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Women, Crime and Character in the Twentieth Century

*Nicola Lacey**

Key words:

Women; crime; criminology; literature; responsibility; realist novels; selfhood; criminalisation; gender; character.

Abstract:

This paper investigates the fate of women in the 20th Century English criminal justice system. Drawing on both literary and legal sources, I venture an explanation for the relatively low rates at which women are adjudged to have committed crimes, despite the huge social changes in their legal, political and economic position during the course of the last hundred years. First, I present some statistics to illustrate trends in female criminalization and incarceration during the 20th Century. Second, I sketch and compare the conceptions of selfhood and responsible agency to be found in criminology, criminal law, the criminal process and 20th Century literary fiction. Third, I focus on literary representations of women, exploring what light women's counter-normative behavior in fiction can shed on the patterns of female criminalization. And finally, I draw out the implications of this interpretation for methodology in the social sciences.

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Figure 1

The woman who looks out of Holloway Prison with such striking dignity in this image provides an eloquent starting point for this paper, in which I will investigate the fate of women in the 20th Century English criminal justice system. Drawing on both literary and legal sources, I will venture an explanation for the relatively low rates at which women are adjudged to have committed crimes, despite the huge social changes in their legal, political and economic position during the course of the last hundred years. At the end of the 19th Century, notwithstanding the existence of criminal classification statutes some of which were specifically targeted at women, women made up just 18% of those convicted of the more serious offences, and 17% of those in prison. At the time of this photograph, the women's prison population was moreover swollen by the incarceration of suffragettes. We do not know if this woman was a suffragette, but the caption tells us that the window through which she looks has been shattered in a suffragette protest outside the prison. So we might expect the image to stand as a symbol of agentic female law-breaking as women slowly come to assume rights, occupy roles and gain opportunities exclusion from which had helped keep them among a small minority of law-breakers for the previous 150 years. Instead, Holloway Prison stands as a metaphor for what turned out to be a very different 20th Century story: one in which the gendered pattern of criminalisation became more rather than less marked. An emblem of Victorian discipline re-imagined (though never entirely realised) as mental hospital, Holloway exemplifies the continued tendency to medicalise female criminality. Recently closed and destined to become housing, we might regard its demise as a product of

London's inflated property market. But of greater significance for my project in this paper is the fact that the repeated reports documenting the prison's failings betoken the lack of any coherent policy on women offenders through much of the Century – this lack itself representing a perplexity about the very notion of female deviance.¹

Amid the huge variety of forms of crime and criminalisation across time and space, the gendered nature of judgments about criminalisation is remarkably pervasive. In most developed countries over the last 200 years, women make up a small minority of those formally identified as offenders. This in itself makes the gendering of social processes of criminalisation a central question for the social sciences (a fact which had however escaped them until alerted by the pioneering work of feminist scholars like Carol Smart (1976; 1995), Frances Heidensohn (1968; 1985) and Ngaire Naffine (1987)). Yet underlining the fact that these differences are socially produced, research by Malcolm Feeley, Deborah Little and

¹ See for example the Prison Inspectorate's Report of 2013

<http://www.justiceinspectors.gov.uk/prisons/wp-content/uploads/sites/4/2014/03/holloway-2013.pdf>

Despite some improvements in subsequent years -

<https://www.justiceinspectors.gov.uk/hmiprisons/wp-content/uploads/sites/4/2016/02/Holloway-web-2015.pdf> - Holloway was scheduled for closure in 2016. For a telling picture of the pathologies of women's imprisonment in the Twentieth Century, and of the power of gender norms in shaping the discipline of women in prison, see Carlen (1983).

Hadar Aviram (Feeley and Little 1981; Feeley 1994; Feeley and Aviram 2010,² has shown that there are historical exceptions to the usual gender ratio, one being London in the late 17th and early 18th Centuries, when women and men were convicted at the Old Bailey in roughly equal numbers (see also Smith 2014; Godfrey 2014). Indeed all the West European countries which Feeley and Aviram studied saw a marked decline of female criminality during the 18th and 19th Centuries.

In a series of lectures delivered a decade ago, I argued that we could draw on cultural resources, notably realist novels, to shed light on the reasons for these variations in gender patterns of criminalisation. My starting point was Daniel Defoe's vivid female offender, *Moll Flanders* (1722). In the early 18th Century, Defoe found it natural to write a novel whose heroine was a sexually adventurous, socially marginal property offender. Only half a century later, this would have been unthinkable. In the book which eventually emerged from my attempts to think through how and why this had happened, and what it meant for criminal law

² Feeley and Aviram's data show women to have been a significantly greater proportion of offenders in several European countries during the 17th and early 18th Centuries, with the proportion dropping from the mid 18th Century through the 19th Century. They suggest that the decline of women in the criminal process was a product of a move from public to private patriarchy, as the development of industrial capitalism, and associated changes in family structure, consolidated by protective legislation, deprived women of forms of economic opportunity and social status available to them in the era of family capitalism in which their labour was often crucial to household finances.

(Lacey 2008),³ I argued that the disappearance of Moll Flanders, and her supersession in the annals of literary female offenders by heroines like *Tess of the d'Urbervilles* (1891), was a metaphor for fundamental changes in ideas of selfhood, gender and social order. And I suggested that it was easier to insert women into the (of course highly gendered) conceptions of criminal character which drove early 18th Century judgments of responsibility than to accommodate them within a conception of responsibility as founded in choice and capacity – a framework which was emerging just as the acceptance of women's capacity to exercise their agency was becoming more constrained, and women were increasingly subject to informal discipline, as their bodies came to bear the burden of representing bourgeois respectability.

At the conclusion of the lectures, I put a question to my audience: that of whether, in 2008, Moll Flanders was thinkable again. This, of course, was disingenuous: the question was really to myself, and I have been puzzling about it ever since. Answering it, however, required me to complete my historical analysis of criminal responsibility-attribution through the 20th century – a project which was concluded last year (Lacey 2016). At which point, the British Academy's invitation to deliver the Maccabaeian Lecture provided an opportunity to bring the social sciences and humanities into dialogue with one another in the most suitable forum in the country for such an attempt. So I decided to bring my story of women, crime and character up to the millennium.

³ The thesis of my book is consistent with Feeley's and Aviram's interpretation (2010), while concentrating on a somewhat different evidential base.

The paper proceeds as follows. First, I present some statistics to illustrate trends in female criminalization and incarceration during the 20th Century. Second, I sketch and compare the conceptions of selfhood and responsible agency to be found in criminology, criminal law, the criminal process and 20th Century literary fiction. Here I note various methodological complexities as compared with a literary analysis of the earlier period, while arguing that law and literature have continued to share a sufficient range of preoccupations to maintain the validity of the project, albeit with some modification. Third, I focus on literary representations of women, exploring what light women's counter-normative behavior in fiction can shed on the patterns of female criminalization. And finally, I draw out the implications of this interpretation for methodology in the social sciences.

Gender, crime and punishment through the 20th Century

Let me begin, then, by considering the ways in which criminal law 'sees', 'thinks about', constructs and responds to women. To assess the gender dynamics of criminal responsibility in the 20th Century, it is useful to set out from some fairly basic data, of the kind from which Feeley and Little launched their 18th-19th Century analysis in 1981. I should preface this discussion by acknowledging that official crime statistics must carry a substantial health warning. First, with the exception of rare offences such as homicide, changes in the definition and range of offences, and in the way in which they are grouped in the official records, make it tricky to construct robust series over a significant period of time. Second, the official statistics represent – though they make it all too easy to forget this – the culmination of a complex set of processes of social labelling, lay and official judgments, the exercise of power, as opposed to 'raw facts'. Third, the techniques developed in the late 20th

Century to counter these difficulties – notably crime surveys, which give us some purchase on the extent to which the official records distort the underlying behaviour which they purport to represent - are not available for the whole period. As a result of these difficulties, some forms of criminology have tended to avoid the official statistics altogether. Moreover some feminist criminologists have been further prompted in this direction by the sense that the official statistics risk strengthening the reified, biological understandings of criminality which are so pervasive in early criminology, and which persisted for a yet longer period in relation to women (Smart 1976, 1995; Heidensohn 1968, 1985; Naffine 1987, 1996; Allen 1987). Though each contains articles which draw on official statistics, neither the latest edition of the *Oxford Handbook of Criminology* (Liebling et al eds. 2017) nor the *Oxford Handbook of Gender, Sex and Crime* (Gartner and McCarthy eds. 2014) includes a single table or figure presenting officially recorded crime. My view, however, is that statistics-avoidance in criminology has been overdone, and that the statistics over a century do tell us something important. While they gloss over the forms of offending and labelling behaviour and the motivations underlying the figures, they nonetheless represent real exercise of state power, and track its focus and extent over time. My approach here has therefore been to enlist the assistance of a very skilled econometrician⁴ with whom I worked to construct the most robust set of data possible, at ten year intervals through the century.

