Provocation and Loss of Self-Control: What Does “Losing It” Really Mean?’ (2019) 13 *Crim. Law and Philos.* 247, at 250.

⁶⁷ R. Taylor, ‘The Model of Tolerance and Self-Restraint’ in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*, eds. A. Reed and M. Bohlander (2011), p. 54.

⁶⁸ *R v Smith (Morgan)* [2001] 1 AC 146, p. 169.

⁶⁹ *R v Clinton, Parker and Evans* [2012] EWCA CRIM 2.

⁷⁰ D. Baker and L. Zhao, ‘Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity’ (2012) 76 *J. of Crim. Law* 254, at 272.

⁷¹ T. Dutoit, ‘Re-specting the Face as the Moral (of) Fiction in Mary Shelley’s *Frankenstein*’ (1995) 26 *Modern Language Notes* 847, at 857.

⁷² V. Clemens, *The Return of the Repressed: Gothic Horror from The Castle of Otranto to Alien* (1999) 104.

⁷³ L.J. Moran, ‘Law and the Gothic Imagination’ in *Essays and Studies 2001: The Gothic*, ed. F. Botting (2001) 87-88.

⁷⁴ R.L. Stevenson, *Strange Case of Dr Jekyll and Mr Hyde* (1886).

doubling, the creature may be considered, as David Ketterer suggests, ‘both a psychological double and an independent character leading a realistic existence’.⁷⁶ A.A. Markley views the creature as ‘the embodiment of... aspects of Victor’s own psyche, the repressed returned’.⁷⁷ George Levine describes Victor and the creature as ‘fragments of a mind in conflict with itself’ who ‘haunt and hunt each other’;⁷⁸ for Ketterer, their physical differences represent the ‘false splitting of the apparently good and the apparently evil’ in characters that are intricately both.⁷⁹

This thematic circularity characterises the National Theatre’s 2011 staging of *Frankenstein*, in which Benedict Cumberbatch and Jonny Lee Miller alternated the roles of Victor and the creature.⁸⁰ Director Danny Boyle explained that ‘Frankenstein and the Creature literally create each other: every other night they re-inhabit each other’.⁸¹ The act of doubling in *Frankenstein* has, in its philosophy, much in common with Basil Hallward’s process of painting Dorian Gray in Wilde’s text: as Basil says of Dorian’s picture, Victor has ‘put too much of [himself]’ into the creature,⁸² and in doing so revealed ‘the secret of [his] own soul’.⁸³ The secret of Victor’s soul, in true Dorian fashion, is displayed externally as the creature’s physical repulsiveness. Dutoit argues that, in literature, ‘the face functions as transparent reflection of the moral character’,⁸⁴ noting that the creature’s ugliness anticipates his moral downturn: ‘the outside – his face – does not [initially] reflect the inside’.⁸⁵ Markley suggests their physical differences ‘reiterate questions regarding outer appearance versus inner virtues’,⁸⁶ which complements Daniel Cottom’s argument that ‘in seeking to represent himself, man makes himself a monster’.⁸⁷

The creature’s body, then, functions as a site of external and internal conflict. Chris Baldick views the creature as dramatizing the body politic in times of rebellion as ‘fragmented’, ‘misshapen’ and ‘monstrous’.⁸⁸ This can be extended by characterising the criminal legal system as a patchwork of fragmented concepts (including *mens rea*), which have been moulded by the courts. The creature’s body is a manifestation of this patchwork law. Here, I take Susan Stryker’s description of the creature as ‘the alien Other [Victor] constructs and upon which he projects all he cannot accept in himself’,⁸⁹ and augment it with a reading of the creature as the criminal or legal Other: the court assembles a (subjective) double of the defendant from the evidence and constructs an objective reasonable person against whom they are judged.

⁷⁵ O. Wilde, *The Picture of Dorian Gray* (1992; 1890).

⁷⁶ D. Ketterer, *Frankenstein’s Creation: The Book, the Monster, and Human Reality* (1979) 56.

⁷⁷ A. A. Markley, ‘Mary Shelley’s “New Gothic”: Character Doubling and Social Critique in the Short Fiction’ (2001) 3 *Gothic Studies* 15, at 16.

⁷⁸ G. Levine, ‘The Ambiguous Heritage of Frankenstein’ in *The Endurance of Frankenstein: Essays on Mary Shelley’s Novel*, eds. G. Levine and U.C. Knoepfelmacher (1979) 14-16.

⁷⁹ *id.* p. 57.

⁸⁰ N. Dear, *Frankenstein, based on the novel by Mary Shelley* (2011).

⁸¹ M. Costa, ‘Frankenstein: Man or Monster?’ *Guardian*, 17 January 2011

<<https://www.theguardian.com/culture/2011/jan/17/a-monster-role-frankenstein-danny-boyle>>.

⁸² Wilde, *op. cit.*, n.75, p. 6.

⁸³ *id.* p. 8.

⁸⁴ Dutoit, *op. cit.*, n.71, p. 850.

⁸⁵ *id.* p. 853.

⁸⁶ Markley, *op. cit.*, n.77, p. 15.

⁸⁷ D. Cottom, ‘Frankenstein and the Monster of Representation’ (1980) 9 *SubStance* 60, p. 60.

⁸⁸ C. Baldick, *In Frankenstein’s Shadow: Myth, Monstrosity, and Nineteenth-Century Writing* (1987) 14.

⁸⁹ S. Stryker, ‘My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage’ (1994) 1 *GLQ* 237, p. 238.