Here, first, are the imprisonment figures, showing both women as a proportion of the prison population and women prisoners as a proportion of the female population as a whole. Unlike the crime statistics, these figures are easy to collect, and they are very interesting, for at least two reasons. First, the number of women in prison in the first decade of the Century will

⁴ David Hope, to whose meticulous work I owe a huge debt.

certainly have been swollen by the punitive state reaction to the suffragettes' protests, which led to around a thousand women being imprisoned between the turn of the Century and the First World War- a significant number given the overall size of the women's prison population at the time (Purvis 1995). Another factor is that the figures will have been affected by changes in how the statistics are constructed, or by the impact of the criminal classification statutes of the period, which targeted particular groups of women (Zedner 1991). Whatever the detailed reasons, women turn out to have been quite a substantial minority of the prison population not long after the appearance of victimised, relatively powerless Tess of the d'Urbervilles. If the criminal classification statutes are indeed an important part of the explanation, this would back up my argument in *Women Crime and Character* (Lacey 2008) that gender-specific ideas of criminal character as a basis for responsibility- attribution might facilitate the criminalisation of women, while strictly capacity or opportunity-based practices of responsibility-attribution might be less likely to lead to the criminalisation of women, in circumstances in which women's opportunities were restricted and their agentic capacities called into doubt.

Women as a proportion of the prison population in the Twentieth Century: Figures 2.1 and 2.2

As you see from these Figures, while absolute numbers of women in prison have risen over the course of the 20th Century (Allen and Dempsey 2016), the female proportion of the overall prison population has in fact fallen from 17% to around 5%, while the drop in the

proportion of the overall female population incarcerated has fallen even further.⁵ Overall, what is most striking is the fact that, even if we take as our starting point 1930 – just two years after the franchise was extended to all women, marking the moment of women’s full formal entry into citizenship – the figures are remarkably stable, and remarkably low, right through to the end of the Century, albeit with a spike during the Second World War and a significant rise in the Century’s final decade.

Now let us turn to the crime statistics, for which we have constructed three decadelly measures through the century: women as a proportion of those convicted of violence against the person; as a proportion of those convicted of a group of common property offences; and as a proportion of those convicted of all indictable offences.

Figures 3.1 - 3.6

Notwithstanding a steady increase in the female proportion of those convicted of violence against the person from the 1960s on, and a less marked but definite concomitant rise in the

⁵ Unsurprisingly, and as can be seen from the figure for 1940, the proportion of women rose during each of the two world wars, reaching 18.4% in 1916. Persisting gender differences in imprisonment can be seen in a wide range of jurisdictions on World Prison Brief data for 2016. Among democratic advanced economies, the proportion of women in the prison system ranges from 3.4% in France up to 9.3% in the USA, via 4.5% in England and Wales, 5.1% in Scotland, 5.6% in Sweden, and 8.0% in Australia (World Prison Brief data, <http://www.prisonstudies.org/world-prison-brief-data> (accessed 18 March 2017)).

property offences, in the case of violence, women at the millennium do not reach the proportionate representation of the beginning of the Century, while in property offences, they do no more than match it.

Again, we must remember that these figures smooth out huge differences between different forms of offending – and in particular give no sense of the impact and scale of forms of criminalisation trained with particular intensity on the social control of women – notably offences relating to prostitution, infanticide and abortion (Smart 1976; Burman and Gelsthorpe 2017; Peay 2017; Phoenix 2017). The prison figures also exclude other forms of semi-carceral social control such as approved schools and commitment to mental hospitals (Harcourt 2006; O’Sullivan and O’Donnell 2007). Yet, notwithstanding some increase in the late 20th Century, compare the relative stability of these figures with the dramatic changes in women’s legal, social and economic status and opportunities during this period (as crudely represented here by figures on labour market participation and higher education; and then by a Table presenting a timeline of a wider range of relevant changes across the Century).

Figures 3, 4 and 5

These are changes which, of course, fall very far short of what many of us still hope for, but which – particularly in the second half of the Century - may nonetheless justly be accounted nothing less than a quiet revolution. The contrast with criminalisation and imprisonment is extraordinary. Far from fulfilling the panicked prognostications of early criminologists such as Luke Owen Pike (1873-1876), who anticipated that women’s liberation would lead to a surge in female crime, it looks as if, at least in relation to the more serious forms of offending which result in custodial sentences, the changes in women’s official criminalisation have been modest, with even the proportionate rise in female violence shaped in part by a decline

in levels of male violence rather than any decisive change in female behaviour (Smith 2014). And while it is easy to satirize the fears on this count which plagued the late Victorian and Edwardian male imagination, there does seem to be something important to be explained about why the huge social changes in women's legal, economic and political position during the 20th Century appear not to have been felt to anything like a comparable degree in the criminal process. To unravel this question, I will suggest that it is helpful to put legal and literary resources into dialogue with one another.

Agency and responsibility in 20th Century Law and Literature.

Turning to that task, I must immediately confront and deal with some methodological challenges which confront any attempt to extend a legal and literary analysis of women's agency and criminality from the 19th into the 20th Century. The first complication is simply that the field of cultural representation has burgeoned during the last century, prompted by both technological change and economically and politically driven developments such as increasing prosperity and education. Whereas it was easy to justify a focus on literary fiction as one of the most significant forms of cultural representation in the 18th and 19th Centuries, printed fiction competes in the 20th Century with radio and television series and feature films – to name just three comparable narrative forms - as well as with the theatrical and visual arts which were already significant in earlier centuries.

Moreover while it was reasonably easy to distinguish a recognisable genre of literary fiction – realism – in the 18th Century, even in the 19th, the genre was diversifying as the Gothic

novel produced offshoots such as sensation fiction and science fiction. There was, of course, a debate, to which authors like Charles Dickens and Wilkie Collins contributed, about whether these distinctions were meaningful (Lacey 2008: 122-3), but that need not concern us here. What is obvious, and has made selecting a sample of fiction far more difficult for the 20th Century, is that this diversification has continued apace, with specialist genres such as detective fiction, crime novels, so-called ‘chick lit’, magical realism, postmodernism, proliferating at an ever greater rate during the course of the Century. So, even restricting myself to British and Irish novels – as I have done, so as to remain consistent with the sample from my 2008 book – the choice is vast. I cannot claim to have been able to produce a very scientific way of defining the literature on which I am focusing, other than to say that it is the sort of literary fiction which might well find its way on to a Booker Prize list, and must have a distinctly realist ambition. Justifying the focus on books rather than soap operas or films seems easier to me, given that the latter developed after the beginning of the century, and have accumulated in reach and importance since the 1960s. But it should be acknowledged at the outset that my effort in this paper is a very small part of a potential project which would consider the changing legal and cultural constructions of women behaving badly in a wider range of cultural forms, with crime and detective fiction, film and soap operas a potentially fruitful terrain which has indeed already begun to be mined by imaginative criminologists, literary and media scholars.⁶

The second methodological challenge, which I had not anticipated, is this: When I started researching and consulting friends and colleagues about a sample of books for my original

⁶ See for example, Young (1995); Sparks (1992); Naffine (1996); McCaw (2011); Surette (1998: 5th edition 2015); Williams (2002); Dolin (2007).

project, it was extremely easy to construct a list of realist novels in which women were central characters and were moreover centrally engaged in, if not criminal, at least counter-normative or strongly agentic behaviour. Indeed many of them had given their names to the novels in which they appeared: Daniel Defoe's *Roxana* (1724); Samuel Richardson's *Pamela* (1740) and *Clarissa* (1747-8); Henry Fielding's *Amelia* (1751); Frances Burney's *Evelina* (1778), *Cecilia* (1782) and *Camilla* (1796); Mary Wollstonecraft's *Maria* (1798); Maria Edgeworth's *Belinda* (1801); Jane Austen's *Emma* (1815); Charlotte Bronte's *Jane Eyre* (1847) and *Shirley* (1849); Elizabeth Gaskell's *Mary Barton* (1859); Margaret Oliphant's *Hester* (1883). Curiously, and I think significantly, it has proved much harder to identify 20th Century literary fiction in which women are both central characters and counter-cultural if not criminal. Indeed, as we shall see, some of the most central, powerful and counter-cultural female characters in 20th Century realist fiction are portrayed as in some way involved or collusive in their own victimisation.

I should, however, have anticipated this second problem, because I now see that it relates very closely to a third, which on the face of it could have been fatal to the enterprise of this paper. This is the explosion of literary modernism in the early part of the 20th Century, which in fundamentally reshaping the form and, arguably, function of the novel, fractured the close analogy between the representational and indeed didactic or ethical purposes which the novel and the criminal law had arguably shared since the early 18th Century. In light of modernism, with its radical questioning of the veracity of literary representations, of the unity of coherence of the subject, and of the knowability of self and others, influential legal/literary scholars including Jan-Melissa Schramm (2000) and Alexander Welsh (1992) have concluded that the disanalogies between law and literature become such that a certain kind of legal/literary interpretive project no longer makes sense.

Here I would agree with Rex Ferguson's argument in his persuasive *Criminal Law and the Modernist Novel* (2013) that, despite important emerging differences in the form and function of literature in the first three decades of the 20th Century, the analogies between both the problems which law and literary authors confronted, and the ways in which they resolved them, are sufficiently close to sustain a meaningful project of interdisciplinary analysis. To understand why this is the case, we need to look in some further detail at the relevant shifts and trends in the construction of subjecthood, agency and responsibility in literature, in the criminal process, and in the criminal law.

Let us start with the criminal law. As I have already suggested, the 19th Century's systematising and modernising project, with its gradual construction of doctrinal rules constituting the responsible subject of criminal law in certain ways, and of protocols and institutions capable of testing and refining these doctrinal rules, was coming to fruition at the turn of the Century, with notable developments including the revival of the possibility of the accused testifying in her own defence in the 1898 Criminal Evidence Act, and the creation of the Court of Appeal in 1908. With regular professional representation of both sides in serious criminal cases, and a growing body of systematic literature in the form of treatises and textbooks, doctrines of *mens rea* and defence were gradually constituting the subjective responsibility of a person with normal cognitive and volitional capacities for the conduct elements of an offence as the paradigm condition for conviction – and one moreover which, as *Woolmington*⁷ confirmed definitively in 1935, the state had the burden of proving beyond

⁷ *DPP v Woolmington*, [1935] UKHL 1.

reasonable doubt in all its elements. A system based on the trial as a process for inculpation, rather than an opportunity for exculpation, was being consolidated during this period, with presumptions such as that a person intended any natural consequences of their actions slowly being reconstructed as evidential rather than conclusive legal mechanisms. Strict liability offences based on causal outcome responsibility were growing in number and significance, but occupied a marginal place in the central ideology of the criminal law, which was increasingly focused on capacity responsibility, particularly in its subjective form, as both a device both legitimating and coordinating legal judgments of guilt.

On the face of it, this move to subjectivism in the criminal law presents both analogies and disanalogies with the constitution of the subject in literary modernism. On the one hand, the centrality of subjective experience and of psychological states to the meaning of action and indeed the interpretation of the world is central to both legal subjectivism and the intense turn away from representation and towards expression of experience in writers like Henry James, Virginia Woolf or James Joyce. On the other hand, the legitimating and coordinating function of the principle of subjectivism in the criminal law seems to turn on an assumption about the unity of the subject and its knowability and transparency – both to the subject herself and to others, notably police officers and members of a jury – which is under sustained challenge in the novel of this period. In literature, authors – particularly those writing from an in some sense émigré or outsider perspective, whether because of their national origins or their gender or social status - seized on the crisis of authority and social disruptions of the late 19th and early 20th Centuries to put the very projects of truth, reason and transparency into question. By contrast, the law continued with its systematising –

confusingly given the literary language - process of 'modernisation', undeterred by the surrounding crisis of authority. For criminal law, with its concrete regulatory and power-imposing tasks, did not enjoy the luxury of exploring the metaphysical crisis which arguably underpinned the moments of obscurity, multiplicity, unpredictability, insanity, fragmentation, impenetrability or incomprehensibility pervasive in novels of the period. Hence it turned instead to the construction of a range of protocols and institutional arrangements which allowed that regulatory, controlling and normative project to continue. Subjectivism and psychology, which bore the weight of the collapse of meaning and predictability in the novel, became the engine through which knowledge and truth was constructed in the law. They were, however, as we shall see, regimes of knowledge and truth in which women were incompletely accommodated.

Indeed in both law and literature, these modernising projects – whether of the construction or the subversion of the responsible subject – were ones in which women were either incompletely, or differentially, inserted. And in both fields, assumptions about subjectivity or its collapse were strongly overlaid with gender norms and assumptions. In the criminal law, women's assertion of subjectivity was – other than in a small number of female-gendered offences – almost definitionally tied up with a breach of gender norms, and hence tended to attract either a move towards pathologisation in the form, for example, of a mental incapacity explanation or defence; or a reading of 'double deviance': a breach of the criminal law and a breach of femininity. As Hilary Allen nicely put it, criminal law struggled to place women as 'reasonable persons' (Allen 1998). In literature, too, we find this divided tendency: an exaggerated experience of interiority or even mental collapse sits relatively easily with femaleness (Virginia Woolf's *Mrs Dalloway* (1924); Sylvia Tietjens of Ford Madox Ford's *Parade's End* 1924-1928); Doris Lessing's Martha Quest of the *Children of Violence* series

(1952-1969)); while rational female agency, particularly where combined with a successful presence in social spaces beyond domesticity, such as work, invites a particularly punitive interpretation.

In a range of ways, as Lindsay Farmer has argued (Farmer 2016), and as I have also shown in earlier work (Lacey 2016), the move to a subjective version of capacity responsibility implied a dualism in the criminal law as between responsible subjecthood on the one hand, and the conduct for which responsibility was attributed on the other. And this in turn implied a certain de-moralisation of the criminal law – or at least a projection of the site of judgment onto conduct as opposed to responsibility or *mens rea*, which was now constructed in factual, psychological, non-moral terms (Farmer 2016; Lacey 2016; Norrie 2014). This means that any study of the literature of this period must focus as much on the forms of conduct for which women are held responsible as on the assumptions about their responsible agency which accompany them. Moreover this ‘factualisation’ or ‘demoralisation’ of responsible agency underwrites another analogy between law and literature in this period. For it is prompted by a discomfort with judgment which is a counterpart of the scepticism about judgment which was pervasive in the novel. In addition, the crisis of truth and judgement found in the modernist novel realises itself in the consequential reliance in the law on either a jury’s interpretation of testamentary narrative or its evaluation of expert evidence, each of which produces its own epistemological uncertainties which the law does not resolve, but rather glosses over through the mechanism of jury secrecy. Unable to refuse judgment in the style of the novel, English criminal law displaced it onto the secret deliberations of a lay jury or the inscrutable judgment of an expert. The law’s vulnerability here is perhaps exposed most clearly in cases in which mental incapacity is put at issue in the trial: a position into which a disproportionate number of women offenders fall (Allen 1982; Edwards 1984).