2. *'She might become ten thousand times more malignant than her mate': gender, reasonableness and misogyny in Frankenstein*

The predominance of men, and the passivity of women, in the text is significant when considering that the book 'contains disguised elements of Godwin and Shelley family history', as Nora Crook observes.⁹⁰ Mary Shelley grew up among London's intellectual elite and was influenced by her parents and their friends, among them Samuel Taylor Coleridge, William Wordsworth, and, of course, Percy Bysshe Shelley.⁹¹ Mary's mother died shortly after giving birth to her, leaving her to be raised by a father whom she idolised but who broke off all contact for several years after she eloped with Percy.⁹² While Victor Frankenstein might have been cast in the mould of Mary's husband, he also has shades of her father, to whom the first edition of the text is 'respectfully inscribed'.⁹³ The epigraph of this edition is taken from John Milton's *Paradise Lost* (1667) and later invoked by the creature ('Did I request thee, Maker, from my clay?'), echoing Mary's dismay at being banished from her father's affections.

The creature's destruction of Elizabeth gains significance when interpreting them, as U.C. Knoepflmacher does, as 'aggressive and passive components' of Mary Shelley: 'a raging Monster and a "yielding" Elizabeth'.⁹⁴ Just as Victor and the creature can be viewed as 'feuding halves of a single personality', so too can 'the beautiful and passive Elizabeth and the repulsive, aggressive Monster who will be her murderer' be considered doubles who are in conflict because of Victor's rejection of the feminine:⁹⁵

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 common denominators that can be traced back... to Mary Shelley's childhood and to her threatened identity as adult daughter, wife and mother.⁹⁶

Frankenstein was published at a time when gender roles were shifting and crystallising. Nicola Lacey observes a change from the 'strong, active and dominant' eighteenth century anti-heroines like Moll Flanders into powerless nineteenth century martyrs like Tess of the D'Urbervilles.⁹⁷ This article suggests that *Frankenstein* predicts the crystallising of gender roles in the nineteenth century, the effects of which are still apparent in contemporary case law.⁹⁸ Many characters act within narrowly-prescribed gender roles in *Frankenstein*; in contrast, although the creature is referred to using he/him

⁹⁰ N. Crook, 'Mary Shelley, Author of *Frankenstein*' in *A New Companion to the Gothic*, ed. D. Punter (2012) 111.

⁹¹ A. Wright, *Mary Shelley* (2018) 7.

⁹² K.C. Hill-Miller 'My *Hideous Progeny*': *Mary Shelley, William Godwin, and the Father-Daughter Relationship* (1995) 59.

⁹³ Shelley, op. cit., n.2, p. iv.

⁹⁴ U.C. Knoepflmacher, 'Thoughts on the Aggression of Daughters' in Levine and Knoepflmacher, op. cit., n.78, p. 94.

⁹⁵ id. p. 109.

⁹⁶ id. p. 112.

⁹⁷ N. Lacey, '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, 3-4.

⁹⁸ *Clinton*, op. cit., n.69; *Dawes*, op. cit., n.60.

pronouns, he does not easily fit into a binary gender type, as Judith Butler notes.⁹⁹ While the novel, she argues, ‘manages to keep women in their place’, the creature ‘may well be carrying that excess of gender that fails to fit properly into “man” and “woman” as conventionally defined’.¹⁰⁰

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.¹⁰¹

The fluid, destabilising, uncategorisable aspects of the creature’s gender are directly related, in Peter Brooks’ view, to his perceived monstrousness.¹⁰² Constructed ‘in the place of the absent mother’, the creature might be interpreted as ‘a woman who is seeking to escape from the feminine condition into recognition by the fraternity’.¹⁰³ Brooks describes a monster as a being which ‘exceeds the very basis of classification, language itself’¹⁰⁴ and therefore ‘eludes gender definition’ by questioning socially prescribed gender roles and flouting law ‘that defines sexual difference’.¹⁰⁵

The creature’s ragged anatomy also instantiates the othering of the working-class body. Franco Moretti notes that, ‘[l]ike the proletariat, the monster is a collective and artificial creature’ who is ‘denied a name and an individuality’.¹⁰⁶ This contrasts with Victor’s social power as a man with privilege, which Anne Mellor suggests he exerts by ‘usurping the female’.¹⁰⁷ She argues that one of the novel’s ‘deepest horrors... is Frankenstein’s implicit goal of creating a society for men only’ which ‘eliminate[s] the female’s primary biological function and source of cultural power’.¹⁰⁸ 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’.¹⁰⁹ Victor’s quest in effect ‘supports a patriarchal denial of the value of women and of female sexuality’.¹¹⁰ Donna Heiland thus views *Frankenstein* as ‘interrogating [a] fantasy of a world without women’.¹¹¹

Frankenstein can therefore be read as a text which examines misogyny. This hatred towards women takes many forms including ‘male privilege, patriarchy, gender discrimination, sexual harassment, belittling of women, violence against women, and sexual objectification’.¹¹² Although the criminal law may not intentionally disregard the lived experiences of women defendants, it is contended here that it may be regarded objectively misogynistic given the failure of women defendants to successfully invoke the provocation defence, which demonstrates ways in which male wrongdoing is

⁹⁹ J. Butler, ‘Animating Autobiography: Barbara Johnson and Mary Shelley’s Monster’ in *A Life with Mary Shelley*, ed. B. Johnson (2014) 47-48.

¹⁰⁰ id.

¹⁰¹ id.

¹⁰² P. Brooks, *Body Work: Objects of Desire in Modern Narrative* (1993) 219.

¹⁰³ id.

¹⁰⁴ id, p. 218.

¹⁰⁵ id.

¹⁰⁶ F. Moretti, ‘The Dialectic of Fear’ (1982) 136 *New Left Rev.* 67, at 69.

¹⁰⁷ A.K. Mellor, *Mary Shelley: Her Life, Her Fiction, Her Monsters* (1988) 115.