These analogies between the situation of criminal justice and that of the modernist novel of the early 20th Century can be further appreciated if we supplement our vision of the criminal law with that of the criminal and penal processes which surrounded it. In the late 19th Century, as the criminal classification statutes attest, the essentialised, biological view of crime to be found in the positivist criminology of Lombroso and Ferrero (1895) was itself shaping criminalising and penal arrangements in the form of mechanisms which certainly made bold (indeed, from our perspective outrageous) claims to ‘truth’. But in the early 20th Century, this notion of biological pathology was beginning to give place to a vision shaped rather by notions of social pathology: with the acceptance that social and economic circumstances constituted important determinants of criminal conduct (Smart 1976: Chapter 2; Heidensohn 1985: Chapter 6). This socially deterministic vision was deeply threatening to the very notion of a responsible subject or the notion of stable character, and it echoed the focus in literary fiction on the role of environment in shaping both personality and conduct. Of course, the influence of biological theories did not disappear overnight either in criminal justice or in literature (think of the strange combination of biologism and social analysis which underpins Henry James’ portrayal of Kate Croy in *The Wings of the Dove*, (1902) Radclyffe Hall’s analysis of lesbianism in *The Well of Loneliness* (1928); or D.H. Lawrence’s view of sexuality in *Lady Chatterley’s Lover* (1928)). Hence biological and social theories enjoyed an extended period of uncomfortable cohabitation - albeit with women remaining disproportionately situated within the biological interpretation. The way in which the criminal process managed the resulting tensions was through a division of labour between the criminal law and the penal process, which became increasingly constructed around what David Garland has called ‘penal welfarism’ (Garland 1985, 2001); in other words, the assumption that the penal and other arrangements should be designed in terms of

manipulating offenders' environment so as to maximise their chances of reform and personal change. Within this distinctive configuration, criminal justice institutions were closely articulated with emerging mental health and social welfare institutions in a quite new constellation of institutions and discourses emerging from the Victorian ameliorative projects: institutions and discourses which were markedly less retributive but no less paternalistic than their Victorian predecessors. In penal welfarism as in criminal law, a turn to reliance on scientific expertise provided a partial solution to problems of legitimation and coordination while, as we shall see, storing up epistemological difficulties similar to those being explored in the modernist novel. And in a time lag which characterises the relationship between literature and law throughout the Century, those difficulties made themselves felt more fully in the criminal justice system in the second half of the Century. Meanwhile, the specifically gendered qualities of the emerging forms of penal welfarism, particularly in relation to female delinquency and mental incapacity, exaggerated an existing cultural tendency to label women's counter-normative behaviour in terms of illness rather than oppositional responsible agency. While – perhaps significantly - recorded in relation to a man (Septimus Smith, a victim of shellshock), the invincible, patriarchal rationality of the scientific authority which legitimised these judgments is bitinglly criticised in Virginia Woolf's *Mrs Dalloway* (1924).

Finally, in terms of the analogies between literary fiction and criminal law during this period, we should note that, just as the law was itself having to negotiate certain challenges to authority and epistemological perplexities similar to those explored in depth in the modernist novel, doing so by developing its own distinctive protocols as well by an increasing turn to the truths constructed by scientific discourses, conversely, the novel never entirely abandoned its representational and interpretive roles. Certainly, modernist novels deliberately eschewed

the aesthetic of linearity, progress and narrative closure which characterise the great realist novels of the 19th Century; they also, as we have seen, pondered the multiplicity, fragmentation and instability of the self. But, as Terry Eagleton has noted (Eagleton 2005), the move can never be complete: individual agency reasserts itself in forms such as resistance to plot line, and the explorations of fragmented consciousness typical of, say, Virginia Woolf, or the disjointed quotidian 'epiphanies' recounted in James Joyce, themselves partake in a certain form of representation, a certain engagement with and indeed interpretation of human being and reality. Moreover the analogy between the novel's ethical and the law's regulatory purposes still held. Woolf may have protested that politics should be separate from art, and that the world of the novel is brought into being simply by the novel itself. But few of her readers, contemporary or current, could possibly read *Orlando* (1928) or even *Mrs Dalloway* (1924) as politically innocent texts, artefacts which give us no vision of aspects of human being or dilemmas about how to live (Eagleton 2005: 313). Moreover Orlando as a character is vividly agentic, even amid the radically historically determined nature of her/his identity, and notably her/his gender identity. Think of *Orlando*'s biting satire on the construction of gender, or Woolf's devastating depiction in *Mrs Dalloway* (1924) of Lady Bradshaw's disappearance, by way of marriage, into the maw of patriarchal power: as Woolf memorably puts it, 'Fifteen years ago she had gone under. It was nothing you could put your finger on; there had been no scene, no snap; only the slow sinking, waterlogged, of her will into his.' (Woolf 1924/2013: 118). Few instances of even high modernism exemplify the extremes of opacity and unknowability of the incident in the Marabar caves in E M Forster's *A Passage to India* (1924) - often cited as the paradigm instance of modernism's focus on the limits of knowledge, and one directly relevant to legal judgment since the unknowable incident

becomes the subject of a trial.⁸ For example, Ford Madox Brown's trilogy, *Parade's End* (1924-28) combines a representational family and social history with a moment-by-moment exploration of Christopher Tietjen's experience of emotional chaos, in the more subversive modernist style which characterises Ford's presentation of the radically unknowable Captain Ashburnham of *The Good Soldier* (1915).⁹ Moreover, while aspects of modernism doubtless touched much literary fiction during this period, a vast amount of fiction continued in a more straightforwardly realist vein. A key instance would be F. Tennyson Jesse's *A Pin to See the Peepshow*, published in 1934, and of great interest from our point of view because it is broadly based on the notorious murder case against Edith Thomson and Frederick Bywaters in 1922.

How do these trends in the construction of the responsible subject in criminal law, criminal justice and literary fiction proceed in the second half of the 20th Century? As Eagleton has noted, the trauma of the Second World War did not unleash anything like the explosion of a radically new form of literary fiction such as the modernism created by the émigré or otherwise 'outsider' writers of the early 20th Century. One can only speculate on the reasons for this: perhaps one factor was the sense that, unlike the First World World War, the Second World War had been unavoidable and fought in a just cause; another that the subsequent

⁸ The Marabar caves incident is of particular interest because it implies a clash of testimony between two subjects each of whom speak – or fail to speak – from marginalised positions: a white woman in the context of an alleged sexual impropriety, and an Indian man. Ultimately it is the default prejudice, as reflected in the colonial power embodied in the legal system, which is constructed as claiming (a fragile form of) knowledge and credibility.

⁹ On which see Ferguson (2013): Chapter 3.

change of government to a (Labour) administration with an ambitious agenda of national renewal led to a more optimistic cultural ambience. Whatever the reason, literary fiction of the second half of the Century settled back into a primarily realist and representational mode, albeit with further diversification of genres – notably a burgeoning of specifically crime and detective fiction - and some significant points of innovation, again coming from new voices in some sense from the margins in either racial, colonial, sexuality or gender terms – postcolonial and feminist novels being key examples.¹⁰ New forms of subjectivity were explored and, to some extent, normalised – particularly in terms of sexuality and gender identity (in for example Jeanette Winterson’s *Oranges are Not the Only Fruit* (1985) or Jackie Kay’s *Trumpet* (1998). But the conscious, capable and responsible subject more or less returns to centre stage, her character development and her ability to learn from cumulative experiences once again the primary focus of literary fiction. Over much of its terrain, literary fiction contracts, concentrating itself upon emotional and domestic dramas. Significantly from our point of view, however, in the latter part of the Century, we can identify some key literary figures who seem to represent an interesting amalgam of environmentally produced deviance with older tropes of bad character or even evil – a trend nicely evoked by Fay Weldon’s *Life and Loves of a She-Devil* (1983), considered in more detail below; and the more ambitious work of Angela Carter, which, in a manner reminiscent of Woolf’s *Orlando* (1924), reaches for the tools of fantasy to express a vision of fluid,

¹⁰ Key examples include Doris Lessing’s *Children of Violence* series (1952-69); Jackie Kay’s *Trumpet* (1998); Zadie Smith’s *White Teeth* (2000); Andrea Levy’s *Small Island* (2004); and Angela Carter’s *Wise Children* (1991).

elusive identity, and to conjure a world in which gender, identity and even time are radically in question.¹¹

Developments in criminal law and criminal justice to some extent diverge in the post-Second World War era. Until the last two decades of the Century, the criminal law continued on its path towards a systematic ‘general part’ consisting of principles applying across the offences – as epitomised by Glanville Williams’ key 1953 text, *Criminal Law: The General Part* (Williams 1953, 1961). The field also saw some significant efforts at substantive systematisation, for example in the Theft Act 1968 and the construction of a category of sexual offences in the Sexual Offences Act 1956. Hence the myth of the gender-neutral legal subject persisted – disrupted only occasionally, as in cases such as *Thornton* and *Ahluwalia*¹² in the field of women’s self-defence, which put the reality of gendered power relations at the heart of doctrinal argument. But the 1960s and 1970s saw, in criminal justice, developments which reflect in quite a fascinating way, several decades later, a close analogue to the novel’s epistemological crisis of the modernist period. As the treatment/cure-oriented versions of penal welfarism, organised around the so-called ‘rehabilitative ideal’, gathered pace, tensions between the legal conception of a capable, choosing subject who could justly be held responsible, and a more deterministic vision of subjects and their conduct as shaped by social environment or mental pathology, came to a head. On the one hand, the more committed advocates of the rehabilitative and treatment ethic – Baroness Barbara Wootton key among them (Wootton 1959, 1963) – followed through on the logic of a determinist ontology by

¹¹ See for example *Nights at the Circus* (1984) and the more dystopian *The Passion of New Eve* (1977).

¹² *R v Thornton* [1996] 1 WLR 1174; *R v Ahluwalia* 1993) 96 Cr App R 133.

arguing for an abandonment of the *mens rea* principle in criminal law, in effect implying the disappearance of the responsible subject and a shift in the trial process from judgment to diagnosis within an entirely forward-looking and scientifically driven model. Liberal proponents of the responsibility principle, notably H.L.A. Hart (Hart 1968),¹³ defended a middle path, asserting the moral centrality of a requirement of proof of *mens rea* in most cases, while allowing the defences to recognise and accommodate situations in which the pressures or influences of environment, circumstance or illness were so great as to undermine even the relatively undemanding conditions of agency set by the criminal law.

But a more radical riposte to the Wootton position was also forming itself, and its realisation in some ways echoes what Eagleton sees as the novel's retreat into older ways of representing the world (Eagleton 2005: 331-8). Driven by anxiety about the excesses of state power implied by the myth of 'treatment', the implicit appeal to a vague norm of social health, and the consequent establishment of wide and hard to challenge official discretion on the part of parole boards, prison medics, social workers and others, a civil libertarian critique of the rehabilitative ideal gained ground, first in the United States and then in other countries, from the early 1970s on (American Friends' Service Committee 1971; von Hirsch 1976). But this civil libertarian reaction was not the only form which the rejection of the rehabilitative ideal took. Perhaps yet more significant was a strong reassertion of the moral centrality of a subject fully responsible for her wrongdoing, with criminal judgment reframed within a 'neoclassical' model of what Lindsay Farmer has called 'the punishable subject' (Farmer 2016): a neo-retributive vision in which criminal responsibility is a projection of the moral

¹³ See in particular Chapter 7, 'Punishment and the Elimination of Responsibility'.

conditions of justified punishment, themselves premised on individual moral desert.¹⁴ This ‘remoralisation’ of criminalisation and punishment has been widely reflected in western legal systems, including those of Britain, where punishment commensurate with desert – albeit accompanied by forward-looking concerns such as deterrence and incapacitation – has reasserted itself as the central principle of criminalisation, with legal doctrines of *mens rea* holding firmly to intentionality, knowledge and foresight as the paradigm conditions of responsibility, albeit articulated more closely with an evaluative judgment of the overall wrongfulness of the conduct in question.

This has not meant, however, that the appeal to science has been altogether abandoned. In cases of mental incapacity, of course, expert testimony has continued to underpin modifications of the responsibility principle, mainly via the defences. And in a significant development, we have seen the emergence of forms of preventive, pre-inchoate criminalisation in areas such as terrorism and public disorder. These, I have argued (Lacey 2016: 147-73), constitute a new form of character responsibility, albeit one premised not primarily on bad character understood in terms of evil or wickedness but in terms of presentation of risk, with actuarial or clinical forms of risk assessment accordingly occupying an important place among contemporary legal form of responsibility attribution. Perceived dangerousness as measured by clinical or actuarial data or – worse – popular sentiment and fear, has become, particularly in certain areas of criminal law, the new form of bad character (Lacey 2016: 147-73). And, as in the case of women’s self-defence, as well as in the 18th Century, the conceptions of what count as good and bad character are strongly shaped by

¹⁴ For an extreme expression of a modern retributivist position, see Moore (1998); for more moderate versions, see von Hirsch (1993); Duff (2001).

social norms relative to gender, as to race and class. Significantly for our purposes, the forms of risk and danger which underpin the new hybrid patterns of responsibility-attribution tend not to be associated strongly with women.¹⁵ In life, the emblematic figures of late 20th Century female crime, Myra Hindley or Rosemary West, can hardly be compared with Moll Flanders, involved as they were in extreme violence, associated with a powerful male figure and involving sexual cruelty, rather than in profit oriented business with a generous helping of sexual activity on the side... They lend themselves to characterisation in the terms of evil or pathology, rather than remediable and putatively rational bad behaviour.

In criminology, too, we have seen some significant shifts in the ways in which criminality is imagined, represented and explained during this period. In some ways echoing literary modernism's focus on subjective experience – and perhaps enabled by the relative demoralisation of criminal law and factualisation of criminal responsibility – an important strand in the sociology of deviance from the 1960s on explored the lifeworld of the (invariably male) offender, in an almost existential celebration of the excitement of transgression (Smart 1976; Heidensohn 1985), and a decisive rejection of remaining traces of the early criminological view of crime as pathology. In labelling theory, too, we saw a shift to a focus on the mechanisms of power through which criminalisation is constructed, and a move away from the assumption of crime as a unitary or natural phenomenon. This move was also encouraged by the feminist criminologies emerging from the late 1960s on, which mounted a telling critique of the ways in which, particularly in relation to women,

¹⁵ Exceptions may of course pertain among certain groups whose intersectional characteristics are perceived to present risks: further empirical work is required on this important point.

older, essentialist criminological assumptions continued to exert considerable power, particularly in those areas in which criminal law's gaze was trained specifically upon women – areas which make up a small part of officially recorded crime, but exert an enormous disciplinary force (Smart 1976; Naffine 1987; Jackson 2001; Harding 2011; Phoenix 2017). More generally, feminist scholars pointed out that women simply continued to be ignored in most of the more thoroughly sociological genres of criminological scholarship, despite their use of methods and focus on forms of behaviour which should have made gender norms a central category of inquiry and analysis. This move in criminology towards the sociological analysis of the mechanisms of power, the cultural forces, the institutional structures and the socio-economic conditions which shape different forms of crime has led to a diversification of the field into a wide array of sub-genres (see for example Liebling et al 2017). It has also implied a greater and greater division between legal and criminological analysis, with criminal law and criminal justice increasingly ideologically shaped by a moral ontology which is open to social science or other scrutiny in only strictly circumscribed ways. But it is important to note that, on each of the most plausible general criminological theories – those rooted in opportunity, those focused on the power of crime-inhibiting mechanisms of control, and those concerned with labelling - one might have expected to see, particularly in the second half of the 20th Century, significant changes in both women's offending and practices of naming/identifying it.

To sum up: In accordance with both cultural and economic changes – notably increasing levels of education, the expansion of the academy, the development of technologies which make it easier to disseminate both academic and literary texts, as well as to produce new forms of fictional representation – both literary fiction and criminal justice diversified in the second half of the 20th Century. This makes generalisation, the identification of patterns and

the building of even speculative explanatory theses ever more perilous. And yet, as I hope to have shown, we can nonetheless identify some broad trends and analogies, as modernism is followed by a partial revival of realism, and penal welfarism is partially supplanted by a revived neoclassical retributivism and a new form of focus on character. With these patterns in mind, let us now turn back to our principal topic – that of the light which a juxtaposition of legal and literary sources can shed on the understanding of women’s criminalisation.

Gender, power and agency in Twentieth Century literature: sexuality and deception; eccentrics, madwomen and murderesses...