¹⁰⁸ id.

¹⁰⁹ id.

¹¹⁰ A.K. Mellor, ‘Possessing Nature: The Female in Frankenstein’ (1988) *Romanticism and Feminism* 220, at 221.

¹¹¹ D. Heiland, *Gothic and Gender: An Introduction* (2004) 100.

¹¹² K. Srivastava et al., ‘Misogyny, feminism, and sexual harassment’ (2017) 26 *Industrial Psychiatry J.* 111, at 111.

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.¹¹³

The women of *Frankenstein* are, as Mary Jacobus observes, ‘[a]t best... the bearers of a traditional ideology of love, nurturance, and domesticity; at worst, passive victims’.¹¹⁴ They die not of natural causes but by illness or execution: Elizabeth is strangled by the creature; Justine, the family maid, is wrongly executed for William’s murder; Victor’s mother Caroline dies of scarlet fever that she catches from Elizabeth (Elizabeth’s surname, ‘Lavenza’, evokes ‘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, Walton’s sister, who bears the same initials as Mary Wollstonecraft Shelley. Victor and Walton are both career men who exploit women’s emotional labour: 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’.¹¹⁵

Elizabeth’s dual role of mother and lover, (his ‘more than sister’), is made explicit when Victor dreams of her transforming into his late mother.¹¹⁶ Sandra Gilbert and Sarah Gubar suggest that Shelley’s ‘developing sense of herself as a literary creature and/or creator seems to have been inseparable from her emerging self-definition as daughter, mistress, wife, and mother’,¹¹⁷ and this notion of inhabiting myriad roles features in Debra Best’s reading of *Frankenstein*. Best highlights the instability of the ‘multivalence’, or multiplicity, of roles played by each character.¹¹⁸ By killing the people who embody multiple key roles in Victor’s life, the creature ‘enact[s] Victor’s darkest desires’ and evidences ‘Victor’s culpability in the murders by having him identify himself with the monster’.¹¹⁹ The creature’s killing of Elizabeth is underscored with sub-textual elements of sexual jealousy. Eve Kosofsky Sedgwick reads *Frankenstein* as a work ‘in which [the] 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’.¹²⁰ To Sedgwick, ‘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’.¹²¹ George Haggerty views the creature as Victor’s ‘real mate’, noting that ‘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’.¹²²

READING *FRANKENSTEIN* AS A CRITIQUE OF GENDERED DEFENCES TO CRIMINAL ACTION

¹¹³ Knoepfmacher, op. cit., n.78, p. 107. Walton might also be considered Victor’s double. See M.A. Kayman, *From Bow Street to Baker Street: Mystery, Detection and Narrative* (1992) 148.

¹¹⁴ M. Jacobus, ‘Is there a woman in this text?’ (1982) 14 *New Literary History* 117, at 132.

¹¹⁵ Mellor, op. cit., n.110, p. 222.

¹¹⁶ id.

¹¹⁷ S.M. Gilbert and S. Gubar, *The Madwoman in the Attic: The Woman Writer and the Nineteenth-Century Literary Imagination* (2000 2nd edn.) 224.

¹¹⁸ D.E. Best, ‘The Monster in the Family’ (1999) 6 *Women's Writing*, at 365.

¹¹⁹ id. p. 373.

¹²⁰ E.K. Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (1985) 186.

¹²¹ id.

¹²² G. Haggerty, ‘Gothicism’ in *The Gay and Lesbian Literary Heritage*, ed. C.J. Summers (1995) 336.

Although *mens rea* has played a ‘central rhetorical role in ensuring respect for human agency’, the law ‘has always tended to erase female agency’.¹²³ The reasonable person may be as harmful as the reasonable man because of the biases which it may still contain beneath a veneer of ostensible gender neutrality. In this section I will argue that the creature’s killing of William echoes the way in which retaliatory violence 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 loss of control defence, as shown in *Clinton*.¹²⁴ I will also identify parallels between the creature’s killing of Elizabeth and the lived experience of battered women defendants.

The general linguistic practice of the law in which ‘references to the masculine were assumed unless otherwise indicated’ can function, Joanne Conaghan argues, ‘to conceal the conceptualization of a male subject as the a priori model of humanity’.¹²⁵ She identifies three key ways of evidencing the law’s maleness: firstly, that the law has historically privileged ‘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’.¹²⁶ The law ‘is not 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’.¹²⁷ Conaghan thus conceptualizes 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’.¹²⁸ The thesis of this article is very much in the spirit of what Conaghan suggests here.

1. ‘In hot blood’: provocation and the ‘sudden snap’

The link between honour and virtue during the seventeenth century means 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’, Horder argues.¹²⁹ This is exemplified by cases like *John Manning* and *Mawgridge*; *Frankenstein* similarly foregrounds affronts to male honour and ‘justified’ masculine rage. 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 case law. Mellor highlights that Victor’s obsession with his creature culminates in Victor ‘becoming himself a monster’.¹³⁰ This stimulates an interpretation of the unconscious sexual component to Victor’s destruction of the female creature 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’.¹³¹ Both *Frankenstein* and provocation case law justify anger in response to sexualised affronts to male honour.

These judgments evidence 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

¹²³ M. Rollinson, ‘Re-Reading the Criminal Law: Gendering the Mental Element’ in *Feminist Perspectives on Criminal Law*, eds. D. Nicolson and L. Bibbings (2000) 101.

¹²⁴ *Clinton*, op. cit., n.69.

¹²⁵ J. Conaghan, *Law and Gender* (2013) 72.

¹²⁶ *id.*, p. 75.

¹²⁷ *id.*, p. 102.

¹²⁸ *id.* Emphasis added.

¹²⁹ Horder, op. cit., n.6, p.40.