How, then, are women’s agency, responsibility and terrain for action represented in 20th Century literary fiction of a broadly realist temper? If we leave aside the criminal classification statutes, with their pathologised image of fallen women and inebriates (Zedner 1991), the headline story of female crime at the beginning of the Century was, of course, that of the suffragettes: a powerful image of women’s agency and one which must have been reinforced for contemporaries by the hunger strikes in which many imprisoned suffragettes engaged. And indeed in the literary sphere, the Century starts promisingly enough in terms of literary depictions of female agency and counter-cultural capacity. A key example is Henry James’ *The Wings of the Dove* (1902). In this devastating book, the beautiful, damaged, ambitious and certainly very will-ful Kate Croy, rejecting the advantageous marriage prospects which her wealthy and controlling aunt has planned for her, becomes secretly engaged to the besotted, impecunious and far less psychologically powerful Morton Densher, whom she then manipulates into deceiving terminally ill heiress Millie Theale that he is in love with her. Millie, a quietly powerful figure in her own right, discovers the truth,

but nonetheless – we are led to believe – in an extraordinary act of love – or is it of revenge, or simply resignation? - leaves her fortune to him. Kate and Morton now have the means to marry. But though Kate has won her dangerous game, their relationship is polluted, and James gives us a vivid sense of the very self – that of Morton – dissolving, and then resisting, under the pressure of the moral dilemma which the destruction of their moral integrity entails. As for Kate, she hovers in James’ portrayal, a troubling metaphor for *fin de siècle* perplexity about women’s social position: highly capable and agentic, but damaged by a toxic mix of indulgence and neglect. A dutiful daughter of a manipulative and degenerate father, a hint of the genetic inheritance so central to the criminology of the time is eclipsed in James’ portrayal by the shaping force of the gender and class norms, and the norms of filial obligation, which encase and constrain her. Kate is a luminously capable and agentic figure, but one with no real scope to exercise her considerable talents in a productive way. With a foot in both modernist and realist camps, this novel gives a vivid sense of female capacity and wilful agency, and of the exquisitely controlled terrain, shaped by legal norms and social conventions, over which women might exercise it at the start of the Century.

Kate’s deceptiveness echoes back to Victorian associations between feminine deviance and dishonesty – an association which persists in both literary fiction and criminology (Lacey 2013). But her cruel and counterproductive conduct reaches beyond mere dishonesty, and if literary heroines had continued to develop in the mould of Kate Croy, one feels that the true descendants of Moll Flanders – though considerably more complex psychologically - would have been walking the pages of English novels far earlier and more frequently in the 20th Century than they in fact did. Instead, Millie Theale is perhaps a better bellwether for the literary fate of women: capable, yet often portrayed as complicit in their own victimisation. But Kate does prefigure what turns out to be a pervasive feature of 20th Century female

literary deviance: her criminal or counter-cultural behaviour is not merely motivated by her desire for the financial independence which underpins agency, but also framed by love or sexual desire, and hence re-domesticated within the usual gender hierarchy. Think, for example, of Lawrence's *Lady Chatterley* (1928), who flouts strong social conventions of both class and gender to pursue her feelings for gamekeeper Mellors.¹⁶ Or of Fay Weldon's Ruth of *The Life and Loves of a She-Devil* (1983), who indulges in a range of criminal conduct, much of it involving deception, as well as acts of positively Gothic self harm, to revenge herself on her unfaithful husband and his lover – using the norms of exaggerated femininity moreover to do so. By the early 21st Century, this love motive can at least take lesbian form, as it does in Sarah Waters' *The Paying Guests* (2014), in which the hitherto appallingly dutiful Frances Wray sleepwalks millimetre by millimetre (with one enormous leap in between) into colluding in the concealment of a homicide committed by her lover. But the literary trope of female moral choice and action shaped – even distorted - by sexual passion remains remarkably constant. In fact the painful depiction of constrained yet potentially destabilising female sexuality is remarkably consistent with that explored in Radclyffe Hall's Stephen Gordon of *The Well of Loneliness* (1928) – a book with strong intertextual resonance

¹⁶ Likewise the violent attempt and intention, respectively, of Hermione and Gudrun in D. H. Lawrence's *Women in Love* (1920) are motivated by their intense feelings for men, even though each of them is represented as having a certain independence, the first because of inherited wealth, the latter because she has a profession as a teacher and considerable skill and reputation as a sculptress. Indeed Gudrun, by throwing up her independence to follow Gerald, albeit temporarily, comes – knowingly – close to becoming a 'murderer': see note 25 below.

with Waters' novel in a number of ways, not least in its setting in the early 20th Century and portrayal of a minor character with a close resemblance to Stephen Gordon.¹⁷

Legal and literary tendencies to frame female crime in terms of sexuality and deception are tellingly brought together in F Tennyson Jesse's *A Pin to See the Peepshow* (1934), in which Julia Almond¹⁸ has her motivations interpreted by lawyers, judge and jury through the lens of gendered stereotypes about the deceptiveness of a woman determined to escape her husband and protect her lover. Perhaps yet more significant, however, is how little this narrative structure changes over the next 80 years. The deceptive and sexually framed female crime of Yvonne Carmichael in Louise Doughty's *Apple Tree Yard* (2013) bears a striking, and dispiriting, resemblance to that of Julia Almond: a woman of good standing whose character and credibility are destroyed by the discovery of her deception. One change is, however,

¹⁷ Indeed the orientation of strong female characters towards men is reflected in literature well beyond the terrain of crime or even markedly counter-cultural behaviour. For example, Harriet, the central figure in Olivia Manning's *Balkan Trilogy* (1956 – 1964) and *Levant Trilogy* (1977 – 1980) – a strong figure and an educated woman - loyally follows in the path of her feckless husband Guy, even in the face of his callous self-centredness, and notwithstanding feeling that '[A]mid the bovine atmosphere of collegiate maleness she was just a skirt with a library book' (1956-64/2012: loc. 1360). Cf. Hervey Russell, a strong character at the centre of Storm Jameson's *None Turn Back* (1936): 'She had no ambitions of her own; if she shone, it must be in order to see some man roused and admiring. She felt convinced that she could help an ambitious man to be successful.' (1936/2011, loc. 2580).

¹⁸ Almond is based on the real (and convicted) murder defendant Edith Thompson: see Afterword by Elaine Morgan in Tennyson Jesse (1934/1979: 405-8).

clear: unlike Almond, the very sexualisation of Carmichael's alleged crime, while further damaging her credibility, underpins her fundamental lack of perceived dangerousness.

Carmichael's conviction is for perjury rather than murder; but the criminal law's disciplinary force pales beside that of prevailing social norms.

This is most assuredly not to deny that there are developments in the English novel of key significance for understanding how agency, its gendering and the opportunities for exercising it are developing. Particularly in the early part of the Century, with the flourishing of literary modernism, the focus on the interior world of subjects, perhaps most especially female subjects, is striking. Indeed, in an exaggerated reflection of what was happening in terms of the psychologisation of ideas of criminal responsibility (and of criminal incapacity), interiority – echoing the deepening of psychological understandings of criminal responsibility – often virtually replaces or displaces plot. This is particularly striking in James Joyce's *Ulysses* (1922), notably in Molly Bloom's famous soliloquy. And quite apart from exemplifying the novelistic turn to the psychic interior, the soliloquy is a fascinating commentary on gender difference. On the one hand, Molly's sense of self is saturated with the body and with sex, in a way reminiscent of the features of *Lady Chatterley's Lover* (1920) which make it uncomfortable reading for today's feminist. On the other hand, Molly is an astute commentator on men's combined arrogance, brutishness and fragility, repeatedly commenting on their need to appear to control things (and indeed implying their ineffectiveness in doing so...). In a lovely moment of irony, she describes a lover as an

‘ignoramus that doesn’t know poetry from a cabbage’ (Joyce 1922/2016: loc 13838)¹⁹ and conjectures that the world would go better if run by women.

Interiority, alongside a heightened sense of the self and its complex relation to the social, is also central of course to the tone and focus of Virginia Woolf’s literary fiction in novels such as *Mrs Dalloway* (1925) and *Orlando* (1928). Indeed *Orlando* explicitly ponders not only the social construction of gender (‘She was becoming a little more modest, as women are, of their brains, and a little more vain, as women are, of her person’ (Woolf 1928/Kindle: loc. 1770) but also the multiplicity of the self. In proto-postmodern style, Woolf brings the self into being as a question or a project rather than a represented discovery. *Orlando*’s (1928) combined perception of the upsides of feminine identification/sociality and critique of the constraints on women is strikingly fresh almost a century after its publication. Though often thought of as an extended love letter, *Orlando* is also a seriously political novel: its portrayal of the social habitus and power structure of gender self-discipline is decades before its time - indeed positively Foucauldian. And it marks the emergence of radical idea of gender as a spectrum, as fluid – an idea which is arguably only coming to practical fruition in the western world in the early 21st Century. Indeed it is hard to come up with many 20th Century novels with such a straightforwardly agentic and central (partially) female character.

This leads to a further theme which emerges from the novels: that many of the instances of counter-cultural feminine agency in 20th Century literature are women who have in some

¹⁹ This quotation is taken from the eighth sentence of Molly Bloom’s soliloquy at the end of *Ulysses*.

sense cast off or distanced themselves from a conventional femininity or even femaleness, while at the same time using all the psychological mechanisms through which women are typically able to exercise power. A fascinating example is Elizabeth Bowen's Mme Fisher of *The House in Paris* (1926) – one of the most cruel and manipulative female figures in 20th Century literature, and one whose relationship to femininity is at once emphasised and distanced. She exercises a key part of her power to manipulate and indeed destroy others psychologically through her role as a mother and through her preternaturally acute sense of other's psychic vulnerabilities; but her invalid status, age and widowhood render her relation to norms of sexualised femininity oblique. Weldon's 'she-devil' Ruth²⁰ – perhaps an ironic play on Defoe's 'she-merchant', *Roxana* (1724) – engages in criminal conduct of which she is unashamed; and she draws on both her intelligence and hyper-conventional femininity to plan and execute it. Ironically, however, she draws on a number of stereotypically female capacities – domestic and child-rearing skills for example – to effect part of her revenge, and ultimately rebuilds herself a sexually attractive woman, through an exaggerated form of cosmetic surgery which shifts the novel from realism into fantasy, in the ultimate stages of her plot.²¹ So Ruth is only a very approximate descendant of Moll Flanders. It is moreover

²⁰ See for example Weldon 1983: 48-9: indeed Ruth experiences her husband's labelling of her as a 'she-devil' as a liberation: "if you are a she devil the mind clears at once. The spirits rise. There is no shame, no guilt, no dreary striving to be good. There is only, in the end, what you want. And I can take what I want. I am a she devil!"

²¹ Weldon's sequel, *Death of a She-Devil* (2017) sees Ruth further punished by her own self-assertion, as the physical effects of her cosmetic surgery, her unreliable powers of judgement, and the perfidy of her associates sees the sisterhood which she has established implode in what can only be described as Gothic style. The novel is hard to interpret, but at best

worth noting that among her stereotypically feminine tools we must include a highly developed capacity for deception – something which also occupies, not surprisingly, a key place in instances of women’s crime in crime fiction, a key example being Agatha Christie’s *Witness for the Prosecution* (1925).

Beyond deception, the pervasive sexual context of female literary deviance, and its distinctively gendered modality, two further themes emerge strongly from 20th Century literary representations of female deviance. One is a preoccupation with mental instability and mental illness, and with the fragility of the line between mental health and mental illness, as well as a determination to explore the multiplicity and instability of the self in ways prefigured by 19th Century sensation fiction but in an entirely fresh and far more subjective psychological form. The critique of a binary split between sanity and insanity with which many novels engage – Virginia Woolf’s *Mrs Dalloway* (1924); Antonia White’s *Frost in May* (1933) and *Beyond the Glass* (1954), or Doris Lessing’s *The Four-Gated City* (1969) and *The Golden Notebook* (1969) – is of particular interest from this point of view. Again, this is a luxury which the law, engaged as it is in a project of classification and judgment, cannot indulge: and yet it struggles with the very same dilemma in court rooms, legislatures and jury rooms. The gendered nature of its judgments is evident – as in the well known pattern of constructing women’s self defence in terms of mental incapacity defences (Nicolson and Sanghvi 1993).

pessimistic about, and at worst contemptuous of, the feminism which might have been seen to inform the original book.

A second theme, abutting that of madness or instability, is that of eccentricity. Many novels portray even vivid and powerful female protagonists as in some sense pathetic, eccentric or marginalised: think, for example, of Muriel Spark's painfully brave yet out of touch Jean Brodie of *The Prime of Miss Jean Brodie* (1961). There is an interesting contrast here with Graham Greene's and Angela Carter's deliciously unapologetic (and occasionally criminal) eccentrics, Augusta Bertram and Nora and Dora Chance of, respectively, *Travels with my Aunt* (1969) and *Wise Children* (1991) – raising an interesting question as to whether the space to adopt an eccentric persona is one, small piece of social space gained by late 20th Century women, in an intriguing (dis)analogy with Moll Flanders' more straightforwardly deviant persona. Note, however, that these happy, agentic female eccentrics walk the pages of books which in significant respects exceed the bounds of realism. Virginia Woolf's *Orlando* is once again the paradigm here: surely the most transgressive novel of the early 20th Century in gender terms, and one which also presages a tendency to displace representations of female crime and deviance onto earlier historical periods.²² For example, Woolf anticipates Carter's (or Weldon's) displacement of female agency into imagined worlds, with Evelyn/Eve's (*The Passion of New Eve* 1977) punitive feminisation and feminised victimisation representing a more violent version of *Orlando*'s discovery of increasingly constraining gender norms amid her sexual transposition across the centuries. At the end of the Century, Sarah Waters' imaginative reworking of the Victorian gothic around lesbian sexuality (*Fingersmith* 2002; *Affinity* 1999) features a range of criminal and deviant women, of whom Grace Sucksby of *Fingersmith* – an intelligent rogue who is ultimately not without

²² Again, this is a tendency which also marks 19th Century novels, whose representations of female deviance are often set at safe historical or geographical distance: see Lacey 2008: 223-4.

heart - is probably the closest analogue of *Moll Flanders* which I have encountered in my reading so far.²³

Novelists tackling similar issues from a more conventionally realist method tend to portray a world in which, notwithstanding the possibilities of crossing or mixing of gender identities, the norms remain as fixed – and as potentially brutal to those who transcend them – as ever. Here Jackie Kay's *Trumpet* (1998), based on the true story of a jazz musician who lived as a man, and whose 'exposure' as a woman after his death causes psychic shock and public scandal, is a paradigm – as are Jeanette Winterson's *Oranges Are Not the Only Fruit* (1985) and Sebastian Barry's *Days without End* (2016). In these books, questions are raised about why, respectively, gender and sexuality, are treated as so central to human identity and relationships. It is a theme on which literature has moved light years ahead of law. In an exemplary recent case, a woman who had deceived another young woman into believing that she was a man, and then engaged in penetrative sex with her using a prosthesis, was convicted of sexual assault by penetration – an offence equivalent in seriousness to rape, and earning her a six and a half year custodial sentence. It was simply assumed that the deception as to sex/gender – unlike deceptions as to age, marital or health status, or an intention to pay, in a sex work context – was a fundamental issue going to consent.²⁴

²³ Perhaps it would be more accurate to say that the Sue Trinder /Grace Sucksby pairing equates to that of Moll and her older 'governess': see Lacey 2008: 224 n. 62.

²⁴ <https://www.theguardian.com/uk-news/2017/jun/29/gayle-newland-found-guilty-at-retrial-of-tricking-female-friend-into-sex> ; <https://www.theguardian.com/uk-news/2017/jul/20/gayle-newland-jailed-for-tricking-female-friend-into-sex> (accessed September 18 2017).