¹³⁰ Mellor, op. cit., n.107, pp. 121-22.

¹³¹ Shelley, op. cit., n.2, p. 148.

of violence or grave insult by reacting in the heat of the moment'.¹³² It foregrounds male wrongdoing as *Frankenstein* does, including the sexual aspects underscoring the creature's retaliatory actions following his mate's destruction. He threatens to 'ravish from [Victor his] happiness forever': '[y]ou can blast my other passions', he claims, 'but revenge remains'.¹³³ A sexual element is evidenced by the fact that the creature and Victor each kill the other's mate.¹³⁴ James Holt McGavran suggests that 'their shared obsession also bespeaks attraction, parodies courtship, constitutes union — no matter how weird, how negatively expressed, how destructive to both'.¹³⁵ Although not a literal case of infidelity, Victor's destruction of the female creature is certainly sexualised: he states that 'the wretch saw me destroy the creature on whose future existence he depended for happiness'.¹³⁶ Victor's destruction of the female creature is motivated in part by her reproductive capacity and his fear that she will 'propagate' a 'race of devils... upon the earth'.¹³⁷ Victor destroys the female creature to prevent her from embarking on a sexual relationship with his first creation, and the creature strangles Elizabeth before she and Victor can consummate their marriage. There is an evident sexual undertone to the creature's threat to Victor, 'I shall be with you on your wedding night', and that Elizabeth is killed on her bridal bier.¹³⁸

It is contended that there are clear 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 provision in *Camplin* may fail to accurately reflect him, his actions appear to echo what Katharine Baker calls 'typically masculine emotional outbursts'.¹³⁹ Baker is not essentializing emotional differences between men and women, instead describing these outbursts as socially constructed and ultimately unrepresentative of how men and women 'tend to experience emotion'.¹⁴⁰ I suggest therefore that the creature's killing of William echoes the hot-blooded crimes of passion that Horder describes above. The creature was already in a vulnerable mental state following the De Laceys' rejection, lamenting that '[t]here was none among the myriads of men that existed who would pity or assist me'.¹⁴¹ When he first sees William, he supposes him to be a potential 'friend and companion'.¹⁴² 'Urged by this impulse', the creature seizes the boy, but when William screams, the creature assures him that he does 'not intend to hurt' him.¹⁴³ When he learns William is Victor's brother, however, he declares 'you belong then to my enemy — to him towards whom I have sworn eternal revenge; you shall be my first victim'.¹⁴⁴ The creature 'grasped his throat to silence him, and in a moment he lay dead at [his] feet'.¹⁴⁵ This bears a strong similarity to the killings in heated blood described above, both the honour-coded anger and the burgeoning loss of control element developed in the nineteenth century. The creature kills William out of a sense of being wronged by Victor, his enemy, and his sudden 'snap' resembles the killing in

¹³² Conaghan, op. cit., n.125, p. 90.

¹³³ Shelley, op. cit., n.2, p. 173.

¹³⁴ C.M. Davison, 'Monstrous Regiments of Women and Brides of Frankenstein: Gendered Body Politics in Scottish Female Gothic Fiction' in *The Female Gothic: New Directions*, eds. D. Wallace and A. Smith (2009) 197.

¹³⁵ J.H. McGavran, "'Insurmountable barriers to our union": Homosocial male bonding, homosexual panic, and death on the ice in Frankenstein' (2000) 11 *European Romantic Rev.* 46, at 58.

¹³⁶ Shelley, op. cit., n.2, p. 171.

¹³⁷ id, p. 170.

¹³⁸ id, p. 173; p. 199.

¹³⁹ K.K. Baker, 'Gender and Emotion in Criminal Law' (2005) 28 *Harvard J. of Law and Gender* 447, at 447.

¹⁴⁰ id, p. 449.

¹⁴¹ Shelley, op. cit., n.2, p. 138.

¹⁴² id, 144.

¹⁴³ id.

¹⁴⁴ id.

¹⁴⁵ id.

Hayward, when there had been no time ‘for the blood to cool’.¹⁴⁶ 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’.¹⁴⁷ This reasoning suggests that the sudden and temporary loss of self-control exhibited by the creature accords with the type of male emotional response that would mitigate wrongdoing in cases of provocation.

2. ‘In cold blood’: battered wives and the ‘slow burn’

In this section, 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 *Frankenstein*, I examine how the types of behaviour the creature exhibits on some occasions shares qualities with battered wives who kill.

The defendant in *Ahluwalia* set fire to her abusive husband’s bedclothes while he slept but did not intend to kill him; he died of his injuries a few days later. The court held that the jury could take into account actions that had occurred over a period of time, but still charged the defendant with murder. On appeal,¹⁴⁸ Lord Taylor established that a jury could take account of the interval between the provoking conduct and the defendant’s reaction:

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.¹⁴⁹

The court here attempted to encompass elements of female-coded ‘slow burn’ responses (though their acceptance was less than emphatic), noting that the subjective element of provocation ‘would not... be negated simply because of the delayed reaction in such cases’, provided that there was a sudden and temporary loss of self-control at the time of the killing.¹⁵⁰ However, ‘the longer the delay and the stronger the evidence of deliberation on the part of the defendant’, the less likely provocation would be established.¹⁵¹ Although ‘there was much evidence that the appellant had suffered grievous ill-treatment’, they found little to suggest that the effect of it was battered woman syndrome.¹⁵² 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!’¹⁵³ It is a sentiment vividly demonstrated in cases like *Ahluwalia* where battered wives kill their abusers, as both narratives involve a reclamation of power from an abusive male authority figure. The relationships are not identical but analogous; the

¹⁴⁶ *Hayward*, op. cit., n.13.

¹⁴⁷ *Duffy*, op. cit., n.25. Emphasis added.

¹⁴⁸ *Ahluwalia*, op. cit., n.38.

¹⁴⁹ *id.* pp. 138-39.

¹⁵⁰ *id.*

¹⁵¹ *id.* p. 139.

¹⁵² *id.* p. 140.

¹⁵³ Shelley, op. cit., n.2, p. 221.

multivalence of relationships between Victor and the creature, described by Best,¹⁵⁴ means the power dynamic between them takes on a quasi-romantic subtext and blurs the binaries in gender roles.

In *Thornton*, the trial judge directed the jury to take the whole story into account, following *Ahluwalia*. Beldam LJ agreed the distinction drawn in *Duffy* ‘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’, and the judge suggested that the defendant could have ‘walked out or gone upstairs’ – which is never suggested in cases of men killing their partners.¹⁵⁵ If one minute was enough to negate the sudden and temporary provision, then the days and months that elapse after the provoking act of his mate’s destruction and the creature’s killings of Henry and Elizabeth respectively almost certainly would. (Victor spends three months in prison before returning to Geneva for his wedding).¹⁵⁶ The judge in *Thornton* focused on the understandability of the sudden and temporary provision rather than the appropriateness of its social and psychological underpinnings.¹⁵⁷

In *Humphreys*,¹⁵⁸ the defendant attempted suicide by slashing her wrists after her partner raped her, which he had repeatedly done before, and subsequently used the knife on him in fear that he would do so again.¹⁵⁹ She was acquitted on appeal on the grounds of the cumulative provocation suffered. The defendant’s novel attention-seeking traits should have been left to the jury ‘as eligible for attribution to the reasonable woman’, the latter constituting a psychological disorder which set her apart.¹⁶⁰ This upheld *R v Dryden*, in which the defendant’s ‘eccentricity and obsessiveness’ were characteristics applicable to the reasonable person.¹⁶¹ 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’,¹⁶² which represented a tentative step towards taking into account prolonged domestic abuse.

The women of *Frankenstein* are framed as martyrs to male-perpetrated violence, which mirrors the perception of battered wives in these cases. Elizabeth is murdered on her wedding night. Victor’s mother is presented in saint-like terms: caring for her ailing father, adopting a child from poverty, and selflessly nursing said daughter at the expense of her own life. The martyrdom of Madame Frankenstein is mirrored by the unjustly executed Justine, who is selfless to the point of trying to comfort others on her way to the gallows.¹⁶³ This corresponds with Catharine MacKinnon’s assertion that ‘law sees and treats women the way men see and treat women’¹⁶⁴ 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 cast revenge as ‘a kind of wild justice, which the more man’s nature runs to, the more ought law to weed it out’.¹⁶⁵ But what was the provocation defence if not a form of man’s justified revenge? Vengeful components recur in *Mawgridge*, *Hayward* and *Welsh*. ‘The desire for vengeance,’

¹⁵⁴ Best, op. cit., n.118.

¹⁵⁵ *R v Thornton (No. 2)* [1996] 1 WLR 1174, p. 1180.

¹⁵⁶ Shelley, op. cit., n.2, p. 186.

¹⁵⁷ *Thornton (No. 1)*, op. cit., n.38, p. 313.

¹⁵⁸ *Humphreys*, op. cit., n.38.

¹⁵⁹ *id.*, p. 1010.

¹⁶⁰ *id.*

¹⁶¹ *R v Dryden* [1995] 4 All ER 987.

¹⁶² *Humphreys*, op. cit., n.38, p. 1009.

¹⁶³ Shelley, op. cit., n.2, p. 89.

¹⁶⁴ C.A. MacKinnon, *Towards a Feminist Theory of State* (1989) 161-2.

¹⁶⁵ F. Bacon, ‘Essay IV: Of Revenge’ in *Bacon’s Essays, with Annotations*, eds. F. Bacon and R. Whately (1875) 52.

according to Oliver Wendell Holmes, ‘imports an opinion that its object is actually and personally to blame’.¹⁶⁶ John Gardner suggests that ‘[t]he spirit of the criminal law is... closely connected with the justifiability of our retaliating... against those who wrong us’.¹⁶⁷ Aspects of revenge like actual and personal blameworthiness (Holmes) and penal justifiability (Gardner) may be said to underlie prevailing assumptions within the law. That the actions of the men in *Mawgridge* and *Hayward* were mitigated for reasons of spousal infidelity, but the women of *Ahluwalia* and *Thornton* could not invoke the same defence on grounds of prolonged abuse, may point to an instability in the law’s understanding of the emotional experiences of men and women – that male vengeance may be justified but female vengeance may not.

3. ‘Greater abhorrence... in the female form’.¹⁶⁸ the ‘doubly deviant’ woman offender

The notion of ‘double deviance’ further illustrates the misogyny demonstrated in these cases.¹⁶⁹ It may be thought of as a gendered harm, which Conaghan describes as unequal treatment due a person’s ‘membership of [a] particular class, group, race or gender’.¹⁷⁰ The Old Bailey Online states that men were ‘expected to be violent and aggressive’ while women were severely prosecuted for ‘stepp[ing] far outside expected gender roles’.¹⁷¹ Double deviance thus describes the dichotomy of sentencing women: they are simultaneously treated more leniently for less serious crimes – Otto Pollak contends that ‘[m]en hate to accuse women and thus indirectly to send them to their punishment, police officers dislike to arrest them, district attorneys to prosecute them, judges and juries to find them guilty’¹⁷² – while penalised ‘more harshly when their crimes transgress legal and gender norms’.¹⁷³

Although the cases discussed in this section do not relate to loss of control, they centre on images of female criminality and are therefore relevant to the way in which women defendants are perceived and treated by the courts. Lucia Zedner notes that women criminals in the nineteenth century were judged against ‘a highly artificial notion of the ideal woman – an exemplary moral being’ and so their crimes ‘were viewed as acts of deviance from the “norm” of femininity’.¹⁷⁴ Henry Mayhew’s description of women criminals in 1862 reads as a microcosm of this double standard: ‘in them one sees the most hideous picture of all 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’.¹⁷⁵

The prevalence of this stereotype in law is corroborated by contemporary jurisprudence. Edward William Cox’s 1877 seminal sentencing text *Principles of Punishment* states that ‘[a]lthough the crime may be the same, it is found in practice to be impossible to adjudge the same degree of

¹⁶⁶ O.W. Holmes, *The Common Law* (1881; 2005), 35.

¹⁶⁷ J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) 213.

¹⁶⁸ Shelley, op. cit., n.2, p. 170.

¹⁶⁹ Lloyd, op. cit., n.52.

¹⁷⁰ J. Conaghan, ‘Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment’ (1996) 16 *Oxford J. of Legal Studies* 407, at 408.

¹⁷¹ Old Bailey Online, ‘Gender in the Proceedings: Gender and Crime’ (2018)

<<https://www.oldbaileyonline.org/static/Gender.jsp>>.

¹⁷² O. Pollak, *The Criminality of Women* (1961) 151.

¹⁷³ See Callahan, op. cit., n.11 and Lloyd, op. cit., n.52.

¹⁷⁴ L. Zedner, ‘Women, Crime, and Penal Responses: A Historical Account’ (1991) 14 *Crime and Justice* 307, at 308.

¹⁷⁵ H. Mayhew, *The Criminal Prisons of London and Scenes of Prison Life* (1862) 464.

punishment to women as to men',¹⁷⁶ noting that the 'the real punishment of female convicts is not the hardness of the labour but the restraint and discipline to which they are subjected'.¹⁷⁷ Until 1828, wives who killed their husbands could be given an additional charge of *petit treason*,¹⁷⁸ which until 1790 was punishable by burning at the stake.¹⁷⁹ It was described by Sir Edward Coke as a 'manner of treason' occurring when a subordinate killed a superior, 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'.¹⁸⁰ Obedience, Callahan argues, 'sums up the behavioral expectations of servants and women in one word'.¹⁸¹ The creature in *Frankenstein* tells Victor:

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.¹⁸²

It is only later in the text that the empowered creature switches the roles, telling Victor '[y]ou are my creator, but I am your master; Obey!'¹⁸³ Nineteenth century cases like *Phipoe*¹⁸⁴ and *Godfry*¹⁸⁵ lead Callahan to suggest that women with a history of prostitution, drug use, or violence were treated more harshly for defying gender roles.¹⁸⁶ Although the female creature is destroyed by Victor pre-reanimation, and thus is not a murder victim in the literal sense, she remains thematically important. Even before she is constructed, she is described in a way that marks her as property. The creature lists specifications for her, demanding 'a creature of another sex, but as hideous as myself', who must be 'of the same species... [with] the same defects' and, specifically, female.¹⁸⁷ Although the creature describes his prospective mate as his equal,¹⁸⁸ he has already exercised his autonomy to pre-emptively deny hers.

Victor consciously and deliberately constructs a woman's body, and her potential criminality is crucial to the decisions Victor makes on her behalf. The notion that she might be as violent as her male counterpart is more than Victor can stomach. I suggest that the fact that she is destroyed 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', observing 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 develop desires of its own.¹⁸⁹ Victor's terror when envisaging his female creation's potential wickedness expresses fears and misunderstandings about female criminality. Having already created a 'fiend... [of] unparalleled

¹⁷⁶ E.W. Cox, *The Principles of Punishment, as Applied in the Administration of the Criminal Law by Judges and Magistrates* (1877) 145.

¹⁷⁷ *id.*

¹⁷⁸ Treason Act 1351.

¹⁷⁹ Callahan, *op. cit.*, n.11, p. 1020.

¹⁸⁰ E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (1644; 1817) 19.

¹⁸¹ Callahan, *op. cit.*, n.11, p. 1017.

¹⁸² Shelley, *op. cit.*, n.2, pp. 102-03.

¹⁸³ *id.*, p. 205.

¹⁸⁴ *Mary Theresa Phipoe (alias Mary Benson) The Times, December 8, 1797, 152-55.*

¹⁸⁵ Callahan, *op. cit.*, n.11, p. 1028.

¹⁸⁶ *id.*

¹⁸⁷ Shelley, *op. cit.*, n.2, pp. 147-48.

¹⁸⁸ *id.*, p. 150.

¹⁸⁹ M. Mulvey-Roberts, 'The Corpse in the Corpus: Frankenstein, Rewriting Wollstonecraft and the Abject' in *Mary Shelley's Fictions: From Frankenstein to Falkner*, ed. M.E. Sinatra (2000) 199.

barbarity', Victor is concerned that the female creature 'might become ten thousand times more malignant than her mate and delight, for its own sake, in murder and wretchedness'.¹⁹⁰ That she might be disobedient is especially galling:

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?* [...] [S]he might quit him, and he be again alone, exasperated by the fresh provocation of being deserted by one of his own species.¹⁹¹

Victor's prediction that the creature's acts may appear more abhorrent in female form evokes the doubly deviant woman offender,¹⁹² embodied by Myra Hindley whose crimes were regarded as 'uniquely evil' by the courts.¹⁹³ When the creature confronts him, Victor vows never to 'create another like yourself, equal in deformity and wickedness'.¹⁹⁴ 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'.¹⁹⁵ While Victor 'seems to acknowledge that the Monster's aggression has been partly justified', 'a female who might delight in sadism "for its own sake" is a horror he cannot contemplate'.¹⁹⁶ The women in *Frankenstein* conform to nineteenth-century notions of femininity which Lacey characterises as 'passive rather than active, driven by emotion rather than reason'.¹⁹⁷ This is the conventional image of the woman offender,¹⁹⁸ and the strict delineation of gender roles is one of the creature's earliest lessons: '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'.¹⁹⁹

Frankenstein foregrounds male wrongdoing at the expense of female criminality. The wrongly-accused Justine admits: 'I almost began to think that I was the monster that [my interrogator] said I was'.²⁰⁰ Her only sin is making a false confession, which she does to 'obtain absolution'.²⁰¹ This is the highest level of criminality of which any woman in the novel can be accused; even then it is portrayed as noble self-sacrifice. Mellor suggests that the only potentially criminal woman in the text is destroyed before reanimation 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'.²⁰² For Mellor, this points to a deeper 'fear of female sexuality' that 'threatens the foundation of patriarchal

¹⁹⁰ Shelley, op. cit., n.2, p. 170.

¹⁹¹ id. Emphasis added.

¹⁹² See Callahan, op. cit., n.11 and Lloyd, op. cit., n.52.

¹⁹³ *R v Secretary of State for the Home Department, exp Hindley [2000] 2 All ER 385*, p. 392. See D. Gurnham, 'The moral narrative of criminal responsibility and the principled justification of tariffs for murder: Myra Hindley and Thompson and Venables' (2003) 23 *Legal Studies* 605.

¹⁹⁴ Shelley, op. cit., n.2, p. 171.

¹⁹⁵ Knoepfmacher, op. cit., n.78, p. 106.

¹⁹⁶ id, p. 107.

¹⁹⁷ N. Lacey, 'Women, Crime and Character' (2007) *LSE Working Papers* 5/2007 1, at 3.

¹⁹⁸ id.

¹⁹⁹ id, p. 85.

²⁰⁰ id, p. 88.

²⁰¹ id.

²⁰² Mellor, op. cit., n.107, p. 119.

power'.²⁰³ The female creature is not permitted to exist and explore her own criminality, so we must look to the creature for feminised forms of criminal action in the novel.

4. *Loss of control: redressing the gendered imbalance*

Loss of control is considered to be 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'.²⁰⁴ Though not related to the defence, that controlling or coercive behaviour in a family relationship is now a criminal offence, applying to all defendants regardless of gender or sexuality,²⁰⁵ marks a shift in the law to appreciating the experiences of battered wives. Whilst there is no specific offence of domestic abuse, sentencing guidelines on coercive or controlling behaviour recognise 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'.²⁰⁶

The new loss of control defence was established, as Child and Ormerod note, to address defendants who kill 'in circumstances of justified anger or acute fear',²⁰⁷ responding to the 'perceived unfairness' and 'inconsistent interpretations' of provocation.²⁰⁸ Provoking acts can now be interpreted cumulatively,²⁰⁹ a notion vividly demonstrated in *Frankenstein*: the creature experiences suffering on a significant scale over an extended period of time, describing his life as 'an accumulation of anguish'.²¹⁰ This cumulative impact directly takes into account female-coded emotional responses and criticisms from commentators like Baker who suggests the law had been 'deficient in failing to recognize the different ways that women and men tend to experience emotion'.²¹¹ Baker exposes the injustice that arises from the law 'hold[ing] women culpable for the physical violence they inflict on their former abusers', but that '[a]s long as men react immediately, thoughtlessly, and without emotional struggle, their violent acts are minimized or excused'.²¹² 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 imbalance.

Although the Act represents a step forward in encompassing a greater range of emotional responses, aspects of provocation remain. Marcia Baron and Sarah Sorial respectively point out the inconsistency with which the law treats lenience to human frailty, in which provoking acts may mitigate a defendant who kills but not a defendant who steals money to save their family from eviction.²¹³ Sorial is also concerned that provocation case law will be used to interpret, and therefore undermine, the new provisions, and Susan Edwards notes that justifiability may still be interpreted 'according to masculinist standards',²¹⁴ both of which are apparent in the controversial reopening of the sexual

²⁰³ *id.*, p. 120.

²⁰⁴ A. Reed and M. Bohlander, 'Introduction' in Reed and Bohlander, *op. cit.*, n.67, 1.

²⁰⁵ Serious Crime Act 2015, s.76(4)(a)-(b).

²⁰⁶ Sentencing Council, 'Domestic abuse' <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>>.

²⁰⁷ J. Child, and D. Ormerod, *Smith, Hogan, and Ormerod's Essentials of Criminal Law* (2017, 2nd edn.) 165.

²⁰⁸ *id.*

²⁰⁹ *Dawes*, *op. cit.*, n.60, p. 54.

²¹⁰ Shelley, *op. cit.*, n.2, p. 102.

²¹¹ Baker, *op. cit.*, n.107, p. 447.

²¹² *id.*, p. 460.

²¹³ Sorial, *op. cit.*, n.66, p. 253 and Baron, *op. cit.*, n.36, p. 19.

²¹⁴ S.S.M. Edwards, 'Anger and fear as justifiable precludes for loss of self-control' (2010) 74 *J. of Criminal Law* 223, at 253.

infidelity exclusion in *R v Clinton, Parker and Evans*.²¹⁵ The defendant 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 found that the taunts would satisfy both triggers, and reinstated the relevance of sexual infidelity:

[T]o 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-s.55(3) and (4), the prohibition in s.55(6)(c) does not operate to exclude it.²¹⁶

This goes against the meaning of s.55(6)(c), as James Slater argues. While the subsection requires ‘that sexual infidelity be ignored even when accompanied by other factors’,²¹⁷ he suggests that this contextual approach now ‘enables sexual infidelity to act as the main and indeed predominant qualifying trigger’.²¹⁸ Although excluding sexual infidelity ‘without exception... perhaps does risk injustice’,²¹⁹ Slater argues the ‘moral significance of violent reactions to sexual infidelity’ speaks to ‘wider problem[s] concerning the male use of violence against female partners’.²²⁰ Although the change aimed to reduce gender bias,²²¹ Kate Fitz-Gibbon warns that ‘the defence may still be formulated in a way that restricts the court's ability to adequately respond to women's experiences’.²²² While the Act formally acknowledges that ‘the emotion of fear can lead to the perpetration of lethal violence that warrants a manslaughter not murder conviction’,²²³ she remains concerned, in light of *Clinton*, that the new defence ‘will do little to overcome gender bias historically associated’ with provocation.²²⁴

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 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 fluid gender, which lends itself to multiple nuanced sub-textual readings as a queer/trans/non-binary body,²²⁵ reflects the instabilities of delineating between male-coded and female-coded violence. The creature, like the abused women in *Ahluwalia*, *Thornton* and *Humphreys*, has no sense of his own power until provoked. It takes an accumulation of triggers for him to respond with violence. Loss of control affords more protection to ‘slow burn’ female-coded violence while continuing to invoke the language of a male-coded ‘snap’ – and it is an unstable blending of both the old and new approach which I suggest Frankenstein’s creature embodies.

It was contended earlier that privileging male emotional responses may suggest the law can be objectively misogynist in practice. *Frankenstein* captures most of the law’s contradictory and inconsistent developments, including Victor’s internalised misogyny. Despite s.54’s good intentions,

²¹⁵ *Clinton*, op. cit., n.69.

²¹⁶ *id.*, p. 39.

²¹⁷ J. Slater, ‘Sexual Infidelity and Loss of Self-Control: Context or Camouflage?’ (2012) 24 *Denning Law J.* 165, *id.*, at 159.

²¹⁸ *id.*, p. 160.

²¹⁹ *id.*, pp. 163-64.

²²⁰ *Clinton*, op. cit., n.69, p. 16.

²²¹ K. Fitz-Gibbon, ‘Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control’ (2013) 40 *J. of Law and Society* 280, at 282.

²²² *id.*, p. 305.

²²³ *id.*

²²⁴ *id.*

²²⁵ Stryker, op. cit., n.89.

Clinton undermines the philosophy of the new defence, weakening the sexual infidelity exclusion by resurrecting it as a relevant contextualising factor.²²⁶ This also indicates a potential imbalance between men and women attempting to invoke the defence in future. The revenge exclusion in s.55(4), according to Child and Ormerod, is ‘likely to present a significant hurdle’ for battered women defendants invoking the defence when an ‘element of planning’ is involved.²²⁷ Killing abusive or unfaithful partners implies elements of revenge, motive and premeditation – yet the revenge exclusion stands and negates the defence, but the sexual infidelity exclusion can be circumvented and the defence applied. Using the phrasing from *Clinton*, if revenge is ‘integral to and forms an essential part of the context’ of the killing,²²⁸ it follows that it might be considered just as contextualising and mitigating a factor as sexual infidelity was held to be in that case. The fate of battered wives invoking loss of control is yet to be proven, so while male vengeance can be let back in, female vengeance may yet be barred.

CONCLUSION: TRANSCENDING THE BINARY IN *FRANKENSTEIN* AND CRIMINAL LAW

In this article I have argued that the language of loss of self-control appears to be entrenched in male-coded conceptions of power. Purportedly universal to all defendants, it instead describes a specific case (as in *Mawgridge*, *Welsh* and *Clinton*) of men killing in hot-blooded anger provoked by adultery or nagging. I argue that the creature’s actions demonstrate instabilities within the defence, specifically 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 describes not a loss but rather a (re)gaining of control. 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. Taking action to prevent their abuser from causing further harm is more an *emergence* of control than the loss of it; a reclamation of power from an abusive male figure, illustrated by *Frankenstein*. The law therefore still makes concessions to male frailties, which suggests that the defence is still, at least in part, honour-based.

This article has also demonstrated how the central relationship in *Frankenstein* between Victor and the creature blurs the boundaries between perpetrator and victim, culpability and mitigation. By enacting gendered crimes, the creature plays the role of both battered wife and abusive husband, and dramatises the vengeance component that the law consciously excludes but subconsciously incorporates. 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 honour-coded crimes. Case law demonstrates that women are just as capable of what has historically been regarded male-coded violence but appear to have been more harshly punished for transgressing both legal and gender norms. As Gerald Wetlaufer notes, literature is able to contain contradictions and instabilities that the law often cannot.²²⁹ As a destabilising figure, the creature does not fit within the law’s binaries, and so he ultimately subverts and transcends them; that he displays both feminised and masculinised violence calls into question the utility of these concepts as perpetuated and arbitrarily delineated by law. If a literary text from the early 1800s can tell us more about a central concept of the criminal law than the law itself, or the resonance of literature as a resource of legal critique, what does this tell us about the law? It tells us that the law is de-historicising, a machine for taking out history; literature can put the

²²⁶ *id.*

²²⁷ Child and Ormerod, *op. cit.*, n.207, p. 167.

²²⁸ *Clinton*, *op. cit.*, n.69.

²²⁹ G.B. Wetlaufer, ‘Rhetoric and Its Denial in Legal Discourse’ (1990) 76 *Virginia Law Rev.* 1545, at 1564.

history back in and show when and how developments were emerging. The creature, a monster that becomes a mirror, can help to reveal the law as it truly is.