In short, as far as I have been able to discern, crime is exceptionally rare for female heroines beyond the specific genre of crime fiction, and even here, deception, particularly in a sexual context, predominates as the quintessential modality of the female offender. Beyond crime fiction, or literary fiction deploying historical displacement or elements of magical realism, though deviant behaviour and its temptations remain a theme of the novel, these are played out over a small canvass in terms of conduct - while a huge one in terms of emotions. And this leads to a final, very dark theme, exemplified by Nicola Six, anti-heroine of Martin Amis's *London Fields* (1987): a hyper-sexualised, thoroughly agentic but very damaged woman who uses her considerable rational and sexual powers to manipulate two men in such a way as to produce her own murder. Almost like Millie Theale, Nicola's role in the novel is that of 'murderess', as Amis puts it.²⁵ The message is clear: a wilfully deviant woman can

²⁵ Amis is here echoing Birkin of Lawrence's *Women in Love* (1920), who is in turn echoed by Dinah, the unconventional younger sister in Rosamond Lehman's *The Echoing Grove* (1953), in which she identifies herself as having neared this role at various points in her life: 'Some women do get drawn into the aura [of other couples' 'nerve storms'], though. They get to be murderesses. You can smell it in them. I know what you mean. I was pretty rank myself once.' (Lehman 1953/Kindle: loc 5600 p 294); see Eagleton 2005: 263). Female murderesses are distressingly common in 20th Century literary fiction. Also notable in this context is the co-optation of Mme Fisher's almost impossibly dutiful and thoroughly damaged daughter, Naomi, in the exercise of her power, notwithstanding Naomi's recognition of 'evil' in the house: indeed both Naomi and Karen come close to being, like Max - and at least at a spiritual level - murderesses, effaced by Mme Fisher's malign will (Bowen, *The House in*

expect to be murdered. Nicola Six is a murderess who combines Millie Theale's fatalism with Kate Croy's wilful and cold resourcefulness. Bisecting the period which separates Millie from Nicola, Daphne du Maurier's immortal *Rebecca* (1938) provides another telling metaphor of 20th Century literary fiction's preoccupation with the female murderess. Indeed Rebecca's ultimate triumph over both her husband and her successor as Mrs de Winter might stand as the epitome of 20th Century female literary agency: her power is psychological, exercised through her hold over the minds of others; and her ultimate use of that power - resistant to the patriarchal structure within which her marriage has confined her though it may be - consists in an act of indirect self-destruction.²⁶ If this is progress in terms of the power of female agency, it is the very reverse in terms of the terrain over which, and the means by which, that agency is represented as being played out.

Paris 1926). My thanks to Quentin Skinner for suggesting that Millie could be seen as a murderess.

Beyond the specific purview of this paper, but a feature of *London Fields* which cannot escape comment in any feminist text, is Amis's equation, in Keith's persona, of femaleness with rapability: see for example Amis (1987:168). It is an association which is also visited, in a more thoughtful and critical way, in Angela Carter's *The Passion of New Eve*, in the persona of Eve, who as a former man reconstructed as a woman, experiences a rape from, as it were, both gender subject positions: her rapist 'forced me to know myself as a former violator at the moment of my own violation. When he entered me, the act seemed to be one of seppuku, a ritual disembowelment I committed upon myself...' (Carter 1977: 98)

²⁶ This is of course to say nothing of the other strongly counter-normative female figure in *Rebecca*: the powerful and sinister Mrs Danvers, who offers a paradigm of deceptive female literary deviance, and one in which there is more than a hint of (vicarious) erotic pleasure.

In conclusion

The main message from the realist literary tradition through the 20th and into the early 21st Century from my reading is therefore that – in keeping with the still modest place of women in the criminal courts and prisons of England and Wales – their literary representations and preoccupations remain remarkably confined. Countercultural 20th Century literary women exert a power which emerges from the personal, emotional, interior; which is motivated by relationships, romance and sexual jealousy; which is effected by deception; which often features mental breakdown; which is invariably shaped by pressures within a family, sexual and patriarchal context; and which may be rendered less threatening by being displaced in time. I would love to be directed to any good examples – particularly counter-examples to this interpretation. But as things stand, my conclusion is that parallels between literary and legal representations of women are every bit as strong as they were in the 18th and 19th Centuries, suggesting that changes in women’s legal and political status and economic opportunities have not been accompanied by nearly such a vivid change in underlying constructions of gender difference. For worse, or perhaps better, the harder edges of formal state control represented by the official crime and imprisonment figures pale into insignificance alongside the informal discipline exerted by conventional gender norms and the power structures which sustain them – norms which are vividly represented in the novel. Sexualisation in particular remains a key means of denigration and control: indeed, ironically – and as perhaps reflected in social media assaults on women – it may have strengthened in the wake of the greater sexual freedom ostensibly accorded to women in recent decades. As women’s undoubted progress in the worlds of work, politics and education continues, this under-representation may seem unimportant, indeed something to be celebrated. It would, after all, be absurd to regard a rise in women’s representation among offenders as a salutary

marker of gender equality. But we should remember that these same differences – related as they are to surrounding structures of power – may also be the very things which keep women radically under-represented in the very top echelons of business, political, legal and media worlds, and often – Hillary Clinton offers a vivid recent example – vilified and disrespected when they enter these realms. Yet more important, they continue to expose women to disproportionate levels of poverty and sexual exploitation and make them vulnerable to violence.

This finding of a relatively modest imaginative terrain over which counter-normative female behaviour is played out in the pages of realist literary fiction echoes, of course, the relatively modest changes in the gender ratio of criminalisation and imprisonment during the course of the Century. It echoes, moreover, the continuing marginalisation of women in criminology. A vigorous incursion of feminist analysis and argument into the field from the late 1960s to the end of the Century exposed the gendered assumptions which underpinned not only the intellectually discredited essentialism of early positivist criminology, but also the troubling paternalism and sheer sexism of the differential treatment of female delinquents; the rank misogyny of the law, and/or the implementation of the law, on abortion, divorce, rape, incest, infanticide, prostitution, domestic violence; and the frequent construction of women reacting to male violence in terms of mental incapacity defences rather than the more agentic framework of self defence. But, forty years after the publication of Smart's pioneering *Women, Crime and Criminology* (Smart 1976) – indeed half a century after Frances Heidensohn's key article (Heidensohn 1968) – the field has proved resistant to the kind of integrated gender analysis which Smart persuasively argued to be needed to produce a discipline capable of truly shedding light on not only women's but men's behaviour and official reactions to it. Criminology remains fascinated by why people commit crime rather

than why they comply with the law, and hence with men: and in criminological terms, while, ostensibly, women's opportunities have increased, their capacity to take them up remains differentially constrained by informal social controls – confirming Feeley and Aviram's speculation that the private patriarchy which shaped the decline of women in the criminal process in the late 18th and 19th Centuries has survived the 20th to a greater degree than one might have expected. Moreover these same gender norms doubtless have effects – exaggerated though the so-called 'leniency hypothesis' about reluctance to criminalise women may often have been – on gendering the social construction of crime by officials and members of the public.

In terms, finally, of my argument about the re-emergence of character responsibility in the late 20th Century – a development which we might expect to have some significance to gender patterns of criminalisation - some possible hypotheses about these connections present themselves. One of them is this: To the extent that the huge economic shocks of the 1970s and since, along with the social changes which they brought in their wake, have affected the status system which I argued in *Women Crime and Character* (2008) to have been a key part of what shaped legal and literary patterns of female deviance, that realignment has in some ways increased women's status relative to men's. (Think, for example, of the figures on higher education presented in Figure 5 above.) Arguably, phenomena such as the increasing harassment of women on social media is a backlash against this realignment of gender opportunities and status. In other words, women's material progress may have called forth an intensification of informal social control. In criminal justice, the new forms of character-assisted responsibility attribution are themselves targeted at forms of conduct which remain male-dominated (itself, of course, a matter to be explained). So one broad possibility would be that the (relative, and still far from complete) gains made by women are either reinforcing

incentives for women not to offend, and diminishing fears about women's crime; while doing exactly the reverse for men (particularly, of course, some groups of men). And in terms of labelling, the emerging hybrid pattern of bad character and risk – the new form of character responsibility - invokes an image of dangerousness from which women are relatively insulated by prevailing gender norms.

Whatever the truth of this preliminary interpretation, one point – at once methodological and substantive – emerges. The relative stability of the gender patterns of criminalisation over the course of the 20th Century suggest that material changes themselves are an incomplete explanation of the development of the social phenomena of criminalisation and punishment over time. What cultural forms such as literary fiction help us to appreciate is the key role played by gender norms, expectations and assumptions in shaping human judgment or behaviour: that of people defining rules and conventions; that of those breaching established rules and conventions; and that of those interpreting and responding to perceived breaches. As well as a case study in the potential for bringing law, criminal justice and literature, the social sciences and the humanities, into dialogue, then, I offer this paper as a case study in the pitfalls of the prevailing strong tendency in the social sciences to separate quantitative and qualitative approaches; and to separate questions of material power and interest from questions of culture. Bringing these different questions and methods together does not always produce the clear results beloved of an academy increasingly concerned with auditing and ranking. But it is the only way to begin to tackle the large and urgent explanatory questions which, surely, justify the academy's existence.

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References: