

**THE SOCIO-LEGAL RESPONSE(S) TO WOMEN WHO KILL: A PROPOSED
MODEL FOR ACKNOWLEDGING THEIR AGENCY**

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This thesis is submitted to fulfil the requirements of the degree of Doctor of
Philosophy

Declaration

I declare that this thesis is my own work, and has not been submitted in substantially the same form for the award of a higher degree elsewhere.

An earlier version of chapter five has been published as ““The Mad”, “The Bad”, “The Victim”: Gendered Constructions of Women Who Kill Within the Criminal Justice System” *Laws* 2013, 2, 337-361

Some elements of the discussion in chapter 7, section 7.3 on women as ideal victims has been published in *The Conversation* (2nd July 2014), available at <https://theconversation.com/you-shouldnt-have-to-be-perfect-to-qualify-as-a-rape-victim-26012>

Siobhan Francesca Weare

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Abstract

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This thesis will explore the socio-legal response(s) to women who kill. Interrogating the constructions of “woman” and “femininity” within criminal legal discourse it will argue that the agency (that is, the ability of an individual to choose to act in a particular way) of women who kill is denied, both passively and actively within criminal legal discourse. It will be argued that denying the agency of women who kill is problematic for numerous reasons, including but not limited to, the construction and reinforcement of gender discourse surrounding femininity and issues of justice both being done and being seen to be done for women who kill and for their victims. In order to address these issues, this thesis will therefore propose an agency-based model for women who kill, which will interrupt both the passive and active agency denials which currently exist for these women.

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Chapter One - Introduction

*Between 2001 and 2012, 738 women were indicted for homicide in England and Wales, 502 of those women were convicted.*¹

1.1 Women Who Kill: An Original Approach

The trial and conviction of Joanne Dennehy in 2014 ensured that the issue of women who kill again made headlines. During her trial and the consequent passing of a whole-life sentence, a significant amount of media commentary focused on addressing questions, such as: '[w]hat makes a female serial killer tick?'² as well as exploring historical cases involving women who kill.³ However, there are other, arguably more important questions that need to be, but have yet to be, asked that I will address within this thesis. This thesis will take an original approach to the topic of women who kill by asking new, pertinent questions of the socio-legal response to these women, in particular of the ways in which the agency of these women is denied within criminal legal discourse. At the outset it is important to note that the working definition of agency used in this thesis is: *the ability of an individual to*

¹ Office for National Statistics, "Focus on: Violent Crime and Sexual Offences, 2011/12 – Appendix Tables" available at <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-290621> Table 2.12

² The Week, "Joanne Dennehy: what makes a female serial killer tick?" available at <http://www.theweek.co.uk/crime/57263/joanne-dennehy-what-makes-female-serial-killer-tick>

³ The Daily Star, "Women who kill: A special look into Britain's worst female murderers" available at <http://www.dailystar.co.uk/news/latest-news/345764/Women-who-kill-A-special-look-into-Britain-s-worst-female-murderers>

choose to act in a particular way. This is only a working definition, with the issue of agency being explored in detail in chapters two and four. There are three substantive original contributions that this thesis makes to the existing body of research in this area.

Firstly, the analysis undertaken is specifically conducted in the context of criminal legal and societal discourse within the criminal law of England and Wales. I draw upon a range of case studies from within the English Legal System and conduct a detailed critical evaluation of the criminal law and legal provisions relevant to this jurisdiction. This can be contrasted with existing research in the field which uses case studies from several different jurisdictions as well as taking largely criminological and sociological approaches.⁴

Secondly, within the context of English criminal legal discourse I conduct an intricate analysis of the agency denials of women who kill. Although the agency denial of women who kill has been explored in the existing literature,⁵ I suggest for the first time that within criminal legal discourse women who kill have their agency denied *both passively and actively*.⁶ I explore the symbiotic relationship between labelling these women as either *mad, bad or victims* and what I term as an active denial of their agency, I also explore how these women have their agency passively

⁴ See for example: Morrissey, Belinda, *When Women Kill: Questions of Agency and Subjectivity* (London: Routledge, 2003); and Seal, Lizzie, *Women, Murder and Femininity: Gender Representations of Women Who Kill* (Basingstoke: Palgrave Macmillan, 2010)

⁵ See particularly; Morrissey, 2003

⁶ See below, section 1.3, pp. 7-8, for definitions of, and a detailed explanation on the use of these terms

denied due to their construction as legal objects, rather than subjects within criminal legal discourse.⁷

Finally, engaging in such a detailed analysis with the issue of the agency denials of these women allows me to propose an agency-based model for women who kill within criminal legal discourse. Having critically engaged with criminal legal theory and discourse, as well as relevant legal provisions, I propose a model that interrupts both the passive and active denials of agency⁸ for these women, something which has not yet been proposed in any significant detail within existing academic research.

1.2 Research Questions

Reflecting the original contributions I will make, this thesis is underscored by and will address three key, and interrelated, research questions. Firstly, what are the constructions of “woman” and “femininity” within criminal legal discourse?; secondly, is there a relationship between these constructions and the agency of women, with the consequence that women who kill currently have their agency denied within criminal legal discourse?; and finally, if so, how might their agency be recognised? In order to answer these research questions, this thesis will critically engage with, and take forward the existing research in the field of women who kill.

⁷ See below, section 1.3, pp. 7-8, for a more detailed explanation of this argument. See also chapter four, sections 4.4.1 and 4.4.2

⁸ See below, section 1.3, pp. 7-8, for definitions of, and a detailed explanation on the use of these terms

1.3 Terminological Definitions and Explanations

Having outlined the original approach being taken in this thesis and the research questions it sets out to answer, it is necessary to provide further definitional clarification for some of the terminology which has been mentioned and which will be used throughout the thesis. Initially it is worth noting that I will be using the terms “women who kill”, “female killers” and “homicidal women” throughout the thesis, all of which make specific reference to an individual’s sex. However, this thesis will be focused specifically on *gender* discourse, namely the concept of femininity. Thus the use of terms such as “women who kill” which refer to sex, rather than gender, are reflective of the fact that it is the woman as a physical embodiment or sexed being, who has done the act of killing. The importance and relevance of gender discourse becomes clear when exploring the socio-legal responses to these women and the ways in which they are judged according to their deviance from their *gender*, that is appropriate femininity, which is largely assumed within socio-legal discourse to correspond with an individual’s sex.⁹

The key concept that underlies the discussions and arguments being made in this thesis is that of agency. Therefore it is important at the outset that I provide a basic outline of what I mean by the term agency within the context of this thesis. Agency is an interdisciplinary, contextually varied term with numerous different definitions and attached meanings. However, the majority of definitions comprise the ability or capacity of an individual to act and their ability to make choices with regards to their behaviour. For example, Messerschmidt defines agency as referring

⁹ See chapter 3, sections 3.1, 3.2, 3.3

'[t]o the behaviours in which a person chooses to engage in order to shape his or her experiences within social structures in light of his or her understanding of the social structures that surround and constrain his or her options.'¹⁰ A detailed engagement with the concept of agency will take place throughout this thesis, particularly in chapters two, four and five, exploring in significant detail the issues surrounding the concept. Thus, at this introductory phase the working definition of agency that will be used throughout this thesis is: *the ability of an individual to choose to act in a particular way*. Throughout this thesis this definition of agency will be positioned and contextualised in relation to women, taking into account the patriarchal society and social structures that are relevant to agency exercise.

The fact that I am positioning my definition of agency within the context of patriarchy is an important methodological point in itself. Patriarchy is a system of social governance whereby men are dominant over women and men overwhelmingly dominate the mainstream institutions of power. Patriarchy is not simply the domination of men and oppression of women; a society that is patriarchal involves the participation of *both* men and women.¹¹ However, their participation in that society is marred by significant power differences that allow men to '[s]hape culture in ways that reflect and serve men's collective interests.'¹² Patriarchal societies are not only male dominated, they are also male identified, '[i]n that core cultural ideas about what is considered good, desirable, preferable, or normal are associated with

¹⁰ Messerschmidt (1993) in Greeson, Megan and Campbell, Rebecca, "Rape survivors' agency within the legal and medical systems" *Psychology of Women Quarterly*, 35, 4 (2011) 582, p.583

¹¹ Johnson, Allan G., *The Gender Knot: Unraveling Our Patriarchal Legacy* (Philadelphia: Temple University Press, revised and updated edition, 2005) p.5

¹² Johnson, 2005, p.6

... men and masculinity',¹³ as well as being male centred, with '[t]he focus of attention [being] primarily on men and what they do.'¹⁴ Finally, an essential element of patriarchy is control:

men are assumed (and expected) to be in control at all times, to be unemotional (except for anger and rage), to present themselves as invulnerable, autonomous, independent, strong, rational, logical, dispassionate, knowledgeable, always right, and in command of every situation, especially those involving women. These qualities, it is assumed, mark them as superior and justify their privilege. Women in contrast are assumed (and expected) to be just the opposite, especially in relation to men.¹⁵

These elements of patriarchy are reflected in the analysis which occurs throughout this thesis, and therefore the concept of patriarchy is an essential grounding for the arguments made within the thesis, particularly in relation to the criminal law's passive denial of women's agency.

However, I am aware that one criticism of my methodological approach may be that my discussions on norms and discourse in the context of agency acknowledgement are on discourse that takes place within a patriarchal society. Thus one criticism of my approach could be that I have not suggested a method by which patriarchy could be removed before moving on to deal with acknowledging women's agency. I have purposefully taken this approach as one of the aims of this thesis is

¹³ Johnson, 2005, p.6

¹⁴ Johnson, 2005, p.10

¹⁵ Johnson, 2005, p.14

not to eradicate patriarchy within society. This would be a utopian ideal that could not be achieved simply in the context of a thesis, not least because challenges to patriarchy have historically been silenced and maligned.¹⁶ Rather I am suggesting that by acknowledging women's agency within criminal legal discourse and within the patriarchal institution that is law, criminal legal discourse can take the lead and initiate positive changes within societal and gender (and thus patriarchal) discourse to ameliorate the position of women. Acknowledging women's agency within criminal legal discourse would be a first step in attempting to alter the power relationships and dynamics that exist in a patriarchal society to the detriment of women.

Having defined agency, it is also important to explain what the terms "active agency denial" and "passive agency denial", and their variations, mean in the context of this thesis. The term *passive* agency denial is used to describe the agency denial that occurs due to women's lack of status as legal subjects with agency. I have used the word *passive* to describe this because the masculine gendering of the legal subject within criminal legal discourse is a continuing pre-existing state of affairs. Indeed, the construction of women as legal objects who are acted upon, rather than as legal subjects within criminal legal discourse, is a pre-existing state of affairs, reflecting a *given* in patriarchal society. It simply is. No positive act was ever required to bring this state of affairs at law into existence into such a society.

In contrast, *active* agency denial refers to the agency denial that is symbiotic to labelling women who kill as either mad, bad or victims. More specifically the *active*

¹⁶ Johnson, 2005, p.17

agency denial is referring to the creation of a new identity for women who kill through labelling. So not only do the labels attached to women who kill reflect the deviance and gendered constructions of these women, but the labelling also creates a new all-consuming identity for them. As such this is, I would argue, a positive act of doing, and is reflected in the use of the term *active*. Differentiating between passive agency denial, which reflects the pre-existing position of women as legal objects, and active agency denial, in which labelling women who kill creates a new identity for them, allows a comprehensive engagement with how the agency of women who kill is ultimately denied within criminal legal discourse. In turn this allows a detailed engagement with the issue of how the agency of these women can successfully be acknowledged within criminal legal discourse

1.4 Rationale and Justification for Study

The existing research on women who kill clearly acknowledges the labelling of these women that occurs, as well as the subsequent denials of their agency. However, it does not provide a clear solution to the problem which I would suggest is rooted in altering criminal legal discourse and legal reform within England and Wales. Therefore, arguably a clear rationale for conducting the research undertaken in this thesis is to go some way towards providing a solution which acknowledges the agency of women who kill. Indeed, this is something that I attempt to do with a proposed agency-based model for women who kill which seeks to interrupt current agency denials, both passive and active.

Women who kill are given different judicial treatment in sentencing, depending on whether they are labelled as either mad, bad, or a victim and the subsequent way in which their agency is actively denied. For example, women who kill labelled as mad or as victims are often given lesser or more lenient sentences than those labelled as bad, who are often punished more harshly than arguably they should be. The approach by the judiciary to the sentencing of women who kill is a dichotomous one which pigeonholes women who kill into being labelled with seemingly little room for any middle ground. This is perhaps most evident in the case of Nicola Edgington,¹⁷ who had two homicide cases brought against her and was labelled as mad in the first case, and as bad in the second, with a clear divergence in punishments in the two cases. Edgington was pigeonholed into the labels she was given, when arguably her actions suggested an element of both “madness” and “badness” were present. I would therefore suggest that a further rationale for this study can be found in the need for a clear middle ground in cases of women who kill which is cognisant of the existing normative framework of labelling and that this could at least be partially addressed by an acknowledgment of the agency of these women within criminal legal discourse.

Another justification can be found in some of the continuing themes found in existing feminist literature. Indeed, much of the existing literature on women and violence focuses on women as victims, rather than as perpetrators of serious violence.¹⁸ Although this focus should undoubtedly be commended, not least for the

¹⁷ For a more detailed discussion on the case of Nicola Edgington see section 5.5, pp.217-220

¹⁸ See for example: Christie, Nils, “The Ideal Victim” in Fattah, Ezzat (Ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Basingstoke: MacMillan, 1986); and Meloy, Michelle, and

improvements that have been made in attempting to combat violence against women, it is submitted that by continually focusing on women as victims and consequently failing to acknowledge their propensity as perpetrators it has the potential to undermine the feminist quest for equality. Indeed, I would argue that in order to truly end the subordination of women and domination of men within societal discourse, it is necessary to acknowledge and explore not only the injustices faced by women within society, but also the pejorative actions of women which affect others.

A similar approach has been taken by Murphy and Whitty in their article “The Question of Evil and Feminist Legal Scholarship”,¹⁹ where they argue that feminist legal scholars should engage directly with the question of evil, partially in order to ‘[d]evelop the narrative of woman-as-victim.’²⁰ This thesis simultaneously develops upon, and can be distinguished from, the approach taken by Murphy and Whitty. Rather than focusing explicitly on the issue of evil in order to develop the narratives surrounding women who kill, a term which in and of itself could be construed as a label which denies agency, this thesis builds upon their acknowledgment of the need to explore agentic models of women who kill.²¹ Therefore, although exploring the issue of women who kill may seem at first glance to be counter-intuitive to the feminist campaign for equality by painting women in a pejorative light, in fact I would argue that engaging with this issue has the potential to have the opposite effect. For

Miller, Susan, *The Victimisation of Women: Law, Policies and Politics* (Oxford: Oxford University Press, 2011)

¹⁹ Murphy, Thérèse and Whitty, Noel, “The Question of Evil and Feminist Legal Scholarship” *Feminist Legal Studies*, 14, 2006, 1

²⁰ Murphy and Whitty, 2006, p.19

²¹ Murphy and Whitty, 2006, pp. 22-23

example, focusing on women who kill and interrogating the discourses surrounding this issue allows a renewed focus on the gender norms associated with appropriate femininity, which play such a significant role in the continued oppression of, and inequalities faced by women.

The final justification for conducting this study draws inspiration from a quote taken from the work of Susan Edwards:

Like it or not, law is the most powerful tool we have at our disposal and efforts to reveal its genderedness and also to challenge the significance which is given to law as ultimate truth and ultimate justice and attempts to transform it, are neither futile nor doomed. But the inexorable fact remains that *inter alia* law is holistically, root and branch, viscerally, temporally male. Do we have a choice not to challenge, engage and transform it, if we value our "existence"?²²

Conducting this study is an opportunity not only to engage with the gendered nature of law, but also to challenge it within the context of perhaps what can be perceived to be the most gendered deviant group of individuals: women who kill. Acknowledging the agency of this particularly deviant sector of women provides an opportunity to challenge the gender norms and discourse which are so pervasive within criminal legal discourse. By challenging these norms in this study and suggesting ways in which the agency of these women can be recognised within criminal legal discourse, there is also the opportunity to transform the way in which

²² Edwards, Susan, *Sex and Gender in the Legal Process* (London: Blackstone Press Limited, 1996) p.7

the criminal law responds, *not only to women who kill, but also to all perpetrating women who come into contact with the criminal justice system.*

1.5 Methodological and Theoretical Approaches

I have taken a qualitative research approach in this thesis. Having defined the parameters of my research questions and certified the key concepts that would underlie my thesis, a qualitative research methodology would most readily allow me to analyse the socio-legal discourse surrounding women who kill, and thus effectively answer my research questions. Indeed, in order to develop a theoretical framework which would allow me to answer the final question of how the agency of women who kill can be recognised, a qualitative approach was most appropriate. In taking this qualitative approach, I collected and analysed primary sources including a body of case law involving homicidal women and relevant statutes. I also utilised secondary sources, such as written commentaries on case law and legislation, journal articles and monographs. This qualitative methodological approach allowed me to critically engage with both primary and secondary sources to successfully question the constructions of “woman” and “femininity” within criminal legal and societal discourse, and the relationship between these constructions and the agency denials of women who kill. Conducting qualitative research allowed a gap within the existing literature to be recognised and allowed me to go some way in filling that gap in this study with the agency-based model for women who kill which is ultimately proposed.

A fundamental underpinning of this thesis is interrogating the constructions surrounding “woman” and “femininity” as found in gender discourse, and their relationship with, and influence on, law and legal discourse. Therefore I have taken an inter-disciplinary socio-legal approach. Indeed, the very nature of gender discourse is that it is a social construct, which is often (re)inforced within societal institutions such as law and the justice system. Moreover, looking specifically at the topic of women who kill, one of the key arguments advanced in this thesis is that these women may be viewed as ‘doubly deviant’²³ because they have not only offended against society, but also against their gender therefore demonstrating that in this context the law does not exist in its own existential vacuum. Rather it interacts with societal and gendered norms when responding to women who kill. Therefore taking a black-letter approach would not have been appropriate in the context of this study and a socio-legal one was required. This is further enhanced by an acknowledgment that some of the consequences that may arguably arise as a result of the agency recognition proposed in this thesis are not specifically related to law, but have wider societal and sociological remits and implications.

This thesis is theoretically informed by feminist legal theory. Utilising a feminist legal analysis is helpful in allowing an interrogation of the constructions of “woman” and “femininity” to be undertaken, as well as to explore the interrelationship between gender and criminal legal discourse. The terms “feminist theory” and “feminism” are umbrella terms which encompass a whole host of different meanings and concepts. At their most basic they refer to the undertaking of

²³ Lloyd, Ann, *Doubly Deviant, Doubly Damned: Society’s Treatment of Violent Women* (London: Penguin, 1995)

an analysis of the status and subordination of women within society with the aim of improving women's lives.²⁴ More specifically "feminist *legal theory*" "[p]roceeds from the assumption that gender is important in our everyday lives and recognises that being a man or a woman is a central feature of our lives ..."²⁵ Applying this within a legal context, feminist legal theory examines '[h]ow gender has mattered to the development of the law and how men and women are differently affected by the power in law',²⁶ in particular women's subordination by the law.²⁷ Feminist legal theory suggests '[t]here is something ... about the very structure or method of modern law which is hierarchically gendered.'²⁸

Lacey succinctly lays out three broad conceptions that underlie feminist legal theory. Firstly, 'feminists ... claim that sex/gender characterises the shape of law as one important social institution'²⁹ and therefore aim to provide a more sophisticated analysis and conception of law incorporating the influence of sex/gender.³⁰ Secondly, feminist legal theorists argue that the concepts of sex/gender are not only utilised as a form of differentiation, but also of '[d]iscrimination, domination or oppression.'³¹ Therefore, feminist legal theorists aim to (re)construct the law and legal principles to allow equality and justice between and for both sexes/genders.³² Thirdly and finally, '[f]eminist legal theorists are almost universally committed to a social constructionist

²⁴ About.com, "Feminist Theory: An Overview" available at

<http://sociology.about.com/od/Sociological-Theory/a/Feminist-Theory.htm>

²⁵ Chamallas, Martha, *Introduction to Feminist Legal Theory* (New York: Aspen Publishers, second ed, 2003) p.xix

²⁶ Chamallas, 2003, p.xix

²⁷ Chamallas, 2003, p.xx

²⁸ Lacey, Nicola, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998) p.2

²⁹ Lacey, 1998, p.3

³⁰ Lacey, 1998, p.3

³¹ Lacey, 1998, p.3

³² Lacey, 1998, p.3

stance: ... the idea that power and meaning of sex/gender is a product not of nature but of culture ... gender relations are open to revision through the modification of powerful social institutions such as law.³³ These conceptions are largely reflected in the analysis which takes place throughout this thesis and reflected in one of the major justifications for undertaking this study: that of law taking the lead with the modification of gender norms.

Within feminist legal theory, several schools of thought have emerged, the most important of which within the context of this thesis is that of gender difference. Within gender difference there are two distinguishing and dichotomous theories which exist. The first, liberal feminism, focuses on gender neutrality/equality before the law with '[d]octrinal arguments that women and men should be treated the same'³⁴ and that any so-called "special treatment" given to women only serves to (re)emphasise unequal and disadvantaged treatment for women.³⁵ In contrast, difference feminists argue that there is such a vast difference in the societal circumstances for men and women that differential treatment is required: '[m]ere formal equal treatment could not sufficiently address existing structural and ideological inequalities.'³⁶ This form of feminism seeks to highlight the gendered nature of institutions, including law, by questioning '[t]he legitimacy of existing gender norms and their implications for society's institutions and legal structures.'³⁷

³³ Lacey, 1998, p.3

³⁴ Fineman, Martha, "Feminist Legal Theory" *American University Journal of Gender, Social Policy and the Law*, 13(1), (2005), 13, p.16

³⁵ Fineman, 2005, p.16

³⁶ Fineman, 2005, p.17

³⁷ Fineman, 2005, p.17

Drawing upon both of these arms of feminist legal theory allows for a critical interrogation and multi-faceted approach to be taken when exploring the discourse surrounding women who kill. The outcome of this multi-faceted approach is perhaps most evident in chapter six, with the proposed agency-based model for women who kill. Within this model, elements of both the gender equality and difference schools of thought can be seen. The notion of gender equality is reflected in the (re)construction of the criminal legal subject as being gender neutral, thus allowing women to be recognised as legal subjects alongside men. However, elements of difference feminist discourse can be pinpointed in the notion that although women's agency must be recognised, it must also be acknowledged that the ability of women who kill to have made a choice to behave in a particular way (to have exercised their agency) may have been limited to varying degrees by existing social structures and their societal experiences, both of which differ from that experienced by men. As Fineman notes, typically there is a tension between the notions of gender difference and gender neutrality, however it is possible to argue for equality norms and gender neutrality whilst making some, albeit often minor, concessions for women's unequal material circumstances and life experiences.³⁸

Within the context of utilising a feminist legal methodology, of particular importance to this thesis were the methods developed within the *Feminist Judgments* project.³⁹ The project was '[i]nformed by feminist theoretical concerns

³⁸ Fineman, 2005, p.19

³⁹ Hunter, Rosemary; McGlynn, Clare; and Rackley, Erika, (Eds), *Feminist Judgments From Theory to Practice* (Oxford: Hart Publishing, 2010)

about the way in which law constructs gender'⁴⁰ and aimed to critically engage with, and thus disrupt, the process of gender construction within legal discourse, thereby allowing the introduction of '[d]ifferent accounts of gender that might be less limiting for women.'⁴¹ Indeed, many of the feminist judgments focused upon addressing the treatment of those women perceived as deviating from appropriate femininity, instead trying to '[i]nsert the perspective of the woman herself into the picture, to understand her position and the (often limited) choices she faced.'⁴² This methodological approach is one that fundamentally underpins my thesis, with a clear aim of this research being to interrogate the existing gender discourse and norms surrounding appropriate femininity, within the context of women who kill. A significant part of that interrogation involves critically analysing the deviance of women who kill from appropriate femininity and exploring the socio-legal responses to this deviance by exploring the active denials of agency of these women by labelling them as either mad, bad or victims.

Perhaps of most importance within the context of this thesis, is the way in which the *Feminist Judgments* project seeks to assert and acknowledge women's agency. Hunter et al. explicitly acknowledge the gendering of agency as masculine, dichotomised with the feminine gendering of vulnerability and victimhood, which has the consequence that '[w]omen often find that when they attempt to exercise

⁴⁰ Hunter et al., 2010, p.7

⁴¹ Hunter et al., 2010, p.7

⁴² Hunter et al., 2010, p.21

agency, such as in the context of refusing to consent to sexual activity or medical treatment, they are not taken seriously.⁴³ Thus several of the feminist judgments:

[a]ssert the possibility of occupying positions both of autonomy and vulnerability, agent and victim at once. The fact that one occupies a position of vulnerability need not deprive one of agency; and conversely, the fact that one acted in a way that appears autonomous does not mean that one's autonomy was not in fact circumscribed or impaired by experiences of vulnerability or victimhood.⁴⁴

Deconstructing this either/or dichotomous view of agency is reflective of the fundamental arguments and aims underpinning this thesis; that of acknowledging the agency of women who kill, whilst simultaneously recognising the lived experiences of these women that may impact upon the choices that they make. Drawing upon the methods utilised in the *Feminist Judgments* project will therefore support me in developing an agency based model for women who kill.

Feminist criminological theory also plays a significant role within this thesis. Feminist criminology developed from the 1960s onwards alongside second-wave feminism as a response to the marginalisation of women within criminology, and a significant disregarding of their lived experiences in relation to crime. Therefore a central theme of feminist criminology is critiquing extant criminology for oversights in relation to women. These critiques include: 'the failure to theorise or to engage in the empirical study of female offending; the neglect of female victimisation and,

⁴³ Hunter et al., p.22

⁴⁴ Hunter et al., p.22

particularly, male violence against women [and]; the over-concentration on the impact of the criminal justice system on male offenders.⁴⁵

Daly and Chesney-Lind have suggested that there are five key characteristics underpinning feminist criminology that differentiate it from male-dominated theories of crime. Firstly, gender is socially constructed and although related to biological sex, is not simply derived from it.⁴⁶ Secondly, social life is fundamentally ordered by gender discourse and relations.⁴⁷ Thirdly, the constructions of masculinity and femininity are not equal, rather masculinity is constructed as superior to, and dominant over, femininity.⁴⁸ Fourthly, 'systems of knowledge reflect men's views of the natural and social world; the production of knowledge is gendered.'⁴⁹ Finally, women should not be at the periphery of intellectual inquiry, but rather at the centre of it.⁵⁰ These characteristics which underlie feminist criminology can be found as both underpinning principles, and explicit arguments throughout this thesis. For example, an entire chapter⁵¹ is devoted to a discussion on the construction of gender and the norms associated with appropriate femininity.

Of particular importance within the context of this thesis is the criminalisation of women. Several authors within feminist criminology, including Smart and Edwards, have suggested that when women enter the criminal justice system as defendants they are judged as 'doubly deviant'. As Edwards explains; 'female

⁴⁵ Newburn, Tim, *Criminology* (Cullompton: Willan, 2007) p.305

⁴⁶ Daley, Kathleen and Chesney-Lind Meda, "Feminism and Criminology" *Justice Quarterly*, 5, 1988, 497, p.504

⁴⁷ Daley and Chesney-Lind, 1988, p.504

⁴⁸ Daley and Chesney-Lind, 1988, p.504

⁴⁹ Daley and Chesney-Lind, 1988, p.504

⁵⁰ Daley and Chesney-Lind, 1988, p.504

⁵¹ See chapter three

defendants are processed within the criminal justice system in accordance with the crimes which they committed and the extent to which the commission of the act and its nature deviate from appropriate female behaviour.⁵² Thus, in response to, and to ameliorate this perceived double deviance of these women the response to their criminal behaviour is often to (re)construct and thus relocate them within the norms of appropriate femininity.⁵³ This particular gendered approach to the criminalisation of women is one which is considered and critiqued throughout this thesis in the context of women who kill.

1.6 Methodological Concerns

It is worth noting that a particular “quirk” of the methodological approach taken in this thesis is that it is written in the first person. This was a conscious methodological decision and was made to reflect the concept of agency which is so integral to this thesis. By writing in the first person I am taking ownership of the choices that I have made and the arguments that I am making in this thesis, thus reflecting the concept of agency which I am arguing for an acknowledgment of, as well as the particular definition of agency which is used: that of the ability of an individual to make a choice.

It is also important to note that from a methodological perspective it is difficult not to compare the agency of women with men. Indeed, in order to fully

⁵² Edwards, Susan, *Women on Trial: A Study of the Female Suspect, Defendant and Offender in the Criminal Law and Criminal Justice System* (Manchester: Manchester University Press, 1984) p.213

⁵³ Newburn, 2007, p.313

explore and illustrate the imbalance and inequality that women face in the context of agency denials it is certainly tempting to compare their position to that experienced by men. However, I have made the conscious decision to try not to take such a comparative approach because by doing so I would implicitly be confirming women as “the Other”.⁵⁴ The position I will take throughout the thesis is that women should not be “Othered” but rather in contrast that they should be given full legal subjecthood.

Another potential methodological concern within this study is that despite being underpinned by feminist legal theory, this thesis may not be considered as “feminist” in the traditional sense of the term. Indeed, as noted above, typically feminist research critically interrogates and explores the status and subordination of women within society with the aim of improving women’s lives.⁵⁵ However, one potential implication which may arise as a result of the agency-based model being proposed in this study is that women who kill who are labelled as mad or as victims may receive harsher prison sentences than is currently the case. Arguably this does not have the effect of improving the lives of these particular women affected, and in fact may put them in a more pejorative position than the existing state of affairs in which their agency is denied. However, I would argue that although acknowledging the agency of women who kill may have a pejorative impact on some individual women, this is outweighed by the wider impact on ameliorating gender discourse for

⁵⁴ Beauvoir, Simone de, *The Second Sex* (translation by Borde, Constance and Malovany-Chevallier, Sheila) (London: Random House, 2010) p.6

⁵⁵ About.com

women, mentioned above and discussed in detail in chapter six.⁵⁶ Indeed, this potential amelioration of gender discourse arguably does largely reflect the aims of feminism: namely ending the subordination of women.

Although this thesis explicitly critiques the use of labels specifically attached to women who kill⁵⁷ as well as labelling theory⁵⁸ more widely, I am aware that within this study I myself am also guilty of invoking and attaching labels. For example, throughout the thesis I utilise the label of “woman”, thus reflecting the meanings typically associated with this label within societal discourse. However, doing so is necessary in order to allow me to critically engage with and interrogate this label. Indeed as Butler notes: ‘I am led to embrace the terms that injure me because they constitute me socially.’⁵⁹ Thus, in this thesis I have had to embrace the injurious term of “woman” when discussing women who kill, precisely because it is this term and its associated societal and gendered norms and connotations that are reflected within criminal legal discourse and contribute to the agency denials of women who kill. However embracing this term does not mean accepting it, a notion reflected in the interrogation of the construction of “woman” which occurs throughout this thesis and ultimately in the acknowledgment of women’s agency through the model proposed in chapter six. Indeed as Butler notes; ‘[o]nly by occupying — being occupied by — that injurious term can I resist and oppose it, recasting the power that constitutes me as the power I oppose.’⁶⁰ Thus it is only by utilising and thus

⁵⁶ See chapter six, section 6.1

⁵⁷ See chapter five

⁵⁸ See chapter two, section 2.3

⁵⁹ Butler, Judith, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997) p.104

⁶⁰ Butler, 1997, p.104

embracing the term woman, that I am able to interrogate and oppose its current construction.

I also consciously utilise the label “*battered women who kill*”. Although I am aware that this is a loaded term with both social and psychological connotations, I have used it because it is the term that is most frequently used within the existing academic literature that focuses on women who kill their abusive partners.⁶¹ Moreover, the discussion on the use of battered woman syndrome which takes place in chapter five⁶² is reflective of the use of this particular label.

It is also worth noting that in chapter six itself, where I propose the model which acknowledges the agency of women who kill, I have purposefully invoked the use of labels in the form of the following acronyms: when referring to women who kill labelled as bad I will use WKB, for women who kill labelled as mad I will use WKM and for women who labelled as victims I will use WKV. Again, I am aware that it may seem contradictory in making use of labels myself when acknowledging the agency of women who kill, especially when a significant aspect of my thesis criticises the current use of the labels mad, bad and victim. However, by doing so I do not mean to undermine the arguments I am making with regard to labelling, but rather I am doing so for ease of clarity and understanding for the arguments that I am making in chapter six.

⁶¹ See for example: Radford, Lorraine, “Pleading for Time—Justice for Battered Women Who Kill” in Birch, Helen, *Moving Targets—Women, Murder and Representation* (London: Virago Press Ltd, 1993); and, Noh, Marianne; Lee, Matthew, and Feltey, Kathryn, “Mad, bad or reasonable? Newspaper portrayals of the Battered Woman Who Kills” *Gender Issues* 27, (2010), 110

⁶² See in particular section 5.1

1.7 Thesis Outline and Structure

This introductory chapter has been termed as Chapter One, and is followed by five substantive chapters and a conclusion, which is termed as Chapter Seven for continuity. Chapter Two is titled “Terminology and Literature Review”. It will explore some of the key concepts and research terms that form the basis for the arguments being advanced in this thesis, such as agency, labelling theory, construction theory and Butler’s theory of performativity. I critically engage with the existing literature on these topics, highlighting their gendered dimension and thus allowing a contextualisation for the concepts that form the basis of the thesis. Chapter Three moves on to explore the concept of gender and within this the discourse surrounding appropriate femininity. This chapter expands on the gendered analysis from Chapter Two, exploring key ideas such as the construction of gender within law and the construction of woman and some key aspects of appropriate femininity, including motherhood, physical appearance, sexuality and emotions.

Chapter Four draws on the discussions in the previous two chapters. It engages in more detail with the concept of agency, specifically the relationship between agency and women and agency within the criminal law, exploring how the interrelation of these concepts leads to women’s agency being passively denied. In particular I argue that passive agency denial occurs because women are constructed as legal objects rather than legal subjects. I question whether the criminal law is a gendered construct through a critical engagement with the construction of the criminal legal subject and by exploring whether the defences to murder are

themselves gendered. More specifically, I argue that the criminal legal subject is the reasonable person, which although positing itself as a gender neutral construct is actually gendered masculine, thus excluding women from legal subjecthood. Agency is specifically considered to be the property of subjects, and therefore when women who kill come before the criminal law it is their status as *women*, lacking legal subjecthood, which passively denies their agency.

Having explored the passive agency denial of women who kill, in Chapter Five I argue that it is this passive agency denial which then allows the agency of women who kill to be actively denied when they are labelled as either mad, bad or victims by both society and the law. Therefore this chapter examines these labels attached to women who kill within socio-legal discourse and the relationship between these labels and the ways in which the agency of these women is actively denied. Each of these labels attached to women who kill actively denies their agency in subtly different ways, invoking imagery and discourses of madness, mythic monstrosity and victimisation. However each of these labels, when attached to women who kill as legal objects whose agency is denied, is all-consuming and is reflective of a new identity for the women they are attached to. I argue that regardless of the different ways in which this active agency denial occurs, the overall issue of agency denial, both passive and active, has a number of significant consequences for these women and for their victims, specifically around justice both being done and being seen to be done for women who kill and for their victims.

In Chapter Six, the final substantive chapter of this thesis, I suggest that alongside ameliorating the consequences of agency denial in Chapter Five, there are several reasons why the agency of women who kill should be recognised, including challenging gender norms and discourse and acknowledging the ability of women to perpetrate serious violent crimes. Having explored how the agency of women who kill is both passively and actively denied, I suggest the introduction of what I term to be an “agency-based model” for women who kill, which would allow the agency of these women to be acknowledged. In order to interrupt women’s passive agency denial I argue that the current construction of the legal subject and thus the reasonable person needs to be altered in order to help facilitate it to become a gender neutral concept, rather than simply pertaining to be. Interrupting women’s passive denials of agency allows the active agency denial symbiotic to labelling to also be interrupted.

It is important to note here at the outset, that I will not be suggesting that the labels of mad, bad and victim will no longer be attached to women who kill. Rather I will argue that recognising women as legal subjects with agency mean that when these labels are attached to women who kill as legal subjects and agents, they are less influential and pervasive as identities than when attached to women as legal objects. Thus the active agency denial which occurs with labelling is interrupted. It is also important to note here that I acknowledge that even once women’s agency is recognised within criminal legal discourse, their ability to actually exercise this agency will arguably be read through the prism of patriarchy. Indeed, throughout this thesis it will be acknowledged that any agency exercise which occurs has to be contextualised within the existing social structures of a patriarchal society.

Finally Chapter Seven, the conclusion, summarises the arguments that have been presented throughout the thesis, exploring the implications that arise from the research conducted and the agency-based model proposed in this thesis, as well as examining potential areas of future research.

Chapter Two - Terminology and Literature Review

2.1 Literature Review Methodology

Having introduced the main issues as conceived by this study, it is now necessary to examine in more detail some of the problematic words, themes, issues and constructs presented by both the subject matter and the literature surrounding it. The purpose of this chapter is to question and critically engage with the existing literature on the various terminologies and theories that will underpin this thesis, including labelling and construction theory and Judith Butler's seminal work on performativity. I will also explore some of the literature surrounding the concept of agency. It is perhaps worth noting that in structuring my thesis, I found myself in a quandary as to where to place this initial discussion on the concept of agency because it forms such a pivotal part of the thesis. I ultimately made the decision to include a largely descriptive initial discussion of the concept at the beginning of this chapter because of the relationship between agency and labelling and construction theory, which becomes evident throughout the thesis. A critical engagement with the concept of agency occurs throughout later chapters in the thesis, particularly in chapters four, 'passive denials of agency', and five, 'active denials of agency', and thus an initial descriptive engagement with the concept is all that occurs in this chapter.

During the initial research and chapter planning and drafting process of writing my thesis, I made the decision to use a qualitative research methodology.

One consequence of this was the repeated use of numerous research terms, including “agency”, “labelling”, “constructing” and “performative(-ity)”. These terms were ones that were appearing most frequently in my research, that I was using as part of my search parameters, as well as being some of the ones which I was using myself to describe my research questions. Throughout the thesis these concepts will be used and therefore it is necessary to contextualise them and to explore their potentiality, not merely as words, but their importance as practical and symbolic constructs and labels. In doing so this chapter aims to both position and explain the use of these theories not only within the broader context of the thesis, but more specifically within the context of agency and ultimately creating an agency-based model for women who kill.

Indeed as will be validated later in the thesis, the concept of agency is one that is gendered and thus concepts such as labelling and construction theory and performativity are relevant when exploring this gendering. For example, labelling is relevant to agency because of the symbiotic relationship between the gendered labelling of women who kill as mad, bad or victims and the active denials of agency that occur within criminal legal discourse. Similarly, the masculine gendered construction of the criminal legal subject ensures the continued objectification of women, denying their status as legal subjects and thus passively denying their agency. Finally, a critical engagement with the concept of performativity enables a closer analysis of the underpinnings of the gendered construction of the legal subject to take place. Therefore, this chapter will now move on to critically engage with the literature surrounding each of these key concepts in turn.

2.2 What is Agency? – The Existing Academic Literature

The concept of agency, at its most basic, is the capacity to act for oneself¹ and includes the '[a]bility to make effective choices and to transform [them] into desired outcomes.'² The Oxford English Dictionary defines agency in its most basic form as 'action, capacity to act'.³ Expanding on this idea of capacity to act into three, more detailed subcategories, the dictionary states that agency is:

ability or capacity to act or exert power; active working or operation; action, activity ... action or intervention producing a particular effect; means, instrumentality, mediation ... such action embodied or personified; a being or thing that acts to produce a particular effect or result.⁴

These basic definitions of agency underlie much of the literature on this topic.

Taking a more detailed approach to the topic, agency can be described as a liberal, post-enlightenment construct, heavily influenced by René Descartes and Immanuel Kant, and their work on the mind-body dichotomy. Descartes' work, although not inventing the position regarding the mind-body distinction, was extremely influential on later thinkers. Indeed Descartes is viewed by many scholars

¹ Mahoney, Martha, "Victimisation or Oppression? Women's Lives, Violence and Agency" in Fineman, Martha Albertson and Mykitiuk, Roxanne, *The Public Nature of Private Violence – The Discovery of Domestic Abuse* (New York: Routledge, 1994) p.59

² The World Bank, "World Development Report 2012: Gender, Equality and Development" (2011) available at <http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf> p.150

³ Oxford English Dictionary, "agency, n." available at <http://www.oed.com/view/Entry/3851?redirectedFrom=agency#eid> (OED Third Edition, September 2012)

⁴ Oxford English Dictionary, "agency, n."

as the founder of modern Western philosophy.⁵ He posited the theory that the physical could be separated from the mental, with the consequence that the mind is privileged over the body. In his monograph *Meditations*⁶ Descartes argued that although he was in possession of a physical body, it was an '[u]nthinking thing ...'⁷ devoid of reasoning, as it was absolutely distinct from his mind. For Descartes, the mind itself was distinct even from the brain and thus could exist without the body at all.⁸ Thus following this theory, Western philosophy conceptualised humans '[a]s disembodied minds ...'⁹ By privileging the mind over the body, Descartes' theory has clear importance for the concept of agency because it suggests that '[h]uman agency is distinct. It is the mind acting freely through acts of will which make us unique ...'¹⁰ Thus, when humans act freely or voluntarily through their exercise of agency, morality and responsibility must also be considered by examining the nature of the voluntary act(s) to determine whether praise or punishment is deserved.¹¹

Descartes' work, particularly that on agency, is both reflected in and expanded upon in the propositions advanced by Kant, and what has come to be termed as Kantian principles. These principles focused more specifically on the notion of the "moral agent" and the theory of autonomy. The Kantian moral agent is

⁵ Rollinson, Matthew, "Re-reading criminal law: Gendering the mental element" in Nicolson, Donald and Bibbings, Lois (Eds), *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing, 2000) p.105

⁶ Descartes, René, *Discourse on Method and Meditations on First Philosophy* (translated by Haldane, Elizabeth S.) (Digireads.com Publishing, 2005)

⁷ Descartes, 2005, p.72

⁸ Descartes, 2005, p.72

⁹ Rollinson, 2000, p.105

¹⁰ Rollinson, 2000, p.105

¹¹ Morris, Katherine, "Bêtes-machines", in Gaukroger, Stephen; Schuster, John, and Sutton, John, *Descartes' Natural Philosophy* (London: Routledge, 2000) p.404

one who perceives situations in the context of their moral characteristics.¹² According to Kant, '[d]eveloping into a moral agent requires learning about the "subjective conditions of freedom" and, importantly, practicing one's virtue in order to develop a moral character.'¹³ The relationship between morality and autonomy is a significant one within Kantian principles. Namely the idea that individuals can act of their own volition in a morally righteous way.¹⁴

Consequently, for Kant, when individuals exercise their moral agency they are acting based upon their own moral imperatives, rather than those that are externally imposed; '[t]hey are governing themselves by their own standards ...'¹⁵ However, it is notable that Kant also acknowledged that agents can act to satisfy other inclinations, rather than acting from purely a moral standpoint at all times,¹⁶ thus suggesting that agency exercise can take more than simply a moral form.

The work of Descartes and the development of Kantian principles in relation to agency had a central focus on an individual's actions.¹⁷ Their liberalist views constructed a subject who became human due to their possession of agency. That is, an individual '[w]hose humanity consisted in [their] theoretically unlimited potential, and ... capacity to exercise meaningful choice in the direction of [their] own life.'¹⁸

¹² Herman, Barbara, *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993) p.83

¹³ Moran, Kate A., *Community and Progression in Kant's Moral Philosophy* (Washington DC: The Catholic University of America Press, 2012) p. 166

¹⁴ Hill, Thomas E., Jr., *Human Welfare and Moral Worth – Kantian Perspectives* (Oxford: Oxford University Press, 2002) pp.33-34

¹⁵ Hill, Thomas E., Jr., 2002, p.33

¹⁶ Hill, Thomas E., Jr., 2002, p.34

¹⁷ Chiu, Elaine, "Confronting the Agency in Battered Mothers" *S. Cal. L. Rev.* 74, (2000-2001), 1223, p.1241

¹⁸ Abrams, Kathryn "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" *Colum. L. Rev.* 95, (1995), 304, p.326

Applying these theories to today's contemporary society, it is suggested that all "humans" inherently possess agency, something that is reflected in various academic literature.¹⁹ Thus individuals who possess and exercise agency are assumed to be rational agents who can make reasoned choices with regards to appropriate actions and behaviour.²⁰

The work of Albert Bandura is also important in the context of understanding the concept of agency. Bandura has suggested that there are four core features of human agency; intentionality, forethought, self-reactiveness and self-reflectiveness.²¹ The most important of these for the purposes of this thesis and its focus on criminal legal discourse is that of intentionality. Intentionality, according to Bandura, refers to how individuals choose to behave: 'an intention is a representation of a future course of action to be performed. It is not simply an expectation or prediction of future actions but a proactive commitment to bringing them about.'²² Bandura goes on to explain that: 'in short, the power to originate actions for given purposes is the key feature of personal agency. Whether the exercise of that agency has beneficial or detrimental effects, or produces unintended consequences, is another matter.'²³ For Bandura then, agency and intention are two fundamentally intertwining concepts. When an individual is imbued with agency

¹⁹ This can be seen in statements such as '[a] capacity for agency is as much a given for humans as the capacity for respiration' (Sewell, William, H., Jr, "A Theory of Structure: Duality, Agency and Transformation" *American Journal of Sociology*, 98(1), (1992), 1, p.20); and '[a]ll human beings, by nature, have agency ...' (Eduards, Maud L., "Women's Agency and Collective Action" *Women's Studies Int. Forum*, 17, 2/3, (1994), 181, p.181)

²⁰ Duff, Anthony, *Intention, Agency and Criminal Liability – Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990) p.101

²¹ Bandura, Albert, "Social Cognitive Therapy: An Agentic Perspective" *Annu. Rev. Psychol.* 52, (2001), 1, pp.6-11

²² Bandura, 2001, p.6

²³ Bandura, 2001, p.6

their actions are arguably simultaneously invested with a sense of intention and purpose. This is particularly evident in the context of the criminal law, which will be discussed in detail later in chapter four.

Another particularly important aspect within the concept of agency is the ability of “an acting subject” to transform society with their intentional and chosen acts.²⁴ However, any action which individuals choose to take occurs within the context of their situated position within society. Their choice of actions, the outcomes and ultimately their ability to transform society is influenced by their identity and power relationships with others within existing social structures.²⁵ This idea was expanded on further by Sewell who explains that agency can only be exercised by individuals within the context of existing social structures. Consequently it is individuals within those structures with the requisite power to successfully control, reinterpret or mobilise resources that are able to exercise their agency.²⁶

Individuals imbued with agency make both conscious and unconscious choices about their behaviour that can result in both intended and unintended consequences.²⁷ It is therefore reasonable to assume that agentic individuals can be held responsible for their actions and the consequences that stem from the behavioural decisions that they make. As explained by Duff, ‘in holding someone responsible for his actions, we suppose that he is in some relevant sense a “free”

²⁴ Marchbank, Jennifer and Letherby, Gayle, *Introduction to Gender: Social Science Perspectives* (Harlow: Pearson Education Limited, 2007) p.316

²⁵ Hitlin, Steven and Elder, Glen H., Jr., “Time, Self and the Curiously Abstract Concept of Agency” *Sociological Theory*, 25(2), (2007), 170, p.185

²⁶ Sewell, 1992, p.20

²⁷ Hays, Sharon, “Structure, Agency and the Sticky Problem of Culture” *Sociological Theory*, 12(1), (Mar 1994), 57, p.64

agent; that he has, in the traditional terminology “free will.”²⁸ However, it would be incorrect to think that agency equates with choices being made wholly and completely freely by individuals. Rather, the choices that agents make are always influenced by society. That is to say that the ability of an individual to exercise agency is always constrained, to varying degrees depending on the individual concerned, by social structures, discourses and norms. As explained in Hays’ work on agency, ‘[a]gency ... is the individual and collective autonomy made possible by a solid grounding in the constraining and enabling features of social structure.’²⁹ So it is social structures that both initially enable, and ultimately constrain, an individual’s exhibition of agency: ‘[a]gency is made possible by the enabling features of social structures at the same time as it is limited within the bounds of structural constraint.’³⁰

Whilst it is apparent from the above analysis that *individuals* are ascribed agency, the concept extends also to *collectives, or groups*. An agentic collective or group then encompasses individuals with shared beliefs who coordinate their actions “[t]o form collective projects, to persuade, to coerce, and to monitor the simultaneous effects of one’s own and others’ activities”³¹ with the aim of achieving shared goals and producing particular results. Collective agency exercise can be seen in the work of many groups and organisations within society, through for example protests and political activities.³²

²⁸ Duff, 1990, p.102

²⁹ Hays, 1994, pp. 64-65

³⁰ Hays, 1994, p.62

³¹ Sewell, 1992, p.21

³² Eduards, 1994, p.182

From the above analysis, it is apparent that although particular definitions of agency have emerged within the literature that differ slightly, there are some key similarities and themes which have emerged. The most recurrent of these are choice, action and the role of social structures. Therefore, the particular definition of agency which will be used within this thesis is: *the ability of an individual to choose to act in a particular way*. It must be noted here that this definition will be positioned and contextualised within existing social structures. This largely reflects the importance of “choice” as the key recurring theme within the preceding discussions on the definitional concept of agency. For example, Lacey defines agency as being ‘[r]esponsible conduct which the agent chooses.’³³ The definition of agency which will be used in this thesis is also one which is largely reflected in Messerschmidt’s work: ‘[a]gency refers to the behaviours in which a person chooses to engage in order to shape his or her experiences within social structures in light of his or her understanding of the social structures that surround and constrain his or her options.’³⁴ Although the concept of agency is arguably the most important within this thesis its importance cannot be fully acknowledged without exploring the other key theories which underpin the argument being proposed; the first of which is labelling theory.

³³ Lacey, Nicola, “Space, time and function: intersecting principles of responsibility across the terrain of criminal justice” *Criminal Law and Philosophy*, 1, (2007), 233, p.236

³⁴ Messerschmidt (1993) in Greeson, and Campbell, 2011, p.583

2.3 Labelling Theory

Labelling theory explores the process by which deviant labels are applied to and received by individuals.³⁵ These labels are applied once an individual's behaviour deviates from that which has been normalised and has thus deemed as acceptable within societal and socio-legal discourse, with the result that the offending person is labelled as deviant. Put simply, labelling occurs as a response to actual or perceived deviance or norm contravention. The importance of labelling theory in the context of this thesis can be found in the labelling of women who kill and the consequences that this ultimately has for the agency denial of these women.

During the 1960s and 1970s labelling theory was '[t]he dominant sociological theory of crime'³⁶ and was developed as a response to positivistic criminology. The idea behind the introduction of the theory was that criminologists should move their focus from the causes of crime, of which there were many, to instead concentrate on exploring the societal reactions to crimes and their perpetrators.³⁷ The key labelling theorists are widely accepted to be Tannenbaum, Lemert and Becker. Modern labelling theory was developed by Tannenbaum in his publication *Crime and the Community*.³⁸ Tannenbaum argues that labelling, describing and thus identifying a deviant person as criminal has the effect of evoking such traits in them. Put simply:

³⁵ Naffine, Ngaire, *Female Crime: The Construction of Women in Criminology* (Boston: Allen and Unwin, 1987) p.76

³⁶ Carrabine, Eamonn; Iganski, Paul; Lee, Maggy, Plummer, Ken, and South, Nigel, *Criminology: A Sociological Introduction* (London: Routledge, 2004) p.70

³⁷ Abbott, Pamela, and Wallace, Claire, *An Introduction to Sociology: Feminist Perspectives* (London: Routledge, second ed, 1997) p.240

³⁸ Tannenbaum, Frank, *Crime and the Community* (New York: Columbia University Press, 1938)

'the person becomes the thing he is described as being.'³⁹ Tannenbaum argues that it is irrelevant who is doing the labelling, even if they are doing so in an attempt to reform the deviance or criminality, rather than punish it. By labelling an individual as deviant rather than suppressing the illicit behaviour, it instead has the effect of enhancing it. Therefore for Tannenbaum 'the way out is through a refusal to dramatise the evil'⁴⁰ through labelling. This reflects the notion posited in this thesis that labelling women who kill as mad, bad or victims offers excuses and explanations for their actions by denying their agency.

Keeping these issues in mind, it is perhaps unsurprising that in his version of labelling theory Tannenbaum focuses on the direct impact that the labelling process has, that is the role that the consequent stigmatisation of the individual '[p]lays in generating delinquent and criminal careers.'⁴¹ Most importantly for Tannenbaum is the "[d]ramatisation of evil", that is the process of public labelling.⁴² According to Tannenbaum, once society publically labels an individual's actions as deviant, this results in the person themselves being so labelled. Consequently, self-labelling occurs with '[t]he person's self-image [changing] in a similar direction',⁴³ and them identifying with the deviant behaviour.

³⁹ Abbott and Wallace, 1997, p.240

⁴⁰ Tannenbaum, 1938, pp.19-20

⁴¹ Schur, Edwin, *Labelling Deviant Behaviour: Its Sociological Implications* (New York: Harper and Row, Publishers, 1971) p.10

⁴² Leonard, Eileen, *Women, Crime and Society: A Critique of Theoretical Criminology* (New York: Longman, 1982) p.67

⁴³ Leonard, 1982, p.67

Tannenbaum's work was expanded upon in 1951 with the publication of *Social Pathology*⁴⁴ by Edwin Lemert, which offered what Leonard describes as '[t]he first sophisticated version'⁴⁵ of labelling theory. Lemert offers a definition of the deviant individual to whom labels are applied. He suggests they are defined as someone:

[w]hose role, status, function, and self-definition are importantly shaped by how much deviation he engages in, by the degree of its social visibility, by the *particular* exposure he has to the societal reaction and by the nature and strength of the societal reaction.⁴⁶

Like Tannenbaum, Lemert is concerned with the societal reaction to deviance and the consequent stigmatisation processes that occur once an individual has been so labelled. However, Lemert also expands on Tannenbaum's work, developing the distinction between primary and secondary deviance. He explains primary deviance as incidents of deviance which provoke little reaction from others and thus do not '[l]ead to symbolic reorganisation at the level of self-regarding attitudes and social roles.'⁴⁷ In contrast, Lemert argues that secondary deviance occurs when there is some societal reaction to the individual's deviant behaviour with the consequence that a label is attached which simultaneously acknowledges and stigmatises their illicit behaviour. In secondary deviance, once an individual is labelled and thus stigmatised, they self-label and thus identify pejoratively with the traits associated

⁴⁴ Lemert, Edwin, *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behaviour* (New York: McGraw-Hill, 1951)

⁴⁵ Leonard, 1982, p.67

⁴⁶ Lemert, 1951, p.23

⁴⁷ Lemert, Edwin, *Human Deviance, Social Problems and Social Control* (Englewood Cliffs NJ: Prentice Hall, 1967) p.17

with the label attached to them. The labelled individual may reorganise themselves around the label, with the label thus becoming their primary identity.⁴⁸

As is clear above, central to Lemert's theory of labelling is the pivotal role that societal reaction plays because it is not until societal reaction occurs through labelling that a formal stigmatisation take place. It is this labelling and stigmatisation that may ultimately drive an individual '[d]eeper into a deviant life.'⁴⁹ Therefore, it is arguable that '[s]ocietal reaction may be more important than anything that occurred before a person's involvement in rule breaking'⁵⁰ because it is this that causes individuals to reorganise themselves around the deviant label that they have received.

This previous work on labelling theory by Tannenbaum and Lemert was furthered by that of Becker, a second generation sociologist. His book *Outsiders: Studies in the Sociology of Deviance*,⁵¹ is widely regarded within sociological criminology as the most important work on labelling theory. Becker's aim in his work on labelling theory is to acknowledge the point of the view of the deviant individual. He emphasises that the person being labelled as deviant, or as Becker puts it as "an outsider", may actually not accept the label being attached to them: 'he may not accept the rule by which he is being judged and ... may feel his judges are *outsiders*.'⁵² Rather than simply succumbing to the label and reorganising their primary identity around it, Becker argues that these individuals actually had enough

⁴⁸ Lemert, 1951, p.77

⁴⁹ Leonard, 1982, p.68

⁵⁰ Leonard, 1982, p.68

⁵¹ Becker, Howard, *Outsiders: Studies in the Sociology of Deviance* (New York: The Free Press, 1963)

⁵² Becker, 1963, pp.1-2

intelligence and control over their lives to be able to reject it.⁵³ However, although an individual may themselves reject the label being attached to them, Becker also acknowledges that once a deviant label is attached to an individual, this becomes their 'master status' in society. As explained by Leonard, 'once labelled deviant, this identification outweighs any other, colouring all social relationships. Being known as an 'ex-convict', for example, is the central fact of your social existence as far as others are concerned ...'⁵⁴

In his discussion on deviance Becker notes that deviance was created by society and more specifically by social groups:

The central fact about deviance: it is created by society ... *social groups create deviance by making the rules whose infraction constitutes deviance*, and by applying those rules to particular people and labelling them as outsiders. From this point of view, deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an "offender". The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label.⁵⁵

For Becker then, it is not the act of deviance, nor the characteristics of the deviant themselves that are especially important, rather it is the responses of others to the deviance and the consequent process of labelling which takes place that is integral to labelling theory. Indeed, he highlights the fact that behaviour viewed as deviant by

⁵³ Naffine, 1987, pp.82-83

⁵⁴ Leonard, 1982, p.72

⁵⁵ Becker, 1963, p.9

one social group at one time may not be viewed as such by a different social group at a different time. Similarly the particulars of the individual who is participating in the behaviour can also have an impact on whether such conduct is viewed as deviant or not. 'In short, whether a given act is deviant or not depends in part on the nature of the act (that is, whether or not it violates some rule) and in part on what other people do about it.'⁵⁶

Therefore, it is clear that '[d]ifferentials of race, age, sex and social class are influential in determining whose rules are operating.'⁵⁷ Before an act is viewed as deviant and an individual is labelled as such for participating in such an act there must be "a rule" created which defines the act as deviant.⁵⁸ However only certain people have the requisite power to make, and also to enforce, these socially constructed norms and rules.⁵⁹ This is a job which Becker notes is normally done by the '[p]rofessional enforcer who, by enforcing already existing rules, creates the particular deviants society views as outsiders.'⁶⁰ It is clear then that not only do differentials of race, age, sex and social class influence whether an individual has deviated from socially constructed norms and whether they will consequently be labelled, but that these factors are also significant in who can enforce these rules and norms. Thus when labelling occurs, power differentials and enterprises are present in numerous ways.

⁵⁶ Becker, 1963, p.14

⁵⁷ Leonard, 1982, p.72

⁵⁸ Becker, 1963, p.162

⁵⁹ The notion that only certain groups of people or individuals have power within societal discourse is discussed in more detail in chapter two at pp.51-52 and chapter six at pp.241-242

⁶⁰ Becker, 1963, p.163

Becker also developed a number of other major insights in relation to labelling theory. One such development was the notion of the 'secret deviant'; an individual who deviates from socially constructed norms or rules but whose deviance is not noticed and consequently not stigmatised and labelled. This illustrates that actions can still be deviant even if they are not publicly stigmatised⁶¹ and that conversely individuals must therefore be able to be incorrectly stigmatised and labelled.⁶² According to Becker, this non-labelling of secret deviants and incorrect labelling of others highlights that '[t]he process of labelling may not be infallible ...'⁶³

2.3.1 Women and Labelling

It is apparent from the discussions above that sex and power differentials exist within the labelling process. However, despite the fact that women are constantly labelled in various ways, including being labelled as deviant, relatively little academic research has been conducted into the relationship between labelling theory and women. It must be noted here that "woman" is itself a label and it is with some reluctance that I am using it as I am aware of its contextual and contingent nature. However, for the purposes of this chapter, it is difficult to discuss the subject under consideration without acknowledging and attaching a label which has been subjectively chosen and possesses a number of inherent, often injurious, meanings, something my later analysis acknowledges.

⁶¹ Leonard, 1982, p.72

⁶² Becker, 1963, p.9

⁶³ Becker, 1963, p.9

Any mention of labelling theory being applied to women by Tannenbaum, Lemert or Becker was at best minimal. It was not until several years later that women and labelling theory were considered together in any detail. In *Outsiders* Becker briefly looked at the role that family, particularly wives, played in the lives of jazz musicians. The portrayal of women given is 'uniformly an unattractive one.' As noted by Naffine;

Their principal role is that of the 'square' wife ... she represents the other side - the conventional order which threatens to destroy all talent and imagination ... As wife, she is invariably colourless and conformist. Her husband, by contrast is "spontaneous" and "individualistic". Her sole preoccupation appears to be to expunge these characteristics and to drag her partner down to her level.⁶⁴

Becker also discusses women in the context of how the application and enforcement of rules varies depending on the consequences. More specifically, he discusses Vincent's work on the unmarried mother, where Vincent suggested that illicit sexual relations without consequences rarely had pejorative consequences for those involved. In contrast however if there was a consequence to such relations, for example the woman becoming pregnant, the social censure, stigmatisation and punishment was normally severe. It is important to note here that Vincent made the point that such stigmatisation and punishment was normally exclusively reserved for

⁶⁴ Naffine, 1987, p.79

the unmarried mother, rather than the father,⁶⁵ thus demonstrating '[t]he differential enforcement of rules on different categories of people.'⁶⁶

Indeed, more extreme examples of this differential enforcement of rules on women can be seen in relation to women who are raped, then consequently incorrectly and unjustly convicted of adultery and stoned to death in some religious cultures.⁶⁷ A similar fate does not necessarily await the perpetrating rapist. This discussion by Becker on Vincent's work illustrates that when women do not conform to appropriate gendered behaviour they are more readily labelled as deviant by the powerful within society, that is men within the context of a patriarchal society. Although statistics demonstrate that women are less frequently sentenced for criminal behaviour when compared to men⁶⁸ and are therefore comparatively less frequently labelled deviant for criminal behaviour, their deviance from the socially enforced rules and norms that embody appropriate femininity⁶⁹ results in their labelling and stigmatisation.

Since Becker's work, other scholars have attempted to present a theory of labelling in the context of female criminal behaviour. Harris was one such scholar who produced a theory that he argued was '[a]n extension of, and an improvement

⁶⁵ Vincent, Clark, *Unmarried Mothers* (New York: The Free Press of Glencoe, 1961) pp.3 -5

⁶⁶ Becker, 1963, p.13

⁶⁷ The Guardian, "Rape victim, 13, stoned to death in Somalia" (2nd November 2008) available at <http://www.guardian.co.uk/world/2008/nov/02/somalia-gender>

⁶⁸ According to the government's biennial report published in October 2012, of the 1,246,310 persons of known gender who were sentenced at court in 2011, 24% were female, compared to 76% who were male. See; Ministry of Justice, "Statistics on Women and the Criminal Justice System 2011" available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220081/statistics-women-cjs-2011-v2.pdf p.44

⁶⁹ For a detailed discussion on the concept of appropriate femininity see chapter three, section 3.4

on, labelling theory ...'⁷⁰ He argues that women's greater conformity to criminal legal norms could be explained by '[t]heir manipulation by ... powerful men who convince them that crime is a wholly inappropriate activity for women.'⁷¹ According to Harris, men want women to remain law-abiding in order for them to perform the vital social functions traditionally associated with women, such as child-rearing. If women are involved in crime and imprisoned there is no-one to perform these functions, and consequently the nuclear family could break-up, thus threatening "[t]he institutional hegemony of the socially dominant."⁷² Harris argues that the powerful define the type-scripts of people who should (men), and should not (women), be involved in criminal activity and therefore there is no need for official labelling. Consequently, '[t]hose who are "scripted" as criminals assume the role even before they come into contact with law enforcement agencies.'⁷³

Fox is another scholar who has discussed labelling theory in the context of female criminal behaviour. She argues that women choose not to offend primarily for two reasons. Firstly, literature makes it clear that women who are labelled as criminals are considered to be fallen women and therefore they will suffer stigmatism and public ostracism.⁷⁴ Secondly, '[w]omen obey the law because social-value constructs, such as "good girl", "lady" and "nice girl" exhort them to be model citizens or [alternatively] risk negative social evaluation.'⁷⁵ Similarly to Harris' model

⁷⁰ Naffine, 1987, p.80

⁷¹ Naffine, 1987, p.80

⁷² Naffine, 1987, p.80

⁷³ Naffine, 1987, p.81

⁷⁴ Fox, Greer Litton, "'Nice Girl': Social Control of Women through a Value Construction" *Signs* 2, (1987), 805, p.807

⁷⁵ Naffine, 1987, p.81

there is no need for official labelling because women are controlled by societal and gendered norms and rules, thus actively discouraging them from becoming involved in criminal activity. According to Fox if women deviate, even slightly, from appropriate feminine behaviour, society will willingly withdraw the “good girl” label.

Other feminist criminologists have also explored the relationship between labelling theory and women, primarily in the context of women who commit crime. The American feminist criminologists Klein and Kress have suggested a theory attempting to explain why women are often not subject to the same labelling as men when they commit particular crimes.⁷⁶ Female sex offenders are often treated more punitively than their male counterparts because their behaviour is viewed as ‘[j]eopardising their socially prescribed reproductive function’,⁷⁷ and thus threatening the dominant typification of motherhood for all women. In contrast, women who engage in less serious offences, such as shoplifting, are not considered to be a serious threat to the social order.⁷⁸ This theory is supported to some degree by Lees, who carried out a study on teenage girls and found that ‘[t]he ways in which young men and young women label young women act as a powerful mechanism of social control.’⁷⁹ Finally, Carlen et al. have ‘[s]hown the ways in which labelling influences the patterns of female crime and the ways in which female criminals are labelled unfeminine.’⁸⁰ Indeed, as will be highlighted and discussed in detail in chapter five, in the context of women who kill, there is a clear relationship between

⁷⁶ Naffine, 1987, p.86

⁷⁷ Naffine, 1987, p.86

⁷⁸ Naffine, 1987, p.86

⁷⁹ Abbott and Wallace, 1997, p.241

⁸⁰ Abbott and Wallace, 1997, p.242

the degree of women's deviance from appropriate femininity and the way in which they are labelled.

From the above discussions on the origins and development of labelling theory it is clear that labelling theory in its original and traditional form was not intended to be applicable to women. One explanation available for this lack of engagement between labelling theory and women is that traditionally women are constructed as "the Other".⁸¹ This status as "the Other" has meant that women are considered to be subordinate to men and therefore the application of labelling theory to women was not a priority. As a result, when attempting to combine labelling theory with female deviance it is necessary to manipulate the theory. Indeed, such manipulation is evident in the work of all of the scholars examined who have attempted to combine labelling theory and women. The fact that such manipulation is required demonstrates that a number of issues are raised when applying traditional labelling theory to women, particularly women who commit crime.

The primary concern with the application of labelling theory to women who are labelled as criminals is the theory of secondary deviance: that is that deviant individuals will identify with their label, resulting in a negative self-image and subsequent re-offending. As noted by Naffine, it is mainly men who reoffend, rather than women.⁸² It therefore becomes apparent that traditional labelling theory is arguably incompatible with female crime because secondary deviance is not

⁸¹ Beauvoir, 2010, p.6

⁸² Naffine, 1987, p.85

generally present when women commit crime. Despite this, labelling theory has remained largely concerned with deviance in the context of criminal behaviour. It should however be noted that although women do not offend as frequently as men, when they do offend they are often treated more punitively than men, facing harsher labelling and greater stigmatisation. This is particularly so when women commit violent crime such as murder.⁸³

As examined earlier in this chapter, labelling does not only occur within the context of criminal deviance, but also in the context of societal and gendered deviance. Indeed, women are frequently labelled as deviant as a result of not conforming to appropriate feminine behaviour dictated by societal and gender discourse. This is because 'widespread violation of gender norms by women constitutes a serious threat to the entire gender system.'⁸⁴ Women may violate various gender norms including; '(1) presentation of self ... (2) marriage and maternity, (3) sexuality ... and (4) occupational choice.'⁸⁵ Despite this, labelling theory has failed to address the labelling of non-criminal, deviant women in detail. This is despite the fact that when women deviate they are often labelled '[t]o get them back in line.'⁸⁶ One historical example of using labelling as a social control mechanism for women was the labelling of deviant women as witches.⁸⁷ It is arguably somewhat ironic that labelling theory has traditionally been applied only to criminal deviance in the context of women, despite the fact that social deviance

⁸³ See chapter five, in particular section 5.3 for a more detailed discussion on this issue

⁸⁴ Blinde, Elaine, and Taub, Diane, "Women athletes as falsely accused deviants: managing the lesbian stigma" *The Sociologist Quarterly*, 33(4), (1992), 521, p.522

⁸⁵ Blinde and Taub, 1992, p.522

⁸⁶ Grana, Sheryl, *Women and Justice* (Lanham: Rowman and Littlefield, 2009) p.72

⁸⁷ Grana, 2009, p.72

occurs much more frequently. Moreover, the social requirement that women adhere to appropriate feminine behaviour makes it much more likely that they will be labelled should they deviate, however marginally, from this behaviour. Deviance does not have to take the form of criminal behaviour for women, yet this appears to be a fact largely overlooked within labelling theory.

Not only is the relationship between labelling theory and women problematic, there is a question relating to the extent to which it denies the agency of women. Labelling theory, as developed by Becker, was designed to focus on the individualism and agency of the male deviant. However, rather than producing the same outcome when applied to female deviants, labelling theory instead adds to the existing stereotypes and devalues women. When applied to women, labelling theory has '[e]xpunged the agency of the female.'⁸⁸ As noted by Naffine, accounts of the female lived experience which invest women with sense of purpose, decision-making ability and choice are missing from the existing labelling literature. 'Neither the criminal nor conforming woman has been given ... a voice: the opportunity to say in her own words how she perceives her own social reality.'⁸⁹

Indeed, many criminologists within the labelling school '[h]ave assumed that women are unable to shed light on the reasons for their own actions. They possess no critical insights.'⁹⁰ Instead, women are assumed to be unable or unwillingly to question their position within society because they are merely a product of social engineering and thus have their agency over their actions denied. Moreover, as

⁸⁸ Naffine, 1987, p.82

⁸⁹ Naffine, 1987, pp.86-87

⁹⁰ Naffine, 1987, p.83

argued by Harris and Fox, deviant women do not need to be officially labelled because they are being controlled long before they become deviant through constructs such as the typical offender and the “good girl”.⁹¹ As is so-often the case when discussing women, within labelling theory arguments have been developed about the socialisation of women to the point that they are perceived merely as the objects of socialisation and consequently their agency is denied.

Despite the problems outlined above that applying labelling theory to the behaviour of women has presented, there are some aspects of the theory which are particularly useful when discussing female deviance both in a criminal and non-criminal context. The power relationships which exist in the labelling process are particularly pertinent in the context of the labelling of women. As noted in the discussions above, those creating the labels are the powerful within society, those being labelled deviant are not. Women operate from a disadvantaged position of power⁹² and therefore ‘it is often not women who are doing the labelling [because] ...Women do not have the power to label...’⁹³ This lack of power results in the continued subordination and suppression of women. Indeed, the power hierarchy as demonstrated within labelling theory goes some way towards explaining the persistent labelling and categorisation by the criminal justice system of women who kill as either mad, bad, or victims.⁹⁴ This in turn also offers some explanation,

⁹¹ Naffine, 1987, p.88

⁹² The relationship between women and power is discussed in more detail in chapter six at pp. 240-241

⁹³ Grana, 2009, p.72

⁹⁴ See chapter five for a detailed discussion on the labelling of women who kill as mad, bad or victims

however inadequate, for the continued denial of female agency, which if recognised would simultaneously attribute and acknowledge power to women.

Another useful aspect of labelling theory, linked to the above discussions on power relationships, is its demonstration of how behavioural rules are created and enforced within societal discourse. Similar to the way in which society proscribes deviance, 'certain forms of behaviour considered unacceptable for women are proscribed.'⁹⁵ Appropriate feminine behaviour as dictated by gender discourse exists in its current form as a result of behaviour(s) sanctioned or punished by society and law. The rules pertaining to acceptable feminine behaviour are created in much the same way as the rules pertaining to deviance are created in labelling theory. That is to say that it is always the powerful who create the rules for the powerless to follow. Becker states that '[i]t is true in many respects that men make the rules for women in our society.'⁹⁶ Therefore if women do not conform to acceptable forms of feminine behaviour, regardless of whether this behaviour is criminal in nature, they are labelled as socially deviant. If women also engage in criminal behaviour they are considered to be doubly deviant, as they are '[p]erceived as having not only broken the law but also as having transgressed their gender roles.'⁹⁷ It is therefore submitted that aspects of labelling theory generally reflect the relationships between women and society and women and the law.

⁹⁵ Leonard, 1982, p.83

⁹⁶ Becker, 1963, p.17

⁹⁷ Newburn, 2007, p.306

It is the case of course, that the mere act of attaching a label to an individual could be argued to be a “construction” of the category of “woman”. Given this relationship between labelling theory and construction, it is to construction theory that I now turn.

2.4 Construction Theory

Construction theory is linked to labelling theory, in that labelling theory arguably in and of itself can constitute a “construction” in the context of construction theory. Moreover labelling women deviant, as noted above, directly contributes to damaging constructions of women. Construction theory developed from the work of theorists such as Simone de Beauvoir⁹⁸, Berger and Luckmann,⁹⁹ and Bennett and Feldman.¹⁰⁰ Hacking also discussed construction theory in detail in his book *The social construction of What?*¹⁰¹ He looked at the general aims and beliefs of construction theorists regardless of the subject (X) they were interrogating. He broke these aims down into three main points;

(1) X need not have existed, or need not be at all as it is. X, or X as it is at present, is not determined by the nature of things; it is not inevitable...

(2) [X] is quite bad as it is

⁹⁸ See, Beauvoir, 2010, p.xxii where she argues that ‘one is not born, but rather one becomes a woman’.

⁹⁹ See, Luckmann, Thomas, and Berger, Peter L., *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Open Road Media, 2011)

¹⁰⁰ See, Bennett, W. Lance, and Feldman, Martha S., *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (New Brunswick, NJ: Rutgers University Press, 1981)

¹⁰¹ Hacking, Ian, *The social construction of What?* (Cambridge, MA: Harvard University Press, 1999)

(3) We would be much better off if X were done away with, or at least radically transformed.¹⁰²

At the heart of construction theory is the idea that whatever the subject, it is not fixed or inevitable, rather it is '[t]he product of historical events, social forces and ideology.'¹⁰³

Applying this general theory of constructionism to gender, that is replacing X with "gender", Hacking produced a basic sequence:

Feminists convinced us (1) that gendered attributes and relations are highly contingent. They also urged (2) that they are terrible, and (3) that women in particular, and human beings in general, would be much better off if present gender attributes and relations were abolished or radically transformed.¹⁰⁴

Hacking also notes that social constructionism has the potential to be liberating to those it is applied to.¹⁰⁵ To support this assertion he uses the example of women and their role as mothers; arguing that motherhood and its associated meanings are not fixed but rather that in contemporary society women can to some degree construct their own lived version of motherhood, without the same constraints which historically bound them so tightly. He remarks; 'they need not feel quite as guilty as they are supposed to if they do not obey either the old rules of family or whatever is the official psycho-paediatric rule of the day, such as "you must bond with your

¹⁰² Hacking, 1999, p.7

¹⁰³ Hacking, 1999, p.2

¹⁰⁴ Hacking, 1999, p.7

¹⁰⁵ Hacking, 1999, p.2

infant, or you both will perish”¹⁰⁶. It is clear then that for Hacking because the subject of construction has been so constructed by historical and social forces, norms, and ideologies, there is potential for the subject to be liberated and thus re-constructed over time by these same forces.

However Hacking’s assertion that construction theory is liberating is, I would suggest, somewhat flawed. Taking Hacking’s example of women and their role as mothers: it is true that in today’s society there is more awareness surrounding motherhood, and its associated issues, such as extreme fatigue and exhaustion and post-natal depression. Indeed, in particular the issue of post-natal depression is one that has received widespread attention and publicisation by the media and mental health charities, in an attempt to raise awareness of and provide support to mothers.¹⁰⁷ However, such “awareness” is part and parcel of the labelling of “woman” as the subject of law, for example in the defence of Infanticide, which requires a diagnosis of puerperal psychosis, an extreme form of postnatal depression, with the consequence that the women who make use of it are labelled as mad.¹⁰⁸

It is also pertinent that the social construction of woman and motherhood is still determined by the powerful within society, much in the same way as labelling theory, discussed earlier in the chapter. That is to say that it is men within a

¹⁰⁶ Hacking, 1999, p.2

¹⁰⁷ See recently for example; *The Guardian*, “Postnatal depression: what the baby books don’t tell you” (16th May 2014) available at <http://www.theguardian.com/science/blog/2014/may/16/postnatal-depression-baby-blues-risk-factors> and *Mind*, “Postnatal depression” available at <http://www.mind.org.uk/information-support/types-of-mental-health-problems/postnatal-depression/#.U3sdVcZ6fFI>

¹⁰⁸ See chapter five, section 5.2 for a detailed discussion on Infanticide and the label of mad.

patriarchal society who determine the socially accepted construction of motherhood for women. The socio-legal construction of the subject is 'grounded in patriarchy, as well as in class and ethnic divisions.'¹⁰⁹ The result of this is that social constructions surrounding women and motherhood are still being determined by patriarchy within society. The media has also had an increasing role in social construction. Indeed, the media often highlights and makes examples of so-called "bad mothers". The particular social construction of women and motherhood which continues to exist is extremely limiting in the particular behaviours which are deemed to constitute a "good mother". As noted in a *Sunday Times* article:

Mothers ... are living through a permanent exam wherein we must meet some impossible ideal: we must be endlessly patient and available, always cheerful, never yell, not project our own neuroses on our children, have perfectly turned out children, cook like Nigella and never be too tired for sex.¹¹⁰

These requirements of good motherhood have become known as the "motherhood mandate", the notion that women must devote all their time to their children and their family, be the homemaker and put the needs of family before her own. This concept is discussed in more detail in the next chapter.¹¹¹ It is apparent then that social construction can actually result in the continued suppression of women through the enforcement of particular behaviours and stereotypes associated with appropriate femininity.

¹⁰⁹ Smart, Carol, *Feminism and the Power of Law* (London: Routledge, 1989) p.88

¹¹⁰ The Sunday Times, "Thanks, Britney, from all bad mothers" (20th January 2008) available at <http://www.thesundaytimes.co.uk/sto/style/living/article78855.ece#prev>

¹¹¹ See chapter three, section 3.4.1

2.4.1 "Constructing" The Subject Of Law

The law claims to be neutral, objective and impartial. As Ronald Dworkin explained, we are all '[s]ubjects to law's empire'.¹¹² That is to say that we are all '[l]iegemen to its methods and ideals, bound in spirit ...'¹¹³ Indeed every branch of the law has a subject, even corporate law where the subject is the corporation. Legal subjects are given particular characteristics, that is to say that they are '[d]eemed to act in certain ways, to wield certain rights and to assume certain responsibilities.'¹¹⁴ As noted by Naffine and Owens; 'the legal person, or legal subject, plays an absolutely critical part in law. The attributes accorded by law to its subject serve to justify and rationalise law's very forms and priorities.'¹¹⁵

Despite assertions that the legal subject is a neutral subject, that is to say that it is '[a] gender-less, race-less, class-less individual ...'¹¹⁶ many feminists claim that it is in fact gendered. As Lacey explains the legal subject is an individual who has '[t]he capacities for rational understanding, reflection and control of their own actions.'¹¹⁷ These traits are typically associated with masculinity, thus explaining the equation of legal subjecthood with this gender construction.¹¹⁸ This argument is further reinforced by Davies who argues that the law is gendered masculine, reflecting the

¹¹² Dworkin, Ronald, *Law's Empire* (Fontana, 1986) p.vii

¹¹³ Dworkin, 1986, p.vii

¹¹⁴ Naffine, Ngaire and Owens, Rosemary, "Sexing Law" in Naffine, Ngaire and Owens, Rosemary (eds.) *Sexing the Subject of Law* (London: Sweet and Maxwell, 1997) p.7

¹¹⁵ Naffine and Owens, 1997, p.7

¹¹⁶ Lacey, Nicola; Wells, Celia and Quick, Oliver, *Reconstructing Criminal Law: Text and Materials* (London: LexisNexis Butterworths, Third Edition, 2003) p. 40

¹¹⁷ Lacey, 1998, p.193

¹¹⁸ Lacey, 1998, p.193

social and gendered construction of masculinity.¹¹⁹ Put bluntly, the legal subject is '[a] white, middle class, man.'¹²⁰ The masculine gendered nature of the legal subject therefore ensures that women's position as "the Other" is unyielding. Women have the option of either assuming masculine stereotypes and consequently being labelled and stigmatised as unnatural, (yet still lacking status as legal subjects), or maintaining their femininity and also lacking legal subjecthood.¹²¹

Feminist legal scholars have taken different approaches when exploring the gendered construction of the legal subject. MacKinnon is an American feminist lawyer. During the early eighties her work was a major catalyst for a dramatic shift in feminist legal thought and discourse.¹²² MacKinnon argued that within a patriarchal society "woman" was a social construction constructed by, and for, men. 'What was thought of as the female sex was not in fact the *nature* of women. Women's apparent sexual difference from men, indeed their very sexuality, was not theirs - for women were simply the expression of men's desire.'¹²³ This construction of women, in relation to, and by men, formed the basis for MacKinnon's epistemological views on the construction of the legal subject. In her monograph, *Feminism Unmodified: Discourses on Life and Law*,¹²⁴ MacKinnon proposes that;

[g]ender is socially constructed as difference epistemologically; sex discrimination law bounds gender equality by difference doctrinally. A built-in

¹¹⁹ Davies, Margaret, "Taking the Inside Out: Sex and Gender in the Legal Subject" in Naffine, Ngaire and Owens, Rosemary (eds.) *Sexing the Subject of Law* (London: Sweet and Maxwell, 1997) p.29

¹²⁰ Lacey, 1998, p.28

¹²¹ Davies, 1997, p.29

¹²² Naffine and Owens, 1997, p.5

¹²³ Naffine and Owens, 1997, pp.4-5

¹²⁴ MacKinnon, Catharine, *Feminism Unmodified – Discourses on Life and Law* (Cambridge MA: Harvard University Press, 1987)

tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron...¹²⁵

According to MacKinnon therefore, sex equality can never truly exist because by their very nature the sexes of men and women are inherently different. The construction of gender as binary in nature also means that there cannot ever truly be gender equality.

Rather than ensuring equality, the power relationships within gender construction produce male supremacy and female subordination. The legal subject is inherently masculine and consequently the legal subject is judged by the values associated with masculinity: '[w]hen a man and woman stand before the law, it is not that law fails to apply objective criteria when faced with the feminine subject, but precisely that it does apply objective criteria and these criteria are masculine.'¹²⁶ As a result it is arguable that when a woman comes before the law she is not judged objectively, but rather subjectively in her role as man's Other. These women must therefore construct a biography that is reflective of the socially constructed woman and the associated norms of appropriate femininity. Despite being judged subjectively against the criteria of femininity, women's continuing status as man's Other arguably means that she is viewed as a legal object rather than a legal subject.

¹²⁵ MacKinnon, 1987, pp.32-33

¹²⁶ Smart, Carol, *Law, Crime and Sexuality: Essays in Feminism* (London: SAGE Publications Ltd, 1995) p.189

Expanding on the work done by MacKinnon, Naffine notes how when creating its subject the law has failed to include the lived experiences of women and instead only invoked '[t]he experiences, the expectations and the values of the male.'¹²⁷ Despite this, Naffine argues that women actually have a role to play in the construction of the legal subject explaining that '[w]oman's role as "other" is integral to man's construction as "one"...' ¹²⁸ Lacey succinctly summarises Naffine's arguments in her book *Unspeakable Subjects*:¹²⁹

[O]fficially the legal subject is potentially anyone, anywhere. And it is this any-personness of the legal person which is supposed to ensure that the law is at the disposal of us all, equally, without fear, favour or affection ... However... the legal subject [is] someone with a quite specific set of distinguishing characteristics. But these characteristics do not sit easily together. On the one hand our man of law is assumed to be a freestanding, autonomous creature, rationally self-interested and hard headed; on the other hand he is a being who is assumed both to have and to need access to the values of *Gemeinschaft*, the family values, though he must not display them in his public, legal *Gesellschaft* life. The legal person described here is thus essentially a paradox ... The law ... assigns to women the job of holding the two worlds together ... As the courts continue to tell us, the *Gemeinschaft* functions are vital and necessary ones, but they are most appropriately

¹²⁷ Naffine, 1987, p.4

¹²⁸ Lacey, 1998, p.194

¹²⁹ Lacey, 1998

performed by dutiful wives and mothers - not by the man of the law.

Women's domestic labours sustain the paradox of the man of law.¹³⁰

Thus, the female body and the feminine, as the hidden "Other" complements and is a partial constitution of the masculine legal subject.¹³¹

Naffine has also explored the construction of the legal subject specifically in the context of the criminal law, suggesting that the subject of the criminal law is the rational man.¹³² She notes that the criminal law is primarily concerned with the policing of the heterosexual male body and therefore any other bodies are viewed as deviant and unnatural.¹³³ Consequently, the legal construction of the criminal subject is also male. More specifically the criminal legal subject is the body of the heterosexual man. The heterosexual male body as the legal subject in criminal law '[i]s defined by its intactness, its wholeness, its completeness ...'¹³⁴ This can be contrasted with the female body which '[i]s defined by its gaps, its openings, its incompleteness.'¹³⁵ This so-called incompleteness of women's bodies further confirms their status and construction as the "Other" and as a result, women are denied, amongst other things, bodily integrity. A similar fate awaits the homosexual man when he '[o]pens his body boundaries in a manner which is seen to resemble or

¹³⁰ Naffine, Ngaire, *Law and the Sexes* (Sydney: Allen and Unwin, 1990), pp.148-149

¹³¹ Lacey, 1998, p.195

¹³² Naffine, Ngaire, "The Body Bag" cited in Naffine, Ngaire and Owens, Rosemary, (eds.) *Sexing the Subject of Law* (London: Sweet and Maxwell, 1997) p.80

¹³³ Naffine, 1997, p.84

¹³⁴ Naffine, 1997, p.88

¹³⁵ Naffine, 1997, p.88

mimic the female mode of opening ...¹³⁶ and consequently does not conform to appropriate masculine behaviour.

Finally, the work of Smart also makes a significant contribution to the discourse surrounding the legal subject. In her publication *Feminism and the Power of Law*,¹³⁷ Smart makes a number of observations regarding law's construction of the legal subject, particularly the legal construction of the female subject. The basis of Smart's arguments stem from the observation that law does not exist as its own separate entity but rather that it is '[g]rounded in patriarchy, as well as in class and ethnic divisions.'¹³⁸ She also highlights that '[i]n order to have any impact on law one has to talk law's language, use legal methods, and accept legal procedures. All of these are fundamentally anti-feminist ...'¹³⁹ The patriarchal nature of the law means that women are constructed in relation to men in a binary system. The existence of this binary system means that the concepts of masculinity and femininity can only be understood by reference to one another. Within such references is the underlying knowledge that femininity is inferior to masculinity.¹⁴⁰ For example, in this binary logic, rationality is associated with men and emotionality with women. Female bodies signify '[t]he negative side of the polarity between good/bad, noble/savage, sanity/madness, order/chaos.'¹⁴¹

¹³⁶ Naffine, 1997, p.91

¹³⁷ Smart, 1989

¹³⁸ Smart, 1989, p.88

¹³⁹ Smart, 1989, p.160

¹⁴⁰ Smart, 1989, p.33

¹⁴¹ Smart, 1989, p.103

In her subsequent work, *Law, Crime and Sexuality: Essays in Feminism*,¹⁴² Smart both develops and discards some of the arguments made in *Feminism and the Power of Law*¹⁴³ in relation to the construction of the female legal subject. She differentiates between the legal discursive construction of woman, which, as noted above, constructs woman oppositionally and differentially to man, with the legal discursive construction of a *type* of woman. The latter might refer to for example, the female criminal, who can both be differentiated from the construction of woman generally (because women should not partake in deviant criminal behaviour), but also simultaneously differentiated from the construction of woman as always opposed to man.¹⁴⁴ 'Thus [the female criminal] may be an abnormal woman because of her distance from other women, yet simultaneously she celebrates the natural difference between Woman and Man.'¹⁴⁵ Thus the constructions of both woman and a *type* of woman are symbiotic. Woman '[h]as always been *both* ... virtuous and evil ... not *either* virtuous *or* evil. Woman therefore represents a dualism, as well as being one side of a prior binary distinction.'¹⁴⁶ Using the example of the female prostitute, she is constructed within legal discourse as the bad woman. However, she also '[e]pitomises the Woman in contradistinction to Man because she is what any woman could be ... while the man remains innocuous.'¹⁴⁷

¹⁴² Smart, 1995

¹⁴³ Smart, 1989

¹⁴⁴ Smart, 1995, pp.193-194

¹⁴⁵ Smart, 1995, pp.193-194

¹⁴⁶ Smart, 1995, p.194

¹⁴⁷ Smart, 1995, p.194

In *Law, Crime and Sexuality*¹⁴⁸ Smart's closing remarks focus on specific types of female subjects that are continuously constructed by legal discourse. They include, 'the criminal woman ... the sexed woman, the unruly mother.'¹⁴⁹ When law addresses the female subject it is often in one of these forms, which law has itself constructed. A standout remark made by Smart in these concluding remarks provides a vivid illustration of law's construction of the female legal subject: 'The law is like this room full of men. When it notices women, it inevitably simultaneously sexes them and embodies them ...'¹⁵⁰ Having deconstructed the legal construction of the female subject, Smart then concludes by arguing that it is not only legal discourse that constructs women but also that '[w]omen discursively construct themselves.'¹⁵¹ If this ability of women to construct themselves is forgotten, '[w]e risk disempowering 'women' and overinflating the power of more organised discourses.'¹⁵²

Reflecting on the construction of the legal subject, it is apparent that women are constructed as the "Other" and thus lack subjecthood. As noted by Davies, '[t]he assumption of heterosexual masculine subjectivity is materially related to the position of men and women under the law.'¹⁵³ As women are constructed in relation to men, that is to say that they are "the Other" of men, they are not considered to be *true* subjects of law. The limitation and denial of female legal subjecthood is evident even in instances where legislation has been enacted in an attempt to eliminate

¹⁴⁸ Smart, 1995

¹⁴⁹ Smart, 1995, p.221

¹⁵⁰ Smart, 1995, p.221

¹⁵¹ Smart, 1995, p.231

¹⁵² Smart, 1995, p. 231

¹⁵³ Davies, 1997, p.35

discrimination based on sex or gender.¹⁵⁴ Indeed, '[t]he ironic consequence is that the law is framed either in male language, or cast in terms which ignore the effect of such practices on women by introducing legal standards which deny women's subjectivities.'¹⁵⁵ It is suggested that this denial of female legal subjecthood has the consequence of also ensuring the continued denial of female agency. For if woman is not considered to be a true subject of the law then she cannot have the attributes that come as a consequence of having this subjecthood recognised.

This link between the denial of female subjecthood and denial of female agency was illustrated succinctly by Susan Edwards in her discussion on the gender politics of homicide;

The quintessence of homicide law is "male", the authoritative definitions of the legal rules that define it and interpretation of these principles have been prescribed by men and have addressed what men do. In consequence the law exonerates men absolutely and eclipses the predicament and experience of women. Struggles in and around the law on this issue alone have resulted in lawyers trying to match women's accounts to the immutable and unyielding masculinist legal categories. In the short term such negotiations have been expedient, in the long term in efforts to conform to law's standard universal subject, women's accounts are distorted.¹⁵⁶

¹⁵⁴ Barnett, Hilaire, *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing Limited, 1998) p.72

¹⁵⁵ Barnett, 1998, p.72

¹⁵⁶ Edwards, 1996, p.365

Edwards then goes further, explaining that women's agency is also denied through the belief by some judges and academics that 'augmenting and extending the ... rules of provocation and self-defence so as to accommodate women's reactive response is ... legitimating a woman's license to kill.'¹⁵⁷ I suggest that the real reason for such wariness in this context is rather the possibility that should these agentic defences be extended too far in the direction of female offenders, the agency of these women and thus their status as legal subjects will have to be recognised.

The works of the feminist scholars mentioned in this chapter are of particular use within the context of my thesis and the ultimate creation of an agency based approach for women who kill. Naffine notes how '[w]oman's role as "other" is integral to man's construction as "one" ...'¹⁵⁸ This affirmation of woman's active - passive role in the construction of the legal subject highlights that there is the possibility of creating a discursive space within which women's agency over their actions is recognised. It must be noted here that any agency-based model, centred around Naffine's work would give women a more passive role, as according to Naffine 'women's domestic labours sustain the paradox of the man of law.'¹⁵⁹ However, it is essential to take note of the space that Naffine is potentially creating in allowing an agency-based model to be created because her work has the potential to form a partial basis for the beginnings of such an approach.

Smart's work on the construction of the legal subject is also of particular interest within the context of my thesis. Similarly to Naffine, Smart suggests that

¹⁵⁷ Edwards, 1996, p.366

¹⁵⁸ Lacey, 1998, p.194

¹⁵⁹ Naffine, 1990, pp.148-149

women have a role to play in both their legal and social construction, arguing that '[w]omen discursively construct themselves.'¹⁶⁰ This suggests that women have more power than has previously been acknowledged, even within feminist literature. When discussing the issue of power it is necessary to acknowledge, albeit briefly, the seminal work of Foucault. In the first volume of *The History of Sexuality*,¹⁶¹ Foucault analyses power, suggesting that '[t]here is an implicit conjunction between the will to knowledge and power, and that although knowledge and power are not the same thing, each incites the production of the other.'¹⁶² Put simply, knowledge produces power and vice versa. According to Foucault; '[p]ower is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society.'¹⁶³ For Foucault then, power is important because it is through the exercise of power that knowledge is produced and it is power that ultimately allows the construction of the subject in relation to that knowledge.¹⁶⁴ Foucault also posits the notion that power is mobile, meaning that individuals who previously lacked power were not forever condemned to this position, and could in fact utilise knowledge and power in order to change their (powerless) circumstances.¹⁶⁵ Indeed, in his later work Foucault explains that 'individuals are no longer conceived as docile bodies in the grip of an

¹⁶⁰ Smart, 1995, p.231

¹⁶¹ Foucault, Michel, *The History of Sexuality: Volume 1 An Introduction* (London: Penguin Books, 1976)

¹⁶² Barker, Philip, *Michel Foucault: An Introduction* (Edinburgh: Edinburgh University Press, 1998) pp.24-25

¹⁶³ Foucault, 1976, p.93

¹⁶⁴ Barker, 1998, p.27

¹⁶⁵ Barker, 1998, p.32

inexorable disciplinary power, but as self-determining agents who are capable of challenging and resisting the structures of domination in modern society.¹⁶⁶

By analysing the work of Naffine, Smart and Foucault, it can be seen that if women are genuinely considered to have the power and ability to construct themselves then this may arguably have positive implications for the development of a theory based on recognising the agency of women who kill. Indeed, as highlighted by Barnett:

In order for the woman to become a Subject (as opposed to the Other, or object), to have a voice, she must learn to speak (as) woman; develop her own language which can then be admitted to, accommodated within, the male-dominant language. Only when women's different voices are heard, will women be recognised as having subjectivity and thus become, as Irigaray puts it, 'the other of the other', rather than the 'Other of the same'.¹⁶⁷

2.5 Judith Butler and “Performativity”

2.5.1 Luce Irigaray

Another key theoretical underpinning of this thesis is that of “performativity” as elucidated by Butler. However, before a critical engagement with Butler’s work

¹⁶⁶ McNay, Lois, *Foucault and Feminism: Power, Gender and the Self* (Boston: Northeastern University Press, 1992) p.4

¹⁶⁷ Barnett, 1998, p.195

can be undertaken it is first necessary to contextualise the ensuing discussions by briefly exploring the work of Irigaray, which much of Butler's work is in response to.

Much of Irigaray's work focuses on the construction of the female subject. As explained by Butler, Irigaray argues that women; '[c]onstitute a paradox, if not a contradiction, within the discourse of identity itself. Women are the "sex" which is not "one". Within a language pervasively masculinist, a phallogocentric language, women constitute the *unrepresentable*.¹⁶⁸ Unlike de Beauvoir who suggests that the female subject is constructed as "the Other",¹⁶⁹ '[I]rigaray argues that both the subject and the Other are masculine mainstays of a closed phallogocentric signifying economy that achieves its totalising goal through the exclusion of the feminine altogether.'¹⁷⁰ This exclusion of the feminine occurs through the operation of the binary opposition of masculine and feminine. Within this binary opposition the feminine is constructed as the excluded. In other words, according to Irigaray, '[t]he masculine occupies both terms of binary opposition, and the feminine cannot be said to be an intelligible term at all.'¹⁷¹ This has the consequence that the female body is ultimately insignifiable,¹⁷² that it is unrepresentable because woman does not occupy either side of the binary gender distinction.¹⁷³ Butler summarises Irigaray's position well:

¹⁶⁸ Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge Classics, 2006) p.13

¹⁶⁹ Beauvoir, Simone de, *The Second Sex* (translation by Borde, Constance and Malovany-Chevallier, Sheila) (London: Random House, 2010) p.6

¹⁷⁰ Butler, 2006, p.13

¹⁷¹ Butler, Judith, *Bodies That Matter: On The Discursive Limits of "Sex"* (London: Routledge, 1993) p.39

¹⁷² Butler, 2006, p.17

¹⁷³ Butler, 2006, p.14

[I]rigaray's theory of sexual difference suggests that women can never be understood on the model of "subject" within the conventional representational systems of Western culture precisely because they constitute the fetish of representation and, hence, the unrepresentable as such. Women can never "be", according to this ontology of substances precisely because they are the relation of difference, the excluded by which that domain marks itself off. Women are also a "difference" that cannot be understood as the simple negation or "other" of the always-already-masculine subject ... but a difference from the economy of binary opposition, itself a ruse for a monologic elaboration of the masculine.¹⁷⁴

A major criticism to be made of Irigaray's work is her assertion that the feminine is unrepresentable because she exists outside of the gender binary. Logic and common sense tells us that this is not the case. Woman exists as both matter and a subject in the most basic physical sense, that is to say that she exists in three-dimensional form as a living, breathing human being. Moreover, the feminine subject also exists, at least within societal discourse, as demonstrated through the earlier discussions on labelling theory, construction theory and ultimately Butler's theory of gender performativity. Woman may be the subordinate within the binary opposition of masculine and feminine, but it is suggested that this does not automatically preclude her non-existence as a subject within societal discourse at least.¹⁷⁵ Rather, the incompleteness that comes with such subordination for woman '[p]ermits that

¹⁷⁴ Butler, 2006, p.25

¹⁷⁵ This *does not* mean that women are recognised as subjects for the purposes of law, that is as legal subjects. See chapter four, section 4.4 and chapter six, section 6.3

category to serve as a permanently available site of contested meanings. The definitional incompleteness of the category might then serve as a normative ideal relieved of coercive force.¹⁷⁶

Linked into the criticism surrounding the current non-existence of woman as a subject is Irigaray's suggestion that woman will become a subject when her voice is heard and she '[d]evelop(s) her own language ...'¹⁷⁷ By doing this Irigaray appears to leap from the position that woman does not exist as a subject, to the suggestion that she has the power to develop her own language and be accommodated within the male-dominated language. Such assertions raise a number of issues; firstly, if woman does not exist as a subject, how will she ultimately be able to develop a language which is accommodated by man? Secondly, if woman does not currently exist as a subject this must equate to a lack of power for woman. Therefore, the question must be posed as to how women '[l]earn to speak (as) woman ...'¹⁷⁸ without the power which must be required to enable them to do so? I would suggest that more detailed answers are required to these pertinent questions than Irigaray provides and consequently much of her work taken in its own context is of limited use within this thesis. However, Irigaray's work provides the basis for much of Judith Butler's work and it is in this context that it is most useful.

¹⁷⁶ Butler, 2006, p.21

¹⁷⁷ Barnett, 1998, p.195

¹⁷⁸ Barnett, 1998, p.195

2.5.2 Judith Butler

Judith Butler is an American post-structuralist philosopher. 'Her work has exerted great influence in a variety of academic and extra-academic environments ...'¹⁷⁹ particularly in the fields of feminism and queer theory. Butler is arguably most known for her work on the theory of gender performativity, which argues that '[g]ender is a process, and not some essence that pre-exists a subject's formation.'¹⁸⁰ Drawing upon Austinian linguistic philosophy,¹⁸¹ Butler argues that *performativity* is:

[n]ot a singular "act", for it is always a reiteration of a norm or a set of norms, and to the extent that it acquires an act-like-status in the present, it conceals or dissimulates the conventions of which it is a repetition. Moreover, this act is not primarily theatrical; indeed its apparent theatricality is produced to the extent that its historicity remains dissimulated (and, conversely, its theatricality gains a certain inevitability given the impossibility of a full disclosure of its historicity).¹⁸²

According to Butler, gender is performative in nature, that is to say that; 'gender is the repeated stylisation of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.'¹⁸³ This reflects the notion that gender is socially constructed

¹⁷⁹ Loizidou, Elena, *Judith Butler: Ethics, Law Politics* (Abingdon: Routledge Cavendish, 2007) p.1

¹⁸⁰ Loizidou, 2007, p.1

¹⁸¹ The concept of performativity was developed by John Austin in his work *How to Do Things with Words*, where although not specifically using the term 'performativity' he discussed the concept of 'performative utterances'. See, Austin J. L., *How to Do Things with Words: The William James Lectures delivered in Harvard University in 1955* (edited by Urmson, J. O. and Sbisà, Marina) (Oxford: Oxford University Press, second edition, 1976)

¹⁸² Butler, 1993, pp.12-13

¹⁸³ Butler, 2006, p.45

and is thus reflective of societal norms. The pervasiveness of gender within the lives of individuals is, I would argue, both reflective of and symbiotic to the concept of gender performativity. Societal norms simultaneously allow and constrain a particular “performance” of gender that individuals must adhere to, with the consequence that it becomes so normalised over time that it reinforces the social norms that dictated the performance initially.

There are some similarities and differences between performativity and gender performativity. According to Butler, ‘[p]erformativity is a practice of citationality by “which discourse produces the effects it names.”’¹⁸⁴ Although *gender performativity* is also a practice of citationality, instead gender discourse specifically ‘[p]roduces bodies “as already sexed”, that is as having a sex prior to naming.’¹⁸⁵ Although Butler is most renowned for her work on the understanding of gender formation through this theory of gender performativity, in the context of this literature review it is necessary to focus more specifically on her work on performativity largely outside the context of gender construction.¹⁸⁶

Butler’s work is undoubtedly useful to the methodology within this thesis. Indeed, her development of the theory of performativity is particularly relevant in the context of discussions on the labelling of women who kill within socio-legal discourse. The nature of performativity, that is that it is ‘[n]ot a singular act, but a

¹⁸⁴ Butler, 1993, p.2

¹⁸⁵ Ahmed, Sara, *Differences that Matter: Feminist Theory and Postmodernism* (Cambridge: Cambridge University Press, 1998) p.113

¹⁸⁶ See chapter three, pp. 94 -96 for a more detailed discussion of Butler’s work on gender performativity

repetition and a ritual, which achieves its effects through its naturalisation ...'¹⁸⁷ reflects the legal and social responses to female killers. Indeed it is the performativity of law, the reiteration of legal norms, which continuously labels and constructs female killers as mad, bad, or victims and denies the agency of these women. Similarly, the performative nature of societal norms offers an explanation for the social ostracisation and non-agentic constructions surrounding women who kill. Consequently this section of the chapter will focus on Butler's theory of performativity in the context of non-performance of societal norms, the construction of the subject, the creation of agency and the labelling of individuals.

At the heart of Butler's work is her concern that normative gender presumptions have the ability to determine the liveability and viability of certain lives. She observes that 'the norms'¹⁸⁸ that govern idealised human anatomy ... work to produce a differential sense of who is human and who is not, which lives are liveable, and which are not.'¹⁸⁹ According to Butler, '[w]hen we defy ... norms, it is unclear whether we are still living, or ought to be, whether our lives are valuable, or can be made to be, whether our genders are real, or ever can be regarded as such.'¹⁹⁰ The concept of performativity and its citational practice calls into question and reiterates these norms that govern what is considered to be real and thus intelligible.¹⁹¹ As Butler highlights '[t]hrough the practice of gender performativity, we not only see how the norms that govern reality are cited but grasp one of the

¹⁸⁷ Butler, 2006, p.xv

¹⁸⁸ According to Butler: 'The norm is a measurement and a means of producing a common standard, to become an instance of the norm is not fully to exhaust the norm, but, rather to become subjected to an abstraction of commonality.' (Butler, Judith, *Undoing Gender* (New York: Routledge, 2004) p.50)

¹⁸⁹ Butler, Judith, *Undoing Gender* (New York: Routledge, 2004) p.4

¹⁹⁰ Butler, 2004, p.206

¹⁹¹ Butler, 2004, p.218

mechanisms by which reality is reproduced *and* altered in the course of that reproduction.¹⁹² Although it may appear here that Butler is calling for the abolition of gender norms within society this is not strictly accurate. Indeed, as she makes clear in *Gender Trouble*¹⁹³ gender norms form a substantive part of an individual's identity and therefore abolishing them would have the effect of destabilising identity.¹⁹⁴ Rather Butler is attempting to highlight that a '[n]orm only persists as a norm to the extent that it is acted out in social practice and re-idealised and reinstated in and through the daily rituals of bodily life.'¹⁹⁵ Consequently, society has the ability to alter or indeed abolish certain norms through changing performative behaviours.

In *Bodies That Matter*¹⁹⁶ Butler focuses on the construction of the subject. She argues that through the concept of performativity it becomes clear that a foreclosed subject forms the foundations of society, that is: '[a] subject that animates the socio-symbolic order, one that exists, lives and engages in practices, which are not normative, but counter-normative.'¹⁹⁷ Those who do not conform to societal norms (gender or otherwise) and are considered to be foreclosed subjects are '[p]roduced as "abject beings", beings that are not yet subjects ...'¹⁹⁸ However, according to Butler in order for a subject to be created, the 'exclusionary matrix ... requires the simultaneous production of a domain of abject beings, those who are not yet "subjects", but who form the constitutive outside to the domain of the

¹⁹² Butler, 2004, p.218

¹⁹³ Butler, 2006

¹⁹⁴ Butler, 2006, p.200

¹⁹⁵ Butler, 2004, p.48

¹⁹⁶ Butler, 1993

¹⁹⁷ Loizidou, 2007, p.165

¹⁹⁸ Butler, 1993, p.3

subject.¹⁹⁹ Butler notes that abject beings operate within the “[u]nliveable” and “uninhabitable” zones of social life²⁰⁰ However, for Butler this does not mean that the abject exists separately to the subject, but rather that the abject actually forms the foundations upon which the subject can be identified.²⁰¹ Therefore, according to Butler even those who are considered to be abject can be identified as subjects, because the abject itself forms part of the subject.

Butler’s focus on the creation of conditions for liveable and viable lives is of particular use in the context of this thesis. As noted above, she acknowledges the existence of a foreclosed, or abject, subject, an Other, within society. Butler’s work enables ‘[s]o called “abjected” subjects to become culturally intelligible’²⁰² through the suggestion that these “abjected” subjects are in fact subjects, as they actually form the foundation of the subject. This allows those who may not have previously been considered subjects, such as women and deviants, to be considered as such. Indeed as Lacey explains; ‘[w]omen’s role as “other” is integral to man’s constitution as “one”; the woman as other acts as the support which gives back to man, in a mirror image, his sense of the integrity of his own identity.’²⁰³

Finally, Butler’s work also explores the potentially injurious labelling (or as she refers to it as naming) of individuals who deviate from societal norms, gender or otherwise. Her theory of performativity enables us to see more clearly how labelling occurs, demonstrating the role of both historical ideologies and existing cultural and

¹⁹⁹ Butler, 1993, p.3

²⁰⁰ Butler, 1993, p.3

²⁰¹ Loizidou, 2007, p.36

²⁰² Loizidou, 2007, p.1

²⁰³ Lacey, 1998, p.194

societal norms. 'To be named a woman, for example, means that there is a historical understanding of who is a woman, but to become one, to re-appropriate that naming or to resist the historical way in which that naming is uttered, produces us as subjects of a contemporary culture.'²⁰⁴ This theorisation is arguably somewhat of a reiteration and development of the work of labelling theorists as discussed earlier in the chapter.²⁰⁵ However, Butler's concept of performativity deviates somewhat from the basis of labelling theory through the suggestion that the individual who is named or labelled has the ability to answer back and can resist and reverse the labelling, as well as resist '[t]he authority of the one that names ...'²⁰⁶ Butler's performativity based theory accredits more power to the individual than in labelling theory, which suggests that the deviant label has the effect of encouraging them to participate in future deviance as they struggle to resist their deviant label.

Indeed Butler's suggestion that the labelled individual has the ability to resist that labelling is useful in the context of Smart's theory of double deviance. Smart's theory proposes that women are labelled as doubly deviant when they commit crime, as they have not only offended against society, but also against their gender, that is the norms of appropriate femininity. If Butler's theory is correct then women potentially have the ability to resist the doubly deviant label. Therefore, it is submitted that Butler is saying that although the discourse of "woman" is itself constituted by discourse, women are not determined by it. That is to say that it is possible for women to "rebel" against the constituted category, which in the case of

²⁰⁴ Loizidou, 2007, p.41

²⁰⁵ See chapter two, section 2.3

²⁰⁶ Loizidou, 2007, p.42

criminal women is often that they are doubly deviant. This potential for “rebellion” was highlighted by Loizidou: ‘women are not any more to be viewed as passive, repressed by power and waiting for the regime of power to alter, recognise and “represent” them in order to be able to transform their conditions of liveability.’²⁰⁷ The power that comes with resisting the label arguably has the potential to create the space required to produce an agency-based model for female killers.

Despite aspects of Butler’s work undoubtedly being useful in the context of this thesis, there are also several criticisms of her work that can be made. Arguably the most important criticism of Butler’s work is found in its intellectual inaccessibility to both academics and non-academics alike. Nussbaum describes Butler’s written style ‘[a]s ponderous and obscure.’²⁰⁸ Butler’s writing style ‘[i]s notoriously difficult, filled as it is with allusions, reversals, ellipses, neologisms, and complex sentences with multiple clauses, to say nothing of occupatio, litotes, irony and hyperbole.’²⁰⁹ Indeed, in 1998, Butler won first prize in The *Philosophy and Literature* Bad Writing Contest.²¹⁰ The obscurity of Butler’s work is even more prevalent for non-academics, thus arguably having direct implications on the potential effectiveness of any of the theories suggested by Butler outside the realms of academia. Indeed, as noted above she suggests that people have the power to resist the labels which are given to them. However, the inaccessible nature of Butler’s work raises the question as to whether it is really possible for women to resist labelling in the way that Butler suggests if

²⁰⁷ Loizidou, 2007, p.4

²⁰⁸ Nussbaum, C. M., “The professor of parody: the heap defeatism of Judith Butler” *The New Republic* (22nd February 1999), 37, p.38

²⁰⁹ Stow, Simon, *Republic of Readers?: The Literary Turn in Political Thought and Analysis* (New York: SUNY Press, 2008) p.101

²¹⁰ *Philosophy and Literature*, “The Bad Writing Contest - Press Releases, 1996 – 1998” at http://denisdutton.com/bad_writing.htm

they cannot understand her work? For example, women labelled as criminals or murderers, unless academics, are extremely unlikely to understand the points Butler is trying to make about the resisting of such labels.

Linked in with this issue of inaccessibility, is Butler's use of parody which, according to Loizidou, '[o]bscures the real needs of women ...'²¹¹ As Nussbaum explains:

For women who are hungry, illiterate, disenfranchised, beaten, raped, it is not sexy or liberating to re-enact, however paradoxically, the conditions of hunger, illiteracy, disenfranchisement, beating and rape. Such women prefer food, schools, votes and the integrity of their bodies.²¹²

Thus, one significant issue with Butler's work is her failure to acknowledge '[t]he material conditions of life that constrain our formation as subjects.'²¹³ Indeed Butler's use of parody means that the women to whom her work is the most valuable, such as criminal women, are in fact the most likely to be unable to understand her work and implement her theories in the context of their lives. Consequently these women will be unable to reconstruct themselves along the lines that Butler suggests if they cannot understand the arguments that she is making.

Another major criticism of Butler's work is that it is difficult to see how her theories exist outside their theoretical foundations and thus how they can actually be used in a practical context. That is to say that there is little sense of practicality

²¹¹ Loizidou, 2007, p.161

²¹² Nussbaum, 1999, p.43

²¹³ Loizidou, 2007, p.161

about her work. Indeed, Nussbaum's primary complaint with Butler's work is '[t]hat feminism should primarily be a practical and political matter, with a definite program of action, and that Judith Butler's feminism fails this practical test.'²¹⁴ This is a feeling echoed by Staal who explains how '[s]he became frustrated with Butler's reliance on theory and didn't find a way to connect her ideas with her actual life...'²¹⁵ Again taking Butler's work on labelling theory, she does not include any practical direction on how best to resist the labels bestowed upon women. Even when discussing her much cited theory of performativity and using the example of "drag queens", Butler does not provide what would be considered to be a workable framework for its practical implementation that would help to understand the reality of the female gender.

2.6 Concluding Remarks

This chapter has critically engaged with the theoretical and terminological underpinnings of this thesis, examining existing academic literature on agency, labelling theory, the construction of the female subject and the concept of performativity. It has become clear that what is missing within the existing literature is a cohesive approach which allows women as legal subjects to be recognised as well as acknowledging their agency. However, the discussions in this chapter have highlighted that through an engagement with the existing literature a space exists

²¹⁴ Broad Recognition, "Nussbaum on Butler" available at <http://broadrecognition.com/politics/nussbaum-on-butler/>

²¹⁵ A Year of Feminist Classics, "Introducing Gender Trouble by Judith Butler" available at <http://feministclassics.wordpress.com/2011/11/06/introducing-gender-trouble-by-judith-butler/>

which would allow for an agency-based model to be created and thus provides a solid foundation for such a model to be formulated. Before the structure of such a model can be discussed in any significant detail, a more comprehensive critical analysis of the concept of agency must be undertaken, which will occur in chapters four and five.

From the analysis undertaken within this chapter it has also become clear that there is a significant gendered dimension to labelling and construction theory as well as within performativity. Consequently, the critical discussions that have taken place throughout this chapter lead to a number of questions which must be answered. These include; what is gender, specifically female gender, and how is this constructed? What is the role of gender norms in the labelling and construction of women? How does the law and society currently label and construct women who kill? What will need to be included in an agentic-based model for women who kill in order for it to potentially successfully be implemented within the legal system? The next chapter of my thesis aims to begin addressing these questions by exploring the concepts of gender and appropriate femininity with the intention of contextualising the discourse and constraints within which the current agency denial of women who kill occurs. The focus in the next chapter on the gender discourse surrounding appropriate femininity further develops the gendered analysis conducted in this chapter on the key concepts within this thesis, as well as laying the groundwork for the critical analysis of agency which will take place in chapters four and five.

The following chapter will begin by exploring the sex/gender distinction before moving on to critically engage with “sex” and “gender” as two distinct

concepts. It will explore the construction of gender in the law before finally moving on to look at some of norms associated with appropriate femininity within gender discourse.

Chapter Three – Gender and Appropriate Femininity

3.1 The Sex/Gender Distinction

This chapter will begin by engaging with the sex/gender distinction. The importance of this initial engagement can be found in helping to answer the question of “what is gender?” by distinguishing and differentiating it from sex. Thus this initial discussion on the sex/gender distinction, focusing on academic literature and scholarly opinion, provides some pre-contextualisation for the following discussions on the approach taken by legal discourse.

The terms sex and gender are often used interchangeably when talking about an individual, for example in casual conversation and in questions collecting data on application forms. Academics also use the terms interchangeably, for example MacKinnon who admits ‘I use sex and gender relatively interchangeably.’¹ However, it has been argued by many feminist scholars, dating back to the work of de Beauvoir,² that these terms actually have very different meanings. Traditionally sex is used to describe primary biological characteristics, such as chromosomes, which cannot be altered, whereas gender is usually understood to describe secondary cultural characteristics that can be interrogated and altered.³ The terms man/woman, male/female are therefore traditionally used to describe a person’s

¹ MacKinnon, Catharine, *Toward a Feminist Theory of the State*, (Cambridge MA: Harvard University Press, 1989) p.xiii

² In *The Second Sex* de Beauvoir argued: ‘[n]ot every female human being is necessarily a woman; she must take part in this mysterious and endangered reality known as femininity.’ See: Beauvoir, 2010, p.3

³ Davies, 1997, p.31

sex, whereas the terms masculine/feminine, masculinity/femininity are traditionally used to describe a person's gender. The distinction between sex and gender can be traced back, at least, to the work of Freud. He developed his psychoanalytic theories with a '[c]entral focus on issues of gender and sexuality.'⁴ His work '[r]ejects notions of pure masculinity and femininity and highlights the complexity that many men and women experience in living their gender and sexual identities.'⁵ Thus: '[i]n Freud's theory, what culture calls "masculinity" and "femininity" emerge as forms of identity which refuse to be confined inside the boundaries of male and female bodies leaving men and women as inherently bisexual mixtures of gender.'⁶

The contemporary sociological distinction between the terms of sex and gender can be attributed to the American psychoanalyst, Stoller. He prescribed particular definitions to the concepts of sex, gender, gender identity and gender role. According to Stoller *sex* should be restricted to what he terms as '[a] biological connotation',⁷ whereas *gender* may be independent of sex and has psychological, cultural and social connotations.⁸ For Stoller:

gender identity starts with the knowledge and awareness ... that one belongs to one sex and not to the other, though as one develops, gender identity becomes much more complicated, so that, for example, one may sense

⁴ Marchbank and Letherby, 2007, p.122

⁵ Marchbank and Letherby, 2007, p.123

⁶ Alsop, Rachel; Fitzsimons, Annette and Lennon, Kathleen, *Theorising Gender* (Cambridge: Polity Press, 2002) p.47

⁷ Stoller, Robert, *Sex and Gender: The Development of Masculinity and Femininity* (London: Karnac Books, 1994) p.9

⁸ Stoller, 1994, p.9

himself as not only a male but a masculine man or an effeminate man or even a man who fantasies being a woman.⁹

Finally, an individual's *gender role* is the gendered behaviour that they display in society which establishes their position with regard to their gender.¹⁰ Perhaps most importantly in the context of gender analysis as Collier acknowledged, Stoller argued '[t]hat biological sex augmented, but did not determine, the appropriate gender "identity" for each sex.'¹¹ Stoller's work on the sex/gender distinction has been extremely influential and has subsequently been adopted by many other scholars. For example Gayle Rubin who 'appropriated Stoller's categories for her own feminist purposes ... [taking] sex to mean biological sexual differences and gender to mean the oppressive social norms brought to bear on these differences.'¹²

It is clear that Stoller's model treats sex and gender as being conceptually different, with the subsequent possibility of men who identify as feminine and women who identify as masculine. However, it is important to acknowledge that within both societal and legal discourse there is often a correspondence between the two terms. The traditional presumption is that an individual's gender is inherently intertwined with their sex, and that therefore men should always identify as masculine and demonstrate traits associated with hegemonic masculinity, and similarly that women should always identify as feminine and thus demonstrate traits associated with appropriate femininity. Delphy succinctly explains the development

⁹ Stoller, 1994, p.10

¹⁰ Stoller, 1994, p.10

¹¹ Collier, Richard, *Masculinities, Crime and Criminology: Men, Heterosexuality and the Criminal(ised) Other* (London: Sage Publications Ltd, 1998) pp.13-14

¹² Moi, Toril, *What is a Woman? And Other Essays* (Oxford: Oxford University Press, 1999) pp.23-24

of this presumed correspondence between sex and gender; '[t]he hierarchical division of humanity into two sexes transforms an anatomical difference (which is itself devoid of social implications) into a relevant distinction for social practice.'¹³ Essentially, the assumed correspondence between gender and sex has developed as a result of attempting to attach significance to the concept of sex. Put another way, '[t]he "biological fact" of sex is only a "fact" of any interest because of the cultural importance attached to it.'¹⁴ That cultural importance takes the form of gender.

Since the 1960s many English-speaking feminists have routinely utilised this sex/gender distinction, where sex is about biological characteristics and gender is a distinct social or cultural category, as a basis for their theoretical work.¹⁵ The sex/gender distinction was particularly embraced by second-wave feminists who used it to explore the cultural construction of femininity as separate from being biologically female, as well as an '[a]pparatus to explore the gendered nature of social institutions and practices.'¹⁶ Second wave feminism can be divided into two quite distinct sub-groups: Cultural feminists and Radical feminists. Second wave Cultural feminists utilise the sex/gender distinction to attempt to eliminate essentialist views of gender.¹⁷ They seek '[t]o disarticulate patriarchal gender norms from the understanding of biological sex. This disarticulation would bring to the fore

¹³ Delphy, Christine, *Close to Home: A Materialist Analysis of Women's Oppression* (London: Hutchinson, 1984) p.144

¹⁴ Chau, P-L. and Herring, Jonathan, "Defining, Assigning and Designing Sex" *International Journal of Law, Policy and the Family*, 16, (2002), 327, p.328

¹⁵ Moi, 1999, p.3

¹⁶ Davies, 1997, p.29

¹⁷ Grenfell, Laura "Making sex: law's narrative of sex, gender and identity" *Legal Stud.*, 23, (2003), 66, p.92

the positive aspects of biological sex and “true” biological femaleness.’¹⁸ Consequently, Cultural feminists use the sex/gender distinction to embrace sex by highlighting that gender is a cultural construct and thereby separating ‘[w]omen’s “natural sex” from culturally drawn negative characteristics traditionally associated with women.’¹⁹

Second-wave Radical feminism also ‘[c]onsiders sex to be the primary division in society and primary identity category.’²⁰ However, unlike Cultural feminism, it sees both sex and gender as socially constructed. Radical feminism ‘[r]ejects the ... view that sexual difference is irrelevant, and emphasises women’s sex as fundamentally different.’²¹ MacKinnon is a prominent second wave Radical feminist. She suggests that the fundamental difference in women’s sex is its construction, that it to say that it ‘[i]s socially constructed by a patriarchal dominance/submission structure.’²² Therefore, according to MacKinnon, in a male-dominated society women are constructed ‘[a]s sexual objects for the use of men.’²³

Unlike second wave feminists, third wave feminists are ‘[c]ritical of the sex/gender distinction.’²⁴ They question whether the distinction should be accepted at all because by doing so there is an implicit acceptance of the natural relationship ‘[b]etween sexed bodies (male/female) and culturally constructed genders

¹⁸ Grenfell, 2003, p.92

¹⁹ Grenfell, 2003, p.92

²⁰ Grenfell, 2003, p.92

²¹ Grenfell, 2003, p.92

²² Grenfell, 2003, p.92

²³ Grenfell, 2003, p.93

²⁴ Grenfell, 2003, p.93

(masculinity/femininity).²⁵ Third wave feminists are also critical of the second wave construction of sex as being fixed, instead arguing that sex is a socially constructed category and thus open to alteration and interpretation. More specifically for poststructuralist third wave feminists, sex is '[a] historical and cultural concept subject ... articulated by language and its meaning changes over time and cultures.'²⁶ Therefore, they consider the discourse surrounding sex as never being fixed and thus it is open to interpretation and is '[a]n open site of contested meaning.'²⁷

The post-structural feminist, Butler challenges the sex/gender distinction. She argues that, like gender, sex is a socio-political construct, suggesting that if sex, like gender, is culturally constructed then perhaps the sex/gender distinction does not actually exist at all.²⁸ Eliminating the distinction would '[a]void the discourse of biological determinism, which restricts the meaning of gender (and sex) to received notions of masculinity and femininity.'²⁹ Indeed, in the introduction to her book *Bodies That Matter*³⁰ Butler suggests that;

"[s]ex" is an ideal construct which is forcibly materialised through time. It is not a simple fact or static condition of the body, but a process whereby regulatory norms materialise "sex" and achieve this materialisation through a forcible reiteration of these norms ... "Sex" is, thus, not simply not what one has, or a static description of what one is: it will be one of the norms by which

²⁵ Grenfell, 2003, p.93

²⁶ Grenfell, 2003, p.94

²⁷ Grenfell, 2003, p.94

²⁸ Butler, 2006, pp.9-10

²⁹ Grenfell, 2003, p.95

³⁰ Butler, 1993

the “one” becomes viable at all, that which qualifies a body for life within the domain of cultural intelligibility.³¹

From this analogy Butler is arguing that sex, or the body, is ‘[p]roduced by gendered ideas and gendered actors.’³² Those who do not conform to social gendered norms, either because they simply cannot or choose not to do so, are viewed as so-called “gender outlaws” and often labelled pejoratively as a consequence.³³

In the context of the current gendered construction of femininity it is submitted that Butler’s assertion regarding the ability to depart from social norms is correct. However, some criticisms can be made with regard to her attempts to collapse the sex/gender distinction. Firstly, Butler’s failure to acknowledge the inherent physical nature of the human body means that ‘[g]ender becomes completely disembodied, and the body itself is divorced from all meaning.’³⁴ Secondly, as Moi observes, Butler’s attempts to collapse the distinction are shown to be flawed because key aspects of her work actually rely on the continued existence of the distinction:

In *Gender Trouble* Butler considers male drag shows to be subversive of social gender norms. But, as she herself stresses, any politically or socially subversive effects of male drag shows depend on the contrast (“gender dissonance”) between male bodies (sex) and feminine clothes and behaviour

³¹ Butler, 1993, pp.1-2

³² Sandland, Ralph, “Feminism and the Gender Recognition Act 2004” *Feminist Legal Studies* 13, (2005) 43, p.47

³³ Grenfell, 2003, p.100

³⁴ Moi, 1999, p.74

(gender). It appears that the original 1960s sex/gender distinction is, after all, quite essential to Butler's political case.³⁵

Thirdly, in the context of this thesis it is the current construction of *gender*, not *sex* as suggested by Butler, that limits women's agency and forces them to adhere to social norms. If we take the point that sex is biologically determined, that is to say that it is based on chromosomes and genetic makeup and therefore an individual cannot change from one sex to another, by distinguishing gender from the rigidity of biological sex and viewing gender as something that is culturally constructed, allows for a contestation and critique of the current gender norms and meanings associated with femininity. Moreover gender as a fluid, ever-changing construct suggests that there is opportunity to create a discursive space within which to alter the current constructions of femininity that deny women's agency within criminal legal discourse. Finally, maintaining the sex/gender distinction means that attributes typically associated with masculinity, such as agency, can also be attributed to women, as the distinction does not require an individual's sex and gender to correspond.

3.2 Sex and Gender

Having critically engaged with academic discourse surrounding the sex/gender distinction it is now necessary to explore the concepts of sex and gender

³⁵ Moi, 1999, p.53

individually, analysing both the social and legal discourse surrounding these terms in detail.

3.2.1 'Sex'

An individual's sex is, at its simplest, defined by biological and often physical characteristics that indicate the physical differences between the sexes, male and female. An individual's sex is determined '[t]hrough the application of socially agreed upon biological criteria [which can include] ... genitalia at birth or chromosomal typing before birth, and they do not necessarily agree with one another.'³⁶ Indeed, as noted by O'Donovan: 'seven variables affecting sex determination have been identified. These are chromosomal sex; gonadal sex; hormonal sex; the internal accessory organs – the uterus in the female and the prostate gland in the male; the external genitals; assigned sex; gender role.'³⁷

English Law has taken an essentially biological approach to issues of sex, highlighted in the controversial case of *Corbett v Corbett*.³⁸ This case concerned the validity of a marriage between a man and a post-operative male to female transsexual. In the case 'the court went on to distinguish sex as a biological concept from gender.'³⁹ It should perhaps be noted at the outset that the judge, Ormrod J, was also qualified as a doctor and therefore his judgment in this case may have been influenced by his medical training and knowledge. Indeed, in his obituary specific

³⁶ West, Candace and Zimmerman, Don, "Doing Gender" *Gender and Society*, 1(2), 1987, 125, p.127

³⁷ O'Donovan, Katherine, "Transsexual Troubles: The Discrepancy between Legal and Social Categories" in Edwards, Susan (ed.), *Gender, Sex and the Law* (London: Croom Helm, 1985) p.10

³⁸ [1971] P. 83

³⁹ O'Donovan, 1985, p.15

reference to his '[w]elcome grasp of complicated medical evidence'⁴⁰ was made. Ormrod J held that 'the biological sexual constitution of an individual is fixed at birth at the latest and cannot be changed ...'⁴¹ He went on to explain that there were several criteria for assessing and determining an individual's sex, including the use of '[c]hromosomal, gonadal, and genital tests, if all three are congruent, determine the sex ... accordingly ...'⁴² Any operative intervention should be ignored.⁴³ Consequently in *Corbett* the marriage was held to be void.

This case demonstrates that within legal discourse sex is not considered to be '[a] matter of choice ... rather it is an essential biological characteristic.'⁴⁴ Certainly the legal position on this issue was confirmed in the later appeal case of *Bellinger v Bellinger*⁴⁵ where the House of Lords refused to acknowledge Mrs Bellinger's post-operative sex in order to allow her marriage to be declared valid. The House of Lords held that a person's sex could be determined by seven factors; chromosomes, gonads, internal sex organs, external genitalia, hormonal patterns and secondary sexual characteristics, style of upbringing and living and self-perception,⁴⁶ thus reaffirming that within legal discourse sex is viewed as largely biological.

⁴⁰ --- 'Obituaries – Sir Roger Ormrod' at http://www.jsasoc.com/Family_archive/Archive/Roger%20Ormrod/roger%20ormrod%20obit%20times.pdf

⁴¹ *Corbett v Corbett* [1971] P. 83 at p.84

⁴² *Corbett*, 1971, p.106

⁴³ *Corbett*, 1971, p.106

⁴⁴ Cowan, Sharon, "'Gender is no substitute for sex": A comparative Human Rights analysis of the Legal Regulation of Sexual Identity" *Feminist Legal Studies*, 13, (2005), 67, p.74

⁴⁵ [2003] 2 A.C. 467

⁴⁶ *Bellinger v Bellinger* [2003] 2 A.C. 467 per Lord Nicholls of Birkenhead at p.472

3.2.2 Gender

In the 1990s many scholars, particularly feminists, claimed the term “gender” to describe and replace that of “sex roles”.⁴⁷ Gender is a socially constructed identity, the performance of which reflects the societal and gender norms associated with hegemonic masculinity for men and appropriate femininity for women. That is to say that, ‘[g]ender is the cultural meanings that the sexed body assumes.’⁴⁸ It is ‘[t]he mechanism by which notions of masculine and feminine are produced and naturalised.’⁴⁹

Gender, and more specifically an individual’s gendered identity, is constructed by the environment in which an individual lives through ‘[l]arge scale institutions ... interpersonal relations ... power structures and economic relationships.’⁵⁰ From this it therefore becomes apparent that gender and power are inexorably interlinked. Indeed, as explained by Detmold: ‘gendering is wholly a function of power ...’⁵¹ This notion is reiterated by McNay who states: ‘gender is understood as an effect of dominant power relations which is imposed upon the inert bodies of individuals.’⁵² This relationship between power and gender has the consequence that masculinity is constructed as being dominant and privileged over

⁴⁷ Jeffreys, Sheila, “They Know It When They See It: The UK Gender Recognition Act 2004” *BJPIR* 10, (2008), 328, p.340

⁴⁸ Butler, 2006, p.9

⁴⁹ Butler, 2004, p.42

⁵⁰ Connell, Robert, “Arms and the man: using the new research on masculinity to understand violence and promote peace in the contemporary world” in Breines, Ingeborg; Connell, Robert; and Eide, Ingrid (Eds.), *Male roles, masculinities and violence: a culture of peace perspective* (Paris: UNESCO Publishing, 2000) p.23

⁵¹ Detmold, M.J., “The Common Law as Embodiment” in Naffine, Ngaire, and Owens, Rosemary (Eds), *Sexing the Subject of Law* (Sydney: Sweet and Maxwell, 1997) p.95

⁵² McNay, 1992, p.71

femininity within societal discourse, a construction which is more widely reflected within patriarchal societal discourse and the associated patriarchal societal institutions such as the law.

3.2.3 Gender Theorists

There are a number of eminent gender scholars, all of whom undoubtedly deserve recognition for their contributions to the field. In both this chapter and throughout my thesis I have made reference to the work of many of them including but not limited to Naffine, O'Donovan, Edwards and Smart. Although this thesis has also previously critically evaluated the work of Butler in chapter two,⁵³ her theory of gender performativity must be explored in further detail as it is a continuing theme and undertone that runs throughout discussions on both the legal and social construction of gender. Indeed, aspects of Butler's theory of gender performativity both inform and reflect the legal and societal constructions of gender. The theory of gender performativity is invaluable in both its most basic form, that is to say that an individual quite literally "performs" the behaviour associated with and expected of their gender, and in its more complicated scholarly form. Consequently, a comprehensive analysis of Butler's work on gender performativity will now be undertaken.

Butler's theory of gender performativity is arguably the most influential in contemporary gender theory. Butler argues that gender should not be envisaged as a noun, but rather, as a verb. In other words, she regards gender as something that an

⁵³ See chapter two, section 2.5.2

individual does, in a similar way in which an individual runs, walks, talks, writes and so forth. She therefore envisages gender as something that is produced by the performance of the individual; it is 'performatively produced and compelled by the regulatory practices of gender coherence.'⁵⁴ Moreover, as noted earlier in the thesis, in chapter two,⁵⁵ in *Bodies That Matter*,⁵⁶ Butler suggests that this performance of gender is not a singular act, rather it is a series of acts which are repeated or reiterated to such an extent that they appear "natural". It is within these repeated performances that the set of circumstances that give rise to the performances actually conceal the notion that there is a performance going on at all.⁵⁷

More specifically, if gender is performative then according to Butler, gender is '[t]he repeated stylisation of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance.'⁵⁸ Indeed, to be successful when performing gender:

[m]arking or displaying gender must be finely fitted to situations and modified or transformed as the occasion demands. Doing gender consists of managing such occasions so that, whatever the particulars, the outcome is seen and seeable in context as gender-appropriate or, as the case may be, gender *inappropriate*, that is, *accountable*.⁵⁹

⁵⁴ Butler, 2006, p.34

⁵⁵ See chapter two, section 2.5.2 at pp. 72-75

⁵⁶ Butler, 1993

⁵⁷ Butler, 1993, pp.12-13

⁵⁸ Butler, 2006, p.45

⁵⁹ West and Zimmerman, 1987, p.135

In her later work, *Undoing Gender*,⁶⁰ Butler expands on the theory of gender performativity, noting how gender is '[a]n incessant activity performed, in part, without one's knowing and without one's willing ...'⁶¹ However, she makes clear that this does not mean that gender performativity is automatic, but rather that '[i]t is a practice of improvisation within a scene of constraint.'⁶² It is suggested that Butler is reinforcing the notion that an individual's gendered performance must be appropriate to the particular social situation that they are in. It is the social situation itself that constrains the gendered performance. Moreover, even when an individual repeatedly finds themselves in remarkably similar situations they will constantly have to amend their gendered behaviour depending on how the situation develops and alters.

Butler also highlights the power structures or relationships that are at play when an individual performs their gender; '[o]ne does not "do" one's gender alone ... the terms that make up one's own gender are, from the start, outside oneself, beyond oneself in a sociality that has no single author ...'⁶³ That is to say that it is the powerful within society that construct appropriate gender behaviour through the enforcement of gender norms. These power structures are found throughout society, between individuals, state entities and corporations. Whichever form these power relationships take, they are constantly influencing how an individual performs their gender. Often their influence may be so inconspicuous that individuals do not realise that their gendered performance is being altered by them at all. The result is that

⁶⁰ Butler, 2004

⁶¹ Butler, 2004, p.1

⁶² Butler, 2004, p.1

⁶³ Butler, 2004, p.1

individuals often feel that they 'own' their gendered performance, when in fact this can never be the case as the existence of the performance itself is as a result of these power structures. The issues surrounding the "doing" or performance of gender are succinctly summarised by West and Zimmerman.⁶⁴ They explain that although it is obviously individuals themselves who are "doing" gender, '[i]t is a situated doing, carried out in the virtual or real presence of others who are presumed to be oriented to its production.'⁶⁵

3.2.4 Gender Socialisation

So far in this chapter it has become clear that the general consensus in the academy is that we are born a particular sex, but that our gender is learned and acquired through our social, cultural and institutional relationships. An individual is socialised to be a particular gender, either masculine or feminine, depending on their sex and as a consequence of the power relations within society which construct gender. As explained by Bolich, people are "gendered" – made into a gendered being ... [through] constant contact with the attributions based on our gender assignment and under the force of social processes meant to make us the gender we were assigned.'⁶⁶ Gender socialisation is defined by Bolich as:

[t]he ongoing process starting from gender assignment that aims to construct our gender identity and our gender role. The process entails utilisation of fundamental social institutions and structures, such as the family, religion,

⁶⁴ West and Zimmerman, 1987, p.125

⁶⁵ West and Zimmerman, 1987, p.126

⁶⁶ Bolich, G.G., *Conversing on Gender* (Raleigh, NC: Psyche's Press, 2007) p.64

education and the state, all of which promote, support, and defend the cultural ideas about how each gender should look, talk and act, as well as think, feel and *be*. Socialisation, as the word suggests, guides our socialisation with others, informing us as to what is expected of us, in how we should experience ourselves and how we ought to perceive others. Socialisation provides boundaries for self-formation and rules for interaction with others. It begins at birth, largely accomplishes its work in childhood, and remains a force the rest of life.⁶⁷

Indeed, the process of gender socialisation reflects the fact that gender is a cultural and social construct that is pervasive in an individual's life from birth. Various groups within society, the complete list of which is too long to include here, undertake the process of gender socialisation through the utilisation of gender stereotypes. It is clear that the influence exerted by certain groups and processes is of particular importance in the process of gender socialisation, particularly the role of parents, peers, school and the media.⁶⁸

Gender socialisation exerts a significant force not only on the individuals being socialised but also on those in society who are actually doing the socialising, for example, parents. When it comes to gender socialisation parents can face difficult decisions, often reflecting difficulties associated with the performance of gender appropriate behaviour. On one hand, many parents '[d]isagree with gender inequalities accompanying the gender hierarchy, conclude that gender stereotypes

⁶⁷ Bolich, 2007, p.64

⁶⁸ Bolich, 2007, p.66

limit rather than liberate, and determine that at least some modest effort to ameliorate gender pressures on our children is a good thing.⁶⁹ Consequently, parents may try to raise their children as “gender neutral” rather than according to gender stereotypes. On the other hand, many parents want their children to “fit in”, to feel accepted and not to be labelled as deviant, and in order for that to happen they must adhere to gender stereotypes and norms. Indeed, even for those parents who try to avoid the gender socialisation of their children, the power of such socialisation means that they may subconsciously treat their children differently depending on their sex.⁷⁰

3.2.5 Gender Stereotypes

As noted above, gender socialisation involves the utilisation of gender stereotypes. Gender requires individuals to manage their conduct in the context of ‘[s]ociety’s view of appropriate behaviour for women and for men.’⁷¹ These views of appropriate gender behaviour are based on gender stereotypes, which often take the form of ‘[g]ender roles ... through which persons conform to their assigned sex and to society’s conventions.’⁷² “Gender norms” is another term used to describe appropriate gendered behaviour. Indeed, scholars often use the two terms, gender stereotypes and gender norms, interchangeably. Similarly to gender stereotypes,

⁶⁹ Bolich, 2007, p.65

⁷⁰ Bolich, 2007, p.65

⁷¹ O’Donovan, 1985, p.11

⁷² O’Donovan,1985, p.11

gender norms dictate the behaviours associated with appropriate masculinity and femininity and thus '[w]hich bodies may be given legitimate expression.'⁷³

The invocation and pervasiveness of gender stereotypes exaggerates gender distinctions and constructs the gender categories of masculine and feminine at opposing sides of a dichotomy. As Beal explains; '[w]e think of being male or female as an either-or proposition, even though in actuality there is considerable flexibility and overlap in male and female behaviour.'⁷⁴ Gender stereotypes and norms unsurprisingly therefore differ greatly for men and women. At this point it must be noted that this thesis is focusing on the construction of femininity specifically within England and Wales and therefore when discussing gender norms and stereotypes it will refer to those used within Western culture. Some of the basic gender norms associated with both masculinity and femininity have been highlighted by Crawford and Unger who note that:

being feminine ... involves a combination of having a socially approved attractive appearance and a high number of expressive traits. Masculinity ... involves a combination of low expressiveness, sports interest, more male friendships, sitting with knees far apart, and conservative attitudes towards feminism. These characteristics are associated with social dominance as well as masculinity.⁷⁵

⁷³ Butler, 2006, pp.xxiv-xxv

⁷⁴ Beal, Carole, *Boys and Girls: The Development of Gender Roles* (New York: McGraw-Hill, Inc., 1994) pp.5-6

⁷⁵ Crawford, Mary, and Unger, Rhoda, *Women and Gender: A Feminist Psychology* (New York: McGraw Hill, fourth ed, 2004) p.59

Gender stereotypes also revolve around occupations and physical characteristics, with femininity for example being more readily associated with less physically demanding jobs and masculinity with those that are more physically demanding.⁷⁶

Individuals who transgress from appropriate gender behaviour are often labelled as deviant or as unintelligible. Indeed, as Butler remarks “intelligible” genders are those which in some sense institute and maintain relations of coherence and continuity among sex, gender, sexual practice, and desire.⁷⁷ Conversely, unintelligible genders are those in which ‘[g]ender does not follow from sex and those in which the practices of desire do not “follow” from either sex or gender.’⁷⁸ The consequences for those who do not adhere to gender stereotypes vary depending on the seriousness of their deviance but it is clear that the degree of social ostracisation reflects the degree of deviance, so the more an individual deviates from appropriate gender behaviour, the more they will be ostracised and vice versa.⁷⁹ Labelling those who do not conform to normalised gender behaviour as deviant produces ‘[a] differential sense of who is human and who is not, which lives are liveable and which are not.’⁸⁰ This is a sentiment reflected by McNay who remarks: ‘obviously, the social constraints on gender compliance and the taboos connected to deviance are so powerful that it is difficult to exist to a socially meaningful extent outside of gender norms.’⁸¹

⁷⁶ Crawford and Unger, 2004, p.51

⁷⁷ Butler, 2006, p.23

⁷⁸ Butler, 2006, p.24

⁷⁹ Crawford and Unger, 2004, p.59

⁸⁰ Butler, 2006, p.4

⁸¹ McNay, 1992, p.72

3.3 Constructing Gender in Law – The Gender Recognition Act 2004

As noted in the earlier discussion on sex, the closest thing to a common law definition of gender was provided by Ormrod J in *Corbett v Corbett*⁸² and approved by the House of Lords in *Bellinger v Bellinger*,⁸³ with sex being distinguished as a biological concept from gender. The introduction of the Gender Recognition Act into law in April 2005, although not actually defining gender, arguably goes one step closer to providing a legal definition of gender. Although the Act deals specifically with transgendered individuals, a detailed discussion about who is outside the parameters of this thesis, the Act also has wider implications in the context of gender construction in law. Indeed, at the very least, as the following discussion will establish, the Act demonstrates the requirements for acceptable gendered behaviour for all under the law.

The Gender Recognition Act 2004 was introduced after the European Court of Human Rights' (ECtHR) decisions in *Goodwin v UK*⁸⁴ and *I v UK*.⁸⁵ In these cases the ECtHR '[d]eclared UK law on transsexuality to be discriminatory and in need of review'⁸⁶, finding the UK in breach of Articles 8 (the right to respect for privacy) and 12 (the right to marry) of the European Convention on Human Rights (ECHR). In these cases the Court '[h]eld that the legal sex of post-operative transgender persons was

⁸² [1971] P. 83

⁸³ [2003] 2 A.C. 467 per Lord Nicholls of Birkenhead at p.472

⁸⁴ [2002] 35 EHRR 18

⁸⁵ [2002] 2 FCR 613

⁸⁶ Cowan, Sharon, "'That Woman is a Woman!' The case of *Bellinger v Bellinger* and the mysterious (dis)appearance of sex" *Feminist Legal Studies*, 12, (2004), 79, p.80

the sex to which they had been medically reassigned.⁸⁷ Therefore the aim of the Gender Recognition Act, as explained in the preamble to the Act, is to '[m]ake provision for and in connection with a change of gender.'⁸⁸ The Act allows a person who wishes to live and be legally recognised as a different "adopted" gender to do so by applying for a Gender Recognition Certificate. If successful in the application process, their new gendered identity is recognised in a reissued birth certificate.⁸⁹

The Gender Recognition Certificate will be granted if several conditions laid down in the Act are met. To be considered as a candidate for a Gender Recognition Certificate, under section one of the Act the applicant must be at least 18 years of age⁹⁰ and 'living in the other gender ...',⁹¹ also known as "the acquired gender"⁹².

The use of the term "acquired gender" refers to:

[t]he gender in which a person identifies and presents, as distinct from the gender that they were ... recognised at birth. Such a distinction is considerable. This reflects the separation of gender and biological "sex" as articulated by strands of social and cultural theory.⁹³

In order to successfully apply for a Gender Recognition Certificate, the applicant must appear before a Gender Recognition Panel. 'Section 1(4) and Schedule 1 provide that such panels must comprise "legal members" and "medical

⁸⁷ Sharpe, Andrew, "A Critique of the Gender Recognition Act 2004" *Bioethical Inquiry*, 4, (2007), 33, p.33

⁸⁸ The Gender Recognition Act 2004, introductory text

⁸⁹ Cowan, 2005, p.75

⁹⁰ The Gender Recognition Act 2004, section 1(1)

⁹¹ The Gender Recognition Act 2004, section 1(1)(a)

⁹² The Gender Recognition Act 2004, section 1(2)

⁹³ Hines, Sally, "Recognising Diversity? The Gender Recognition Act and Transgender Citizenship" in Hines, Sally and Sanger, Tom (eds.), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (New York: Routledge, 2010) p.93

members”, to be appointed by the Lord Chancellor.’⁹⁴ The Gender Recognition Panel must be satisfied that the applicant:

(a) has or has had gender dysphoria, (b), has lived in the acquired gender throughout the period of two years ending with the date on which the application is made [and] (c) intends to continue to live in the acquired gender until death ...⁹⁵

Considering these requirements, although it is apparent that the Gender Recognition Act does not explicitly define the concept of gender, I would suggest that there are two distinct themes that emerge and underpin the law’s construction of gender. The first of these is the requirement in section 2(1)(a) that the applicant must have or have had gender dysphoria which highlights the law’s labelling of those who do not adhere to appropriate gender behaviour. The requirement that an applicant must either have or have had gender dysphoria⁹⁶ is elaborated on in section three of the Gender Recognition Act which states that medical or psychologist reports must be provided as evidence.⁹⁷ Gender dysphoria was historically and more commonly known as *gender identity disorder*.⁹⁸ However, with the introduction and implementation of the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, gender identity disorder has been replaced with the new diagnostic class of gender dysphoria, which is intended to

⁹⁴ Sandland, 2005, p.47

⁹⁵ The Gender Recognition Act 2004, section 2(1)

⁹⁶ The Gender Recognition Act 2004, section 2(1)(a)

⁹⁷ The Gender Recognition Act 2004, section 3(1)

⁹⁸ Psychiatric News, “New Gender Dysphoria Criteria Replace GID” (5th April, 2013) available at <http://psychnews.psychiatryonline.org/newsArticle.aspx?articleid=1676226>

better reflect the lived experiences of those diagnosed.⁹⁹ For an individual to be diagnosed with gender dysphoria under the new criteria in DSM-5 they must demonstrate a strong and persistent identification with the other gender, through for example a strong desire to live or be treated as the other gender, or to remove identifying sexual physiognomies.¹⁰⁰ More specifically, '[t]here must be a marked difference between the individual's expressed/experienced gender and the gender others would assign to [them], and it must continue for at least six months.'¹⁰¹

The requirement of a diagnosis of gender dysphoria in the Gender Recognition Act highlights how the law labels those who do not conform to gender norms. As explained in chapter two when discussing labelling theory,¹⁰² the basic concept of labelling is the '[p]rocess of the application and receipt of deviant labels.'¹⁰³ In the context of the Gender Recognition Act, it is those who make an application for a gender recognition certificate under the Act who are labelled deviant. Applicants are deviant in their "madness", when they are forcibly diagnosed with gender dysphoria. It is submitted that the law labels transgendered individuals as deviant, and more specifically as mad because their behaviour does not conform to the appropriate gender behaviour associated with their biological sex. Indeed, the diagnosis makes many assumptions about the applicant, including '[t]hat the diagnosed person is affected by forces he or she does not understand ... It assumes that certain gender norms have not been properly embodied, and that an error and a

⁹⁹ American Psychiatric Association, "Gender Dysphoria" DSM-5, available at <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>

¹⁰⁰ American Psychiatric Association

¹⁰¹ American Psychiatric Association

¹⁰² See chapter two, section 2.3

¹⁰³ Naffine, 1987, p.76

failure have taken place.¹⁰⁴ Such assumptions result in the applicant being considered as '[i]ll, sick, wrong, out of order, abnormal ...'¹⁰⁵ and labels them as such. As Collier explains, the labelling of transgender individuals as mad by the law is the result of '[a] male/female polarity and the establishment of a rigidity in sex roles at birth.'¹⁰⁶

Butler succinctly highlights the effect of the law's labelling in the Gender Recognition Act. She observes that a diagnosis of gender dysphoria assumes that because an individual expresses a desire to live as another gender, and thus displays attributes associated with that gender, they must be psychologically disordered. Despite a clear process of pathologisation occurring for individuals who wish to have their change in gender status legally recognised, it is one which they must tolerate.¹⁰⁷ This observation reflects one of the key schools of thought within labelling theory as explained by Becker. That is, 'the person who is ... labelled an outsider may have a different view of the matter. He may not accept the rule by which he is being judged and ... may feel his judges are *outsiders*.'¹⁰⁸ However, it is clear that transgender individuals who are labelled as mad by the law are unable to do anything about their labelling if they want to acquire a gender recognition certificate.

The second requirement of the gender recognition panel relates to section 2(1)(b); that the applicant has lived in their acquired gender for two years. This highlights the law's expectation that the applicant will adhere to gender norms as

¹⁰⁴ Butler, 2004, p.76

¹⁰⁵ Butler, 2004, p.76

¹⁰⁶ Collier, Richard, *Masculinity, Law and the family* (London: Routledge, 1995) p.113

¹⁰⁷ Butler, 2004, p.5

¹⁰⁸ Becker, 1963, pp.1-2

dictated by social discourse. It also contributes to demonstrating that the law's construction of gender is something that is performative in nature. The requirement in section 2(1)(b) is also known as the "real-life test", the passing of which is judged by the gender recognition panel. The use of the real-life test '[p]oints to gendered rites of passage, issues of passing and the negotiation of ... gatekeepers.'¹⁰⁹ When adjudicating on whether an applicant has passed the real-life test, Jeffreys suggests that preconceptions of appropriate gender behaviour as well as the evidence of medical specialists will be used in the adjudication process.¹¹⁰ These behavioural preconceptions derive from a process of normalisation of appropriate gender behaviour. As explained by Butler;

Normativity refers to the process of normalisation, the way that certain norms, ideas and ideals hold sway over embodied life, providing coercive criteria for normal "men" and "women". And in this second sense, we see that norms are what govern "intelligible" life, "real" men and "real" women. And that when we defy these norms, it is unclear whether we are still living, or ought to be, whether our lives are valuable, or can be made to be, whether our genders are real, or ever can be regarded as such.'¹¹¹

Therefore, I would suggest that it is reasonable to assume that those attempting to "pass" the real life test have to prove their adherence to the gender norms associated with their acquired gender to the panel. Such adherence will be proven through the continued performance of appropriate gender norms, reflecting

¹⁰⁹ Sharpe, Andrew, "Endless Sex- The Gender Recognition Act 2004 and the persistence of a legal category" *Feminist Legal Studies*, 15, 2007, 57, p.71

¹¹⁰ Jeffreys, 2008, p.332

¹¹¹ Butler, 2004, p.206

Butler's theory of the performative nature of gender. Although the Act does not require the applicant to alter their physical appearance in the sense of undergoing reconstructive surgery or hormone treatment, it does require the individual to present themselves in their acquired gender through the continued performance of the appropriate gender behaviour associated with their acquired gender. In the case of male to female transgender individuals, they are compelled to adhere to the performance of appropriate femininity by imitating, amongst other things, female facial expressions, clothing and make-up.¹¹² In contrast, for female to male transgender individuals, the appropriate performance of masculinity is one of hegemonic masculinity. This is despite the fact that 'large numbers of men and boys have a divided, tense or oppositional relationship to hegemonic masculinity.'¹¹³

Regardless of the acquired gender that the applicant is transitioning into, it is clear that the law, acting through the gender recognition panel, has gendered standards and criteria which must be adhered to when applying the real-life test. These criteria reflect gender norms as dictated by social discourse. Therefore, in order to succeed in their legal recognition, transgendered individuals need to understand and adhere to these standards and present themselves as a plausible candidate.¹¹⁴ Indeed, as noted by Hines, '[t]he law affords rights to a specific ... population – people who ... conform to normative gendered appearance, and who permanently identity as male or female.'¹¹⁵

¹¹² Jeffreys, 2008, p.332

¹¹³ Connell, 2000, p.24

¹¹⁴ Butler, 2004, p.91

¹¹⁵ Hines, 2010, p.101

Critiquing the provisions of the Gender Recognition Act has highlighted that currently there is no clear definition of gender, masculinity, or femininity in English law. However the rigid societal understanding of what it means to be feminine and masculine is reflected in legal discourse and is an underlying theme of the Act, which requires adherence to socially constructed gender norms and behaviours. Transgression of these unwritten “lore’s” results in ostracisation from society and the law. Consequently any mention of gender within legislation, and more specifically within the Gender Recognition Act, is based upon, and is a reflection of, socially constructed acceptable behaviours in relation to masculinity and femininity. Indeed, it has become clear that the law appropriates society’s views on gender norms and utilises them when making decisions on the merits of a case, in this context on cases under the Gender Recognition Act.

It is suggested however, that it is not only within the context of the Gender Recognition Act that societal gender norms are utilised by law, but rather in all areas of the law in cases where gender is considered to be a key issue. As explained by Barnett:

Society - or those with power in society - constructs gender by adopting the physical and psychological distinctions between men and women. Law, being largely the reflection of society, adopts the social construction of gender and translates it into legal norms.¹¹⁶

This relationship between law, gender, and society outside of the context of The Gender Recognition Act will be explored in detail in chapters four and five. These

¹¹⁶ Barnett, 1998, p.16

chapters examine passive and active agency denials of women who kill, focusing specifically on how the legal and social construction of gender has the consequence of denying the agency of women who kill.

3.4 The Construction of “Woman” and Appropriate Femininity

Having established that the law does not have a clear definition of gender but rather bases its construction of gender, that is masculinity and femininity, on society’s views of appropriate gender behaviour, it is now necessary to critically engage with the societal construction of “woman” and establish the parameters of appropriate femininity. Establishing these parameters will form the basis for further discussions in this thesis on how the law adopts, implements and responds to transgressions from appropriate femininity in the context of women who kill.

The concept of “woman” has been, and continues to be, a contested site. Some authors have argued that woman has only ever been defined in relation to what man is not. Perhaps the most famous proponent of this was de Beauvoir who suggested in *The Second Sex*¹¹⁷ that a woman ‘defines and differentiates herself in relation to man, and he does not in relation to her...’¹¹⁸ In suggesting this, she asked ‘what is a woman?’¹¹⁹ De Beauvoir’s answer to this question was to suggest that ‘He is the Subject; he is the Absolute – she is the Other’¹²⁰, meaning that ‘[t]he standard by which all matters are judged is that of the male gender. If maleness is the

¹¹⁷ Beauvoir, 2010

¹¹⁸ Beauvoir, 2010, p.6

¹¹⁹ Beauvoir, 2010, p.3

¹²⁰ Beauvoir, 2010, p.6

automatic reference point for the assessment of societal status, it follows that woman “being different” is the “other” sex.’¹²¹

Woman is socially constructed in relation and opposition to the man. The man has societal status, he is powerful and superior, and therefore woman is constructed as an inferior, weaker being, subordinate to his power.¹²² Indeed according to de Beauvoir it is society, or more specifically those with power in society, that is men, who construct gender by choosing to adopt the physical and psychological differences between men and women. That is to say that it is ‘[s]ociety rather than biology [that] determines the meaning attached to the category woman.’¹²³ This is reflected in her now infamous statement; ‘One is not born, but rather one becomes a woman.’¹²⁴ Of relevance to this thesis, is that this is illustrative of the way that the subsequent labelling of women as the “Other” has ingrained the traditional and continuing gender stereotypes surrounding women, of which there are a number. These include women as the carers of children and family and as the homemakers.¹²⁵ Appropriate femininity is mediated by women’s ‘[b]odies, their minds and their social interaction.’¹²⁶ According to Anne Worrall femininity is constructed around a dichotomy of dependence. Although women are expected to be caring and sacrifice their own self-interests to ensure the needs of others are met,

¹²¹ Barnett, 1998, p.16

¹²² Barnett, 1998, p.15

¹²³ Edwards, 1985, p.9

¹²⁴ Beauvoir, 2010, p.xxii

¹²⁵ Barnett, 1998, p.16

¹²⁶ Worrall, Anne, *Offending Women: Female Lawbreakers and the Criminal Justice System* (London: Routledge, 1990) p.33

they are simultaneously expected to be incompetent and vulnerable and thus need protection.¹²⁷

It is clear then that the gender stereotypes and norms surrounding women and femininity are extensive and although an in-depth engagement with all of these norms is outside the parameters of this thesis, there are some key aspects of appropriate femininity which are of particular relevance to this thesis. These are motherhood, physical appearance, sexuality and emotions; all of which appear as recurring topics in later chapters of this thesis when exploring the socio-legal response to women who kill.

3.4.1 Motherhood

‘Western society has strong beliefs about motherhood.’¹²⁸ As explained by Crawford and Unger: ‘mother is one of the most fundamental archetypes of woman ... In most societies, motherhood is viewed as central to a woman’s identity and fulfilment.’¹²⁹ The ideology of motherhood is also known as the “motherhood mandate” or the “motherhood mystique” and comprises a number of myths including the notion that women who do not want to be mothers are psychologically disturbed and those that cannot have children are fundamentally deprived. Good mothers enjoy caregiving and self-sacrificing to the needs of their children; those that do not are bad mothers. Mothers should devote themselves full-time to their

¹²⁷ Worrall, 1990, p.33

¹²⁸ Crawford and Unger, 2004, p.318

¹²⁹ Crawford and Unger, 2004, p.317

children and those who work are inferior.¹³⁰ Therefore, when women have children it is not enough for them to be “just” mothers, they must also be “good mothers” and conform to the consequent stereotypes associated with, and symbiotic to, the label.

This so-called ‘motherhood mandate’ refers to ‘[t]he culturally proscribed belief that to be complete and successful in the female role, a woman must have children and must spend her time with them.’¹³¹ Russo goes on to explain that the motherhood mandate dictates that: ‘[a]ll women should be mothers and that the “good mother” is measured by the number of her children and the quantity of time she spends with them.’¹³² Therefore, the stereotypical good mother is the one who is the homemaker, who devotes her life to her children and her family and puts their needs before her own. When women undertake paid work and as a consequence spend less time with their children the issue of whether they are being a good mother is often raised. As noted by Mottarella et al. ‘women who work outside the home are perceived as less nurturing and less competent in the role of mother compared to their counterparts who choose to stay home to raise their children.’¹³³ The prevalence of the good mother stereotype is also apparent in media articles that are regularly published on the issue of working mothers. For example one headline in *The Guardian* read; ““Working mothers do no harm to their young children, research finds””.¹³⁴

¹³⁰ Crawford and Unger, 2004, pp.318-319

¹³¹ Mottarella, Karen; Fritzsche, Barbara; Whitten, Shannon; and Bedsole, Davina, “Exploration of ‘Good Mother’ Stereotypes in the College Environment” *Sex Roles* 60, (2009) 223, p.223

¹³² Russo, N.F., “The Motherhood Mandate” *Journal of the Social Sciences* 32, (1976), 143, p.148

¹³³ Mottarella, Fritzsche, Whitten and Bedsole, 2009, p.224

¹³⁴ The Guardian, “Working mothers do no harm to their children, research finds” (22nd July, 2011) available at <http://www.guardian.co.uk/lifeandstyle/2011/jul/22/working-mothers-no-harm-children>

Moreover, the motherhood mandate potentially has the effect of making many women feel guilty about going back to work after having children. This was reflected in a 2011 report “The Changing Face of Motherhood”, prepared by the Social Issues Research Centre.¹³⁵ The report highlighted the feelings of guilt that mothers have about balancing work commitments with the amount of time they spend with their children: ‘in the context of work/life balance participants said that they felt guilty for going back to work, guilty for spending so much time there, and even guilty for enjoying it or finding it fulfilling.’¹³⁶ It is therefore clear that despite the ‘[s]ignificant social, economic and cultural changes that have impacted on practices of mothering in Western societies ...’¹³⁷ the traditional stereotypes associated with the motherhood mandate continue to exist and exert significant influence on societal views of motherhood.

At the opposite end of the spectrum to this good mother stereotype is women who choose not to be mothers and who are consequently viewed as inherently abnormal. The media has a significant role to play in this construction of voluntarily childless women by continuously publishing articles on the subject. A prime example of such an article was published in *The Mirror*; “We aren’t freaks: Women who don’t want children should not be made outcasts.”¹³⁸ The derogatory language used in this headline to describe deliberately childless women is typical of

¹³⁵ The Social Issues Research Centre, “The Changing Face of Motherhood” (2011) available at <http://www.sirc.org/publik/CFOM.pdf>

¹³⁶ The Social Issues Research Centre, 2011, p.15

¹³⁷ Maher, JaneMaree, and Saugeres, Lise, “To be or not to be a mother? Women negotiating cultural representations of mothering” *Journal of Sociology* 43(1), (2007), 5, p.5

¹³⁸ The Mirror, “We aren’t freaks: Women who don’t want children should not be made outcasts” (22nd June, 2012) available at <http://www.mirror.co.uk/lifestyle/women-are-not-freaks-just-because-905131>

the labels attached to them. As explained by Gillespie, voluntarily childless women '[h]ave been understood in ways that emphasise their selfishness and their deviance, as aberrant, immature, and unfeminine.'¹³⁹

In a study conducted by Gillespie, participants discussed the various responses that they had received when explaining that they did not want to have children. Some women '[d]escribed the ways others frequently *disbelieved* that they had chosen childlessness. They described how their choice was often re-cast by others as different more "*legitimate*" explanations were superimposed.'¹⁴⁰ Others explained that people '[d]isregarded their accounts of voluntary childlessness. Often this was by inferring they would "change their mind".'¹⁴¹ Finally, some women experienced their voluntary childlessness being perceived as deviance; 'lack of a desire to mother was conceptualised in terms of deviance and abnormality, as it transgressed cultural images of femininity; of nurturing and self-sacrifice, associated with motherhood.'¹⁴² Gillespie's findings were not isolated and have been reproduced in later studies. Maher and Saugeres for example found that women who did not have children engaged in '[a] process of self-reflection and justification',¹⁴³ but perhaps more importantly that it led the women to '[q]uestion and reject some dominant cultural constructions of femininity and mothering.'¹⁴⁴ The

¹³⁹ Gillespie, Rosemary, "When No Means No: Disbelief, Disregard and Deviance as Discourses of Voluntary Childlessness" *Women's Studies International Forum*, 23(2), (2000), 223, p.225

¹⁴⁰ Gillespie, 2000, p.227

¹⁴¹ Gillespie, 2000, p.228

¹⁴² Gillespie, 2000, p.230

¹⁴³ Maher and Saugeres, 2007, pp. 9-10

¹⁴⁴ Maher and Saugeres, 2007, pp. 9-10

findings from such studies on voluntarily childless women serve to reinforce the continuing significance of motherhood in the construction of femininity.

The socially constructed norms surrounding motherhood for women are also reflected in, and thus arguably reinforced by, legal discourse in the offence/defence of Infanticide.¹⁴⁵ Infanticide is a defence only available to women who are suffering from puerperal psychosis and who kill their children who are less than one year old.¹⁴⁶ The fact that this is a female only defence reflects the expectation that all women should be the carers of children and be good mothers. A more detailed discussion on the offence/defence of infanticide takes place in chapter five.¹⁴⁷ It is not only motherhood that importance is attached to for women, physical appearance also plays a significant role when adhering to appropriate femininity.

3.4.2 Physical Appearance

From an early age appearance plays a significant role in the social construction of gender. Although having an appropriate and often physically attractive appearance is expected of both men and women, particular weight is attached to beauty and concern with one's appearance for women.¹⁴⁸ Indeed, 'in an exploration of the concept of femininity, Susan Brownmiller ... illustrated the powerful role played by physical appearance in cultural definitions of femininity.'¹⁴⁹

¹⁴⁵ Lacey et al., 2003, p.775

¹⁴⁶ The Infanticide Act 1938, section 1(1)

¹⁴⁷ See chapter five, section 5.2

¹⁴⁸ Tseëlon, Efrat, *The Masque of Femininity – The Presentation of Woman in Everyday Life* (London: Sage Publications Ltd, 1995) p.78

¹⁴⁹ Lips, Hilary, *Sex and Gender: An Introduction* (New York: McGraw-Hill, sixth ed, 2007), p.34

The importance of appearance within the ideal of femininity occurred in the eighteenth century with the association of upper and middle class women's respectability with appearance and conduct.¹⁵⁰ Physical appearance has continued to play a central role in the contemporary construction of femininity. As explained by Crawford and Unger, it is still apparent that part of being feminine '[i]nvolves ... having a socially approved attractive appearance.'¹⁵¹

The weight attached to physical appearance in appropriate femininity has resulted in many women defining their identity, at least in part, by their beauty.¹⁵² The importance of physical appearance to the construction of femininity and to the identity to those performing femininity was highlighted in research conducted by Schrock, Reid and Boyd. They conducted interviews with male to female transsexuals about their embodiment of womanhood, with 'interviewee's ... suggest[ing] that wearing women's clothing and makeup shaped their bodies into feminine conformity, which ... helped feminine gestures feel authentic.'¹⁵³

Maintaining an appropriate feminine appearance requires a great deal of work. Women are expected to take pride in their appearance and present themselves as effeminate. As explained by Reynaud there are multiple expectations associated with an appropriate feminine appearance:

[s]he must be beautiful: it is out of the question for her to be natural ... She must wear makeup, be deodorised, perfumed, shave her legs and armpits,

¹⁵⁰ Skeggs, Beverley, "Ambivalent Femininities" in Jackson, Stevi and Scott, Sue (eds). *Gender: A sociological reader* (London: Routledge, 2002) pp. 311-312

¹⁵¹ Crawford and Unger, 2004, p.59

¹⁵² Tseëlon, 1995, p.78

¹⁵³ Schrock, Douglas; Reid, Lori; and Boyd, Emily, "Transsexual's embodiment of womanhood" *Gender and Society*, 19(3), (June 2005), 317, p.324

put on stockings, high heels, show her legs, emphasise her breasts, pull in her stomach, paint her nails, dye her hair, tame her hairstyle, pierce her ears, reduce her appetite ...¹⁵⁴

These appearance requirements demonstrate the performative nature of constructing a feminine appearance.

Indeed femininity itself is a carefully constructed public performance, of which appearance plays a significant part, particularly in the context of the value women attach to themselves, as well as for their validation by others.¹⁵⁵ Therefore this performance of a feminine appearance must be finely tuned and altered depending on the context within which women find themselves. This was reflected in a study conducted by Skeggs who noted: 'spending obvious amounts of time with make-up just to go to work or college was seen to be embarrassing and inappropriate, but spending the same amount of time preparing to go out is expected.'¹⁵⁶ It is therefore clear that women do not only have to work hard at maintaining their appearance, but that they have to tread a fine line at ensuring their appearance matches the social situation which they find themselves in.

One aspect of feminine appearance that receives a great deal of attention, particularly in the media, is how women dress themselves. This is as a result of clothes' close associations with appropriate female sexuality. The importance of clothes in constructing an appropriate feminine appearance cannot be underestimated. As explained by Tseëlon: '[c]lothes, through their proximity to the

¹⁵⁴ Reynaud, Emmanuel, "Manly Aesthetics" in Jackson, Stevi and Scott, Sue (eds). *Gender: A sociological reader* (London: Routledge, 2002) pp.401-402

¹⁵⁵ Skeggs, 2002, p.317

¹⁵⁶ Skeggs, 2002, p.317

body encode the game of modesty and sexual explicitness, denial and celebration of pleasure. Clothes veil the body.¹⁵⁷ Historically for women clothes and fashion '[w]ere regulated along lines of gender and sexuality rather than lines of social distinction ... The major distinction in female dress was between the noblewoman and the prostitute.'¹⁵⁸ This is arguably still very much the case for women in contemporary society, with the notion that non-conformity in the context of clothes has a sexual undertone. Many third wave feminists have argued otherwise, suggesting that women should be able to dress in the way that they wish and that expressing their feminine sexuality through their appearance is actually a challenge to male objectification.¹⁵⁹ However, I would suggest that it is still the case that if a woman is perceived as dressing in a way which lacks modesty there is the very real threat of her being labelled as a prostitute¹⁶⁰ or given a similar sexually deviant and pejorative label. Therefore when dressing in an appropriately feminine manner, women must not be overtly sexual.

Indeed in research cited by Tseëlon, women made clear that they did not want their clothes to convey some sort of sexually available image, make them look tarty or lead men on.¹⁶¹ This '[c]oncern with sexual overtones echoes the absent presence of "the prostitute in every woman."¹⁶² At the same time as not wanting to present themselves as overtly sexual, the women in the study did not want to

¹⁵⁷ Tseëlon, 1995, p.14

¹⁵⁸ Tseëlon, 1995, p.14

¹⁵⁹ See for example; Newman, Jacquetta and White, Linda, *Women, Politics, and Public Policy: The Political Struggles of Canadian Women* (Toronto: Oxford University Press, second ed, 2012) p.246

¹⁶⁰ Tseëlon, 1995, p.29

¹⁶¹ Tseëlon, 1995, p.31

¹⁶² Tseëlon, 1995, p.31

present a totally desexualised image or appear as boring or unfeminine.¹⁶³ From this it is apparent that in order to conform to an appropriate feminine appearance, women must toe the line between being overtly sexual and being totally desexualised. Agreement with Tseëlon is expressed here, particularly when he explains that for women attempting to dress appropriately ‘the permissible territory ... borders on impossibility: signaling desire while denying it – being suggestive, but understated enough so as not to be blatantly seductive.’¹⁶⁴ In order to perform an appropriate feminine appearance, women must get ‘[t]he right balance between appearing coy and enticing’¹⁶⁵ when choosing their clothes.

The continuing preoccupation with women’s appropriate appearance is perhaps most aptly reflected on *The Daily Mail* website, where articles are published on a daily basis either praising or deriding what women wear and publishing the results from regular surveys conducted on the topic. For example, an article published online in March 2014 titled “Working Women dress to impress in power suits on Mondays – but by Friday they’re in jeans”¹⁶⁶ suggests that successful and professional women are those who dress “appropriately”. In contrast, in a separate article they cited statistics on men’s opinions regarding the clothes that women wear; with more than half of men claiming they respected women more if they

¹⁶³ Tseëlon, 1995, p.32

¹⁶⁴ Tseëlon, 1995, p.31

¹⁶⁵ Tseëlon, 1995, p.32

¹⁶⁶ Mail Online, ‘Working Women dress to impress in power suits on Mondays – but by Friday they’re in jeans’ (23rd March, 2014) available at <http://www.dailymail.co.uk/femail/article-2587299/Working-women-dress-impress-power-suits-Mondays-Friday-theyre-jeans.html>

dressed in a reserved way.¹⁶⁷ The article suggested that those women who wear revealing clothing are not perceived as “classy” or “respectful” women by men, thus reflecting the notion that women must conform to an appropriate appearance and toe the line of dressing appropriately.

When women do not conform to the appropriate feminine appearance for the social situation they are in, I would argue and indeed will demonstrate that others often judge them harshly. This is especially the case when the “perpetrating” women are in the public eye, with the media often publishing scathing articles on the aspects of their appearance that do not adhere to appropriate femininity. For example, when former Secretary of State Hilary Clinton appeared without makeup in Bangladesh she made headlines around the world.¹⁶⁸ Furthermore, in the United Kingdom, when former News International CEO Rebekah Brooks testified before the Leveson Inquiry she was berated in the media for her appearance. She drew angry comments for her curly red hair,¹⁶⁹ and her outfit was ‘[c]ompared to the clothes worn by 17th-century witches ...’¹⁷⁰ If the breach of appropriate feminine appearance is considered to be a serious one, the woman in question is often considered to be deviant and is consequently labelled as such. This was touched on briefly above

¹⁶⁷ Mail Online, “Should Rihanna put away her hotpants? Now men say they are turned OFF by women in revealing clothing” (26th July, 2013) available at <http://www.dailymail.co.uk/femail/article-2377791/Men-turned-OFF-women-revealing-clothes.html>

¹⁶⁸ Today.com, “For women in the workplace, it's still about looks not deeds” (15th May 2012) available at <http://lifeinc.today.com/news/2012/05/15/11698778-for-women-in-the-workplace-its-still-about-looks-not-deeds?lite>

¹⁶⁹ Today.com, 2012

¹⁷⁰ Mail Online, “Rebekah Brooks compared to witch by hacking lawyer: Critic says former News International chief looked ‘a little bit Salem’ (13th May 2012) available at <http://www.dailymail.co.uk/news/article-2143599/Rebekah-Brooks-compared-witch-phone-hacking-lawyer-Charlotte-Harris.html>

when discussing how sexually overt women are labelled as prostitutes.¹⁷¹ This labelling of women who do not conform to a feminine standard of appearance is a theme that is evident throughout history. For example, the seminal criminological theory advanced by Lombroso on criminal women, which was first published in 1885 in Italy, argued that the appearance of criminal women was more masculine and physically flawed.¹⁷²

Similarly, when the physical appearance of women is perceived as masculine or “butch” these women are labelled as deviant, more specifically often as lesbians, reflecting the historical association of a masculine appearance in women with homosexuality.¹⁷³ As explained by Lips:

According to the dubious logic of stereotypes, a really feminine woman would not be sexually attracted to other women; a “real” man would not be sexually attracted to other men. Thus, in a reversal of genders stereotypes, lesbians are often characterised as masculine, and gay men are described as feminine ... [f]acial and other features and other physical features that are stereotyped as feminine are linked, when found in males, with attributions of homosexuality, as are masculine features when found in females.¹⁷⁴

This cultural labelling of so-called “butch”, masculine women as lesbians was reflected in a study conducted by Viss and Burn.¹⁷⁵ As Lips succinctly summarises, the

¹⁷¹ See above, chapter three at pp. 119-120

¹⁷² Seal, 2010, pp.24-25

¹⁷³ Seal, Lizzie, “Discourses of single women accused of murder: mid twentieth-century constructions of ‘lesbians’ and ‘spinsters’” *Women Studies International Forum* 32, (2009), 209, p.216

¹⁷⁴ Lips, 2007, p.37

¹⁷⁵ Viss, Denisec and Burn, Shawnm, “Divergent Perceptions of Lesbians: A Comparison of Lesbian Self-Perceptions and Heterosexual Perceptions” *The Journal of Social Psychology* 132(2), (1992), 169

study highlighted that '[h]eterosexual college students rated lesbians as significantly less attractive, more insecure, more masculine ... than a sample of lesbians rated themselves.'¹⁷⁶

Finally, arguably one of the most serious consequences of the stereotypes surrounding women's appearance comes when women are raped. If a woman wears overtly sexual or revealing clothing and is raped, there is a significant proportion of society who believe that she is responsible in some way for being raped. 'An Amnesty International poll found that 26 per cent of those asked said that they thought a woman was partially or totally responsible for being raped if she was wearing sexy or revealing clothing.'¹⁷⁷ Moreover, a BBC News article from 2010 highlighted the results of a survey which found that 'a majority of women believe some rape victims should take responsibility for what happened ...'¹⁷⁸ The fact that stereotypes such as these surround the appearance of women who are raped highlights the continuing prevalence of the standards of an appropriate feminine appearance.

3.4.3 Sexuality

The term sexuality does not traditionally have one fixed meaning, rather it is a combination of various aspects of an individual's life, including, but not limited to, gender, sexual behaviour, sexual orientation, and beliefs and attitudes towards

¹⁷⁶ Lips, 2007, p.37

¹⁷⁷ NUS, "Britain has worst rape conviction rate" (15th May 2009) available at <http://www.nus.org.uk/cy/news/britain-has-worst-rape-conviction-rate/>

¹⁷⁸ BBC News, "Women say some rape victims should take blame – survey" (15th February 2010) available at <http://news.bbc.co.uk/1/hi/8515592.stm>

others. However, in the context of this thesis which explores the socio-legal response(s) to women who kill, the term sexuality will be used to denote women's sexual preferences or orientations and sexual behaviours. Historically, sexuality has been shaped and governed by essentialist perspectives. Indeed, during the eighteenth and nineteenth centuries, the religious response to perceived deviant sexual behaviour was replaced by a medico-pathological one.¹⁷⁹ Essentialist approaches to sexuality hold the view that:

[h]uman sexuality is rooted in biology, and a normal sex drive is a heterosexual drive intended for the production of children and the perpetration of the species. Deviation is considered to be pathological ... Heterosexuality is the norm in this model for both women and men, and sex is properly expressed in stable, monogamous, ideally marital relationships.¹⁸⁰

This essentialist perspective was challenged by Foucault who argued that an individual's sexuality was shaped by powerful discourses, rather than simply being a biological entity.¹⁸¹ For Foucault, '[d]iscourses are not merely linguistic phenomena, but are always shot through with power and are institutionalised as practices'¹⁸² and therefore discourses alter depending on culture, social structures and historical context.

¹⁷⁹ Marchbank and Letherby, 2007, p.253

¹⁸⁰ Marchbank and Letherby, 2007, p.253

¹⁸¹ Marchbank and Letherby, 2007, p.254

¹⁸² Ransom, Jane, "Feminism, difference and discourse: the limits of discursive analysis for feminism" in Ramazanoglu, Caroline (Ed)., *Up Against Foucault: explorations of some tensions between Foucault and Feminism* (London: Routledge, 1993) p.134

More recently, Weeks has also argued that sexuality is '[h]istorically and socially shaped.'¹⁸³ He suggests that reducing complex sexual relations to biological factors is too simplistic an approach and instead '[i]t is important to study the history of sexuality in order to understand the range of possible identities, based on class, ethnicity, gender and sexual preference.'¹⁸⁴ Feminist scholars, such as Abbott, MacKinnon and Jeffreys have also challenged the essentialist view of sexuality, focusing particularly on the fact that sexuality is embedded in power relations which are themselves shaped by identity factors such as gender, race and age.¹⁸⁵ This continued and extensive critique of the essentialist view of sexuality suggests that it has largely been replaced by the view that sexuality is socially and culturally constructed, being influenced by law, religion, medical and psychological theories, social norms and the media.¹⁸⁶

Within the context of sexuality, heterosexuality has been and indeed arguably still is, considered to be the norm for both men and women. Heterosexuality is taken for granted, it is understood by many in society to be natural and consequently homosexuality is considered to be unnatural and abnormal.¹⁸⁷ Societal understandings of heterosexuality as the norm are reflected in the fact that 'heterosexuality and heterosexual relationships are still sanctioned in law and social policy in a way that homosexuality and homosexual relationships are not ...'¹⁸⁸ For example, in many countries same-sex unions are still not legally recognised, whereas

¹⁸³ Marchbank and Letherby, 2007, p.254

¹⁸⁴ Marchbank and Letherby, 2007, p.254

¹⁸⁵ Marchbank and Letherby, 2007, p.255

¹⁸⁶ Marchbank and Letherby, 2007, p.255

¹⁸⁷ Marchbank and Letherby, 2007, p.252

¹⁸⁸ Marchbank and Letherby, 2007, p.252

heterosexual couples' are.¹⁸⁹ Even in England and Wales, where same-sex marriage has been legalised,¹⁹⁰ the grounds for divorce still differ for homosexual couples who cannot, unlike heterosexual couples, use adultery as a ground for divorce,¹⁹¹ or non-consummation as a ground for annulment.¹⁹²

For women appropriate feminine sexuality is largely defined by active heterosexuality.¹⁹³ This is reflected in law, where lesbianism, unlike being gay, has never been completely recognised under English law,¹⁹⁴ nor has it been declared a criminal offence.¹⁹⁵ Indeed in 1921, when Frederick Macquisten MP put forward a proposal to criminalise lesbianism, it was rejected by the House of Lords. '[D]uring the debate, Lord Birkenhead, then Lord Chancellor argued that 999 women out of a thousand had "never even heard a whisper of these practices."' ¹⁹⁶

The hegemonic nature of heterosexuality is not the only stereotype that surrounds appropriate feminine sexuality. These stereotypes can also be found under the sexual double standard. This refers to two standards of sexual behaviour which differ according to whether the individual is a man or a woman.¹⁹⁷ Over time and with alterations in cultural and societal discourse, the sexual double standard has evolved somewhat. The pioneer researcher of the double standard, Reiss,

¹⁸⁹ For example, same sex marriage is still illegal in large parts of Africa and Asia and in many American states, including Alabama, Colorado, North Carolina and Florida.

¹⁹⁰ The Marriage (Same Sex Couples) Act 2013 legalised same-sex marriage.

¹⁹¹ The Marriage (Same Sex Couples) Act 2013, schedule 4, part 3

¹⁹² The Marriage (Same Sex Couples) Act 2013, schedule 4, part 3

¹⁹³ Jackson, Stevi and Scott, Sue (eds). *Gender: A sociological reader* (London: Routledge, 2002) p.270

¹⁹⁴ Marchbank and Letherby, 2007, p.257

¹⁹⁵ Stonewall, "Current Sexual Offences Law" available at

http://www.stonewall.org.uk/at_home/hate_crime_domestic_violence_and_criminal_law/2644.asp

¹⁹⁶ New World Encyclopaedia, "Lesbianism" available at

<http://www.newworldencyclopedia.org/entry/Lesbianism>

¹⁹⁷ Lips, 2007, p.257

'[d]efined the orthodox double standard as prohibiting premarital sexual intercourse for women but allowing it for men.'¹⁹⁸ Over time, this evolved into the conditional double standard, which instead of focusing on sex within marriage only being permissible for women, concentrated on women's engagement in sexual relations only within a committed relationship. In contrast, the conditional double standard permitted men to have as many sexual partners as they wished.¹⁹⁹ In contemporary society, I would suggest that the more developed social learning theory model of the sexual double standard is most applicable. According to this model:

[w]omen are punished for behaving in sexually permissive ways by being stigmatised or isolated, whereas men are rewarded by achieving popularity or admiration for the identical behaviours ... [s]exual script theory has emerged to explain patterns of sexual behaviour. In following traditional scripts, men are socialised to desire and engage in frequent casual sexual activity with multiple partners, whereas women are encouraged to limit their sexual experiences to encounters within committed, monogamous relationships.²⁰⁰

A number of stereotypes exist under the umbrella of the sexual double standard. A study published in *The Canadian Journal of Human Sexuality* found, amongst other outcomes, that men were expected to be more interested in sexuality and sexual matters than women and men were not to be sexually submissive.²⁰¹ As

¹⁹⁸ Milhausen, Robin and Herold, Edward, "Does the Sexual Double Standard Still Exist? Perceptions of University Women" *The Journal of Sex Research*, 36, 4, (Nov.,1999), 361, p.361

¹⁹⁹ Milhausen and Herold, 1999, p.361

²⁰⁰ Milhausen and Herold, 1999, p.361

²⁰¹ Morrison, Todd; Ryan, Travis; Fox, Lisa; McDermott, Daragh; and Morrison, Melanie, "Canadian university students' perceptions of the practices that constitute 'normal' sexuality for men and women" *The Canadian Journal of Human Sexuality*, 17(4), 2008, 161, p.168

succinctly reported by Fox News, the research found the continuing existence of some of the stereotypes that underpin the sexual double standard. They include:

He's to be on the prowl. She's not ... She's a "dirty girl." Men are "experienced" ... He's sex savvy. She isn't ... She was asking for it. He can't get raped ... She's supposed to be virginal. He isn't ...²⁰²

Other stereotypes that underpin the double standard include the normative positions that women are not as interested in, and do not enjoy sex as much as men and therefore most women do not attach much importance to sex.²⁰³

The existence of the sexual double standard has a continuing effect and influence on the sexuality of women. In research conducted by Milhausen and Herold the women questioned almost unanimously agreed on the continuing pervasive influence on the double standard.²⁰⁴ When commenting on the effect of the double standard on women, respondents explained that "[w]omen have to be careful not to ruin their reputations," and "there is more gossip about women."²⁰⁵ These sentiments have been reflected in work by Lips who explains that the stereotypes surrounding appropriate feminine sexuality, including the sexual double standard, have:

[e]normous implications for the sexual behaviour and experience of women and men and for the power relationship between them. It trivialises women's sexual feelings, refusing to allow for the possibility that female sexual desire

²⁰² Fox News, "FOXsexpert: Sexual Double Standards" (August 10, 2009) available at <http://www.foxnews.com/story/0,2933,538795,00.html>

²⁰³ Milhausen and Herold, 1999, p.363

²⁰⁴ Milhausen and Herold, 1999, p.364

²⁰⁵ Milhausen and Herold, 1999, p.364

is important in its own right. It trivialises men's capacity for self-control, suggesting that men are helpless before their sexual impulses. It means that women more than men risk ruined reputations by becoming known as sexually active, and that women who have been sexually assaulted, harassed, or raped are often blamed for their own victimisation.²⁰⁶

As was touched upon above, there are a number of consequences for women who do not adhere to hegemonic feminine sexuality. Lesbians are often labelled as "butch" and considered to be less feminine and more masculine than their heterosexual counterparts.²⁰⁷ As noted by Lips: 'in one study, the predominant stereotypes of lesbian women included an aura of masculinity and the idea that lesbians would try to seduce heterosexual women.'²⁰⁸ Moreover, lesbian relationships are often considered to be abnormal and therefore attempts are often made to normalise them by stereotyping them in such a way that they mimic heterosexual relationships, with one member of the couple representing the "butch" male and the other the "femme" female.²⁰⁹ The lesbian relationship cannot be viewed in any other way through the heterosexual and patriarchal prism. Lesbians may also be subjected to various forms of verbal abuse including being labelled as a "dyke", a "lesbo" or a "carpet muncher".²¹⁰ Women who are considered to be promiscuous are also often pejoratively labelled. For example typing "promiscuous

²⁰⁶ Lips, 2007, p.257

²⁰⁷ See section 3.4.2 above at pp. 122-123 for a more detailed discussion on the constructions of "masculinity" surrounding lesbians

²⁰⁸ Lips, 2007, p.37

²⁰⁹ Lips, 2007, p.38

²¹⁰ Wiktionary, "Wikisaurus: homosexual woman" available at http://en.wiktionary.org/wiki/Wikisaurus:female_homosexual

woman” into “wikisaurus” on the “wiktionary” webpage brings up a long list of abusive and pejorative synonyms including: “cock tease”, “slag”, “slapper”, “slut”, “tramp”, “trollop” and “whore”.²¹¹

3.4.4 Emotions

Before beginning this discussion, it should be noted that there is relatively little original discussion on the emotional nature of women, with many of the resources largely being reproductions of each other. Much of the more recent research is based in the field of psychology and not in that of socio-legal studies or gender. One explanation for the limited research on feminine emotion stereotypes may be that other stereotypes associated with femininity are viewed as more important to admonish. For example, it is suggested here that there has been much critical discussion on appropriate feminine sexuality due to the implications that the performance of appropriate sexuality has for women in every aspect of their lives. Moreover, the critique of appropriate feminine appearance plays a significant part in the ongoing discussion on rape in both society and the law. Despite this, the association of women with emotions is still commonly found in research exploring gender stereotypes. Indeed, according to Shields one of the ways that ‘[w]omen ... present themselves as feminine ... is through the use of gender appropriate emotional displays.’²¹² As explained by Hales:

²¹¹ Wiktionary, “Wikisaurus: promiscuous woman” available at http://en.wiktionary.org/wiki/Wikisaurus:promiscuous_woman

²¹² Crawford and Unger, 2004, p.82

Starting very young, women may be “schooled” in emotional expressivity. As infants, girls are more likely to clap and smile in response to a human face, look into caregivers’ eyes for longer times and babble more in the singsong pidgin of preverbal conversation.²¹³

Just as gender socialisation takes place at a young age²¹⁴ so too does the learning of gender stereotypes, including those surrounding displays of emotion. Indeed, in research highlighted by Kelly and Hutson-Comeaux, it was found that pre-school children held emotion-specific stereotypes similar to adults.²¹⁵ Once a child ascertains the gender-emotion stereotypes associated with their gender, they begin to develop and practice them as they get older, thus reinforcing such stereotypes. So although both women and men may experience the emotion of happiness, ‘[w]omen have been taught that they can strongly express the emotion ... whereas men have been taught to control it. The impact of socialisation practices accumulate over time ...²¹⁶

Stereotypically, women are considered to be more emotional than men, not only experiencing more emotion more frequently, but also having less emotional control.²¹⁷ This is a sentiment reflected by many women themselves with ‘women self-report[ing] that their own emotional experiences are more frequent and more

²¹³ Hales, Dianne, *Just Like a Woman: How Gender Science is Redefining What Makes Us Female* (New York: Bantam Books, 1999) pp.262 -263

²¹⁴ See discussion on gender socialisation earlier in the chapter at section 3.2.4

²¹⁵ Kelly, Janice and Huston-Comeaux, Sarah, “Gender-Emotion Stereotypes Are Context Specific” *Sex Roles*, 40, 1/2, (1999), 107, p.108

²¹⁶ Kelly and Huston-Comeaux, 1999, p.108

²¹⁷ Hales, 1999, p.261

intense than men report.’²¹⁸ Women are also viewed as being better at expressing their feelings and offering emotional support than their male counterparts.²¹⁹ However, not *all* expressions of emotion are automatically associated with femininity. Research has shown that particular emotions are stereotypically associated with each gender, with happiness, sadness and fear being more commonly associated with femininity, in contrast to anger being more readily associated with masculinity.²²⁰ Moreover different emotional contexts are associated with different genders: with women, the interpersonal context, and men, the achievement domain.²²¹ This means that ‘[w]hile stereotypes of women tend to centre around clusters of communal or expressive traits, stereotypes of men tend to cluster around agentic or instrumental traits.’²²²

It is suggested that the emotional stereotypes traditionally associated with femininity strongly interact with, and are reflections of, other stereotypes of femininity. For example, feminine emotions associated with the interpersonal context reflect the stereotype of women as nurturers, caregivers and mothers. When women do not adhere to appropriate emotional performances they are often considered to be abnormal or deviant, being viewed as masculine,²²³ and labelled as “callous”, “cold”, “heartless”, or “insensitive”.²²⁴

²¹⁸ Kelly and Huston-Comeaux, 1999, p.109

²¹⁹ Macdonald, Myra, *Representing Women – Myths of femininity in the popular media* (London: Edward Arnold, 1995) p.63

²²⁰ Kelly and Huston-Comeaux, 1999, p.108

²²¹ Kelly and Huston-Comeaux, 1999, p.110

²²² Kelly and Huston-Comeaux, 1999, p.110

²²³ Lips, 2007, p.3

²²⁴ Thesaurus.com, “Unemotional” available at <http://thesaurus.com/browse/unemotional>

3.5 Concluding Remarks

This chapter has explored both the societal and legal constructions of gender. It has become apparent that gendered expectations, stereotypes and norms within legal discourse interact with, and are reflective of, those held within society more widely. Although there is no absolute definition of gender within legal discourse in the form of the Gender Recognition Act, it is apparent that for the purposes of the law gender is viewed as performative. As such women are expected to “perform” the norms associated with appropriate femininity, particularly those discussed in detail in this chapter; those of motherhood, physical appearance, sexuality and emotions.

This chapter has provided a further gendered contextualisation of the earlier discussions on the key theories explored in chapter two. The importance of this chapter can be found in its demonstration of the gendered norms associated with appropriate femininity, thus providing a contextualisation for later discussions on women who kill and their deviations from gender norms. Moreover, it forms a basis for the following chapter (four) which critically analyses the concept of agency, exploring the relationship between femininity within gender discourse, criminal legal discourse and the concept of agency.

The exploration of the concept of agency that will take place in the next chapter is integral to this thesis because it will provide some contextualisation when answering my three related research questions. Firstly, what are the constructions of “woman” and “femininity” within criminal legal discourse?; secondly; is there a relationship between these constructions and the agency of women, with the

consequence that women who kill currently have their agency denied within criminal legal discourse?; and finally, if so, how might their agency be recognised?

The analysis of agency in the next chapter will build upon some of the concepts discussed in chapter two such as the construction of the legal subject, in more detail. Utilising some of the analysis in this chapter on gender, it will also question the role of gender discourse and the consequent norms and stereotypes surrounding appropriate femininity. This will enable a critical evaluation of the relationship between women and agency to be undertaken, exploring how women's agency is passively denied. Exploring the concept of agency, as it exists in both society and the law, at this point in the thesis, lays some of the important groundwork for the subsequent exploration of the particular relationship between women who kill and agency to be undertaken subsequently in chapter five which explores how the agency of women who kill is actively denied.

The first substantive section of the next chapter will question whether agency has a gendered dimension within societal discourse; and if so, is agency a concept which is associated with women and femininity? If agency as a general concept can indeed be argued to have a gendered dimension, what are some of the implications and ramifications of this specifically within the context of the criminal law? In attempting to draw out some answers to these questions, the second substantive section of the chapter will move on to explore the concept of agency in the context of the criminal law, as found in the principle of individual responsibility which underlies much of the theoretical framework of this area of law. It will also interrogate some of the more specific aspects of the criminal law in relation to the

concept of agency, including questioning whether the construction of the legal subject and criminal defences are gendered; and if so, how do these constructions passively deny the agency of women killers?

Chapter Four – Agency, Legal Discourse and the Passive Denial of Women’s Agency

4.1 Agents

As briefly discussed in chapter two the invocation of agency requires an agent.¹ That is to say that ‘without an agent, it is argued that there can be no agency ...’² As agency is considered to be something that is inherently possessed by all human beings, it is arguable therefore that all humans are agents. However, Edwards has argued that this is too simplistic a view to take and that rather than being the property of all humans, ‘agency is regarded as the property of subjects ...’³ Thus it is only those individuals who are constructed as subjects who can be regarded as agents. As Sewell explains:

To be an agent means to be capable of exerting some degree of control over the social relations in which one is enmeshed, which in turn implies the ability to transform those social relations to some degree ... agents are empowered to act with and against others by structures: they have knowledge of the schemas that inform social life and have access to some measure of human and nonhuman resources.⁴

¹ See section 2.2

² Butler, 2006, p.34

³ Edwards, 1994, p.182

⁴ Sewell, 1992, p.20

Agents then, are individuals who are autonomous, rational and free actors⁵ with the capacity to transform social relations. Re-engaging with the work of Descartes and Kant, discussed earlier,⁶ it is apparent that rationality is considered to be an integral part in their conceptions of agency. Rationality and the mind are concepts that are consistently ascribed to *men and masculinity*, with their ability to make choices and act according to their own semi-autonomous⁷ will. This is a point illustrated by Rollinson who notes that the man is '[p]rincipally construed as a free willing agent ...'⁸ In contrast, women are considered to be '[c]ontrolled by their bodies, passions and emotions [and consequently] they are seen to be acted upon rather than acting.'⁹ Although women are acted upon, their ability to re-act as women is denied¹⁰ and therefore they are constructed as objects rather than subjects. This construction of women which objectifies them, focusing upon them as '[o]bjectified irrational beings that merely attract proprietary rights ...',¹¹ is supported by statements such as the following, made by Nietzsche: "[a] woman wants to be taken and accepted as a possession, wants to be absorbed into the concept of possession, possessed ..."¹² Consequently men are subjects, they are rational beings, they are able to make choices with regards to their behaviours and therefore are the individuals doing the acting: the agents. This is as opposed to women who are

⁵ Reznick, Lawrie, *Evil or ill? Justifying the insanity defence* (London: Routledge, 1997) p.9

⁶ See chapter two, section 2.2 at pp.30-33

⁷ The term semi-autonomous is used here to reflect the influence and role of societal structures and schemas on an individual's decision making process. It is submitted that an individual's choices can never be truly autonomous because of the pervasive influence of societal and gendered norms.

⁸ Rollinson, 2000, p.110

⁹ Rollinson, 2000, p.109

¹⁰ Edwards, 1994, p.183

¹¹ Rollinson, 2000, p.110

¹² Nietzsche, Friedrich, *The Gay Science* (translated by Kaufmann) (New York: Random House, 1974) p.24

objects, they are irrational, emotional individuals, being acted upon, rather than acting themselves. According to Eduard's theory then, women as objects, rather than subjects, are not imbued with agency and are consequently not agents. As explained by Rollinson: '[w]omen, as man's "Other", are ... perceived to lack agency ...'¹³

An individual's ability to act as an agent and exercise their agency is also dependent upon social structures, with the consequence that not everyone is positioned equally when exercising agency; '[a]gency varies with access to and control over resources and schemas because "structures, and the human agencies they endow, are laden with differences in power."' ¹⁴ As a result some individuals are in a better position to utilise their agency than others because of, for example, their sex, gender and class, amongst other factors.¹⁵ Most importantly in the context of this thesis, is the role that gender plays on the ability of women to both have their agency acknowledged as well as their ability to utilise their agency to *any* degree. Indeed, it is clear that the differences in power in the context of successfully exercising agency, mentioned above, are particularly prevalent in gender discourse. As was explained in the previous chapter,¹⁶ gender and power are inextricably interlinked. It is arguable then that the role of social norms and discourse, noted above and the prevalence of feminine gender norms, as discussed in chapter three¹⁷ have obvious implications for both the acknowledgment of women's agency, as well as their ability to exercise agency.

¹³ Rollinson, 2000, p.109

¹⁴ Sewell, 1992, p.21

¹⁵ Eduards, 1994, p.182

¹⁶ See chapter three, section 3.2.2 at pp. 93-97 and section 3.4 at p.111

¹⁷ See chapter three, section 3.4

4.2 Agency and Women within Societal Discourse

Eduards has suggested that there are two positions that have been taken with regards to women's agency. The first suggests that women do not have agency at all because of their gendered characteristics of passivity and irrationality. The other position suggests that if women's agency is acknowledged it is limited to a female-specific agency, again reflecting women's gendered characteristics of caring and nurturing.¹⁸ 'Both views deny women the possibility to challenge and change their condition as women. Agency is regarded as a property of subjects and consequently a male prerogative.'¹⁹ It is clear then that women's agency can either be completely denied, or in instances where it has the potential to exist, it is arguably not utilised for the *benefit* of women, but simply as a tool to reflect and reiterate existing feminine gender norms. Eduards' arguments also highlight the prevalent role that gender discourse plays in both the denials, and unsuccessful utilisations, of agency by women. Indeed, it has been argued that in the dichotomy of agency and victimisation, all human beings are expected to be agents, rather than passive victims.²⁰ However, I would argue that gender discourse suggests otherwise, with norms surrounding appropriate femininity²¹ stereotyping women as being inherently

¹⁸ Eduards, 1994, p.182

¹⁹ Eduards, 1994, p.182

²⁰ Eduards, 1994, p.181

²¹ See chapter three, section 3.4 for a more detailed discussion on these norms

passive beings. Women are '[d]ependent, prone to illness and subject to the control of their raging hormones.'²²

Women's supposed frailness and vulnerability has resulted in them often being perceived, and consequently being constructed, as victims. This portrayal of women as victims is something that has historically been advocated by some feminists, particularly in the academic literature on rape, domestic violence and sexual harassment.²³ Moreover, women arguably fit into Christie's model of the ideal victim: that is to say that women are '[m]ost readily given the complete and legitimate status of being a victim.'²⁴ Reflecting Christie's model, women are weak, they have to put energy into protecting themselves²⁵ and although they may voice their opinions, their lack of power within societal structures means they do not pose a threat to the interests of the powerful within society.²⁶ The passive woman is therefore seen to be a victim of her circumstances, '[l]acking independence and status, subject to control at the hands of [her] partner and a patriarchal society.'²⁷

This portrayal of women either as victims, or certainly as ideal victims, does not sit comfortably alongside the concept of agency. Indeed, as noted by Mahoney:

²² Nicolson, Donald, "Criminal Law and Feminism" in Nicolson, Donald and Bibbings, Lois (Eds), *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing, 2000) p.20

²³ Mahoney, Martha, "Victimisation or Oppression? Women's Lives, Violence and Agency" in Fineman, Martha Albertson and Mykitiuk, Roxanne, *The Public Nature of Private Violence – The Discovery of Domestic Abuse* (New York: Routledge, 1994) p.61

²⁴ Christie, Nils, "The Ideal Victim" in Fattah, Ezzat (Ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Basingstoke: MacMillan, 1986) p.18

²⁵ Christie, 1986, p.19

²⁶ Christie, 1986, p.21

²⁷ Dobash, R Emerson, Dobash, Russell P, Noaks, Lesley (Eds), *Gender and Crime* (Cardiff: University of Wales Press, 1995) p.120

In our society, agency and victimisation are each known by the absence of the other: you are an agent if you are not a victim, and you are a victim if you are in no way an agent. In this concept, agency does not mean acting for oneself under conditions of oppression; it means *being without oppression*, either having ended oppression or never having experienced it at all.²⁸

Victimisation and oppression of women both involve an inequality in power relations within society and existing social structures. This relationship between women and power is reflected in Foucault's work. For Foucault power is relational, that is to say that it is not something to be exercised from the top-down within social structures and hierarchies, but rather something that works in capillaries. Foucault explained his theory of capillary power succinctly;

[I]n thinking of the mechanisms power, I am thinking of its capillary form of existence, the point where power reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourse learning processes and everyday lives.²⁹

Living in a patriarchal society, in which all the structures are male dominated or act in the interests of males, ensures the continued prevalence of gendered power relations in which men dominate women. For women then, who live their daily lives within unequal power structures, demonstrating victimisation or oppression and therefore having their agency denied, is hardly an arduous task. Accordingly this is

²⁸ Mahoney, 1994, p.64

²⁹ Foucault, Michel, *Power/Knowledge: Selected Interviews and Other Writings, 1972-77* (Brighton: Harvester Press, 1980) p.39

one potential explanation for both the denials of women agency as well as their perceived lack of agency or inability to utilise any gendered agency that they may be afforded.

Linked in with the earlier discussions on the role of social structures is the role that societal norms³⁰ play in the denials of women's agency as well as the (un)successful exercise of agency by women. Societal norms influence individuals' own behaviour as well as their expectations with regards to the behaviour of others.³¹ They permeate every aspect of a society in '[m]acro level structures such as economy and politics, as well as meso level and micro level structures such as family and interpersonal relations.'³² Individuals are expected to respect and adhere to the societal norms within their particular society and culture. Indeed, as noted by Hitlin et al., these societal '[n]orms guide us as we ... strive to internalise and live up to these norms and guidelines.'³³

Focusing more specifically on Western societies, societal norms are constructed and enforced before the backdrop of the patriarchal society that exists within them. That is to say that the societal norms which exist within Western society represent and are created by the patriarchal social structure. In its most basic form a patriarchal society is one in which the positions of power and influence within society are predominantly taken by men, and where the existing societal norms are

³⁰ The use of the term societal norms here will be as an umbrella term that incorporates the cultural, social and gender norms that simultaneously guide the behaviour expected of particular classes of individuals within society.

³¹ The World Bank, 2011, p.168

³² Charrad, Mounira, "Women's agency across cultures: Conceptualising strengths and boundaries" *Women's Studies International Forum*, 33, (2010), 517, p.519

³³ Hitlin and Elder, 2007, p.180

seen to favour and benefit men.³⁴ Therefore, a patriarchal society is '[c]haracterised by current and unequal power relations between women and men whereby women are systemically disadvantaged and oppressed.'³⁵ Indeed, within a patriarchal society there is a clear disparity in power between men and women. This has the consequence that women are more readily controlled by informal societal norms. Moreover, this imbalance in power relations means that adherence to patriarchal societal norms is particularly important for women, not least because of some of the negative consequences that are attached to deviance from these socially proscribed norms. As a result, the capacity for women to be acknowledged as, and thus act as agents must be viewed within the prism of these existing social structures of a patriarchal society.³⁶

It is clear then that women are only able to exercise any limited gendered agency which they are afforded within existing societal norms and structures. Indeed, 'women take into consideration social values, meanings and norms when they act ...'³⁷ This point was reiterated by The World Bank in their *World Development Report 2012*. They acknowledge the role that social norms play in women's agency and how they simultaneously define and constrain the space within which their agency can be exercised.³⁸ It is evident then that women's ability to exercise any (limited) agency that they are afforded, is severely constrained by the

³⁴ Oxford English Dictionary, "patriarchy, n" available at <http://www.oed.com/view/Entry/138873?redirectedFrom=patriarchy#eid> (OED, Third Edition, June 2005)

³⁵ London Feminist Network, "What is patriarchy?" available at <http://londonfeministnetwork.org.uk/home/patriarchy>

³⁶ Charrad, 2010, p.517

³⁷ Charrad, 2010, p.519

³⁸ The World Bank, 2011, p.169

patriarchal societal norms which are entrenched in key institutions such as '[f]amily, state, religion, courts and labour markets.'³⁹ When women deviate from these norms they are often labelled as deviant and treated punitively. This can be contrasted with the position of men within a patriarchal society, whose agency is expounded by their dominance within these institutions,⁴⁰ as well as within society more generally.

From the above discussions it is clear that women's agency is generally denied and therefore women struggle to exercise any gendered agency which they are afforded because of the pervasive influence of the societal norms existing within a patriarchal society. However, as explained by The World Bank in their *World Development Report 2012*:

Women's agency matters at three levels. It has intrinsic relevance for women's well-being and quality of life. It has instrumental relevance for actions that improve the well-being of women and their families. And it is required if women are to play an active role in shaping institutions, social norms and the well-being of their communities.⁴¹

Some feminists have acknowledged the importance of focusing on the denials of women's agency.⁴² They have recognised that '[w]omen need [agency] as women ... [o]nly women organised as women and acting on behalf of women, will work for a change of women's conditions in a way that challenges the sexual power relations,

³⁹ Charrad, 2010, p.519

⁴⁰ Sewell, 1992, p.21

⁴¹ The World Bank, 2011, p.151

⁴² See for example, Murphy and Whitty, 2006; and Dahlerup, Drude, *The New Women's Movement: Feminism and Political Power in Europe and the USA* (London:Sage, 1986)

that is, male dominance.⁴³ This expunction of women's collective agency was highlighted by the World Bank who noted that women acting as a group for a particular cause can exert more pressure and encourage change more effectively than a woman acting alone:

[w]hile an individual woman's greater ability to exercise agency might help her reach better outcomes for herself within her environment and constraints, it rarely is sufficient to promote structural changes that will reform the environment for other women.⁴⁴

Thus by collectively exercising their agency, it is suggested that women could encourage changes in social norms and structures that would arguably have an impact on allowing women to exercise their individual agency.⁴⁵ On the other hand, Edwards argues that women are still unable to '[t]ranslate [their] individual experience ... into collective action ...'⁴⁶ This is not least because of the largely gender specific hurdles women face, such as a lack of financial autonomy, issues of domestic and sexual violence and lack of representation in government.⁴⁷

This discussion on women's agency highlights that their agency is not readily acknowledged and therefore they are unable to exercise any individual agency that they are afforded within societal discourse. As a result any successful and transformative⁴⁸ exercise of agency must be collective in nature. However, as evidenced above, even the impact of women's collective agency is limited. I suggest

⁴³ Edwards, 1994, p.182

⁴⁴ Oxford English Dictionary, 2005

⁴⁵ The World Bank, 2011, p.152

⁴⁶ Edwards, 1994, p.183

⁴⁷ The World Bank, 2011, p.152

⁴⁸ In this context a transformative exercise of agency is the ability to influence a marked positive change to a situation within the context of existing social structures.

therefore that whilst there is a limited acknowledgment that women's agency is important, more emphasis needs to be placed on the value attached to the personal agency of women.⁴⁹ Such an acknowledgement has the potential to have the effect of increasing the value attached to women's collective agency. One key way in which women's agency is either denied or limited through patriarchal institutions is by the operation of law and the criminal justice system, which both enforce, and reiterate, denials of women's agency. Indeed, as noted by the World Bank in their 2012 *World Development Report*, 'formal institutions – law and services – can impose or ease constraints on the exercise of agency.'⁵⁰ Therefore this chapter will now move on to explore the relationship between the criminal law and the concept of agency, particularly focusing on the criminal law's regulation and denial of the agency of women accused of committing serious crimes.

4.3 Agency and the Criminal Law

The concept of agency is one of the fundamental underlying principles of the criminal law, reflecting the notion that individuals should be held criminally responsible for their own behaviour.⁵¹ This move towards criminal responsibility began following the 19th century reform movement. The concern shifted towards '[e]nsuring that only those who voluntarily and intentionally or, at least, recklessly commit[ted] wrongful acts or cause[d] prohibited consequences [were] held to be

⁴⁹ This will be drawn upon and developed further in chapter five, section 5.5 and chapter 6, section 6.1

⁵⁰ The World Bank, 2011, p.157

⁵¹ Ashworth, Andrew, and Horder, Jeremy, *Principles of Criminal Law* (Oxford: Oxford University Press, seventh ed, 2013) pp.23-24

criminally responsible.⁵² At the core of this concept of responsibility is voluntariness of action and agency: that only those who choose to behave illegally should be held criminally liable.⁵³ Criminal law then, encapsulates this idea of agency by acknowledging that '[i]ndividuals should be respected and treated as agents capable of choosing their actions and omissions ...'⁵⁴

This idea has been expanded upon in some detail by Reznick, who argues that our criminal legal system adopts Folk Psychology, which makes two key assumptions: firstly that an agent will act according to their desires and beliefs, and secondly that agents are rational.⁵⁵ Applying these assumptions specifically to the criminal law Reznick observes that agents are rational individuals who must be held responsible for their actions if they break the law, unless they have been compelled to do so or suffer from exculpatory ignorance. If they are found to be responsible for their illegal behaviour they should be punished.⁵⁶ Therefore it is generally assumed that '[s]ane adults may properly be held liable for their conduct and for matters within their control, except in so far as they can point to some excuse for their conduct – for example, duress, mistake or even social deprivation ...'⁵⁷ These underlying themes within the criminal law are immortalised through the requirements of *actus reus* (a

⁵² Rollinson, 2000, p.103

⁵³ Rollinson, 2000, pp.103-104

⁵⁴ Ashworth and Horder, 2013, p.24

⁵⁵ Reznick, 1997, p.8. Reznick's definition of the rational agents is someone who 'has a set of rational beliefs, a set of desires, an ordering of these desires based on a set of values, the ability to figure out the options, the ability to understand the consequences of these options, the ability to weigh up the pros and cons of each option, and the ability to choose the one that most satisfies his most important desires.'

⁵⁶ Reznick, 1997, p.9

⁵⁷ Ashworth and Horder, 2013, p.24

wrongful act) and *mens rea* (a wrongful intent) for a criminal offence.⁵⁸ Therefore for an individual to be held criminally liable they must satisfy both the *actus reus* and *mens rea* of the particular offence they have been charged with, without an applicable defence.

4.4 The Criminal Law – A Gendered Construct?

4.4.1 The Gendered Criminal Legal Subject

As agency is considered to be a key concept underlying the criminal law, criminal legal discourse requires ‘a definitive ... subject, as the responsible author of the crime’⁵⁹ in much the same way that exercise of agency requires an agent. As iterated by Duncan, ‘traditional conceptions of the legal subject place that subject as a clear, certain, fixed, pre-existing identity at the core of the law.’⁶⁰ As observed above, implicit within the criminal law is the notion of the criminal subject as a rational agent to whom full responsibility for their actions is ascribed. It is also assumed that ‘in accordance with the precept of formal equality before the law, the legal subject is constructed as a gender-less, race-less, class-less individual abstracted from its social situation.’⁶¹ However, as has already been acknowledged in chapter

⁵⁸ Morrissey, 2003, p.34

⁵⁹ Allen, Hilary, “Rendering Them Harmless: The Professional Portrayal of Women Charged with Serious Violent Crimes” in Carlen, Pat and Worrall, Anne (Eds), *Gender, Crime and Justice* (Milton Keynes: Open University Press, 1987) p.84

⁶⁰ Duncan, Sheila, “The Mirror Tells Its Tale: Constructions of Gender in Criminal Law” in Bottomley, Anne (Ed), *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Publishing Limited, 1996) p.176

⁶¹ Wells, Celia and Quick, Oliver, *Lacey, Wells and Quick – Reconstructing Criminal Law, Texts and Materials* (Cambridge: Cambridge University Press, fourth ed, 2010) p.96

two,⁶² the legal subject is not gender-neutral, rather it is gendered: it is masculine in construction and operation. This male subject is the *universal* legal subject and is thus also applicable in the context of the criminal law. The female subject does not exist within the criminal law or criminal legal discourse: ‘the woman appears only as the mirror to male subjectivity.’⁶³

The gendered aspect of the criminal legal subject is most evident in the historical notion of the “reasonable man”, perhaps most clearly seen in the development of the old common law defence of provocation. Indeed, the “reasonable man” standard was first introduced when judging the adequacy of provocation in 1869 in the case of *R v Welsh*⁶⁴ where it was held: ‘[t]here must exist such amount of provocation as would be excited by the circumstances in the mind of the reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.’⁶⁵ This concept of the “reasonable man” was affirmed and developed for many years in the subsequent case law on provocation.⁶⁶

However, there was a move from the “reasonable man” to the “reasonable person” in *D.P.P. v Camplin*,⁶⁷ with the now infamous statement by Lord Diplock that the reasonable person is:

[a] person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but on other respects sharing such

⁶² See chapter two, section 2.4.1

⁶³ Duncan, 1996, pp.177-178

⁶⁴ (1869) 11 Cox Crim. C. 336

⁶⁵ *R v Welsh* (1869) 11 Cox Crim. C. 336, p.338

⁶⁶ For example *Bedder v D.P.P.* ([1954] 1 WLR 1119) where it was held that no characteristics of the defendant could be considered for the reasonable man.

⁶⁷ [1978] AC 705

of the accused's characteristics as they would think would affect the gravity of the provocation to him.⁶⁸

In *Camplin*, Lord Diplock stated that '[f]or the purposes of the law of provocation the "reasonable man" has never been confined to the adult male. It means an ordinary person of either sex ...'⁶⁹ Therefore for the purposes of the old common law defence of provocation, when exploring the defendant's capacity to exercise self-control their sex and age may be relevant characteristics to be considered.⁷⁰ With the introduction of The Coroners and Justice Act 2009, the common law defence of provocation was abolished and replaced with a new statutory defence of loss of control.⁷¹ Consequently, the historic "reasonable person" test has been replaced by the test found in section 54(1)(c) of the Act: 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way to D.'⁷²

It is submitted that despite Lord Diplock's assertions in *Camplin*,⁷³ the concept of the "reasonable person" in use today is still attributed with the characteristics of the "reasonable man" and therefore remains gendered male. This point was reiterated by Allen who, as Lacey notes:

[r]evealed the way in which the gender-neutral person is nonetheless fleshed out in judicial discourse in highly (and often stereotypically) sex-specific

⁶⁸ *Camplin*, 1978, p.718

⁶⁹ *Camplin*, 1978, p.717

⁷⁰ Mitchell, Barry, "Years of Provocation, Followed by a Loss of Control" in Zedner, Lucia, and Roberts, Julian V. (Eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in honour of Andrew Ashworth* (Oxford: Oxford University Press, 2012) p.117

⁷¹ See chapter 4, section 4.4.2 at pp.157-159, and chapter 5, section 5.1.1 for a more detailed discussion on the new defence of loss of control

⁷² The Coroners and Justice Act 2009, s54(1)(c)

⁷³ [1978] AC 705

terms. The construct of the reasonable person cannot entirely conceal the fact the judges themselves find it difficult to conceive of a legal standard of reasonable behaviour applicable across the sexes.⁷⁴

Indeed, Allen notes how the use of the term reasonable person '[k]eeps alive the illusion of a universal and unitary subject of the law, but ... legal discourse has found itself unable to sustain such a construct.'⁷⁵ As result the standard that has been invoked is '[a]nything but universal or ungendered or androgynous: on the contrary it is variable, differentiated, and very firmly gendered.'⁷⁶

In the light of this, I would submit that despite the suggested gender neutrality of the reasonable person test, it is still '[a] profoundly gender-based and sex-specific standard'⁷⁷ which exists. Indeed, Edwards makes the point that:

[w]e are told, that the *reasonable man* means the *reasonable woman*, just simply by saying so, even though the experiences of women are otherwise immaterial, otherwise irrelevant, and unlike the male experience are rarely authenticated or given law's divine blessing.⁷⁸

Thus the notion that the reasonable person is gender neutral and thus incorporates the voice and experiences of women is a questionable claim, especially I would

⁷⁴ Lacey, Nicola, "General Principles of Criminal Law? A Feminist View" in Nicolson, Donald and Bibbings, Lois (Eds), *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing, 2000) p.94

⁷⁵ Allen, Hilary, "One Law For All Reasonable Persons?" *International Journal of the Sociology of Law*, 1988, 16, 419, p.424

⁷⁶ Allen, 1988, p.424

⁷⁷ Taylor, Laurie J., "Provoked Reason in Men and Women: Heat-Of-Passion Manslaughter and Imperfect Self-Defence" *UCLA L. Rev.*, 33, (1985-1986), 1679, p.1690

⁷⁸ Edwards, 1996, pp.2-3

argue, when explicit reference is made to the issue of sex⁷⁹ in its current construction.

Utilising the examples of the historic defence of provocation and the issues of battered women, Edwards argues that the normative is always male:

How, for example, can the partial defence of provocation [now loss of control] founded on what reasonable men do in the face of adversity truly absorb reasonable women and their reaction to adversity? Thus, what men do when wives take lovers, is what any reasonable man would do if presented with the same circumstances and is common knowledge and experience. Yet, what battered women do when abused and threatened by violent husbands, is not within the ken of the reasonable man concept; it is instead “distinguished” it is within a specialised domain of knowledge and calls for experts to speak to it. Subjectivity, which lies at the heart of the reasonable man, is constituted as universal and rests on particular and highly selective facts. The normative is male.⁸⁰

This is an idea reiterated by MacKinnon, who explains: ‘when [the state] is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied.’⁸¹ Therefore, despite pertaining to be a gender-neutral concept, the reasonable person standard is, I suggest still normatively gendered male.

⁷⁹ As noted above, the reasonable person test can now be found in section 54(1)(c) of the Coroners and Justice Act 2009; ‘a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way to D.’

⁸⁰ Edwards, 1996, p.3

⁸¹ MacKinnon, Catharine, “Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence” *Signs* 8(4), (1983), 635, p.658

Within this context, it becomes clear then that the concept of the “reasonable woman” is not one that has ever been adopted by the criminal law. Arguably this is understandable when considering both the legal and societal status of women when the concept of the reasonable man was introduced in the nineteenth century, ‘[w]hen English law still treated femininity as an unquestioned legal disability, akin to infancy; women were not yet even constituted as legal persons.’⁸² However, the continued omission of this concept from the law, despite progress in women’s legal standing and rights, adds further weight to the argument that the reasonable person remains gendered masculine, rather than neutral, in nature. As explained by Taylor: ‘rather than developing a separate standard for women, criminal law has held and continues to hold female defendants to a male standard of reasonableness.’⁸³

Some academics have argued that the concept of the reasonable woman is not one that is required within the criminal law. For example, Kennedy has suggested that the comparatively small number of female to male criminals has meant that introducing the concept of the reasonable woman has been unnecessary.⁸⁴ The pervasiveness of gender discourse,⁸⁵ which constructs women as unreasonable, emotional, irrational and irresponsible, particularly when they interact with the criminal law, has meant that the concept of reasonableness is constructed in dichotomy with that of the criminal woman. Indeed the concept of reasonableness

⁸² Allen, 1988, p.422

⁸³ Taylor, 1985-1986, p.1691

⁸⁴ Kennedy, Helena, *Eve Was Framed: Women and British Justice* (London: Vintage Press, 1993) p.238

⁸⁵ See chapter three, section 3.4 for a detailed discussion on the construction of appropriate femininity within gender discourse

'[h]as long been regarded as favouring men – maleness characteristically being associated with attributes such as rationality, forethought and strength, while femininity has traditionally been associated with irrationally, impulsiveness and weakness.'⁸⁶ Therefore if the criminal law were to acknowledge the concept of a “reasonable woman” by conjoining the terms “reasonable” and “woman” ... [it would create] ... a contradiction in terms.'⁸⁷

This failure to acknowledge the concept of the reasonable woman and the continued prevalence and use of the concept of the reasonable man, both within, and rather than, the reasonable person, combines to ensure the continued existence of the male criminal legal subject. In turn this rejects the neutral or female legal subject, thus ensuring the maintenance of women as the “Other”. As explained by Morrissey:

[w]estern philosophy and legal discourse have generally tended to predicate concepts of the human on masculine ideals. According to these discourses' narratives of masculinity and femininity, men are considered to possess the autonomy, independence and reason of all human subjects ... In legal discourse, this translates into the idea of the “reasonable man”, which tacitly elides narratives of femininity. The “reasonable man” is narrated as responsible for his actions ... in this tale he retains his agency at all times ...

⁸⁶ McColgan, Aileen, “General Defences” in Nicolson, Donald and Bibbings, Lois (Eds), *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing, 2000) p.145

⁸⁷ Taylor, 1985-1986, p.1691

For the “reasonable man” is considered, by definition, to be reasonable, and to act *as any other man would in the same situation*.⁸⁸

Therefore, the continued prevalence of the concept of the reasonable man and the construction of the criminal legal subject as male ensures the retention of the agency of men, whilst simultaneously passively denying the agency of women.

This failure to acknowledge the female criminal legal subject disqualifies women from legal subjecthood. As explained by Nicolson: ‘male legal subjecthood is further enhanced by the denial of that of women ... Thus, criminal law tends to portray women as passive victims, whose agency and autonomy is effaced by the focus on the perspective of male defendants.’⁸⁹ It is undeniable then that there is a well-defined link between subjecthood and agency and that without clear, unequivocal acknowledgment as a subject of the criminal law, an individual cannot be recognised as an agent under the law. Agency resides in the subject; without a subject, agency cannot exist. Therefore it is suggested that agency is a significant characteristic of the reasonable man, thus reflecting his legal subjecthood. This is a point reiterated by Abrams, who notes that law’s current assumption of the subject is one ‘[c]apable of uncompromised agentic self-determination, to whom legal authorities ascribe full responsibility for actions taken ...’⁹⁰ This has resulted in the portrayal of the woman in law as an individual who lacks any self-determination and

⁸⁸ Morrissey, 2003, p.169

⁸⁹ Nicolson, 2000, p.25

⁹⁰ Abrams, 1995, p.352

thus must be relieved of responsibility associated with her actions,⁹¹ rather than as a reasonable criminal subject whose agency is acknowledged.

Following on from this and of particular importance to this thesis therefore is the notion that the criminal law is passively denying the agency of women killers who both come before, and seek to rely on it, through the masculine gendering of the “reasonable person” as the legal subject and thus a failure to acknowledge women as legal subjects with agency. The term *passive* agency denial is used here because as has been demonstrated in the above analysis the masculine gendering of the legal subject within criminal legal discourse is a continuing pre-existing state of affairs. Indeed, the construction of women as legal objects who are acted upon, rather than as legal subjects within criminal legal discourse, is a pre-existing state of affairs, reflecting a *given* in patriarchal society.

4.4.2 *The Gendered Nature of Defences to Murder*

As well as the gendered construction of the criminal legal subject, I would argue that when exploring the criminal law as a whole it becomes apparent that it has a gendered dimension more generally that serves to reinforce passive agency denial for women. This is an argument shared by many feminist scholars⁹² who have argued that the criminal law does not exist in its own vacuum, but rather that it is a reflection and reproduction of societal discourse. Therefore, the criminal law and its

⁹¹ Abrams, 1995, pp.351-352

⁹² See for example: Fishwick, Elaine “Sexual Assault and Criminal Justice: A Comparative Perspective on Legislation, Policing and Research” in Findlay, Mark, and Hoggs, Russell (Eds), *Understanding Crime and Criminal Justice* (Sydney: Law Book Co, 1988) p.170

associated processes need to be contextualised and thus understood within the social structures and ideologies of a patriarchal society.⁹³

The gendered dimension of criminal law is reflected in the defences available, which, it will be argued, are themselves gendered. The defences available in criminal law can be broken down into two categories, those that are justifications and those that are excuses.⁹⁴ Justification defences, although accepting responsibility for the individual's actions, acknowledge the rightfulness of the defendant's behaviour. In contrast, excuse defences accept the wrongfulness of the individual's actions, but mitigate the responsibility attached to the defendant.⁹⁵ The use of a justification defence then '[p]resents the *act* as appropriate and reasonable, while an excuse defence presents the *actor* as inherently irrational and the act as not to be publicly encouraged or defended.'⁹⁶

In differentiating between the defences and deciding which are categorised as justifications and which are excuses, Reznick has suggested two tests that must be conducted:

The first ... [is] the *Mental Test*: If the mental state of the defendant is critical in determining whether the defence succeeds, it is an excuse. This is because the judgment as to whether someone is responsible depends on features of his mental state ... The second is the *Moral Test*: If the moral circumstances surrounding the offence are critical in determining whether the defence

⁹³ Wells and Quick, 2010, p.483

⁹⁴ Both justifications and excuses can be used by individuals in an attempt to avoid, or limit, punishment.

⁹⁵ Reznick, 1997, p.42; and, Morrissey, 2003, p.74

⁹⁶ Morrissey, 2003, p.74

succeeds, it is a justification. Justifications depend on producing beneficial consequences that outweigh the harms.⁹⁷

Applying this test to the current defences to murder available under the criminal law, it is apparent that the majority of them can be easily divided into one of the two categories. Self-defence is undoubtedly a justification defence, whereas diminished responsibility and insanity are both excuse defences. The now historical defence of provocation allowed evidence of Battered Woman Syndrome (BWS) to be adduced under it,⁹⁸ and therefore could have been classified as either an excuse (if BWS evidence was introduced) or a justification. The replacement defence of loss of control, under which it is as yet unknown whether BWS evidence can be utilised,⁹⁹ is I would suggest likely to be categorised as a justification defence.

The categorisation of defences as excuses or justifications reflects the gendered nature of the defences in question. That is to say that justification defences, such as self-defence and loss of control, are masculine, whereas excuse defences, such as insanity and diminished responsibility are feminine. As explained by Lacey: 'the female gendering of particular defences such as mental incapacity defences like diminished responsibility (as opposed to "masculine" defences like ... self-defence) has ... been widely noted.'¹⁰⁰ The gendering of justification defences as masculine and excuse defences as feminine reflects gender discourse. Consequently, self-defence, as a justification defence is based upon the '[m]ale realities on which

⁹⁷ Reznick, 1997, p.42

⁹⁸ *R v Ahluwalia* [1993] 96 Cr App R 133; and, *R v Thornton* [1996] 1 WLR 1174

⁹⁹ See chapter five, section 5.1.1 at pp.170-173

¹⁰⁰ Lacey, Nicola, *Women, Crime, and Character: From Moll Flanders to Tess of the D'Urbervilles* (Oxford: Oxford University Press, 2008) p.3

the defence was [founded and which] have become entrenched ...'¹⁰¹ Similarly, loss of control (historically provocation) is a masculine construction and thus defence,¹⁰² reflected in the notions of rage and anger typically associated with losing control.¹⁰³ Moreover, the defence '[r]ests on a notion of the *normality* of the mental response that underlies the offence ... any reasonable subject might have responded in this way, and what is explicitly excluded is recourse to the defence by anyone whose response falls *outside* this norm.'¹⁰⁴ In contrast, diminished responsibility and insanity, as excuse defences, are based upon ideas of inherent irrationality, normatively associated with femininity.¹⁰⁵ Indeed, when these defences are invoked, '[i]t is the *abnormality* of the response that grounds the exculpation: the defendant is to be excused in precisely those cases where *no* reasonable person would have responded in such a way.'¹⁰⁶

The gendered nature of defences is also reflected in statistics, which demonstrate that proportionately more women successfully plead one of the excuse defences to homicide, whereas a proportionality higher number of men successfully plead a justification defence. Indeed as Edwards notes:

Throughout all common law jurisdictions, writers, lawyers and critics have expressed concern that women are more likely to be convicted of murder or manslaughter (diminished responsibility) and less likely to be convicted of

¹⁰¹ Morrissey, 2003, p.98

¹⁰² Lacey, 2008, p.3

¹⁰³ Edwards, 1996, p.380. See also Edwards, 1996, p.393, where she notes: 'the problem with provocation is its masculinism.'

¹⁰⁴ Allen, 1987, p.26

¹⁰⁵ See chapter three, section 3.4 for a detailed discussion on the norms associated with appropriate femininity

¹⁰⁶ Allen, 1987, p.26

manslaughter (provocation [now loss of control]) when compared with their male counterparts ...¹⁰⁷

This is reflected in statistics: between 2002/03 and 2012/13, more men than women were both indicted for homicide and found not guilty by reason of insanity. However, as a *proportion* of the number of indictments, proportionately more women were found not guilty by reason of insanity. Statistics published by the Office for National Statistics show that of the 6,927 men indicted for homicide between 2002/03 and 2012/13, 10 of the defendants, that is 0.14%, were found not guilty by reason of insanity. This can be contrasted with the 747 women indicted for homicide in the same time period, of whom 2, that is 0.27%, successfully pleaded insanity.¹⁰⁸

It is also important to note that '[d]espite the general principle of English law, that all ... should be treated the same irrespective of their gender, law-makers have always reserved the right to establish exceptions to this ... for example, in the sexually differentiated legislation concerning homosexuality, rape, [and] infanticide ...'¹⁰⁹ Indeed, the defence of infanticide is gender specific, being solely available to women defendants who kill their children, and women can also exclusively use

¹⁰⁷ Edwards, 1996, p.371

¹⁰⁸ Office for National Statistics, "Crime Statistics: Appendix Tables – Focus on: Violent Crime and Sexual Offences, 2011/12" available at <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/focus-on-violent-crime/rft-appendix-tables.xls> Table 2.12

It should be noted here that there are no similar figures currently available for the defences of loss of control and diminished responsibility, so no statistical comparison can be made. The only figures that are available formed part of the Law Commission's report on reforming these defences and therefore are based upon the 'old law', pre- The Coroners and Justice Act 2009. These figures can be found in, The Law Commission, "Partial Defences to Murder Appendices" available at http://lawcommission.justice.gov.uk/docs/lc290_Partial_Defences_to_Murder_Appendices.pdf These figures were only based upon a selection of the cases where these defences were invoked and are therefore arguably not a representative sample suitable for analysis.

¹⁰⁹ Allen, 1988, p.427

gendered evidence of pre-menstrual syndrome (PMS) and BWS¹¹⁰ to support the defence of diminished responsibility. As Allen explains, such examples jettison as inconsistent the legal subject constructed as being the neutral, genderless reasonable person.¹¹¹ Nicolson has argued that the provision of such gendered evidence and defences is the law's attempt to provide '[e]xceptions to the male oriented notions of criminal liability ...'¹¹² When the defence of infanticide is invoked or evidence of PMS or BWS introduced, they all focus on the female defendants personality and psychology, reflecting the Victorian ideology of '[f]emale biology as a disease.'¹¹³ This ideology utilises '[d]isturbances arising from women's reproductive cycle – along with those deviations from gender role that have come to be defined as "personality disorders" (sexual deviance, violence, rejection of family relationships) ...',¹¹⁴

The female specific defence of infanticide,¹¹⁵ the legal basis for which is the mental disorder puerperal psychosis, highlights the pathologised nature of mothers

¹¹⁰ There has been suggestion more recently that BWS can be extended to that of Battered Person Syndrome (BPS) which would also allow men to utilise such evidence to support a defence of diminished responsibility. BPS is included in the *International Statistical Classification of Diseases and Health Related Problems* (ICD) 9th Revision, code 995.81. The traits typically associated with BWS are similar to those found in BPS and include emotional, physical and sexual abuse from another person. It should be noted however, that BPS is not classified elsewhere. Moreover, I would suggest that men would have particular difficulty using evidence of BPS to support their defence due to the associated discourses of victimisation and pathology which are more readily associated with women and femininity, than men and masculinity.

¹¹¹ Allen, 1988, p.427

¹¹² Nicolson, Donald, "What the law giveth, it also taketh away: Female-specific defences to criminal liability" in Nicolson, Donald and Bibbings, Lois (Eds), *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing, 2000) p.180

¹¹³ Carlen, Pat and Worrall, Anne, "Introduction: Gender, Crime and Justice" in Carlen, Pat and Worrall, Anne (Eds), *Gender, Crime and Justice* (Milton Keynes: Open University Press, 1987) p.7

¹¹⁴ Carlen and Worrall, 1987, p.7

¹¹⁵ See chapter five, section 5.2 for a detailed discussion on the defence of Infanticide.

who kill their children.¹¹⁶ The utilisation of evidence of PMS to support a plea of diminished responsibility '[m]aintains that many (most?) women are physiologically, emotionally and behaviourally abnormal for between a quarter and a half of their productive lives ...'¹¹⁷ Finally, evidence of BWS, which is most successfully adduced in relation to the defence of diminished responsibility reflects the inherent helplessness and pathological nature of women.¹¹⁸ The obvious pathological element associated with Infanticide, PMS and BWS satisfies Reznick's *mental test*¹¹⁹ and therefore all three can be categorised within the realm of excuse defences. This is not unremarkable as excuse defences are usually gendered feminine, as acknowledged above.

The continued use of female-specific defences and gendered evidence provides female-specific excuses for women's violent criminality. Indeed, it is submitted that the use of such defences and evidence to support them, ensures the continuance of a difference approach to women's violent criminality, thus reinforcing the existence of the male gendered criminal legal subject and the non-existence of the female subject. In turn this underlines and enforces women's position as the "Other" within criminal legal discourse. The use of female-specific defences also further entrenches feminine gender stereotypes in the context of violent criminality, particularly the notions of women as inherently pathological and irrational beings. Indeed, although a difference approach may assist individual women with reducing

¹¹⁶ Morris, Allison, and Wilczynski, Ania, "Rocking the Cradle—Mothers Who Kill Their Children" in Birch, Helen, *Moving Targets—Women, Murder and Representation* (London: Virago Press Ltd, 1993) p.206

¹¹⁷ Carlen and Worrall, 1987, pp.6-7

¹¹⁸ Mahoney, 1994, p.65

¹¹⁹ See p.157, above

or altogether avoiding liability for their violent criminality, the use of gendered evidence and defences both reflects and reinforces the pejorative gender stereotypes surrounding women: for example, the construction of women as passive, helpless, pathological and controlled by emotions. 'In other words, a difference approach tends to reinforce the sort of gender constructions which harm women as a group and which feminists have sought so hard to challenge.'¹²⁰

The gendering of excuse defences as feminine, combined with the female-specific defences and the use of gendered evidence, ensures the continued passive denial of agency of women who come before the criminal law, as well as reinforcing the gendered construction of the criminal legal subject. It is clear that the excuse defences, which are feminine in gender, '[d]eny responsibility by denying intentional agency.'¹²¹ Taking the excuse defence of insanity as an example, this passively denies agency by rebutting the associated characteristic of rational competence.¹²² So whilst insanity acknowledges the commission of the act, as an excuse defence, it does so whilst removing the agency of the actor.¹²³

The argument that women are more likely to successfully plead an excuse defence¹²⁴ reflects the presumption within gender discourse that women are inherently irrational beings who lack agency. Indeed, as Morrissey explains:

Women who lack agency also lack the chance to argue in defence of their actions: if they cannot claim that they acted of their own volition in the first

¹²⁰ Nicolson, 2000, p.20

¹²¹ Duff, 1990, p.100

¹²² Duff, 1990, p.101

¹²³ Morrissey, 2003, p.34

¹²⁴ See pp.159-160, above for statistics on the use of excuse defences by men and women.

place, then they are denied the opportunity to claim that their acts were reasonable and justifiable.¹²⁵

This is reflected in the gendered nature of defences, which results in women being unlikely to utilise male justification defences that would acknowledge their agency.

This is particularly evident in the use (or lack thereof) of self-defence, a masculine justification defence, as a defence to murder by battered women who kill their abusive partners. Research published by Noonan in 1996 highlighted that there had never been a case where a battered woman had successfully pleaded self-defence.¹²⁶ This is despite the fact that arguably self-defence is a more accurate reflection of the woman's actions in many cases. The consequences of using self-defence are explained by Duff:

A plea of self-defence rebuts a charge of wounding ... by claiming that the wounding was rendered right or permissible by the fact that it was the only way to ward off a serious attack by its "victim" against its agent. One who justifies her action is prepared to *answer* for it, by showing it to be right: the possibility of avoiding blame or criminal liability by justifying our intended or intentional actions, therefore does not undermine the claim ... of responsible agency.¹²⁷

So battered women, who are unlikely to successfully use a plea of self-defence to the murder of their abusive partner, have their agency passively denied. Similarly,

¹²⁵ Morrissey, 2003, p.170

¹²⁶ Noonan, Sheila, "Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (Or (Re)inscribing The Familiar?)" in Bottomley, Anne (Ed), *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Publishing Limited, 1996) p.198

¹²⁷ Duff, 1990, p.100

women continuing to use feminine gendered excuse defences, rather than any masculine gendered justification defences, have their agency passively denied.

The continued existence and use of the female specific defence of infanticide and gendered evidence of PMS and BWS further assert the passive denials of the agency of women. The defence of infanticide and use of gendered evidence all rely specifically on the discourse of pathology that is readily associated with femininity. This continuous reference to syndromes and psychiatric and psychological deficiencies prevents a detailed examination of the extent to which the actions of violent female defendants '[f]it the available categories of culpability, justification and excuse.'¹²⁸ Instead, by using the female specific defences, which reflect and entrench feminine gender discourse, women have excuses made for their actions, they have their culpability limited and consequently their agency is passively denied. Therefore, for women the automatic position is one of their agency being passively denied within criminal legal discourse.

4.5 Concluding Remarks

The analysis within this chapter has questioned and explored the concept of agency within the context of societal discourse. It has demonstrated that women's agency is only acknowledged within limited circumstances, mainly through collective performances, and that therefore it is extremely difficult for women to successfully exercise their agency because of existing gender norms and social structures within a

¹²⁸ Nicolson, 2000a, p.172

patriarchal society. The analysis then moved on to explore the passive denial of women's agency within criminal legal discourse. It has demonstrated that men have their agency constantly (re)asserted, whereas women have their agency denied.

Women's agency is passively denied initially because they are constructed as objects rather than subjects. Agency is the tenure of rational, acting subjects and is therefore not associated with women as objectified, passive and irrational beings who are acted upon, rather than acting themselves. Indeed, drawing upon some of the gender stereotypes surrounding women discussed in the previous chapter,¹²⁹ including the notions of women as victims and as being controlled by their biological functions and their emotions, are in direct opposition to the concept of agency. Therefore, it is submitted that these stereotypes, as dictated by gender discourse, work to ensure that women's agency is passively denied.

Similarly and specifically in the context of the criminal law, it is submitted that women's agency is also passively denied. It is evident from the above discussions that '[w]here women resort to law, their status is always already imbued with specific meaning arising out of their gender.'¹³⁰ As explained by Smart:

[Women] go to law as mothers, wives, sexual objects, pregnant women, deserted mothers, single mothers and so on ... In going to law women carry with them cultural meanings about pregnancy, heterosexuality, sexual bodies

¹²⁹ See chapter three, section 3.4

¹³⁰ Smart, Carol, "Law's Truth/ Women's Experience" in Graycar, Regina, (Ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (Sydney: Allen and Unwin, 1990) p.7

... [L]aws that deal with the private sphere operate on fully gendered subjects
...¹³¹

Consequently when women come to the criminal law they are constructed as the “Other” and treated as such, with the automatic designation of feminine gender behaviour and attributes, such as passivity, emotionality and irrationality, which as has already been demonstrated, are contrary to the concept of agency. Moreover, the criminal legal subject, the “reasonable person” is gendered male, and therefore women constructed as legal objects have their agency passively denied. Furthermore, the gendered nature of defences, with excuse defences gendered as feminine and justification defences gendered as masculine, also work to passively deny women’s agency within criminal legal discourse.

Although it has become apparent that women’s agency is passively denied in criminal legal discourse, more attention needs to be paid to the specific relationship between the criminal law and women who kill. Indeed, although the agency of these women is passively denied in the same way it is for all women, further questions must be asked of additional agency denials which may take place in the context of women who kill. Therefore, the next chapter explores the socio-legal response(s) to women who kill, drawing upon the analysis of labelling and construction theory discussed in chapter two¹³² and arguing that these women are labelled as mad, bad, or victims, depending on their degree of deviance from gender appropriate behaviour (outside of committing homicide), as well as the specifics of their crime. These particular labels have been used in the context of this thesis because they are

¹³¹ Smart, 1990, p.7

¹³² See chapter two, sections 2.3 and 2.4

the ones most commonly used in the existing literature that explores women who kill.¹³³ Moreover, these three labels are general terms that broadly cover most of the more specific labels that have occasionally been mentioned within the literature. For example the typology of the “masculine woman” suggested by Seal¹³⁴ sits within the label of bad, rather than requiring a separate heading.

This next chapter will explore each of the labels, mad, bad and victim individually. When analysing each label it will explore related relevant defences and offences such as BWS and infanticide, as well as including relevant case studies. The next chapter argues that attaching these labels to women who kill results in their agency being actively denied, reflecting the symbiotic relationship between labelling and active agency denial. The term *active* agency denial will be used here, in contrast to the *passive* agency denial discussed in this chapter, to refer to the creation of a new identity for women who kill through labelling. So not only do the labels attached to women who kill reflect the deviance and gendered constructions of these women, but the labelling also creates a new all-consuming identity for them. As such this is, I would argue, a positive act of doing, and is reflected in the use of the term *active*. Active agency denial occurs as a result of passive agency denial. That is to say that it is the construction of women as legal objects whose agency is passively denied within criminal legal discourse, that allows women who kill to be labelled and for these labels to become their new exclusive identities, thus actively denying their agency.

¹³³ See for example: Morrissey, 2003 and Seal, 2010

¹³⁴ Seal, 2010, p.24

Chapter Five – “The Mad”, “The Bad”, “The Victim” – Labelling Women

Who Kill and Active Denials of Agency

5.1 Battered Women Who Kill—the Mad Woman and the Victim

Battered Woman Syndrome (BWS) was developed by Lenore Walker, an American psychologist, in an attempt to try to dispel the myths and misconceptions surrounding domestic violence as well as to help establish the reasonableness of killing their abusive partner by battered women.¹ As originally conceived by Walker, the syndrome consists of two elements. The first element is known as “the cycle theory”. This suggests that characteristically male violence against their partners has three phases:

The first involves a period of heightening tension caused by the man’s argumentativeness, during which the woman attempts various unsuccessful pacifying strategies. This “tension-building” phase ends when the man erupts into a rage at some small trigger and acutely batters the woman. This is followed by the “loving-contrite” or “honeymoon” phase, in which the guilt-ridden batterer pleads for forgiveness, is affectionate and swears off violence. But he breaks his promise and the cycle is repeated.²

The second element of BWS involves “learned helplessness.” Repeated, unpredictable and seemingly unavoidable abuse by their partner results in battered women becoming increasingly passive and developing a number of characteristics

¹ Sanghvi, Rohit and Nicolson, Donald “Battered women and provocation: The implications of R v Ahluwalia.” *Criminal Law Review*, (October 1993), 728, p.733

² Sanghvi and Nicolson, 1993, p.733

including low self-esteem, anxiety and depression as well as blaming themselves for the violence they suffer. This sense of helplessness traps battered women '[i]nto a situation from which [they are] psychologically and hence physically unable to escape.'³

Before the introduction of The Coroners and Justice Act 2009, case law demonstrated that the inclusion of BWS evidence in cases of women who killed their abusive partner was recognised in relation to the defences of provocation⁴ or diminished responsibility.⁵ With the introduction of the 2009 Act, BWS is now primarily a matter for the amended defence of diminished responsibility,⁶ with there being some contention as to whether they will still be able to adduce evidence of BWS under the new defence of loss of control.⁷ It is suggested however that women who plead loss of control will be able to present themselves as battered, even if not as suffering from BWS. As a result of this shift in the law, women who plead loss of control will likely be labelled as victims, whereas women who utilise evidence of BWS to support a plea of diminished responsibility will be labelled as mad.

5.1.1 Loss of Control—Battered Women Who Kill As Victims

The new partial defence to a charge of murder of loss of control is found in sections 54-56 of the Coroners and Justice Act 2009. Section 54 states:

³ Barnett, 1998, p.271

⁴ *R v Ahluwalia* [1993] 96 Cr. App. R. 133

⁵ *R v Thornton* [1996] 1 W.L.R. 1174

⁶ The Homicide Act 1957, section 2 as amended by the Coroners and Justice Act 2009, s52(1)

⁷ The Coroners and Justice Act 2009, sections 54-56

Where a person ('D') kills or is party to a killing they are not to be convicted of murder but of manslaughter if:

- (a) D's acts and omissions in doing or being a party to the killing resulted in D's loss of self-control;
- (b) The loss of control had a qualifying trigger; and
- (c) A person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.⁸

For there to be such a loss of control there must be a "qualifying trigger" as noted in section 54(1)(b) above. The meaning of these words is defined in section 55 of the Act which states:

- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which –
 - (a) constituted circumstances of extremely grave character, and
 - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).⁹

The effect of the defence of loss of control *in practice* in cases of battered women who kill their husbands is still unknown as there is yet to be a reported case involving a battered woman pleading the new defence of loss of control. Therefore

⁸ The Coroners and Justice Act 2009, s54(1)

⁹ The Coroners and Justice Act 2009, s55

there is some debate as to whether women will be able to invoke BWS evidence to support this new defence. Under section 54(3), which refers to s54(1)(c) and the 'circumstances of D', this is '[a] reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.'¹⁰ Edwards suggests that under s54(3) '[a] consideration of circumstances that go to the capacity for self-control *provided that they also go to the trigger*'¹¹ should be permitted. Therefore, women may be able to introduce evidence of suffering from BWS, as a psychological condition, '[t]o plead a lowered capacity for self-control provided the factor of relevance to capacity is the very same factor that forms part of the qualifying trigger.'¹² However, if women are not able to link the BWS factor to the qualifying trigger as Edwards suggests, then it is submitted that *in theory* women will not be able to use evidence of BWS to support the new defence of loss of control.

Alan Norrie has suggested that the amendments to the law, particularly the defence ground concerning the defendant having a justifiable sense of being seriously wronged,¹³ may encourage a change in how battered women are portrayed within the legal system should their defence utilise loss of control. He argues that rather than focusing on the medico-legal category of BWS, the new law will encourage female defendants '[t]o portray themselves as ordinary people grievously

¹⁰ The Coroners and Justice Act 2009, s55(4)(b)

¹¹ Edwards, Susan, "Loss of self-control: when his anger is worth more than her fear" in Reed, Alan, and Bohlander, Michael, (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Surrey: Ashgate Publishing Ltd, 2013) p.85

¹² Edwards, 2013, p.85

¹³ The Coroners and Justice Act 2009, s55(4)(b)

harmed and acting out of a legitimate sense of anger at what has been done to them.¹⁴

There is therefore some contention as to whether battered women will still be able to adduce evidence of BWS to support a defence of loss of control. However, I would suggest that despite the changes introduced by the new defence, women will still be able to use evidence that they were battered women, even if not evidence that they were specifically suffering from BWS. Section 55(3) of the Coroners and Justice Act, the qualifying trigger of fear of serious violence, attempts to reflect the situation faced by battered women. Moreover, with the introduction of the new defence it seeks to accommodate the “slow-burn” reaction of many battered women, otherwise known as cumulative provocation, where a series of separate incidents have built up over time, ultimately culminating in the defendant losing control and killing. As such, it is argued that battered women who plead loss of control will likely be labelled as victims through an acknowledgment of the violence they have suffered at the hands of the deceased.

Historically, the issue of women as victims of domestic violence was a private matter, reflected in the now oft quoted phrase ‘scream quietly or the neighbours will hear.’¹⁵ However, the rise of radical feminism during the 1970s and demands to make such violence a public matter meant that the construction of women as victims

¹⁴ Norrie, Alan “The Coroners and Justice Act 2009—Partial Defences to Murder (1) Loss of Control.” *Criminal Law Review* 4, (2010), 275, p.286

¹⁵ This was the title of a book written by Erin Pizzay on her experience when setting up the first women’s refuge for battered women in 1971.

of violence began to emerge.¹⁶ The theory of women as victims of crime, particularly within their own home, but also more generally, was developed by many academics.

As summarised by Carrington:

Significant and influential works include Dobash and Dobash's (1979) study of family violence; Russell's (1975) exposé of rape, including rape in marriage, and Brownmiller's (1975) provocative analysis of rape to name only a few. These were followed by Stanko's (1990) work on everyday violence and Walklate's (1991, 2007) major and ongoing contribution to the field of victimology.¹⁷

As is clear, traditionally much of the academic research surrounding women and violence has focused on women solely as victims of domestic violence, rather than as occupying the space of both perpetrator and victim of violence. This is arguably partly because women as perpetrators of violence are considered to be a relatively rare phenomenon.¹⁸ It is important to note here that whilst an important body of research exists on female perpetrators of violence, it is still a relatively small area of research in the vast body of research which has been conducted on violence and homicide. Historically, much of what was written on female criminals focused on pathological and irrational discourses to explain their involvement within the criminal justice system. However, with the development of the theory of BWS and the introduction of the new partial defence to murder of loss of control the idea of

¹⁶ Carrington, Kerry, "Critical Reflections on Feminist Criminologies" in Anthony, Thalia, and Cunneen, Chris (Eds), *The Critical Criminology Companion* (Sydney: Hawkins Press, 2008) p.86

¹⁷ Carrington, 2008, p.86

¹⁸ Morrissey, 2003, p.169

women as both victims and perpetrators was reconciled. In other words, women became perpetrators *because* they were victims.

Although battered women who kill their abusive partners cannot necessarily use evidence of BWS to support a defence of loss of control, the fact that these women can still present themselves as battered means that they are also labelled as victims. The image of helplessness associated with a battered woman has promoted '[a] collective understanding of the battered woman as a person whose identity is predominantly that of a victim.'¹⁹ Indeed, the labelling of these women as victims sits well with gender discourse, particularly the idea that women are '[s]ubject to control at the hands of their partners and a patriarchal society.'²⁰ Therefore it is submitted that in order for a woman to present herself as battered, even if not suffering from BWS, requires her to conform to gender discourse surrounding appropriate femininity.

Indeed, it is clear that a woman's gendered behaviour is still on trial both when she commits a crime generally, and more specifically, when she murders her husband.²¹ Therefore, a battered woman must present herself as a faithful and devoted wife and mother and must react passively and pathologically to violence from her partner.²² Women who conform to such appropriate gendered behaviour are viewed as "true" victims of domestic violence within legal and societal discourse. Women who do not conform are not *really* battered and are therefore '[u]nderdeserving

¹⁹ Noh et al., 2010, p.113

²⁰ Shaw, Margaret "Conceptualising Violence by Women," in Dobash, R Emerson, Dobash, Russell P, Noaks, Lesley (Eds), *Gender and Crime* (Cardiff: University of Wales Press, 1995) p.120

²¹ Norrie, 2010, p.277

²² Sanghvi and Nicolson, 1993, p.735

viragos.’²³ This therefore suggests that not only do battered women have to conform to appropriate feminine behaviour generally, but they must also conform to the appropriate behaviour expected of a battered woman.

The appropriate behaviour expected of a battered woman is often linked to the concept of learned helplessness, the ‘[m]ost prominent component’²⁴ of BWS. Indeed, as was noted by Ferraro, this concept of learned helplessness established the notion that certain characteristics, such as strength and assertiveness, were inconsistent with battered women.²⁵ Based on this analogy viragos are not really battered because they ‘[f]ight back’,²⁶ thus reflecting the label of victim used to describe battered women.

This suggestion that women must conform both to appropriate standards of femininity as well as the behaviour expected of a battered woman is supported in case law. The cases of *Ahluwalia*,²⁷ *Thornton* and *Humphreys* demonstrate the dichotomy existing in constructions of battered women who kill depending on the perceptions of their behaviours. Although all three of these cases were decided under the old common law defence of provocation and before the introduction of the defence of loss of control, they nevertheless continue to successfully illustrate the requirement that battered women must be present themselves as victims or

²³ Radford, 1993, p.195

²⁴ Ferraro, Kathleen, “The Words Change, But the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women” *Violence against Women* 9, 1, (2003), 110, p.113

²⁵ Ferraro, 2003, p.115

²⁶ Radford, 1993, p.195

²⁷ *R v Ahluwalia* [1993] 96 Cr. App. R. 133

alternatively face being viewed as undeserving viragos. Indeed, in each of these cases the women are constructed differentially within judicial and criminal legal discourse.

In *R v Ahluwalia*²⁸ the appellant, Kiranjit Ahluwalia, had suffered years of abuse and humiliation at the hands of her husband. One evening after he threatened to beat her if she did not give him money to pay a telephone bill and threatened to burn her face with a hot iron if she did not leave him alone, Ahluwalia threw petrol on her husband's bedding whilst he was asleep and set it alight. He suffered severe burns and died several days later. At trial, Ahluwalia was convicted of murder and given a mandatory sentence of life imprisonment. She appealed on numerous grounds relating to the issue of provocation. The judgment handed down by the Court of Appeal clearly constructed Ahluwalia as a victimised, meek and abused woman. This is demonstrated by the fact that '[4]1 out of 100 lines describing Kiranjit Ahluwalia's story were devoted to her "many years of violence and humiliation.'²⁹ The judgment utilised a victim-based narrative throughout as well as constructing her actions in relation to appropriate femininity. Lord Taylor CJ, giving judgment for the Court, referred to the case as being a 'tragic' one³⁰, noting that Ahluwalia had '[s]uffered violence and abuse from the deceased from the outset of the marriage',³¹ and focusing in some detail on some of the injuries, both physical and psychological, which she had sustained over the course of the marriage.³² He also made particular

²⁸ [1993] 96 Cr. App. R. 133

²⁹ Nicolson, Donald., "Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill" *Feminist Legal Studies* (1995) Vol III, no 2., 185, p.193

³⁰ *Ahluwalia*, 1993, p.134

³¹ *Ahluwalia*, 1993, p.135

³² For example, Lord Taylor CJ noted some of Ahluwalia's physical injuries, such as bruising and broken bones and being knocked unconscious, as well as the fact that she attempted suicide on several occasions. See, *Ahluwalia*, 1993, p.135

reference to the difference in physical build between Ahluwalia and her deceased husband; 'he was a big man; she is slight',³³ thus reinforcing the construction of Ahluwalia as vulnerable and meek. Her construction and thus status as a 'true' battered woman and victim was re-affirmed and thus cemented in the following paragraph taken from Lord Taylor CJ's judgment:

The state of humiliation and loss of self-esteem to which the deceased's behaviour over the 10 years of the marriage had reduced her, is evidence by a letter she wrote him after he left her for three days about April 1989 ... In the course of begging him to come back to her and to grant her 10 minutes to talk it over, she made a number of self-denying promises of the most abject kind: "Deepak, if you come back I promise you – I won't touch black coffee again, I won't go to town every week, I won't eat green chilli, I'm ready to leave Chandikah and all my friends, I won't go near Der Goodie Mohan's house again, even I am not going to attend Bully's wedding, I eat too much or all the time so I can get fat, I won't laugh if you don't like, I won't dye my hair even, I don't go to my neighbour's house, I won't ask you for any help."³⁴

Although a lengthy paragraph to quote, this clearly highlights the acceptance and reconstruction by the Court of Ahluwalia's victim status. By quoting from this letter sent by Ahluwalia it also illustrates her '[c]onformity with the attributes of passive

³³ *Ahluwalia*, 1993, p.135

³⁴ *Ahluwalia*, 1993, p.135

femininity ... Until the night she killed him, [Ahluwalia] is shown as reacting passively and pathologically to Deepak's violence ...'³⁵

In the case of *R v Humphreys*,³⁶ Emma Humphreys was, much like Ahluwalia constructed as a battered and abused victim. Humphreys was 17 and living with her partner, a 33-year-old man. He had been abusive and beaten her on numerous occasions and used some of her earnings from prostitution to fund his lifestyle. On the night of the homicide, Humphreys cut her wrists out of fear that her drunken partner would force her to engage in sexual activity with him and some of his acquaintances. He taunted her about her failure to cut her wrists effectively and Humphreys then stabbed and killed him. She was convicted of murder at trial and appealed her conviction.

In the Court of Appeal the judgment delivered by Hirst LJ utilised a narrative that constructed Humphreys not just as a battered woman who had been victimised by her partner, but also as a woman who was a victim of her life circumstances. Indeed, although the abuse she suffered from her partner was acknowledged, this formed a very small part of the judgment delivered by the Court. Instead there was a focus on Humphreys' '[m]iserable history'³⁷ as it was termed by Hirst LJ. He noted how 'She [had] a very unhappy family background ... [and that] both her mother and stepfather were alcoholics',³⁸ thus providing some explanation for her own overuse of alcohol and drugs. When she was 16 and left home to work as a prostitute, it was noted that she was '[p]icked up by ... Trevor Armitage. He had a predilection for girls

³⁵ Nicolson, 1995, p.193

³⁶ [1995] 4 All ER 1008

³⁷ *R v Humphreys* [1995] 4 All ER 1008, p.1012

³⁸ *Humphreys*, 1995, p.1012

much younger than himself, had previous convictions for violence, was a drug addict and was known to the vice squad ...'³⁹ Finally, Hirst LJ noted that '[a]nother very important and unhappy aspect of her personal history ... [was] that she had a strong tendency to seek attention ...'⁴⁰ Although these issues could have been utilised to demonstrate Humphreys' deviance from appropriate femininity, they were instead used to construct a narrative which reflected her life experiences as a vulnerable and victimised young woman.

In contrast, in the case of *R v Thornton*,⁴¹ Sara Thornton is constructed as an undeserving virago and her status as a battered woman and a victim is called into question, before being ultimately denied. Thornton suffered abuse at the hands of violent, alcoholic husband. On the evening in question, Thornton's husband told her he wanted her out of the house, called her a whore and threatened to kill her several times. She went into the kitchen to calm down and decided she needed some protection in case he got violent. Unable to find the truncheon she wanted, she picked up a large kitchen knife and went back to speak with her husband. He again threatened to kill her and called her a whore. She stabbed him once, deeply, just below the ribs, resulting in his death. At trial, Thornton was found guilty of murder by the jury, with both the defences of diminished responsibility and provocation failing. She appealed on three grounds relating to the defences of diminished responsibility and provocation.

³⁹ *Humphreys*, 1995, p.1012

⁴⁰ *Humphreys*, 1995, p.1012

⁴¹ *R v Sara Elizabeth Thornton* [1996] 96 Cr, App. R. 112

In the judgment delivered by Beldam LJ in the Court of Appeal, Thornton was not constructed as a battered woman or a victim but rather was portrayed as behaving just as badly as her abusive husband. Indeed as Nicolson notes, '[w]hereas, a total of 161 lines were devoted to describing "the facts which led to the deceased's death", only five dealt directly with his violence and abusive behaviour.'⁴² Similarly to *Ahluwalia*, there is an acknowledgment that Thornton attempted suicide on several occasions, however this is dismissed as a serious issue with the suggestion that '[i]t is questionable whether she actually intended to take her own life.'⁴³

Instead, throughout the judgment there was a focus on Thornton's actions and the ways in which she actively reacted to the violence and abuse she suffered, thus demonstrating her deviance from the passivity and submissiveness associated with appropriate feminine behaviour. Beldam LJ noted how during a row between Thornton and her husband she picked up a knife, threatened him with it and said "You touch my daughter, you bastard and I'll kill you."⁴⁴ He also noted how on the evening of the homicide before Thornton went out for a drink she wrote on the bedroom mirror in lipstick "Bastard Thornton. I hate you."⁴⁵ By focusing on these incidents, amongst others, Beldam was able to construct Thornton as an underserving virago, as a woman who gave as good as she got and who rejected '[s]ubmissive domesticity [and was instead] aggressive, fickle and devious.'⁴⁶ The

⁴² Nicolson, 1995, p.192

⁴³ *Thornton*, 1996, p.114

⁴⁴ *Thornton*, 1996, p.116

⁴⁵ *Thornton*, 1996, p.116

⁴⁶ Nicolson, 1995, p.201

Court ultimately reflected her construction as a deviant woman and undeserving virago in the dismissal of her appeal.⁴⁷

The importance of women conforming both to appropriate standards of femininity, as well as the behaviour expected of a battered woman, is not only relevant in the context of judicial narrative, but also arguably in the context of jury decision-making. This is reflected in a study carried out in the United States by Russell and Melillo.⁴⁸ The study involved six hundred and eighteen undergraduate students from two St Louis Universities who were presented with actual case summaries '[t]hat included standard forms of expert testimony modelled after BWS evidence.'⁴⁹ The results support arguments made by Edwards who suggests: '[w]omen are more likely to fit the model of battered woman syndrome where they are non-assertive and passive and conform to the legitimate victim stereotype.'⁵⁰ Thus battered women who killed and met this model and the associated stereotypes were deemed to be more credible in Russell and Melillo's study and therefore were most likely to receive not-guilty verdicts for the charge of homicide. Conversely, women who were atypical and actively responded to their partner's violence were viewed as less credible and consequently received more guilty verdicts.⁵¹ Labelling

⁴⁷ It should be noted that Thornton's case was eventually referred to the Court of Appeal by the Secretary of State for the Home Department under section 17(1)(a) of the Criminal Justice Act 1968. The fresh appeal was based on new medical evidence regarding BWS. Counsel for Sara argued that her personality disorder and BWS were relevant characteristics to be considered by a jury when deciding whether she had been provoked. The Court of Appeal allowed this appeal and ordered a re-trial where her murder conviction was quashed.

⁴⁸ Russell, Brenda L., and Melillo, Linda S., "Attitudes towards battered women who kill: Defendant typicality and judgments of culpability" *Criminal Justice and Behaviour* 33, (2006), 219, p.219

⁴⁹ Russell and Melillo, 2006, p.223

⁵⁰ Edwards, 1996, p.252

⁵¹ Although this study was carried out in the United States and is more applicable to workings of the American Legal System the study is relevant to the discussion in this chapter and the results provide further evidence to support the arguments being made.

battered women who kill as victims presumes that they are so oppressed that they are powerless and as a result they will be non-violent. However when battered women do become violent, resulting in the death of their abusive partner, the label of victim offers an explanation for their actions.

5.1.2 Diminished Responsibility—Battered Women Who Kill As Mad

The Coroners and Justice Act 2009 also amended the defence of diminished responsibility. The wording of the current definition of diminished responsibility differs considerably from that which was found in the Homicide Act 1957. In short, “abnormality of the mind” has been replaced with “abnormality of mental functioning”, there is a requirement that the abnormality “arose from a recognised medical condition”, the abnormality must have substantially impaired the abilities of the defendant as listed in Section 1(1A)⁵² and the abnormality must have been a significant causal factor in the defendants’ actions.⁵³ Despite these changes, the Ministry of Justice in its Impact Assessment of the 2009 Act noted that they did not think there would be any impact on the type of cases able to use diminished responsibility, on the Courts or on the prison population.⁵⁴ Despite the government’s assertions that the 2009 Act will have little impact, it is suggested that there is

⁵² The Coroners and Justice Act, 2009 section 52(1)(1A) states: those things are – (a) to understand the nature of D’s conduct; (b) to form a rational judgment; (c) to exercise self-control

⁵³ For a discussion on the reasoning behind these changes see; The Law Commission, “Murder, Manslaughter and Infanticide,” Law Com No 304, 2006, available at http://lawcommission.justice.gov.uk/docs/lc304_Murder_Manslaughter_and_Infanticide_Report.pdf ; and Mackay, Ronnie, “The Coroners and Justice Act 2009—Partial Defences to Murder (2): The new Diminished Responsibility Plea” *Criminal Law Review* 4, (2010), 290

⁵⁴ Mackay, 2010, p.301

potential for impact in cases where BWS is adduced to support the plea of diminished responsibility.

The main impact of the change in the law of diminished responsibility on battered women who kill their abusive partners is the requirement that the abnormality of mental functioning must arise from '[a] recognised medical condition.'⁵⁵ The Ministry of Justice have made it clear that this phrase will cover both psychological and physical conditions and therefore is not just '[l]imited to recognised mental disorders.'⁵⁶ Consequently this concept covers more than was previously covered in the un-amended Homicide Act 1957. Although there is yet to be a reported case of BWS being used to support the amended defence of diminished responsibility, it is submitted that evidence of BWS can now be more easily used to satisfy this particular requirement within the amended defence. As long as the jury is satisfied that the woman suffering from BWS and the killing of her abusive partner are sufficiently connected, the defence should succeed. When discussing the requirement of a connection, the Attorney General explained that the abnormality of mental functioning does not need to be the most significant cause of the behaviour but that it must be more than a trivial factor.⁵⁷

The use of BWS evidence to support a plea of diminished responsibility simultaneously reflects and reinforces some of the gender stereotypes surrounding women. Indeed, a study on cases of diminished responsibility highlighted that: 'reports written for male defendants in which this plea was possible indicate the

⁵⁵ The Homicide Act 1957 section 2(1)(a), as amended by The Coroners and Justice Act 2009

⁵⁶ Mackay, 2010, p.294

⁵⁷ Mackay, 2010, p.298

readiness with which they were created as “monsters” or “madmen”, yet simultaneously capable of intending their behaviour, since men are to be understood in terms of what they do.’⁵⁸ This could be contrasted with the treatment received by female defendants, who were ‘[m]ore readily constructed as “normal women”’⁵⁹ and therefore they were more likely to experience diminished responsibility than their male counterparts. The explanation put forward for this discrepancy in the treatment of men and women when pleading diminished responsibility was based on gender stereotypes, that is to say that women are acted upon; they do not act themselves or make their own choices.⁶⁰ The overwhelming conclusion of the study, as noted by Walklate, was that: ‘[w]hen psychiatry and the law interact, the resultant effect is that men are, for the most part, attributed with a sense of agency and responsibility for their actions, whereas women defendants are denied this.’⁶¹

This labelling of battered women who kill as mad when using evidence of BWS to support a plea of diminished responsibility is also reflected in the theory of BWS itself. The use of the term “syndrome” within the name BWS is indicative of a psychological disorder. As Edwards explains the term battered woman *syndrome* suggests ‘[s]omething more akin to an intrinsic condition of mental illness or disorder, rather than an acquired response, the result of the long term consequences of violent abuse, on the perceptions and judgment of the victim.’⁶² Consequently the utilisation of BWS evidence when pleading diminished responsibility pathologises the

⁵⁸ Walklate, Sandra, *Gender, Crime and Criminal Justice* (Cullompton: Willan Publishing, second ed, 2004) p.180

⁵⁹ Walklate, 2004, p.180

⁶⁰ Walklate, 2004, p.180

⁶¹ Walklate, 2004, p.180

⁶² Edwards, 1996, pp.227-228

actions of battered women who kill and reinforces the construction of women as irrational beings, as well as reflecting what Edwards refers to as '[l]aw's typification of women who kill.'⁶³

Moreover utilising evidence of BWS in cases of women who kill requires the introduction of medical professionals, such as psychiatrists, into the courtroom, thus further reinforcing the medicalisation and pathologisation of BWS and the women who make use of it.⁶⁴ It is clear then that by adopting syndrome language it contributes '[t]o an image of battered women as psychologically defective or pathological.'⁶⁵ Adopting such language in the context of battered women who kill their abusive partners also sits nicely with the construction of femininity where women are represented in terms of their bodies and its perceived shortcomings.

Many commentators have correctly noted that the inclusion of evidence of BWS in a plea of diminished responsibility can result in women being sentenced more leniently. Rather than being imprisoned, if a female defendant successfully pleads diminished responsibility she may receive long-term psychiatric treatment.⁶⁶ Consequently, although BWS may be of benefit to some women offenders by offering an explanation for their actions, '[B]WS obviously works within the stereotype of women as "crazy."⁶⁷ It is possible of course, that many female defendants will not care how they are stereotyped, as long as the result is a more lenient sentence. However others will care and '[w]ill undoubtedly perceive it to be

⁶³ Edwards, 1996, p.231

⁶⁴ Edwards, 1996, p.231

⁶⁵ Ferraro, 2003, p.112

⁶⁶ Radford, 1993, p.192

⁶⁷ Naylor, Bronwyn, "Women's Crime and Media Coverage," in Dobash, R Emerson, Dobash, Russell P, Noaks, Lesley (Eds), *Gender and Crime* (Cardiff: University of Wales Press, 1995) p.87

deeply insulting to be told that, unless they accept a label of psychological abnormality, they run the risk of escaping the prison of domestic violence only to spend a long time in a less metaphorical prison.⁶⁸ Moreover, although such gendered stereotyping can work for individual battered women to ensure short-term advantages such as more lenient sentences, '[c]enturies of experiences should have taught us that the overall outcome ... is invariably the reinforcement of inequality, inferiority, and disadvantage'⁶⁹, largely reflected in the reinforcement of pervasive feminine gender stereotypes.

Therefore, although introducing evidence of BWS to support a plea of diminished responsibility may result in sentencing benefits for women who kill, it also ensures that gender stereotypes surrounding women's mental health remain firmly entrenched. Moreover, introducing evidence of BWS does not aid the successful use of the justification defence of self-defence, which is arguably the most appropriate defence for women who kill their abusive partners. Indeed, introducing evidence of BWS and thereby addressing the woman's perceived pejorative psychological state actually undermines any use of self-defence.⁷⁰ Consequently utilising evidence of BWS to support a plea of diminished responsibility provides an explanation for both society and the criminal justice system when a woman murders her abusive partner, namely that she did so because she was mad. Using this explanation of madness fails to acknowledge that battered women who kill were acting in justifiable self-defence. Indeed, labelling a battered woman who kills her

⁶⁸ Sanghvi and Nicolson, 1993, p.737

⁶⁹ Allen, 1988, p.431

⁷⁰ Morrissey, 2003, p.77

abusive partner as mad is in contrast to the feminist jurisprudence model which '[e]xplains the battered woman who kills as ... a rational individual who defended herself under reasonable life-threatening circumstances.'⁷¹

From the above it is clear the evidence of BWS was historically used in relation to both the defences of diminished responsibility and provocation. With the recent amendments to the law it appears that the form of BWS commonly used will still be utilised to support the defence of diminished responsibility, with the new defence of loss of control requiring women to at least present themselves as battered, if not using evidence of BWS. As a result women who plead loss of control and present evidence that they were battered are labelled as victims, whereas women who use evidence of BWS to support a plea of diminished responsibility are labelled as mad. It is clear that the use of both the labels, victim and mad, '[a]lways actively shift the emphasis from the reasonableness of the defendant's actions to her personality in a way which confirms existing gender stereotypes [and] silences battered women.'⁷²

5.2 Infanticide — the Mad Woman

Throughout history, a common response to female violence has been to medicalise and pathologise women's behaviour, reflecting the gendered construction of women as inherently irrational, mentally deranged and controlled by their raging

⁷¹ Noh et al., 2010, p.116

⁷² Sanghvi and Nicolson, 1993, p.734

hormones.⁷³ Lombroso and Ferrero were amongst the first proponents of pathologising female offenders' behaviour. Their work on the female criminal concluded that as a result of their biological make-up, women were less highly developed than men and therefore they were less likely to commit crime. They stated that women were '[m]ore primitive, the consequence of which was that they have less scope for degeneration.'⁷⁴ The female criminal was therefore labelled as "abnormal" and "pathological". Lombroso and Ferrero's work has subsequently been universally criticised.⁷⁵ However, both society and the law continue to locate women's criminality within the "psy" discourses, with more recent studies of female criminals finding that they are psychologically disturbed and unstable.⁷⁶ This is particularly the case for female killers, especially for women who kill their children. The pathologisation of these women is demonstrated by the offence/defence of infanticide for women who kill their young children.

The Infanticide Act 1938 repealed and re-enacted, with modifications, the provisions of the Infanticide Act 1922. The introduction of the Infanticide Act was the result of '[a] policy decision to promote leniency for women who kill their own children.'⁷⁷ Section one of the Act states:

Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or

⁷³ Wilczynski, Ania, "Mad or bad? Child-killers, gender and the courts" *British Journal of Criminology*, 37, 3, (1997), 419, p.425

⁷⁴ Newburn, 2007, p.301

⁷⁵ Hansford Johnson, Pamela, *On Iniquity—Some Personal Reflections Arising out of the Moors Murder Trial* (London: MacMillan, 1967) p.21

⁷⁶ Jones, Ann, *Women Who Kill* (New York: The Feminist Press at the City University of New York, 2009) p.36

⁷⁷ Ogle, Robbin and Maier-Katkin, Daniel, "A rationale for infanticide law" *Criminal Law Review*, (December 1993), 903, p.911

omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.⁷⁸

Before a more detailed discussion of infanticide takes place, it is essential to note several particulars about the Infanticide Act, as outlined above. Firstly, women can plead infanticide as their defence, as well as being convicted of the offence of infanticide. To maintain cohesion and clarity within this chapter, the word “offence” will be used when discussing infanticide. Secondly, the offence of infanticide is only available to the biological mother of the child who has been killed. Thirdly, the age limit of the victim is set at 12 months, and finally ‘it is the only offence known in English law for which a pre-condition is the possession of an abnormal mental state.’⁷⁹

The offence of infanticide provides a clear example of the assumed ‘[u]nderlying pathological nature of mothers who kill their children.’⁸⁰ This is reflected in the legal basis for the plea of infanticide: puerperal psychosis. Puerperal psychosis is; ‘[a] relatively rare and severe mental disorder which affects one or two out of every 1,000 women within the first few weeks of childbirth. The symptoms

⁷⁸ The Infanticide Act 1938, section 1(1)

⁷⁹ Mahendra, B., “Whither infanticide?” *New Law Journal* 156, (2006), 664, p.664

⁸⁰ Morris, Allison, and Wilczynski, Ania, “Rocking the Cradle—Mothers Who Kill Their Children” in Birch, Helen, *Moving Targets—Women, Murder and Representation* (London: Virago Press Ltd, 1993) p.206

span a number of categories of psychosis ... from mania to delusions to acute depression.’⁸¹ Despite puerperal psychosis *in theory* being required to convict a woman of infanticide, it ‘[i]s very rarely the cause of a mother killing her child. Estimates are that this occurs in around five cases a year.’⁸² As a result, in practice the requirement of puerperal psychosis is interpreted far more liberally, often to include any sort of mental illness. However, research cited by Morris and Wilczynski also suggests that ‘[a]bout half of the women who ... are convicted of infanticide are not suffering from any identifiable mental disorder at all.’⁸³ Statistics such as these demonstrate that women are being convicted of infanticide and having their actions pathologised despite not satisfying the required criteria.

Women who are convicted of infanticide but are not suffering from a mental disorder are therefore routinely being labelled as mad without having any evidence to support such an assertion. Labelling these women as mad results in psychiatric treatment and stigmatisation as well as reinforcing pathological feminine gender stereotypes.⁸⁴ It is submitted that the reasoning behind convicting women of infanticide when they are not suffering from any identifiable mental disorder is that it offers an explanation for their actions. In the case of infanticide: she killed her child because she was mad. Viewing filicidal women as mentally ill, regardless of whether

⁸¹ Morris and Wilczynski, 1993, pp.206-207

⁸² Morris and Wilczynski, 1993, p.207

⁸³ Morris, Allison and Wilczynski, Ania, “Parents who kill their children” *Criminal Law Review*, (January 1993), 31, p.35

⁸⁴ Wilczynski, 1997, p.425

there is evidence to support such an assertion, reflects gender discourse surrounding appropriate femininity, particularly motherhood.⁸⁵ According to Frigon:

At the beginning of the twentieth century ... Motherhood was ... constructed as “natural” and a consequence of heterosex. As “compulsory motherhood” was introduced, it meant more than the imposition of pregnancy and birth but also “entry into the nexus of meanings and behaviours which are deemed to constitute proper mothering.”⁸⁶

The qualities and behaviours which constitute proper mothering are a reflection of those which constitute appropriate feminine behaviour, with women '[a]ssumed to be inherently passive, gentle, and tolerant; [similarly] mothers are assumed to be nurturing, caring and altruistic.'⁸⁷ The actions of filicidal women are so starkly in contrast with the construction of appropriate motherhood and mothering behaviour that an explanation must be sought for their actions. This explanation can be found in the form of the Infanticide Act that operates, as noted above, within the “psy” discourses. The Act presumes that a woman '[m]ust have been “mad” to kill her own child.'⁸⁸ The unthinkable nature of the crime of infanticide and its dichotomy to the discourse surrounding appropriate femininity and motherhood means that women who kill their children '[c]an only be immutably unnatural.'⁸⁹

⁸⁵ See chapter three, section 3.4.1 for a detailed discussion on the construction of motherhood in the context of appropriate femininity

⁸⁶ Frigon, Sylvie, “A Genealogy of Women’s Madness” in Dobash, R Emerson, Dobash, Russell P, Noaks, Lesley (Eds), *Gender and Crime* (Cardiff: University of Wales Press, 1995) p.31

⁸⁷ Morris and Wilczynski, 1993, p.36

⁸⁸ Morris and Wilczynski, 1993, p.36

⁸⁹ Edwards, 1984, p.96

From the above analysis it is clear that women can be convicted of infanticide even if they are not suffering from puerperal psychosis. Frigon highlighted this point by acknowledging that: '[v]irtually any type of perceived psychiatric, emotional, personal or mental problem whatsoever *can* be interpreted (if the psychiatrists, lawyers and/or judges so choose) as the severe mental illness (puerperal psychosis) *theoretically* required for the Infanticide Act.'⁹⁰ In addition, those women convicted, either rightly or wrongly, of infanticide are more likely to be dealt with by psychiatric treatment, rather than punitively.⁹¹ I would suggest that it is appropriate for those women suffering from a genuine and identifiable mental illness to be charged with the offence of infanticide and therefore be treated appropriately as a result. However, it is arguably troubling to think that women who are not suffering from any identifiable mental illness whatsoever are being convicted of infanticide in order to offer an explanation for their "unthinkable" actions.

Convicting a woman of infanticide when she is not suffering from the requisite mental illness often results in her being given a non-custodial prison sentence at the expense of her being labelled as mad. These women are more likely to be given supervisory sentences such as probation orders or psychiatric dispositions.⁹² From this it seems fair to suggest that the Criminal Justice System would rather label a filicidal mother as mad, regardless of whether she actually is, in order to provide an explanation for her behaviour, than acknowledge her agency over her actions. The existence of such a practice within the criminal justice system

⁹⁰ Frigon, 1995, p.34

⁹¹ Wilczynski, 1997, p.423

⁹² Wilczynski, Ania, "Child-killing by parents" Dobash, R Emerson, Dobash, Russell P, Noaks, Lesley (Eds), *Gender and Crime* (Cardiff: University of Wales Press, 1995) p.174

further entrenches gender stereotypes surrounding women. That is to say that it enforces the idea that women are mad generally, but especially when they commit murder.

5.3 The Bad Woman

It must be noted at the outset that “bad” is a word which is used throughout the literature and therefore is one which will also be used in this chapter and the thesis more broadly. However, it is acknowledged that the use of the word bad to label women who kill is problematic, as society would view most criminals as being bad people. Therefore, when using the term bad in the context of women who kill what is actually being alleged is that these women are perceived as being wicked, an “extra element” of bad that goes beyond their actual crime. This extra element of bad is as a result of the violation by these women of too many societal and gendered norms which cannot be explained through the use of the labels mad or victim. So, for example, a woman who kills her child but is not diagnosed with a recognised psychological disorder allowing her to be labelled as mad, is labelled as bad. The extra element of bad, leading to her being perceived as wicked, is her violation of the gendered and societal norm of “good motherhood” for women.⁹³

It has been shown that if the required conditions are met or even if the facts of the case or the behaviour of the woman in question can be moulded to fit the

⁹³ See chapter three, section 3.4.1 for a detailed discussion on the construction of motherhood in the context of appropriate femininity. The discourse surrounding bad mothers in the context of women who kill is discussed later in this chapter in section 5.3.2.

required conditions, then women will be labelled as mad or as victims. However, if the actions of the female killer and her background cannot be moulded in such a way as to fit either label, then another explanation for her actions must be found. This explanation takes the form of labelling her as bad. The distinction between good and bad women is not a new one. In their work on the female born criminal, '[L]ombroso and Ferrero defined distinctive sub-species of women as "good" and "bad."'94 Indeed, the dichotomy between good and bad women is not only found within academic work but can also be seen in literature, art and the media more widely.95 It therefore becomes clear that there is a trend to label female killers as bad when their actions cannot be explained utilising the other labels discussed earlier in the chapter.

“'[B]ad" women are cold, selfish and are "non-women" or masculine or even monsters.'96 This can be contrasted with so-called good women who, according to Pollack: '[a]re conventional socially and morally and if they do transgress it is in ladylike and peculiarly feminine ways.'97 The immediate difference between so-called good and bad women is the way in which their lifestyle and behaviour either does or does not accord with appropriate feminine behaviour as dictated by gender discourse. A similar principle applies to women who kill. Although these women can, for obvious reasons, never be labelled as good, if their homicidal behaviour and lifestyle more generally cannot be explained by labelling them as mad or as a victim, and they have the requisite extra element of badness, then the only other

⁹⁴ Heidensohn, Frances, *Women and Crime* (Basingstoke: MacMillan Publishers Limited, 1985) p.115

⁹⁵ Heidensohn, 1985, p.99

⁹⁶ Frigon, Sylvie, "A Genealogy of Women's Madness" in Dobash, R Emerson, Dobash, Russell P, Noaks, Lesley (Eds), *Gender and Crime* (Cardiff: University of Wales Press, 1995) p.34

⁹⁷ Heidensohn, 1985, p.148

explanation on offer for their actions is quite simply that they are “inherently bad”. Bad women are often sub-categorised into particular types of bad women. These categories include, but are not limited to, women who kill who display sexually deviant behaviour and women who kill who are considered to be bad mothers.

5.3.1 Sexually Deviant Women

Women who kill and also display what is regarded as sexually deviant behaviour are often labelled as bad. Labelling women as bad for this reason demonstrates an attempt by both society and the law to regulate female sexuality.⁹⁸ Historically, women were harshly judged if they challenged the norms surrounding appropriate female sexuality of chasteness, passivity, modesty and monogamy.⁹⁹ Similar ideals are still expected of women today: women must still conform to what is considered to be appropriate sexual behaviour. In other words they must not have too many sexual partners and they must engage in the “right kind” of sex. Moreover, there is still the view that having children should be women’s ultimate fulfilment.¹⁰⁰ Linked to this is the idea that women’s relationships should be heterosexual, with women engaging in lesbian relationships considered to be especially deviant, as female homosexuality is considered to be ‘[s]everely at odds with the contemporary normative ideal of marriage and motherhood for women.’¹⁰¹ Consequently it is clear that women can be labelled as sexually deviant if they are sexually promiscuous, too sexually adventurous or are not involved in heterosexual relationships.

⁹⁸ See chapter three, section 3.4.3 for a detailed discussion on female sexuality

⁹⁹ Seal, 2010, p.64

¹⁰⁰ Jones, 2009, p.278

¹⁰¹ Seal, 2010, p.106

Many feminist criminologists have argued that patriarchy requires that women who are considered to be sexually deviant must be controlled. Heidensohn has noted that the law, particularly the criminal law, is the main control mechanism in this context. She has suggested that the law controls female sexuality in four ways:

1. The courts operate a “double standard” with respect to sexual behaviour, controlling and punishing girls, but not boys for premature and promiscuous sexual activities.
2. The courts—and probation officers and social workers—“sexualise” normal female delinquency and thus over-dramatise the offence and the risk.
3. “Wayward” girls can come into care and thence into stigmatising institutions without ever having committed an actual offence.
4. Deviant women ... that is, women who do not conform to accepted standards of monogamous, heterosexual stability with children, are over-represented amongst women in prison because the courts are excessively punitive to them.¹⁰²

Drawing upon Heidensohn’s theory, I suggest that women whose sexuality requires regulation by the criminal law are considered to be bad women. The behaviour of these sexually deviant, bad women is oppositional to that of good women, whose sexuality does not need to be controlled by the law. Consequently, female killers who demonstrate sexual deviancy when committing their crimes, or indeed demonstrate it within their lifestyle more generally, are most certainly bad and must therefore be controlled through punishment. Not only have they offended

¹⁰² Heidensohn, 1985, p.48

against appropriate feminine behaviour by being murderers, they have also offended against appropriate female sexuality through demonstrating sexually deviant behaviour. Therefore, the only label considered to be suitable for such women is bad.

The cases of the female serial killers Myra Hindley and Rosemary West are examples of female killers who also demonstrated sexual deviancy and were consequently labelled as bad women. Although these women were convicted in 1966 and 1995 respectively, the infamy of their cases means that they are both still regularly mentioned in the media, as well as frequenting academic research.¹⁰³ Therefore an analysis of their cases is particularly relevant to this thesis. Moreover, the cases of both women are representative of the pervasive and enduring narratives that surround women who kill who are labelled as bad.

Myra Hindley, along with her partner Ian Brady, murdered¹⁰⁴ five children in and around Manchester between 1963 and 1965. However, she was only tried and found guilty of the murder of two of these children, Edward Evans and Lesley Ann Downey, and as an accessory in the murder of John Kilbride.¹⁰⁵ The evidence against Hindley was compelling. The body of Edward Evans was found in Brady and Hindley's

¹⁰³ Some recent examples of media coverage relating to Myra Hindley and Rosemary West include; Mail Online, "They call me evil Myra ... I find it deeply upsetting: Hindley's chilling letter to mother of Moors victim" (25th July 2013), available at <http://www.dailymail.co.uk/news/article-2376695/Moors-Murderer-Myra-Hindleys-letter-mother-victims-revealed.html> ; and The Mirror, "Fred West's former nanny reveals the true story of her survival 20 years on from the investigation" (29th April 2012), available at <http://www.mirror.co.uk/news/uknews/fred-wests-former-nanny-caroline-810706>. Their cases are also mentioned in various academic research including; Morrissey, 2003; Murphy and Whitty, 2006 and Seal, 2010

¹⁰⁴ Hindley was tried and convicted of the murders of two children and as an accessory in the murder of another. Whilst in prison, she later admitted involvement in the murders of a further two children. She was never tried or convicted of these two additional murders.

¹⁰⁵ Winter, 2002, p.345

house after David Smith, Hindley's brother-in-law, witnessed his murder and reported it to the police. The police also found pictures of Lesley Ann Downey and a tape recording of the murder of the young girl, on which Hindley's voice could clearly be heard telling the young girl to "shut up" when Lesley Ann pleaded with her to let her go home.¹⁰⁶ Pictures taken of Hindley crouched over the grave of John Kilbride on the Moors were also found.

Following her conviction and imprisonment, Hindley confessed to some involvement in the murders for which she was convicted as well as involvement in the murders of two other children; Pauline Reade and Keith Bennett.¹⁰⁷ However, it is interesting to note that the most that Hindley ever confessed to was her involvement in the planning and abduction of the victims, insisting that it was Brady who actually committed the sexual assaults and murders.¹⁰⁸ During Hindley's trial the prosecution sexualised all of her relationships even if they were not sexual in nature. For example, the friendship that she had with '[h]er young neighbour Pat Hodges, [was described] as giving her "a kick", "certain enjoyment" and "morbid satisfaction."' ¹⁰⁹ Before, during and after her trial, the media made much of Hindley's deviant sexuality: the fact that she engaged in sadistic sexual behaviour with her partner in crime, Ian Brady, that she allowed him to take pornographic photographs

¹⁰⁶ The Independent, "Myra Hindley: the other side of evil" (17th November 2002) available at <http://www.independent.co.uk/news/people/profiles/myra-hindley-the-other-side-of-evil-604408.html>

¹⁰⁷ French, Sean, "Partners in Crime: Defending the Female of the Species" in Myers, Alice and Wright, Sarah (Eds.), *No Angels: Women Who Commit Violence* (London: Harper Collins, 1996) p.35

¹⁰⁸ French, 1996, p.35

¹⁰⁹ Winter, 2002, p.356

of her¹¹⁰ and that once she was in prison she began a lesbian love affair with one of the female prison wardens.¹¹¹

Similarly, in the case of Rosemary West, the judge used his summing up to condemn her deviant sexuality. West was found guilty of the murder of ten girls and young women, including her sixteen year old daughter, in 1995. These crimes were alleged to have been committed alongside her husband Fred. However, he committed suicide before the trial began and therefore West became the sole defendant. It has been observed that; 'in British legal history, at least, there has never been a murder trial like that of Rosemary West.'¹¹² Indeed, the only other witnesses to the murders of the young women were dead.¹¹³ The case was based on the discovery of the victim's bodies which were found buried in and around homes which were inhabited by the Wests.¹¹⁴ Evidence was also heard from a number of women who claimed that they had been sexually abused by West as well as other witnesses who described the way she abused her children, her prostitution and her brutal sexuality.

In the judge's summing up West was labelled a prostitute and was described as being either bisexual or a lesbian. The judge also noted that she; '[p]ossessed a collection of dildos, rubber underwear, pornographic videos, a rice flail, and a whip

¹¹⁰ Mail Online, "The Making of Myra Hindley Part 4: Her obsession with Ian Brady" (20 February 2007), available at <http://www.dailymail.co.uk/news/article-436975/The-Making-Myra-Part-4-Her-obsession-Ian-Brady>

¹¹¹ Mail Online, "Unmasked, the former nun who was Myra Hindley's gay lover" (17 July 2007), available at <http://www.dailymail.co.uk/femail/article-468630/Unmasked-nun-Myra-Hindleysgay-lover.html>

¹¹² French, 1996, p.29

¹¹³ French, 1996, p.29

¹¹⁴ Winter, 2002, p.345

and a suitcase which contained a quantity of leather straps and buckles.’¹¹⁵ This collection of sex toys was depicted as solely belonging to West, despite the fact that it could have just as easily belonged to both her and her husband. In fact it is submitted that it should not have mattered who they belonged to, as their existence had limited legal relevance, despite the judge suggesting otherwise. Media reports and academic writing on West and her crimes also highlighted her sexual deviance, particularly her sexual relationships with other women¹¹⁶ and the sexual abuse she inflicted on her own children.¹¹⁷ Therefore it is suggested that a significant part of West’s ‘[p]ersecution was primarily based on her sexual crimes and her violent, debauched sexuality, thereby contravening the strictest social taboos of “normal” heterosexuality.’¹¹⁸

More recently, the case of female serial killer Joanne Dennehy has demonstrated the discourse of deviant sexuality found in the cases of some women who kill who are labelled as bad. In February 2014 Dennehy pled and was found guilty of murdering three men in ten days, as well as the attempted murder of two others. She was tried alongside three men who had assisted her in dumping the bodies in remote areas in the hope that they would not be found. In his sentencing remarks Mr Justice Spencer highlighted Dennehy’s deviant sexuality, noting she had a ‘[s]adistic lust for blood’ and how she had ‘sexually whetted’ the appetite of her third victim, Kevin Lee, by ‘[t]elling him ... [she was] going to dress him up and rape

¹¹⁵ Winter, 2002, p.359

¹¹⁶ The Independent, “Lesbian tells of violent sex sessions” (18 October 1995), available at, <http://www.independent.co.uk/news/lesbian-tells-of-violent-sex-sessions-1578127.html>

¹¹⁷ BBC News, “Watching a murderess most foul” (22 November 2005), available at <http://news.bbc.co.uk/1/hi/uk/4439184.stm>

¹¹⁸ Storrs, 2004, p.22

him.’¹¹⁹ Attention was also drawn to the fact that Dennehy had dressed Lee up in one of her black sequined dresses and then disposed of his body wearing the dress, deliberately positioning it so that his bare buttocks were exposed.¹²⁰ The judge explicitly referred to the ‘[s]exual and sadistic ...’¹²¹ conduct exhibited by Dennehy during Lee’s murder when considering an appropriate sentence. He also acknowledged the diagnosis within the psychiatric report of Dennehy suffering from ‘[p]araphilia sadomasochism, a disorder of preference for sexual activity involving the infliction of pain or humiliation or bondage’¹²² as well as other psychiatric disorders.

Despite being diagnosed with numerous psychiatric and personality disorders, Dennehy’s guilty plea, her sexual deviance and her failure to put forward any partial defence to murder based upon her psychiatric conditions meant that it was the label of bad, rather than mad which was attached to her. This construction and label of bad attached to Dennehy was reaffirmed by Mr Justice Spencer when he stated that her personality and psychiatric disorders did not afford any mitigation.¹²³ Dennehy was sentenced to life imprisonment with a whole life order, the first female killer to be handed such an order by a judge rather than by the Home Secretary, thus reflecting the seriousness of her crimes and her label as a bad woman.

¹¹⁹ Judiciary of England and Wales, “Sentencing Remarks *R v Joanne Christine Dennehy, Gary John Stretch, Leslie Paul Layton, Robert James Moore*” (28th February 2014) available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/the-queen-v-dennehy-sentencing-remarks-28022014.pdf> pp.5-6

¹²⁰ Judiciary of England and Wales, 2014, p.6

¹²¹ Judiciary of England and Wales, 2014, p.14

¹²² Judiciary of England and Wales, 2014, p.16

¹²³ Judiciary of England and Wales, 2014, p.17

5.3.2 *Bad Mothers*

Another subcategory of bad women is that of bad mothers. Women who kill their children are routinely considered to be bad mothers if the specifics of their case cannot be moulded in such a way to allow them to utilise the plea of infanticide. These women are bad because not only have they committed murder, they have murdered their own child, thereby demolishing the construction of motherhood for women. An example of this is the case of Susan Poole,¹²⁴ who allowed her son to starve to death. Despite suffering from depression, she was found culpable for her actions. Poole was charged alongside her partner, Frederick Scott, with the murder by starvation of her 10-month-old son, Dean. She pled guilty to manslaughter on the grounds of diminished responsibility. At trial, four psychiatrists and one doctor gave evidence that Poole was suffering from a personality disorder and severe depressive illness at the time she committed the offence.¹²⁵ However, at the time of the trial Susan had made a substantial recovery from her psychological disorder(s).

The judge also portrayed her as a bad mother: 'when one thinks of the extraordinary maternal sacrifice and care shown by lower animals, one has to wonder at her apparent selfishness.'¹²⁶ Despite a probation order with the requirement of mental treatment being recommended, the judge instead sentenced Poole to seven years imprisonment.¹²⁷ She successfully appealed against her sentence and it was reduced to five years. When considering her appeal, the Court of

¹²⁴ The case of Susan Poole was chosen for analysis due to the "bad mother" narrative which is apparent throughout the judge's comments. This narrative is pervasive despite evidence at trial suggesting Susan was suffering from a mental disorder and could have potentially been labelled as mad.

¹²⁵ Morris and Wilczynski, 1993, p.212

¹²⁶ Morris and Wilczynski, 1993, p.213

¹²⁷ *R v Susan Christina Mary Poole and Frederick David Scott* [1989] 11 Cr. App. R. (S.) 382, p.382

Appeal concluded '[t]hat a sentence of seven years was excessive in all the circumstances of this case. There was the appellant's unstable background, her age, her previous good character and her plea of guilty.'¹²⁸ They also noted that her depression accelerated rapidly and '[t]hat it played a very substantial part'¹²⁹ in Dean's death. However, the Court clearly still felt that Poole needed punishing for her actions. They agreed with the trial judge's verdict on her responsibility, as well as refusing to issue the recommended probation order with mental treatment instead of the continuation of her prison sentence. Therefore, it is reasonable to infer that the Court of Appeal also felt that Poole was a bad mother and deserved imprisonment.¹³⁰ Indeed, as was noted by Morris and Wilczynski: 'it is difficult to avoid the conclusion that it was the negative portrayal of her as a *woman* and as a *mother* which was the determining factor in her treatment within the criminal justice system.'¹³¹

The reasoning behind the labelling of filicidal women as bad when they either fail in pleading, or cannot utilise the plea of, infanticide is a consequence of society's construction of motherhood. The status of women, both socially and legally is determined by motherhood.¹³² Women are not only expected to be mothers, but more specifically they are expected to be good mothers:

The single defining characteristic of iconic good motherhood is self-abnegation. Her children's needs come first; their health and happiness are

¹²⁸ *R v Poole and Scott*, [1989], p.388

¹²⁹ *R v Poole and Scott*, [1989], p.388

¹³⁰ It must be noted that if the judge had instead issued the recommended probation order with mental treatment, she would have been constructed as a 'mad' woman who needed treatment, rather than punishment.

¹³¹ Morris and Wilczynski, 1993, p.214

¹³² See chapter three, section 3.4.1 for a detailed discussion on the construction of motherhood

her primary concern. They occupy all her thoughts, her day is constructed around them, and anything and everything she does is for their sakes. Her own needs, ambitions, and desires are relevant only in relation to theirs. If a good mother takes care of herself, it is only to the extent that she doesn't hurt her children.¹³³

When mothers do not meet these standards of behaviour without a reasonable and rational explanation, they are labelled as bad mothers. This dichotomy between “[g]ood” and “bad” mothers serves as a means of patrolling, controlling and reinforcing the boundaries of behaviour considered “appropriate” for ALL women and mothers.¹³⁴ Those women who fail to meet the standards of good motherhood are labelled and constructed as deviant or criminal.¹³⁵ Consequently the law often treats mothers who commit crimes against their children, without the explanation of suffering from a recognised mental disorder, harshly for violating the traditional gendered role.

Bad women are considered to be ‘[e]specially difficult to construct in relation to acceptable performances of femininity.’¹³⁶ This is in contrast to those women whose homicidal actions are explained by labelling them as mad or as victims, concepts regularly associated with femininity, and who are therefore more recognisably feminine. Consequently, female killers who are constructed as bad, either because they are sexually deviant or because they are bad mothers, are

¹³³ Today.com, “Are you a good mother or a ‘bad mother’?” (7 May 2009), available at http://today.msnbc.msn.com/id/30618909/ns/today-parenting_and_family/t/are-you-good-mother-or-bad-mother/#.TxSB0aVm7T8

¹³⁴ Morris and Wilczynski, 1993, p217

¹³⁵ Roberts, Dorothy, “Motherhood and crime” *Iowa Law Review* 79, (1993), 95, p.98

¹³⁶ Seal, 2010, p.8

harshly punished.¹³⁷ These bad women are viewed as being doubly deviant:¹³⁸ not only have they broken the law but they have also violated appropriate gender behaviour. They are punished more formally and severely than women whose behaviour can be more readily constructed in relation to appropriate femininity and who often benefit from more informal means of social control.¹³⁹ This harsh treatment is particularly true for women who murder either their own or other women's children: 'these women not only break the law, but by breaking the law they transgress their own female nature and their primary social identity as a mother or potential mother.'¹⁴⁰

5.4 Labelling and Active Denials of Agency

The labelling of female killers is symbiotic to their active agency denial. That is to say, labelling women actively denies the recognition of their ability to choose to act in a particular way, and vice versa. More specifically, labelling women who kill as mad, bad or victims, actively denies the recognition of their ability to have made the choice, however limited or constrained that choice may have been, to kill their victims. As noted in the introduction,¹⁴¹ *active* agency denial is referring to the creation of a new identity for women who kill through labelling. So not only do the labels attached to women who kill reflect the deviance and gendered constructions of these women, but the labelling also creates a new all-consuming identity for them.

¹³⁷ Frigon, 1995, p.34

¹³⁸ Lloyd, 1995

¹³⁹ Wilczynski, 1997, p.431

¹⁴⁰ Roberts, 1993, p.107

¹⁴¹ See section 1.3 at pp.7-8

As such this is, I would argue, a positive act of doing, and is reflected in the use of the term *active*. These labels become the new identities of these women as a result of their construction as legal objects.¹⁴² All three of the labels used for women who kill actively deny the agency of these women in slightly different ways.

Labelling women who kill as victims actively denies their agency because the concepts of agency and victimisation are understood in opposition to, and in the absence of, one another. As explained by Mahoney: 'in our society, agency and victimisation are each known by the absence of the other: you are an agent if you are not a victim, and you are a victim if you are in no way an agent.'¹⁴³ Thus when women who kill are labelled as victims this becomes their new identity and therefore their agency cannot be acknowledged. By using victimology theory when labelling women who kill, their responsibility, culpability, and most importantly in the context of this thesis, their agency is actively denied. Whilst this approach is '[u]ndeniably often successful in securing reduced sentences, the disadvantages of such a strategy outweigh the benefits in terms of improving general societal attitudes to, and challenging negative myths and stereotypes of, women.'¹⁴⁴

This active denial of women's agency when invoking the victim label can be seen in the discourse surrounding battered women who kill. Battered women are just that: battered. Therefore they are not seen to act, let alone to have made the *choice* to act, they are merely the products of their battering partner.¹⁴⁵ The

¹⁴² See section 4.4.1 for a detailed discussion on the construction of the legal subject and women as legal objects.

¹⁴³ Mahoney, 1994, p.64

¹⁴⁴ Morrissey, 2003, p.25

¹⁴⁵ Morrissey, 2003, p.96

utilisation of the phrase battered women who kill serves to reinforce the active agency denial of such women because 'the woman herself is neatly elided by the clash of the terms "battered" and "kill."'”¹⁴⁶ Labelling battered women who kill as victims and foregoing their agency not only makes it easier to control them, but perhaps more importantly, it ensures the maintenance of the appropriate gender behaviour status quo. Indeed, as noted by Morrissey:

The campaign to allow BWS evidence into court may well have begun with the best of intentions, then, but the theory now seems to fast be becoming a straitjacket which tries to confine the realities of battered women and domestic violence within rigid parameters which do little to challenge society's or the law's understanding of spousal abuse, women's violence, female agency and femininity itself.¹⁴⁷

Women killers labelled as mad when pleading infanticide or using BWS evidence to support a plea of diminished responsibility, have their crime acknowledged but their agency actively denied. Indeed within the law more generally, the utilisation of pathological discourses often does not recognise the ability of an individual to choose how to act for themselves. For example, under the Mental Capacity Act 2005 '[a] person lacks capacity in relation to a matter if ... he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'¹⁴⁸

¹⁴⁶ Morrissey, 2003, p.96

¹⁴⁷ Morrissey, 2003, p.78

¹⁴⁸ The Mental Capacity Act 2005, section 2(1)

The use of “psy” discourses presents women who kill labelled as mad ‘[a]s not intending the deed, as not knowing or understanding that they are committing it, as experiencing nothing in relation to it.’¹⁴⁹ Using the mad label for these women relies on the discourse of irrationality and weakness that is readily associated with femininity. Thus, by focusing on the influence of women’s mental state or their biological functions and constructing a new identity which reflects the mad label, the agency of these women is actively denied, rendering them harmless. This denial of agency for filicidal women labelled as mad is reflected in sentencing. ‘[O]f the 49 women convicted of infanticide between 1989 and 2000, only two were jailed; the rest were given probation, supervision or hospital orders.’¹⁵⁰ As explained by Wilczynski, this lenient sentencing reflects the belief that filicidal killings by women who plead infanticide are ‘[a]bherrant “tragedies” for which they are not responsible ... they need “help to come to terms with” what they have done.’¹⁵¹

Labelling women who kill as bad actively denies their agency in a subtly different way to constructing them as victims or as mad does. The agency of bad women is actively denied by transforming the woman’s identity into a monstrous, mythical, evil being, thus rejecting and removing her humanity. Therefore, ‘the agency denial which takes place in this technique is specifically that of human agency. The murderess is considered to have acted, but not as a human woman.’¹⁵²

¹⁴⁹ Allen, Hilary, “Rendering Them Harmless: The Professional Portrayal of Women Charged with Serious Violent Crimes” in *Gender, Crime and Justice*. Edited by Pat Carlen and Anne Worrall. Milton Keynes: Open University Press, 1987, 84

¹⁵⁰ The Independent, “Scrap outdated Infanticide Law, say judges” (4 May 2005), available at <http://www.independent.co.uk/news/uk/crime/scrap-outdated-infanticide-law-say-judges-495016.html>

¹⁵¹ Wilczynski, 1997, p.424

¹⁵² Morrissey, 2003, p.25

As explained by Morrissey, a murderous woman labelled as bad is '[n]ot just monsterised but transformed into the living embodiment of mythic evil through her relation to figures traditionally interpreted in this way.'¹⁵³ Therefore her agency as a human and as a woman is denied, with any agency that she is afforded being that of an inhuman mythic creature. Bad women who kill do not have human agency.

The agency denial of Myra Hindley is perhaps most illustrative of this point, with her portrayal as the icon of evil and more specifically '[t]he feminine face of evil.'¹⁵⁴ As a result she was considered not only to lack femininity and be beyond womanhood, but also to be non-human, thus being placed '[i]nto a realm of mythical monstrosity.'¹⁵⁵ Indeed writing on Hindley continually utilises the monster imagery and identity to describe her, with headlines such as: 'Myra Hindley, the Moors Monster, dies',¹⁵⁶ 'The Monster Body of Myra Hindley',¹⁵⁷ and descriptions of her as being '[M]edusa-like.'¹⁵⁸ It is clear then that that the vivid dichotomies of the good and bad, human and inhuman woman and the continued reference to lack of adherence to appropriate femininity combine to actively deny the agency of bad women.

Although I made clear in my methodology that I would not be taking a comparative approach to the position of men who kill, in order to prevent the

¹⁵³ Morrissey, 2003, p.25

¹⁵⁴ Storrs, 2004, p.14

¹⁵⁵ Seal, 2010, p.42

¹⁵⁶ The Telegraph, "Myra Hindley, the Moors Monster, dies after 36 years in jail" (16 November 2002), available at <http://www.telegraph.co.uk/news/uknews/3304454/Myra-Hindley-the-Moors-monster-dies-after-36-years-in-jail.html>

¹⁵⁷ Hawkins, Cathy, "The Monster Body of Myra Hindley" *Scan Journal of Media Arts Culture*, (2004), available at http://scan.net.au/scan/journal/display.php?journal_id=40

¹⁵⁸ Hawkins, 2004

reinforcement of women as the Other,¹⁵⁹ it is perhaps necessary here to engage with the response to men who kill in order to more clearly illustrate my arguments in relation to women who kill labelled as bad. Myra Hindley's partner in crime, Ian Brady, was also labelled as evil and a monster by the media, albeit, less frequently than Hindley.¹⁶⁰ However, Brady's status as a man and thus a recognised subject and agent meant that when he was labelled as a monster or as evil for his involvement in the Moors Murders, these labels did not become his new primary identity. Indeed, as a subject and agent Brady was still ultimately constructed as a male, albeit one who had participated in a particular heinous and monstrous crime. This can be contrasted to the position of his co-offender Hindley, who, as noted above, was labelled as an evil monster which became her new primary identity as a result of her status as a legal object. Her primary identity changed; it was no longer that of a *woman* who had committed a horrendous crime, but rather a *monster*.

Similarly to Ian Brady, Derrick Bird, who killed 12 people and injured 11 others on a shooting spree before killing himself, did not have his primary identity replaced with another. Although he was labelled as a 'crazed killer'¹⁶¹ and a 'mass killer'¹⁶², these labels did not become his new primary identity. As a man and thus a subject and agent, Bird's primary identity remained as that of a man, albeit one who was labelled as a killer because of his crimes.

¹⁵⁹ See pp.20-21

¹⁶⁰ See pp.255-256

¹⁶¹ Mail Online, "Crazed killer Derrick Bird 'waved at a friend' – seconds before gunning down work rival in Cumbria massacre" (4th March 2011) available at <http://www.dailymail.co.uk/news/article-1362687/Cumbria-gunman-Derrick-Bird-waved-friend-seconds-shot-work-rival.html>

¹⁶² London Evening Standard, "Derrick Bird 'had no history of mental health problems'" (21st March 2011) available at <http://www.standard.co.uk/news/derrick-bird-had-no-history-of-mental-health-problems-6383227.html>

It is clear that each of the labels; mad, bad and victim, deny the agency of women who kill in slightly different ways. However, it is submitted that despite these slight differences in *how* these women's agency is actively denied, there is only perhaps one acceptable explanation as to *why* these agency denials occur. One contentious explanation mooted by Morrissey for these continued denials of female agency is that female perpetrators of crime, particularly of homicide, are relatively rare and therefore it has been unnecessary to consider introducing the concept of the reasonable woman, which may have allowed the acknowledgment of women's agency.¹⁶³ This explanation is difficult to digest, not least because it suggests that as women are not "major-players" in the criminal justice system their experience is somehow of less importance.

Another perhaps more realistic explanation also suggested by Morrissey reflected on the threat that women killers pose to patriarchal structures and gender relations. She explained that by labelling women who kill as victims or as mad, '[t]hen the radical implications of [their] acts are muffled, [their] challenge to oppression nullified, at least as far as the dominant purveyors of cultural meaning are concerned. [These women are] returned to [their] place of passivity and silence.'¹⁶⁴ This makes it clear that it is easier to give explanations for the actions of homicidal women than it is to recognise their ability to have made the choice to act in the way that they did. Indeed, it is certainly arguable that giving women agency over their murderous actions would disturb and challenge established gender norms.

¹⁶³ Morrissey, 2003, p.169

¹⁶⁴ Morrissey, 2003, p.170

However, continuing to deny the agency of female murderers arguably presents far more serious issues than merely challenging gender stereotypes.

5.5 Problems with Actively Denying the Agency of Women Who Kill

The discussion on the different labels applied to women who kill demonstrates how women who have committed essentially the same crimes as one another, that of killing another human being, can be viewed differently depending on the construction of their crime, their gender and their sexuality. It has become obvious that there is a correlation between the label given to female killers, their treatment within the criminal justice system and more broadly the social responses to their actions. Despite the differences in the treatment of these women depending on how they are labelled, it is clear that all three of the labels actively deny the agency of, and are consequently uniformly damaging to, the women they are attached to. As noted by Frances Heidensohn:

What is so striking about all of these images of deviant women is how profoundly damaging they are, once attached to any particular woman or group of women. Amongst them all, there is no conception of the “normal” exuberant delinquency characteristic of males. Any women would be damaged by being portrayed as a witch or a whore; and while a “sick” female deviant may be less punitively treated, she will attract other stigma.¹⁶⁵

¹⁶⁵ Heidensohn, 1985, p.95

Indeed, it cannot be denied that using these labels to depict female killers, whether using them correctly or not, perpetuates and entrenches feminine gender stereotypes within both society and the law. The use of these labels may allow individual women, in particular circumstances, to win their battle but they do little to allow women to win the war against having to conform to appropriate feminine behaviour or asserting their individual agency.

5.5.1 Issues of Justice For Women Who Kill

Another issue that arises from the use of the above labels and active denials of agency is that of justice. That is whether justice is actually being done, or indeed whether it can be seen to have been done,¹⁶⁶ when female killers are labelled in this way and have their agency actively denied. When women commit violent crimes more questions are asked of, and simultaneously more explanations are made for, the violent actions of these women. This is because women are processed by the criminal justice system '[i]n accordance with the crimes which they committed and the extent to which the commission of the act and its nature deviate from appropriate female behaviour.'¹⁶⁷ This is particularly the case with women who kill. When these women are tried for their crimes there is a focus on their character and behaviour and the extent of their deviance from appropriate feminine behaviour.¹⁶⁸ This gendered dimension to the trial process reinforces gender stereotypes and denials of women's agency, in turn creating a form of gendered criminal justice. This

¹⁶⁶ *R v Sussex Justices ex parte McCarthy* [1924] 1 K.B. 256, p.259

¹⁶⁷ Newburn, 2007, p.306

¹⁶⁸ Nicolson, 2000, p.16

form of gendered justice does not just focus on the murder committed by the woman in question, but also the degree to which her behaviour and often her lifestyle have deviated from the norms of appropriate femininity.

This gendered justice was recently evident in the sentencing of Magdalena Luczak and her partner for the murder of her son, Daniel Pelka. In her sentencing comments, although the judge acknowledged that both Luczak and her partner breached their position of trust as parents to Daniel, she explicitly referenced Luczak's failings as a mother. She emphasised: 'your breach of trust Magdalena Luczak is wholly irreconcilable with the loving care that a mother should show towards her son',¹⁶⁹ and '[y]ou, Magdalena Luczak, were fully complicit in these acts of incomprehensible cruelty towards your own son ...'¹⁷⁰ Although both Luczak and her partner were given the same prison sentence, the fact that particular focus was placed on Luczak's deviance as a mother demonstrates how the concept of justice for women who kill takes a gendered form. Luczak was not just being sentenced for murder, but arguably also for breaching her primary social identity of a mother.

The consequences differ for women who kill depending on the label attached to them and the way in which their agency is actively denied. This is most prevalent in cases of women who kill their children, with filicidal women whose pre-homicidal behaviour does not meet the standards of good motherhood being treated more

¹⁶⁹ Judiciary of England and Wales, "Sentencing Remarks *R v Mariusz Krezolek and Magdalena Luczak*" (2 August 2013), available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-krezole-and-luczak-sentencefinal.pdf> p.5

¹⁷⁰ Judiciary of England and Wales, 2013, p.4

punitively than those whose behaviour is reflective of these norms.¹⁷¹ Filicidal women who successfully plead infanticide and have their actions pathologised are generally treated with a degree of leniency and sympathy. A mad mother has her agency actively denied as she is not considered to know or understand what she was doing when she killed her child. Therefore her ability to have made the choice to act in the way that she did cannot be recognised because she was acting in a moment of madness. As a result, her actions '[a]re characterised as isolated and contained incidents that can be easily altered through medication and therapeutic treatment.'¹⁷²

It is important to re-emphasise here that despite The Infanticide Act being specific as to the requirement of puerperal psychosis for a successful plea of infanticide, the '[c]oncept and scope of madness in infanticide cases is deliberately nebulous, so that judges, juries, and the media can selectively draw upon it to provide leniency for women whom they believe deserve sympathetic treatment.'¹⁷³ In contrast, bad mothers are often treated much more punitively within the criminal justice system. The agency of bad mothers is actively denied through their placement within a realm of monstrosity which denies their humanity and thus their human agency. A bad mother is "[d]epraved" ... "ruthless, cold, callous, neglectful of [her] children or domestic responsibilities, violent ..."¹⁷⁴ Her actions cannot be pathologised and therefore the act of killing her child which is "[c]onsidered so

¹⁷¹ Huckerby, Jayne, "Women who kill their children: Case study and conclusions concerning the differences in the fall from maternal grace by Khoua Her and Andrea Yates" *Duke Journal of Gender, Law and Policy*, 10 (2003), 149, p.151

¹⁷² Huckerby, 2003, p.166

¹⁷³ Huckerby, 2003, pp.160-161

¹⁷⁴ Huckerby, 2003, p.158

antithetical to the behavioural norms of motherhood [is used] to justify the “demotion” of status from “mother” to the pre-maternal state of “woman”¹⁷⁵ and finally to that of monster, thus actively denying her agency.

The selectiveness with which the justice system can draw upon the concept of madness in cases of women who kill their children means that if a filicidal woman’s case either cannot be constructed, or is not perceived in such a way that she has her agency actively denied as a result of being labelled as a mad mother, it will be done through labelling her as a bad mother. It is clear then that the way in which filicidal women are labelled and how their agency is subsequently actively denied directly affects their treatment within the criminal justice system. Consequently, a woman who kills her child would arguably fare better being diagnosed with a recognised psychological disorder and having her actions pathologised (even if she does not meet the threshold of puerperal psychosis), in the hope of being treated more leniently within the justice system. If she does not succeed in her quest to be labelled as a mad mother, the alternative label of a bad mother awaits, with the potential for a harsher punishment and an altogether different active agency denial.

It is not just for women who kill their children that judicial treatment differs depending on how they are labelled and the way in which their agency is actively denied. The consequence of labelling and agency being actively denied often results in either arguably very lenient, or extremely harsh punishment for any women who kill, with no clear middle ground existing between these two extremes. The case of Nicola Edgington is perhaps most illustrative of this point. Edgington killed her

¹⁷⁵ Huckerby, 2003, p.151

mother in 2005 and was consequently diagnosed with paranoid schizophrenia, with a prominent mood disorder. As a result she successfully pleaded guilty to her mother's manslaughter by reason of diminished responsibility. She was detained indefinitely under the Mental Health Act 1983, a clear acknowledgment that she was suffering from a mental disorder at the time she killed her mother. Despite her sentence of indefinite detention in a psychiatric facility, Edgington was released three years later as she was no longer considered a danger to the community. In October 2011, Edgington attacked Kerry Clark and killed Sally Hodkin and was subsequently found guilty of murder and attempted murder after the jury rejected her plea of diminished responsibility. On 4th March 2013 Edgington was sentenced to a minimum of 37 years in prison.¹⁷⁶

During her trial for murder and attempted murder in 2013, psychiatric evidence was presented declaring that Edgington was indeed suffering from an abnormality of mental functioning. However, the jury concluded that any such abnormality did not meet the requirements for diminished responsibility. Therefore the court concluded that her mental abnormality did not substantially impair her ability to form a rational judgment, or to exercise self-control. Sentencing Edgington, the judge acknowledged that she suffered from a 'mental disability', but accepted the jury's findings that there was not a convincing case '[t]o conclude that the abnormality reduced [her] culpability to any significant extent.'¹⁷⁷ This seemingly drastically reduced any weight that the judge attached to the mitigating factor of

¹⁷⁶ Judiciary of England and Wales, "Sentencing Remarks *R v Nicola Edgington*" (4th March 2013), available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sentencing-remarks-r-v-edgington.pdf> p.4

¹⁷⁷ Judiciary of England and Wales, 2013a, p.4

suffering from a psychological disorder. Moreover, in his sentencing report the judge recognised several aggravating factors, including '[p]remeditation, and a determination to overcome failure in order to achieve [her] ends'¹⁷⁸ and the fact that the attacks were 'unprovoked and random.'¹⁷⁹ He also explained that he could not 'ignore the fact that Nicola had killed before.'¹⁸⁰

Comparing the two homicide cases brought against Edgington, several things become apparent. In the first case in 2006, Edgington was arguably labelled as a mad woman by the court as she was suffering from a mental abnormality that ultimately denied her culpability for killing her mother. Consequently the court felt that she needed treatment, rather than punishment. In contrast, in the 2013 case, Edgington was labelled as a bad woman, and consequently needed punishment rather than treatment. This is despite her obvious on-going mental disorder, which in itself presumably required further treatment. What is clear then is that the responses in both cases are at the opposite ends of the spectrum.¹⁸¹

It seems then that the current law on murder and manslaughter, when being applied to cases of women who kill, sits best when working at extremes, rather than focusing on a more measured middle ground. For Edgington, this had the consequence that her actions were pigeonholed in such a way that although her

¹⁷⁸ Judiciary of England and Wales, 2013a, p.4

¹⁷⁹ Judiciary of England and Wales, 2013a, p.4

¹⁸⁰ Judiciary of England and Wales, 2013a, p.4

¹⁸¹ It should be noted here that this dichotomous approach extends beyond the response to female killers, but reflects a more general response for women when they interact with the law. This is reflected in the *Feminist Judgments* project which throughout aims to highlight the possibility that women can occupy seemingly dichotomous positions at once. See Hunter, Rosemary; McGlynn, Clare; and Rackley, Erika, (Eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010).

agency was actively denied in both instances, she was either labelled as mad and arguably treated leniently, or as bad and was treated punitively. The bad label which became Edgington's new exclusive identity, does not seem to be prepared to acknowledge or incorporate, to any significant degree, a defendant with some form of mental disorder. Similarly, the mad label as an identity arguably fails to acknowledge any significant degree of "badness" for the defendant's actions, reflected in the limited punishments often given. Pigeonholing Nicola into being labelled and identified as *either mad or bad*, when she arguably falls into both categories to some degree, arguably demonstrates the need for a clearer middle ground for female defendants in cases such as these. This middle ground could go some way to being filled with an approach within criminal legal discourse which acknowledges the agency of women who kill and thus prevents these labels from becoming new identities for these women.

Battered women who kill their abusive partners face specific justice based issues when they are labelled as victims. Although labelling them in this way actively denies their agency over their murderous actions, it simultaneously emphasises the responsibility these women have in becoming victims in the first place. Indeed, as noted by Lorraine Radford: 'the topsy turvy justice of patriarchal law puts women on trial for their own victimisation. Thus ... questions asked in courts of battered women who kill emphasise women's own responsibility for prolonged victimisation. Why don't battered women leave their abusers? Why are they abused so many times?'¹⁸² Therefore, it is argued that although these women do not currently have agency over

¹⁸² Radford, 1993, p.177

their own actions, they are deemed to have some responsibility for the actions of their abusive partners. Focusing on battered women's responsibility in this way refutes '[s]ociety's complicity in the killing and the situation which helped precipitate it',¹⁸³ as well as diverting attention away from the criminal justice system's responses to these women.

As well as being held responsible for their own victimisation, battered women who kill must also conform to prescribed forms of "victim appropriate" behaviour in order to secure justice, as noted earlier in the chapter.¹⁸⁴ As explained by Radford, this appropriate behaviour and the life-history scripts which are written for these women are done so by '[p]rofessionals and medical experts within and behind the scenes of the courtroom.'¹⁸⁵ The deserving victims include, '[t]he upper middle class man's ideal bride ... "good mothers", "good wives", "good housekeepers", "good heterosexual servicers" ...'¹⁸⁶ In contrast, women who may be perceived as attempting to assert some agency (albeit unsuccessfully) within their life script by attempting to fight back against, or resist their partners' abusive behaviour are not really battered.

5.5.2 Issues of Justice for Their Victims

Denying the agency of women who kill also presents issues regarding justice both being done, and being seen to be have been done, for the victims of the crimes

¹⁸³ Sanghvi and Nicolson, 1993, p.735

¹⁸⁴ See chapter five, section 5.1.1 at pp.175-183

¹⁸⁵ Radford, 1993, p.195

¹⁸⁶ Radford, 1993, p.195

committed by these women. One such example, which highlights the point most dramatically, is that of filicidal mothers who are able to plead infanticide, despite not suffering from the required puerperal psychosis. These women have their agency actively denied and often receive a non-custodial sentence, usually a probation order, despite the fact that they have murdered their child. This does not sit well with societal expectations of justice, which usually requires those who commit murder to be imprisoned for a significant period of time. Indeed research has found that 'public support for the life sentence [increases] in relation to the seriousness of the crime.'¹⁸⁷ It is submitted that women who are erroneously able to utilise the defence of infanticide are quite literally "getting away with murder" as a result of being labelled as mad and having their agency actively denied. Therefore their victims are not getting the justice that they and the rest of their family deserve. It should be noted here that I am not suggesting that these women should not be able to utilise another defence, such as diminished responsibility. It is simply being suggested that they should not be able to utilise the defence of infanticide if they are not suffering from puerperal psychosis, or as a minimum, suffering from a serious mental disorder, akin to that of puerperal psychosis, which allows for more lenient treatment within the criminal justice system.

Linked into this issue of victim justice is the fact that actively denying female criminal agency through the use of labels directly denies the existence of female violence. Although female killers are relatively unusual, case studies such as those outlined throughout this chapter demonstrate that women are indeed capable of

¹⁸⁷ BBC News, "Murder life sentences questioned in attitudes research" (29 October 2010), available at <http://www.bbc.co.uk/news/uk-11648739>

extreme violence. As it is therefore impossible to say that such cases do not exist, actively denying the agency of these women through labelling them and creating a new identity for them allows an explanation to be invoked which goes some way to denying the propensity of women for violence. These labels and the consequent active denials of agency which occur fails to give credence to the notion that women's violence "[i]sn't always personal, private, or impulsive, that sometimes it is ... a means ... of furthering an ambition ... a vehicle to her own empowerment."¹⁸⁸ Not only does this demean the rights of their victims to be valued,¹⁸⁹ it also '[r]adically impedes our ability to recognise dimensions of power that have nothing to do with formal structures of patriarchy. Perhaps above all, the denial of women's aggression profoundly undermines our attempt as a culture to understand violence, to trace its causes and to quell them.'¹⁹⁰

5.6 Concluding Remarks

Drawing upon analysis from previous chapters on labelling and construction theory and gender discourse surrounding appropriate femininity, this chapter has argued that there is a symbiotic relationship between labelling women who kill as either mad, bad, or a victim and the continuous active denials of their agency. When women who kill are labelled as either mad, bad, or victims, they are given a new all-consuming identity which reflects that of the label and subsequently actively denies their agency. Labelling female killers as a victim actively denies their agency by

¹⁸⁸ Morrissey, 2003, p.153

¹⁸⁹ Morrissey, 2003, p.176

¹⁹⁰ Morrissey, 2003, p.176

portraying them '[a]s so profoundly victimised that it is difficult to regard them as ever having engaged in an intentional act in their lives.'¹⁹¹ Female killers who are labelled as mad have their agency actively denied by acknowledging the crime they have committed 'while removing the agency and responsibility for its commission.'¹⁹² Labelling female killers as bad actively eliminates their agency by suggesting that '[a]lthough the action took place, the actor was not a human woman but a personification of evil.'¹⁹³ These active denials of female agency present a number of justice based issues for the women themselves, their victims and the criminal justice system. It also ensures the continued reinforcement of gender norms within both legal and societal discourse.

Although I shall return to these issues in my thesis conclusion, it is worth noting some interim conclusions. In order to take account of some of the concerns raised within this chapter surrounding issues of justice which are raised when labelling and active agency denial occur, it is submitted that reform is required within both the criminal justice system and the criminal law. Initially the criminal justice system needs to end the judgment of women according to their adherence to, or deviance from, social and gender norms, instead focusing only on the crime that they have committed. In turn this would allow for less focus to be ascribed to the labels that are currently attached to women who kill and which actively deny their agency. It is submitted that the concept of agency within the criminal law and particularly the relationship between women and agency needs further exploration and analysis

¹⁹¹ Morrissey, 2003, p.25

¹⁹² Morrissey, 2003, p.34

¹⁹³ Morrissey, 2003, p.34

within the academic literature. This could be done through reviewing a range of case studies of women who have been convicted of murder, considering the labels which were attached to these women, the way in which their agency was actively denied and the consequences that this has had for both these women and their victims. Doing so will affirm the premise that acknowledging women's agency can, and indeed would, exist in harmony alongside the aims and principles of the criminal justice system and the criminal law.

Having explored the concept of agency and its relationship to women and more specifically women who kill it has become apparent that their agency is denied both passively and actively. As discussed in chapter four, passive agency denial occurs due to women's construction as legal objects, rather than subjects. The construction of the criminal legal subject as the masculine gendered reasonable person ensures the continuing passive denial of women's agency. In addition, the labelling of women who kill as either mad, bad or victims has the effect of attaching new identities to these women and actively denying their agency. These approaches – the combination of active and passive agency denial – combine to completely deny the agency of women who kill within criminal legal discourse. The next and final substantive chapter of my thesis proposes the creation of a new agency-based model for women who kill. It will explore and question the viability of reform in allowing for the agency of women who kill to be acknowledged. More specifically it seeks to open up space(s) in which to allow for the possibility of interrupting the passive and active agency denials of these women which currently takes place.

It will propose the interruption of passive agency denial by creating new discursive space(s) within which woman as a subject of law can be recognised, a space which allows these women as subjects to have agency: to be recognised as agents.¹⁹⁴ The space thus created will allow for the altering of the construction of the current legal subject: the reasonable person. This ceasing of passive agency denial will simultaneously be reaffirmed by, and interrupt, the active agency denial of women who kill when they are labelled as mad, bad or victims. It is not being argued that the labelling of women who kill would cease, as the removal of labels attached to offenders of both genders is impossible because it is so prevalent within society. What in particular is being suggested is that when women's passive agency is acknowledged through their recognition as legal subjects and agents, the labels attached to these women are no longer constructed as their whole identity; the label is not all-consuming, thus interrupting the process of active agency denial. Before the next chapter delves into the finer details of the proposed creation of a new agency-based model for women who kill under the criminal law, the reasons why such an approach is needed will be reaffirmed.

¹⁹⁴ This reflects the aims of the *Feminist Judgments* project in creating space to allow women to occupy spaces that acknowledge their agency. See, Hunter, Rosemary; McGlynn, Clare; and Rackley, Erika, (Eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010).

Chapter Six – Recognising the Agency of Women Who Kill

6.1 Why Must Criminal Legal Discourse Recognise the Agency of Women Who Kill?

As noted in the previous chapter,¹ the current non-agentic discourse surrounding women who kill reaffirms and re-emphasises current norms of appropriate feminine behaviour: those women who conform to appropriate femininity are rewarded contingently, those who deviate are punished. It is therefore submitted that denying women's agency plays a significant part in attempting to normalise women into adhering to appropriate feminine behaviour. Similarly, labelling women who kill and the consequent active denials of women's agency under the law reinforces feminine gender stereotypes. For example, the denial of agency symbiotic with the label of mad attached to women who kill, reinforces the notion that women are pathological, irrational beings. Moreover, the labelling and active agency denial of battered women who kill their abusive partners promotes a particular conception of femininity which is rejecting of the notions of women as strong, assertive and outgoing. Instead these women are constructed as passive individuals who, if they assert their sexuality, are viewed as demonstrating aggressive behaviour.² As Ferraro explains, the current construction of femininity promoted by BWS and the subsequent labeling and agency denial is reflective of gender discourse surrounding appropriate femininity, which has the consequence that only those battered women who conform to such notions are viewed as "truly" being battered.

¹ See: chapter five, section 5.5.1

² Ferraro, 2003, p.120

'Women who are strong, competent, aggressive, and sexually active do not correspond to the imagery connoted by "learned helplessness"'³ and therefore are '[v]iewed unsympathetically by courts and juries because they violate these [established] boundaries'⁴ of appropriate femininity in the context of battered women.

Acknowledging the agency of women who kill allows for the constructions of appropriate femininity currently ingrained within socio-legal discourse to be challenged and reconstructed. Indeed, agency acknowledgment allows questions to be asked of the current normative representations of women through an engagement with, and an analysis of, a wider range of existing and novel gender representations of women. Although it is apparent that both the invocation and influence of gendered norms within the context of women who kill has the potential to benefit individual women, for example in the severity of the charges they face or their sentencing,⁵ the wider pejorative influence of such invocations cannot be ignored. It is certainly arguable that acknowledging women's agency has the potential to create different, more pejorative, outcomes for *individual* women who kill, for example receiving harsher sentences. Indeed, as Lacey and Zedner explain, agents must justly be held responsible and punished accordingly and proportionately for their offence(s).⁶ However, I suggest that the beneficial effect it would have on

³ Ferraro, 2003, pp.125-126

⁴ Ferraro, 2003, pp.125-126

⁵ Ferraro, 2003, p.124

⁶ Lacey, Nicola and Zedner, Lucia, "Legal Constructions of Crime" in Maguire, Mike; Morgan, Rod and Reiner, Robert (Eds) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, fifth ed, 2012) p.172

women *more widely* within socio-legal discourse by challenging existing gender norms is arguably greater and therefore cannot be ignored.

Denying the agency of women who kill also denies society's responsibility for, and complicity in, the circumstances which may have precipitated the murderous actions of these women. This is perhaps most evident in the context of women who kill who present evidence of BWS in their defence and are subsequently labelled as mad or as victims without agency. As noted by Morrissey: 'important issues such as societal responsibility for the crime of domestic violence and women's right to safety are thereby elided ...'⁷ Indeed, the socio-economic issues afflicting battered women, the power imbalances in their relationships both with their partners and within the context of society more widely, and the lack of alternatives available to them are ignored by focusing on agency denial. Thus society's role and complicity in their murderous response to being battered are also effaced.⁸ Similarly, in the context of infanticide, where women who kill labelled as mad (WKM) have their agency actively denied, attention is diverted away from social issues, such as poverty and a lack of paternal responsibility: issues that may be relevant in understanding the mother's actions.

By continuing to label these women and actively deny their agency, the acts of these women are emptied of all external social meaning. Therefore, if the law acknowledges the agency of women who kill there is the obvious potential to allow for a better acknowledgment of the social issues which underlie and contribute

⁷ Morrissey, 2003, p.101

⁸ Nicolson, 2000a, 171

towards the murderous actions of these women. As highlighted above, this is particularly important in the context of battered women who kill and those women who commit infanticide. The importance of acknowledging the context within which these women commit their offences is reiterated in the *Feminist Judgments* project, where '[a]lmost all of the feminist judgments introduce additional 'social framework' material to place the particular facts of the case and/or the legal issues involved in a broader context.'⁹

Through agency acknowledgement it becomes possible for legal discourse to initiate a discussion not only on society's role in contributing towards the issues facing these women, but perhaps more importantly it can also shift the focus onto the ways in which society can effectively combat these issues. Thus for battered women who do not leave their abusive partners and ultimately murder them, legal discourse can acknowledge and initiate improvements to be made in the services offered to these women. Such improvements could include better legal provisions to protect these women from their violent partners, improved socio-economic alternatives, such as housing or refuges and the creation of a discursive language that focuses on and attempts to combat male violence against women. Such improvements are arguably likely to be more successfully implemented in the context of a socio-legal discourse which acknowledges women's agency, thus allowing the focus to be concentrated on the underlying issues rather than ensuring that women's agency denial occurs.

⁹ Hunter et al., 2010, p.37

Although women who kill labelled as bad (WKB) have their agency actively denied, the agency denial which takes place in this context is subtly different from that which takes place in cases of WKM or women who kill labelled as victims (WKV).¹⁰ Labelling women who kill as bad, thus actively denying their agency, fails to allow discursive space(s) to be created within socio-legal discourse which accurately reflects their murderous actions. This lack of discursive space that currently exists for bad women is, perhaps surprisingly, reflected in feminist discourse, with the continued ignorance that some feminist scholarship has largely shown towards these women.¹¹ This feminist ignorance of WKB, is succinctly explained by Morrissey who notes that:

[t]he actions of [bad] women ... are effectively excluded from feminist representation because, unlike the cases of battered women ... their actions cannot be read as examples where women overthrow their oppression and retaliated against either their specific abusers or a general representative of them.¹²

It is therefore '[c]rucial that feminist research does not confine itself to "ideologically sound" cases of women who kill and those that are easy to sympathise with.'¹³ Rather, a recognition by feminists of the agency of women who kill, particularly those labeled as bad, will allow the '[b]roader feminist project of challenging derogatory stereotypes and restrictive gender norms ...'¹⁴ to be successfully conducted.

¹⁰ See chapter five, section 5.4 at pp.209-210

¹¹ This lack of engagement by feminist legal scholarship, as well as the need for agentic models of women who kill was highlighted in Murphy and Whitty, 2006.

¹² Morrissey, 2003, p.156

¹³ Seal, 2010, p.3

¹⁴ Seal, 2010, p.3

Moreover, in the same way that much of feminist scholarship unquestioningly holds men responsible for their pejorative behaviour, it is submitted that feminist scholarship needs to make a greater acknowledgment of, and take more responsibility for, the behaviour of women considered to be deviant,¹⁵ something that can only truly be achieved through agency recognition, particularly by recognising the agency of bad women. I would argue that it is not only feminist literature that can be criticised for a lack of engagement with women who kill, particularly WKB, but also academic literature, legal professionals, actors within the criminal justice system and society more widely. There is a general failure to engage with and thus create a discursive space to allow constructive discussions around the actions of these bad women to occur, and for their agency to be considered.

Part of the discursive language which needs to be constructed around women who kill, especially WKB, is one which acknowledges their agency, thus in turn allowing an acknowledgement of their ability to commit extreme violence qua women. Women who kill challenge accepted gender norms and discourse and therefore the current socio-legal response to these women is to make their actions more culturally thinkable and perhaps acceptable through the use of labels which actively deny their agency. However, denying the agency of women who kill undermines the existence of extreme female agential violence. Acknowledging women's agency and thus creating a discursive language which acknowledges women's ability to carry out extreme violence, allows the incorporation of the concepts of female rationality, power and accountability so that the rationality of

¹⁵ Young, Val, "Women Abusers: A Feminist View" in Elliot, Michele (Ed), *Female Sexual Abuse of Children* (New York: Guilford Press, 1994) p.104

some female violence is not automatically undermined.¹⁶ Taking the example of battered women who kill their abusive partners, these women can be viewed as exercising their agency: making the choice to take justifiable action and '[d]efending themselves from life-threatening violence, albeit in ways that the criminal justice system does not recognise as legitimate.'¹⁷

Finally, creating a discursive space whereby women are acknowledged as legal subjects with agency presents a novel opportunity to explore how women are confined by gender norms within both societal and legal discourse.¹⁸ This is particularly true in the context of women who kill because engaging with women whose behaviour is viewed as deviant allows a critical engagement with the norms of appropriate femininity to occur. As Roberts remarks:

It may be deviant mothers, rather than compliant ones, who reveal the mechanisms by which the institution of motherhood confines women and the price women pay if they resist. We must condemn mothers' violence against their children. However, their violence may force us to confront the complexity of women's subordination and the radical measures we must take to eradicate it.¹⁹

Although the above statement is made in the context of motherhood specifically, it is submitted that this approach is also applicable in the context of women who kill more generally. Indeed, acknowledging the agency of women who kill would allow

¹⁶ Morrissey, 2003, p.164

¹⁷ Seal, 2010, pp.2-3

¹⁸ This reflects a significant aspect of reasoning behind the *Feminist Judgments* project and the methodology of feminist judicial approaches to challenge gender bias within legal discourse. See Hunter et al., 2010, p.40.

¹⁹ Roberts, 1993, p.141

some of the constraints and pervasiveness of feminine gender norms to be challenged, for example the construction of women as objectified, irrational beings is confronted once women are acknowledged as subjects and agents with associated rationality.

Similarly an approach which acknowledges agency would allow the current reliance on gender acceptable explanations for these women's actions to be abolished. Instead I suggest introducing a system whereby, although their actions are undoubtedly reprehensible, some choice is attached to the actions of these women. That is to say that these women made the choice to act in the way that they did. Such an approach allows voices to be given to these women, when previously their voices have been silenced or sidelined through the invocation of gender acceptable explanations, thus exposing the realities of their lives.²⁰ When evaluating the choice that these women have made in the context of this proposed system, it is necessary to take into account whether there may have been some (perhaps unknown or inexplicable) purpose behind their actions or whether their choice has been limited by external or internal factors. For example, taking the previously explored case study of Nicola Edgington discussed in chapter five,²¹ under the proposed system of agency recognition, not only would the choice she made to kill be recognised, but also that her choice was largely inhibited or influenced by her psychological condition. This would go some way to addressing the issue of a middle ground being

²⁰ A similar reasoning is given in relation to the *Feminist Judgments* project. See, Hunter et al., 2010, pp.36-37.

²¹ See chapter five, at pp. 217-220

needed for the treatment of women who kill within the criminal justice system that was raised in chapter five.²²

6.2 Acknowledging Women's Agency

Fully acknowledging women's agency within criminal legal discourse will require a dual approach. As explored in chapters four and five, women's agency is currently denied both passively and actively. Therefore a full and complete recognition of the agency of women who kill requires an approach that will combat both of these existing types of agency denial. It is important to note several particulars about the agency recognition that will be discussed in this chapter. Firstly, it is *human* agency, not female-specific agency, which is being acknowledged within the context of the model I am proposing. The acknowledgment of female-specific agency would have the potential to further reinforce and entrench gender discourse and the existing norms surrounding appropriate femininity, which are already so pervasive within criminal legal discourse. Recognising this form of agency would arguably do little to improve the current socio-legal response to women who kill, a notion reflected in later discussions in this chapter which focus on the issues associated with the creation of a "reasonable woman."²³ Secondly, it is acknowledged within the thesis more broadly that there is clearly the potential for the agency recognition of women who kill to increase both the basic responsibility of these women, as well as their consequential responsibility. That is to say that as a

²² See chapter five, at pp. 217-220

²³ See chapter six, pp. 239-242 below

result of agency recognition women who kill may receive harsher sentences than they currently do. It is important to make clear that this is not the aim of recognising the agency of women who kill, even though in certain contexts there is certainly the potential for a case of harsher sentencing to be made.²⁴

Finally, the agency recognition which will take place will be contextualised within the existing social structures that have the potential to limit women's exercise of agency. That is to say that although the aim of this chapter is to create a discursive space within which criminal legal discourse can recognise the agency of women who kill, it is also important to acknowledge that their exercise of this agency may be *limited*, but *not* altogether eradicated or denied, by current structures and schemas of power which exist. So for example, it will be suggested that battered women who kill their abusive partners do have agency over their murderous actions and indeed exhibit and utilise that agency when they kill their partner. However, their exercise of agency may be limited within the confines of, for example, the various socio-economic factors that means they cannot leave their abusive partner. Similarly, women who kill and plead infanticide should not have their agency actively denied as a result of being labelled as mad, but instead have it acknowledged alongside a simultaneous recognition that their agency exercise may have been limited by their mental impairment.

The importance of the proposed agency acknowledgment taking place in this chapter is therefore not only that women who kill must have their agency

²⁴ For example, women who kill their children and plead infanticide despite not meeting the legal requirement of puerperal psychosis for such a plea. These women are treated with leniency within the criminal justice system, with the typical punishment being a probation order. A more detailed discussion on this issue can be found in chapter five, section 5.2 and section 5.5.2.

recognised, but that it must also be acknowledged that this exercise of agency may be limited or constrained by existing social and power structures. This is reflective of the stance taken by Lacey on the contextualisation of an agent's acts. She notes that: '[t]he context within which an agent has acted – a history of domestic abuse, for example – will be relevant to an evaluation of the disposition which that action expresses.'²⁵ However it must be reinforced that an evaluation of the context and relevant constraints and limitations on agency exercise does not *remove* an individual's agency in the agency-based model being proposed in this chapter.

6.3 Interrupting Passive Agency Denial

As noted earlier in the thesis in chapters two and four the criminal legal subject is currently gendered masculine.²⁶ Therefore in order to interrupt the passive agency denial of women who kill, a criminal legal subject that creates a discursive space for the incorporation of women and femininity could and indeed should be created and acknowledged. This recognition of women's passive agency through their acknowledgment as legal subjects and thus as agents has to occur before active agency denial, which occurs when these women are labelled, can be interrupted.

At the outset it is important to highlight that the agency creation that is the subject of analysis in this thesis is one of human agency, rather than gendered agency, as reflected in the work of Rollinson.²⁷ However, his suggestion that this take

²⁵ Lacey, 2007, p.239

²⁶ See chapter two, section 2.4.1 and chapter four, section 4.4.1

²⁷ Rollinson, 2000, p.122

place through the creation of a universal subject to whom universal rights are ascribed²⁸ is, it is submitted, the utopian ideal. In an ideal world this utopian ideal would be realised and would arguably be the most effective means by which to acknowledge women who kill as legal subjects and consequently ascribe them agency. However, within the existing working confines and structures of the criminal law and justice system, as well as within the limitations of societal discourse, such a utopian ideal cannot and indeed could not be realised or successfully implemented. The pervasiveness of gender norms within criminal legal, and socio-legal discourse would, it is submitted, make it impossible for such a universal subject to be created in the near future.

Even if a universal subject *was* introduced into criminal legal discourse, it would arguably meet the same fate that many of the other universal ideologies have met. For example, the existing legal subject of the “reasonable person” is meant to be a neutral, genderless, classless individual, but is in fact currently gendered masculine. Similarly, legal discourse has promoted the notion of sex equality through statutes, for example The Equal Pay Act 1970 and The Sex Discrimination Act 1975 which have recently been codified into a single statute; The Equality Act 2010. However as MacKinnon rightly explains, sex equality cannot truly exist because by their very nature the sexes are inherently different, they are binary opposites.²⁹ Therefore, woman will always be “the Other”³⁰; she will be inferior to man.

²⁸ Rollinson, 2000, p.122

²⁹ Barnett, 1998, p.18

³⁰ Beauvoir, 2010, p.6

In contrast, some feminist legal scholars, including Forell and Matthews have suggested the introduction of the reasonable woman standard into criminal legal discourse. Such a concept would combat some of the problems previously acknowledged and that would be raised in creating a universal legal subject. Indeed this is a concept which has already found resonance in the United States, where the law on sexual harassment adopted the reasonable woman standard in the case of *Ellison v Brady*.³¹ The rationale for adopting this standard in sexual harassment cases specifically is that the majority of sexual harassment victims and claimants are women.³² In the context of such cases, the standard assesses the harasser's conduct from the perspective of the reasonable woman victim.³³

Forell and Matthews in their monograph *A Law of Her Own: The Reasonable Woman as a Measure of Man*,³⁴ suggested that the reasonable woman standard should be taken further than merely sexual harassment cases and be applied to the conduct of men in all contexts where women are the victims of male aggression, sexual or otherwise. Such an approach would allow a focus to be maintained on respect for women's '[b]odily integrity, agency and autonomy ...'³⁵ They also suggest, perhaps most importantly in the context of this thesis, that female aggressors would also be held to the reasonable woman standard.³⁶ Therefore, unlike creating a universal subject, the introduction of the reasonable woman standard within criminal

³¹ 924 F.2d.872 (9th Cir. 1991)

³² Sanger, Carol, "Reasonable Women and the Ordinary Man" *S. Cal. L. Rev.*, 65, (1991-1992), 1411, p.1413

³³ Sanger, 1991-1992, p.1413

³⁴ Forell, Caroline and Matthews, Donna, *A Law of Her Own: The Reasonable Woman as a Measure of Man* (New York: New York University Press, 2000)

³⁵ Forell and Matthews, 2000, p.xvii

³⁶ Forell and Matthews, 2000, p.xvii

legal discourse would arguably allow women's experiences to be directly acknowledged and taken into account in criminal cases.

Moreover, introducing the concept of the reasonable woman could arguably provide women with the opportunity to develop their own discursive language which represents their lived experiences. This would reflect Smart's argument that women are able to discursively construct themselves.³⁷ Therefore such a language could allow for alterations to existing pervasive gender norms which are structured and enforced within a patriarchal society and allow women to discursively (re)construct themselves, for example through an alteration of the current norms surrounding "good motherhood" which requires women to be totally selfless, putting her children and family's needs before her own.³⁸

However, constructing this reasonable woman within criminal legal discourse fails to acknowledge the material conditions of life that currently constrain the formation of women as subjects. Indeed, any subjectivity given to women in the context of the reasonable woman within criminal legal discourse would exist within the confines of a phallogentric culture. Consequently, the notion that women can construct their own language to represent their lived experiences must take into account the power imbalances which exist for women within a patriarchal society. Foucault's theory of "capillaries of power" suggests that power is productive: it is everywhere and within everyone.³⁹ According to this theory, power is not hierarchical and therefore it can, and indeed, should be exercised by everyone

³⁷ See chapter two, p.64

³⁸ See chapter three, section 3.4.1 for a more detailed discussion on the discourse surrounding good motherhood.

³⁹ Foucault, 1980, p.39

individually within their social relationships and their everyday lives. For Foucault it is this exercise of power that produces subjects, discourse and knowledge.

However, the reality for women within a patriarchal society is that their power can only be exercised effectively as a collective,⁴⁰ with individual attempts to exercise power often failing to produce the desired outcomes for women. Collective power exercise is not a concept which is usually associated with the criminal law and criminal justice system, where it is individuals who are exercising their power either as defendants or as victims seeking justice.⁴¹ So in the context of women who kill, these women are attempting to exercise their power as individual defendants, with the aim of securing the least severe punishment for their crime or securing an acquittal. They are not acting as a collective and therefore their ability to successfully create their own discursive language within existing societal discourse must be questioned. Similarly, the power imbalance that currently exists within a patriarchal society and the criminal justice system raises real doubts as to whether such a language would or indeed even could, be effectively accommodated if created.

Moreover, woman's construction as "the Other"⁴² means that even if the concept of the reasonable woman as a legal subject was successfully introduced, current gender and criminal discourse dictates that a woman can never truly be viewed as reasonable. Indeed the characteristics inextricably interlinked with femininity, such as pathology, emotionality and irrationality mean that women

⁴⁰ See chapter four, pp.144-146 for a more detailed discussion on this.

⁴¹ The notion of collectivity within criminal legal discourse normally arises in the context of the state bringing a case based on the premise that it is both the victim and the state who has been offended against, or when several victims are involved in the same criminal case.

⁴² Beauvoir, 2010, p.6

within a patriarchal society are viewed as incapable of being reasonable. Moreover, in the context of women who kill, these women are not considered to be acting reasonably because of their extreme deviance from the norms of appropriate femininity. As illustrated by Morrissey:

It is not in the least surprising ... that battered women find it very difficult to convey to juries and the judiciary that their actions were reasonable. The idea that a woman could kill her partner and still meet the legal standard of reasonableness, particularly that of the reasonable perception of danger, is a reality few people want to acknowledge, let alone accept.⁴³

Similarly, the introduction of the reasonable woman standard has the potential to further reinforce, rather than dispel, gender discourse and norms surrounding appropriate femininity. Indeed as noted by Sanger, in one case in the United States, where, as noted above, the reasonable woman standard has been introduced in cases of sexual harassment, '[n]on-legal notions of what it means to be a reasonable woman *were* hard at work. For example, [the victims'] testimony was attacked for being too "emotionless", the current characterisation in American public discourse of conduct that might once have been called "dignified."⁴⁴ Therefore with the introduction of the reasonable woman standard, I would suggest that the performative nature of gender, more specifically of appropriate femininity, would arguably be further highlighted and thus reinforced.

⁴³ Morrissey, 2003, p.98

⁴⁴ Sanger, 1991-1992, p.1413

6.3.1 (Re) Constructing the Legal Subject and Interrupting Passive Agency Denial

Having critically engaged with some of the proposed alternative constructions of the legal subject, it is suggested that one way, perhaps the most realistic and attainable way, of successfully interrupting passive agency denial within criminal legal discourse is to alter the construction of the legal subject in its existing form, that is by altering the “reasonable person”. As noted earlier in this chapter and previously in chapter four, the “reasonable person” in its current form, although theoretically a gender-neutral construction, is in fact one which is gendered masculine. The reasonable person in its current form is most commonly used in relation to the masculine defences of self-defence and loss of control.⁴⁵

The specifics of the reasonable person can be found in the defence of loss of control detailed in The Coroners and Justice Act 2009 which refers to: ‘a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.’⁴⁶ As

Herring notes:

The reference to sex in the section is rather odd. It implies that different degrees of tolerance and self-restraint might be expected from men and women. While it is arguable that a particular insult or circumstance might be graver for a woman than a man, or vice versa, there is no good reason why the level of tolerance or self-restraint should be any different.⁴⁷

⁴⁵ See chapter four, section 4.4.2 for a discussion on the gendering of defences.

⁴⁶ The Coroners and Justice Act 2009, section 54(1)(c)

⁴⁷ Herring, Jonathan, *Criminal Law Text, Cases and Materials* (Oxford: Oxford University Press, fifth ed, 2012) pp.250-251

Therefore the very fact that there is a requirement of considering an individual's sex included in the "gender neutral" reasonable person enables the masculine gendering of the existing legal subject. It is submitted that in order to truly restore the intended gender neutrality of the reasonable person, it is necessary to remove the section '[a] person of D's sex ...'⁴⁸ from the phraseology. So the altered form of the reasonable person which would be introduced would read: 'a person with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.'

The importance of removing the mention of the defendant's sex from the construction of the reasonable person is reflected in a quote from MacKinnon, who explains: 'when [the state] is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied.'⁴⁹ Thus by not making any reference at all to sex, even in a neutral guise, the construction of sex, which is normalised as male within patriarchal society, will not be considered as the standard to be applied. Indeed, '[i]t is obvious that in practice the distinctions of gender, so pervasive and insistent outside of the law, do constantly intrude of even its most intentionally neutral operations.'⁵⁰ Thus, if there was no reference at all to a defendant's sex or gender within the construction of the reasonable person, this intrusion would arguably be minimised as it would not be a characteristic that formally and explicitly needs to be considered. Moreover, as Allen explains the very concept of the reasonable person is intended to provide '[a]n objective standard of

⁴⁸ The Coroners and Justice Act 2009, section 54(1)(c)

⁴⁹ MacKinnon, Catharine, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" *Signs* 8(4), (1983), 635, p.658

⁵⁰ Allen, 1988, p.430

comparison beside which the subjective state of legal subjects can be judged.’⁵¹ However, as she rightly notes, in having a requirement of considering the defendant’s sex, the reasonableness required of female offenders is that of normal and ordinary women, a standard which in and of itself is hard to quantify⁵² with women’s construction as ‘the Other’. Thus removing any mention of the defendant’s sex from the construction of the reasonable person not only ensures that the construction of the reasonable person is gender neutral, as there is no reference to gender or sex within its construction, but it also removes this hurdle for women to overcome.

Restoring, and perhaps more importantly maintaining, the gender neutrality of the reasonable person as the legal subject could create a discursive space within which both men *and* women can be viewed as legal subjects, rather than women in their current status as legal objects. Indeed, it is the gendering of women as feminine and the associated attributes which universally depict them as emotional and irrational beings who lack power that currently constructs them as legal objects rather than subjects, thus denying their agency. If such gendering is at least severely limited, if not entirely abolished, through alterations to the reasonable person as the legal subject, then women’s legal subjecthood can be recognised, allowing passive agency denial to be interrupted and women to be recognised as agents.

Indeed, altering the reasonable person creates a discursive space where women as objects, as “the Other”, and as the abject can become culturally

⁵¹ Allen, 1987, p.22

⁵² Allen, 1987, p.49

intelligible⁵³ legal subjects. This is somewhat reflective of Butler's theory that the abject is part of the foundations of the subject, that is to say, that without the abject the subject would not exist.⁵⁴ It is also reflective of Naffine's argument that women have a role to play in the construction of the legal subject: it is women's role as "the Other" that allows man's construction as "One".⁵⁵ Therefore the feminine/woman/Other already forms part of the masculine/man/One. Explicitly removing the concept of gender, that is masculinity, from the reasonable person, means that it is this *person*, which includes both subject (man) and abject (woman) as part of its foundations, that is the new legal subject. Thus a discursive space for woman as a legal subject can be created.

Unlike attempting to create a universal legal subject to whom universal legal rights are ascribed, as critiqued above, the altered reasonable person, suggested in this chapter, would not make arguably unattainable, utopian claims regarding the equality of men and women. Although altering the reasonable person test would allow the agency of both men and women to be acknowledged, it must be noted that there is no grand overarching aim of achieving equality between the sexes within this. Indeed, it is acknowledged throughout this chapter, that even once women are recognised as legal subjects and as agents, their exercise of agency is limited within the existing socio-legal structures of a patriarchal society. These structures and the power relationships within them are arguably adverse to women's agency exercise. However, I would suggest that by acknowledging women who kill as legal subjects

⁵³ Loizidou, 2006, p.1

⁵⁴ Butler, 1993, p.3

⁵⁵ See chapter two, pp.60-61.

and agents, an immediate and positive shift in the power relationship between these women and existing structures would occur, thus reflecting Foucault's argument that power is mobile, as discussed in chapter two.⁵⁶ It is submitted that agency acknowledgment of women who kill is the first step in altering the social and legal structures that inhibit all women from consistently and successfully asserting their agency.

Moreover, altering the existing reasonable person as the legal subject, rather than creating a subject of the reasonable woman, as critically discussed earlier in the chapter,⁵⁷ ensures that the gender norms associated with appropriate femininity are not reinforced. Indeed, creating the legal subject and agent of the reasonable woman and reinforcing these norms would arguably inhibit the successful exercise of agency by individual women within existing patriarchal structures.

Despite the undoubted importance of altering the theoretical basis of the reasonable person to recognise women as legal subjects, it is submitted that it is not enough to merely alter the reasonable person *in theory*, but that there also needs to be alterations in the practical approach being taken within the criminal justice system.⁵⁸ Indeed as Allen notes, the pervasiveness of gender discourse '[c]onstantly intrudes on even [laws] most intentionally neutral operations'⁵⁹ and thus it is important that both theoretical and practical approaches are considered to ensure the recognition of women as legal subjects and agents.

⁵⁶ See chapter two, pp.67-68

⁵⁷ See pp 239-242, above

⁵⁸ There is room for future research here, something I discuss in chapter seven, at pp.286-289.

⁵⁹ Allen, 1988, p.430

Within practical criminal legal discourse that is, within the courtroom and criminal justice system itself, it is suggested that one way passive agency recognition could be reflected in practice is through increased focus on the removal of gendered language. Currently gendered language is regularly and pejoratively used in judicial sentencing remarks in cases of women who kill. This is evident in the case of Magdalena Luczak.⁶⁰ Luczak, alongside her partner Mariusz Krezolek, was found guilty of the murder of her son Daniel Luczak. In sentencing, Mrs Justice Cox, stated: ‘both of you are in breach of what is probably the most important position of trust, as the parents of a small child who was entitled to their protection, their love and their care.’⁶¹ She then goes on to specifically mention the deviance that Luczak demonstrated from the norms surrounding appropriate motherhood: ‘your breach of trust, Magdalena Luczak, is wholly irreconcilable with the loving care that a mother should show towards her son.’⁶² The use of gendered language in sentencing remarks can also be seen in the cases of Myra Hindley and Rosemary West, as discussed in detail in chapter five.⁶³

This culture of pejorative gendered language use is not just confined to cases of women who kill, but also to women who commit other serious criminal offences, for example child sexual abuse. In the relatively recent case involving Lost Prophets singer Ian Watkins and two female co-perpetrators referred to as *B* and *P*, Mr Justice Royce’s sentencing used gendered language specifically when referring to the two female co-defendants. Referring to *B*’s involvement he stated: ‘but you were a

⁶⁰ See chapter five, p.215 for more discussion on this case.

⁶¹ Judiciary of England and Wales, 2013, p.5

⁶² Judiciary of England and Wales, 2013, p.5

⁶³ See chapter five, at pp.198-201

mother. Your infant was only 10 months old. A mother naturally loves, protects, shields, nurtures and cherishes. Your infant would have trusted you implicitly. You totally betrayed that trust.’⁶⁴ Similarly when referring to *P*’s involvement, he emphasised: ‘[y]ou *P* betrayed your daughter for your own selfish ends.’⁶⁵ It is important to note here that it is arguably not just the use of pejorative gendered language that is harmful to agency acknowledgment, but the use of any such language, even in a positive form. This is because the inclusion of gendered language in any form has the effect of focusing attention on the feminine gender norms, which have been so instrumental in confining women to their position as objects whose agency is denied.

One argument against the complete abolition of such language is that including it may be of particular relevance to a case. For example, exploring the difference in physical strength of a woman and her husband in a case involving domestic violence, or looking at physical issues in sexual offences cases. However, I would argue that should reference need to be made to an individual’s sex in exceptional cases, such as those mentioned above, the judge could include a direction to the jury specifying its relevance and why it has been mentioned, thus addressing this concern.

There is also the potential issue that maintaining the mention of “sex” in the reasonable person construction, is necessary for the defence of loss of control. As

⁶⁴ Judiciary of England and Wales (2013b), “Sentencing Remarks *R v Watkins and P and B*”, (18th December 2013), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-watkins-and-others.pdf> p.3

⁶⁵ Judiciary of England and Wales, 2013b, p.6

noted earlier in the thesis⁶⁶ battered women who kill may arguably be able to introduce evidence of BWS if it can be linked into the qualifying trigger being utilised under the act. Moreover, as Edwards notes:

In the context of battered women as defendants in murder cases, sex is especially relevant to the circumstances since it is the female sex as a group that are especially subject to violent abuse ... It is argued that sex has been “showcased” in this way precisely to accommodate the problems predominantly affecting women who the law now concedes face continuous abuse, and in this the law implicitly recognises their lack of physical strength.⁶⁷

Thus, by specifically mentioning sex within the Coroners and Justice Act 2009, and the construction of the reasonable person detailed within it, it is arguable that it underlines the importance of this characteristic in the context of cases of battered women who kill. However, as Edwards also acknowledges; “[i]t can be argued that sex in this context would be relevant, in any event, under “the circumstances of the defendant””,⁶⁸ found in section 54(1)(c) of the Act. Indeed, loss of control is a relevant defence for murders outside of the context of battered women who kill, and therefore other characteristics such as race and religion would come under “the circumstances of the defendant”. Therefore I would argue that such concerns regarding the abolition of sex within the definition of the reasonable person in this context can be ameliorated in this way. Linking this into the discussion above, a

⁶⁶ See chapter five, section 5.1.1 at pp. 171-172

⁶⁷ Edwards, Susan, “Anger and Fear as Justifiable Preludes for Loss of Self-Control” *Journal of Criminal Law*, 74(3), 2010, 223, p.237

⁶⁸ Edwards, 2010, p.237

direction could be made to the jury acknowledging that attention has specifically been brought to the fact that the defendant is a woman, because it is women who are especially likely to be victims of domestic violence.

The removal of gendered language in its entirety would arguably go some way towards being more reflective of the legal subject as being a “person” rather than being gendered masculine, which would consequently aid the interruption of passive agency denial within criminal legal discourse. Similarly the removal of such gendered language could allow women who commit serious crimes, such as homicide, to be viewed as deviant *people* rather than as deviant *women*, the latter of which has more negative connotations and can result in harsher sentencing or difficulties for these women when attempting to successfully utilise a particular defence. Indeed as noted in chapter five,⁶⁹ women who kill their abusive partners and want to introduce evidence of BWS to support their defence must not only adhere to the requirements of both the syndrome and the defence, but they must also conform to the behaviour expected of a battered woman.⁷⁰ Amending the existing construction of the reasonable person by removing the mention of an individual’s sex would prevent the current associations being made between a woman’s criminal behaviour and her degree of deviance from gender discourse and appropriate femininity. As such it would arguably ameliorate the issue of some women who kill being viewed as doubly deviant⁷¹ and being labelled as bad as a

⁶⁹ See chapter five, section 5.1.1 at pp.175-183

⁷⁰ Edwards, 1996, p.252

⁷¹ This is a concept which has been discussed previously throughout the thesis. Where women who kill (labelled as bad) are viewed as being doubly deviant; they have not only offended against society when committing their crime but also against their gender. Removing gendered language from jury

result. Moreover, removing the mention of an individual's sex within the construction of the reasonable person would be a tentative, but positive step, towards achieving the currently unrecognised and unachievable utopian ideal of a completely gender neutral legal subject.

Another practical approach that could be adopted to ensure the gender neutrality of the legal person is that suggested by Allen in relation to instructing jury members. She suggests that '[t]he notion of a neutral legal personhood ... could be inserted by straight *fiat* into any existing doctrine, and that once properly instructed, even the law's most ordinary agents [e.g. jury members] could quite competently work with it.'⁷² Allen suggests that simply asking juries to decide whether the defendant acted as a reasonable person might have done may be '[i]nsufficiently explicit',⁷³ and therefore it might be more appropriate to first acknowledge to the jury the pervasiveness of gender discourse, norms and constructions, '[b]efore formally and explicitly outlawing them'⁷⁴ being used. Allen then goes further and envisages how this may work in more detail:

The jury members might be instructed, for example, that in deciding whether the defendant acted as a reasonable person, they must have in mind the whole range of reasonable human responses, even any that would normally be considered reasonable only in one sex or the other, and then ask themselves whether the behaviour of the defendant (regardless of gender) fell anywhere within that

remarks and judicial comments may help to ameliorate the potential issue of harsher sentencing which may arise from the agency recognition of women.

⁷² Allen, 1988, p.429

⁷³ Allen, 1988, p.430

⁷⁴ Allen, 1988, p.430

range. Alternatively, they might be instructed to consider only such responses as they would be regarded as equally reasonable in *either* sex, and thus to exclude as unreasonable any response that would not be considered reasonable in both. Such explication may well be cumbersome, but hardly more so than is already judicially commonplace.⁷⁵

It is therefore clear that there are practical approaches that could be taken within criminal justice procedures to ensure that the gender neutrality of the reasonable person is maintained, both in theory and in practice. In turn, this would allow for a discursive space to be created within which women could be acknowledged as legal subjects and as agents.

6.4 Labelling and Interrupting Active Agency Denial

As noted earlier in the thesis in chapter five, labeling women who kill as mad, bad or a victim, when combined with passive agency denial, actively denies their agency. Therefore, passively recognising the agency of women within criminal legal discourse by altering the definition of the reasonable person to acknowledge women as legal subjects with agency has a direct impact on active agency denial. That is to say that once women's status as criminal legal subjects is acknowledged and their passive agency is asserted, the active agency denial which took place through the use of the labels mad, bad and victim is interrupted. As explained throughout this thesis, the labels currently attached to women who kill contribute to the denial of their

⁷⁵ Allen, 1988, p.430

agency. Although labels, such as mad, bad and victim, would arguably, and undoubtedly, still be attached to women who kill, once these women are recognised as legal subjects and as agents they would no longer have the effect of actively denying their agency because these labels would not be attached to them as objects and thus not become their identity.

Indeed as noted earlier in the thesis, the labels attached to women who kill, that is mad, bad and victim are currently all consuming for the women that are labeled. That is to say that when such labels are used, the label becomes their exclusive identity and as such actively denies their agency. At the outset it is important to note that it is recognised that these labels will still be attached to women who kill because society has historically, and therefore presumably will continue to, attach labels to those who exhibit deviant behaviour.⁷⁶ Indeed it is important to note that this is not the aim of this thesis, not least because the attachment of labels to deviant individuals or to their deviant behaviour is both prevalent and normalised within social discourse.⁷⁷

Moreover, it may be that the attachment of particular labels to these women is reflective of some, if not all of, their lived experiences, for example battered WKV. It is undeniable that these women are victims in the traditional sense of the word used for those who have been subject to a criminal act at the hands of another. However, the way in which these labels are currently used is gendered, reflecting the

⁷⁶ To suggest that labels should be removed entirely would again be a utopian ideal which is not achievable within the confines of current socio-legal discourse.

⁷⁷ See chapter two, section 2.3 for a detailed discussion on labelling theory and the attachment of labels to deviants.

pejorative gender norms surrounding women and ultimately actively denying their agency. Therefore it is submitted that although these labels cannot be eradicated entirely, acknowledging the agency of the women they are attached to means that when they are used on a subject, on an agent, they would no longer become an exclusive identity and their current effect of actively denying agency is interrupted.

Indeed, it is submitted that when labels are attached to subjects they are less influential and pervasive than when they are attached to objects. That is not to say that when labels are attached to subjects they do not have any resonance whatsoever, merely that they do not become the new identity of the subject that they are being attached to. Put another way, the person is still the subject, albeit with a label, rather than an object who assumes the label as their new identity. This is apparent within societal discourse when exploring the prevalence of the labels attached to the Moors Murderers Myra Hindley and Ian Brady. Both Hindley and Brady were labelled as evil by the media because of the horrendous crimes that they had committed. However, the media attached the label of “evil” to Hindley far more frequently than to Brady. This may arguably be because Brady was sectioned under the Mental Health Act. However, when I used *Nexis* to search for media reports on both Hindley and Brady, the discrepancy in the labels used was highlighted.

I used specific search parameters, searching for each of their names separately, “Myra Hindley”/ “Ian Brady”, in headlines only. I specified the search to be within UK publications only and selected for duplicate options to be “on – high similarity.” I searched within the results produced separately for Hindley and Brady for the word “evil” with the duplicate options still “on-high similarity”. Ensuring these

specifics were used for both searches I conducted, 172 results were produced for Hindley compared with 106 for Brady. Using otherwise the same search parameters, I altered the search term I used within the results from “evil’ to ‘mad”, which produced 27 results for Brady, compared with 26 for Hindley. Altering the search within results term again from “mad” to “mental” highlighted a large discrepancy in the results, with 445 for Brady and only 36 for Hindley.

These results reflect the labelling of Hindley as bad within socio-legal discourse, a label which ultimately denied her agency because as a woman she was constructed as a legal object, rather than a legal subject. It is also worth noting here, that despite these results demonstrating that Brady was more readily labelled as mad when compared to Hindley, attaching this label to Brady does not have the effect of actively denying his agency in the same way it would have done if the label had been attached to Hindley. This is because Brady as a man is recognised as a legal subject and thus as an agent and therefore attaching this label to him does not mean that it becomes his new identity.

Successfully altering the labelling culture within criminal legal discourse initially requires the acknowledgment of women’s passive agency as discussed earlier in the first section of this chapter.⁷⁸ Acknowledging women as legal subjects rather than objects, through the alteration of the reasonable person, has clear potential to enable alterations to the labelling culture, thus interrupting the denials of women’s active agency. Traditionally in labelling theory⁷⁹ it is not women who are doing the

⁷⁸ See sections 6.2 and 6.3, above.

⁷⁹ See chapter two, section 2.3 for a detailed discussion on labelling theory.

labelling as they do not have the power within socio-legal discourse to label.⁸⁰ Indeed as Naffine explains; 'in its female version, labelling theory seems to have lost sight of the deviant as actor and as social critic ... Stripped of any ability to challenge or question her position in society, she is conceived as object rather than agent.'⁸¹ However, once women are recognised as legal subjects, that is as agents, through the discursive space created by altering the reasonable person, their power relationship within criminal legal discourse is similarly altered and ameliorated by interrupting passive agency denial.

It must be noted here that the amelioration of their power relationship is still confined within the existing structures of a patriarchal society. However, this improvement in women's power relationships within criminal legal discourse has clear potential for women to successfully participate in labelling, particularly self-labelling, thus allowing them to alter or overthrow the labels attached to them. This reflects Foucault's argument, acknowledged in chapter two of this thesis,⁸² that power is mobile and therefore individuals can utilise power in order to change their powerless circumstances. It is also reflective of Butler's theory of performativity which suggests that individuals who are labelled have the ability to resist and reverse the labels attached to them.⁸³

Self-labelling would not only be reflective of women actively exercising their agency as subjects but would also allow for women to offer alternative labels which they designate as more reflective of their lived experiences. For example, it has been

⁸⁰ Grana, 2009, p.72

⁸¹ Naffine, 1987, p.83

⁸² See chapter two at pp.67-68

⁸³ See chapter two, section 2.5.2 at pp.76-78 for a more detailed discussion on this.

suggested in some feminist literature, as well as by those that work with battered women, that they should be labelled as survivors, rather than as victims.⁸⁴ Indeed, it is argued that the survivor label invokes imagery of strength and determination, often reflected in the actions of battered women who have developed strategies of resistance, whilst simultaneously trying to provide for their own safety and that of their families.⁸⁵ As Dunn explains, whilst battered women labeled as victims are '[p]resented as trapped ... survivors, conversely, are shown as making choices ...'⁸⁶ Therefore depending on which label is attached, women are placed '[a]t opposite poles of an agency continuum.'⁸⁷

Despite alterations in the theoretical typifications of battered women, there has arguably never been a discursive space successfully created which allows for the construction of battered women as survivors to fully be realised as a reality within *practical* criminal legal discourse. Interrupting passive agency denial and thus recognising women as subjects and agents, is reflective of the "survivor" label and its associated attribute of agency. Therefore the reflective nature of this label for women as agents means that there is arguably the potential that when used by women to self-label, it will replace that of a victim for these women, thus reinforcing their agency.⁸⁸

⁸⁴ See for example: Kelly, Liz, *Surviving Sexual Violence* (Minneapolis: University of Minnesota Press, 1988); Hoff, Lee Ann, *Battered Women as Survivors* (New York: Routledge, 1990); and more recently; Dunn, Jennifer, "'Victims" and "Survivors": Emerging Vocabularies of Motive for "Battered Women Who Stay"' *Sociological Inquiry*, 75(1), 2005, 1

⁸⁵ Dunn, 2005, p.5

⁸⁶ Dunn, 2005, p.2

⁸⁷ Dunn, 2005, p.2

⁸⁸ It is important to reinforce the point here that despite creating a discursive space within which women's agency can be recognised, thus allowing them to self-label as survivors and for others to

Women's potential to self-label as a result of being recognised as subjects and agents, as well as their potential for resisting the labels attached to them as a result of interrupting active agency denial has the added benefit of potentially altering gender discourse. These labels, used in the existing context of women as objects, are used because they are a way to explain and justify the actions of women who kill in a way that reflects gender discourse within a patriarchal society and legal system. However, by acknowledging women as legal subjects and agents, the power attached to these labels has diminished, not least because they no longer become the overwhelming identity of agentic women who kill. Therefore even if these labels continue to be used to describe these women without becoming their identity, arguably the power attached to them without the ability to actively deny women's agency will be lessened, and in turn the gender stereotypes they reflect will not be so entrenched. Interrupting agency denial through the recognition of women as legal subjects and agents therefore, I would argue, has the clear potential to begin a process of altering and ameliorating the pejorative gender norms associated with femininity.

Taking each of the labels currently attached to women who kill in turn, it is possible to see how interrupting passive agency denial has resulted in these labels no longer actively denying the agency of these women, instead creating a space within which more questions can be asked of these women's experiences and the socio-economic factors which may have contributed to them committing their crimes. The

label them as such, their ability to exercise their agency as survivors is limited within the existing structures of a patriarchal society. Therefore, the support provisions such as alternative accommodation, counseling etc which are in place for these women are still required.

importance of creating a space within which women's lived experiences and the realities of their lives can be recognised is acknowledged and reflected within the *Feminist Judgments* project. Indeed, particular concerns for the project were '[w]riting women's experiences into legal discourse ... challenging gender bias ... contextualisation [of the] reality of women's lived experience [and] improving the conditions of women's lives.'⁸⁹ Interrupting passive denials of agency reflects these particular concerns and allows more questions to be asked of women's experiences and the choices that they make.

Currently for WKM, their agency is actively denied through the invocation of "psy" discourses, which present these women as irrational, as not understanding and therefore not intending to kill their victim.⁹⁰ For women currently constructed as legal objects their new identity becomes that of the mad label and therefore their agency is also actively denied. However interrupting passive agency denial, through the expansion of the legal subject and the acknowledgment of women as agents, has the consequence that attaching the label of mad to women who kill interrupts active denials of their agency. This is because agents are rational actors and madness is a concept that is oppositional to, and thus inherently incompatible with, an agential subject. This has the consequence that although the label of mad will undoubtedly still be used to describe the murderous actions of these women, when they are labeled, they are being labeled as subjects with agency, that is as agents, rather than as objects and therefore mad will no longer become their overwhelming identity.

⁸⁹ Hunter et al., 2010, p35

⁹⁰ See chapter five, section 5.4, pp. 208-209 for a more detailed discussion on how women who kill labeled as mad have their agency actively denied.

Instead, they will be viewed as women who have made the choice to kill, with the acknowledgment that the nature of this choice may (on the facts of the particular case) have been impeded or limited by mental health problems.

Prima facie, it may appear that individuals labeled as mad can never have their agency acknowledged, and indeed it has become apparent that women in their current position as legal objects who are labelled as mad consistently have their agency denied. However the idea of *subjects* with mental health issues still being treated as agents who can make choices regarding their lives and behaviour is already reflected in law for men, demonstrated in the recent sterilisation case: *An NHS Trust v DE*.⁹¹

In this case *DE*, a 37-year-old man who suffered from learning difficulties, already had one child with his long term partner. He made it clear that he did not want any more children but was considered to lack the capacity to make decisions as to the use of contraception, including whether to have a vasectomy. Therefore the NHS Trust sought a declaration that it was lawful for him to undergo a vasectomy. In its reasoning the Court clearly attached significant weight to *DE*'s wishes with regard to fathering more children, despite also finding he lacked capacity: 'Dr Milnes regarded the most magnetic factor in favour of vasectomy as being *DE*'s desire not to have any more children. It is undoubtedly a magnetic factor carrying considerable weight ...'⁹² Therefore it is submitted that women as *legal subjects* could similarly be labeled as mad (without it assuming their new identity) and still simultaneously be

⁹¹ [2013] EWHC 2562 (Fam)

⁹² *An NHS Trust v DE* [2013] EWHC 2562 (Fam), official transcript, para 96.

treated as agents, albeit with some limitations.

Acknowledging women as legal subjects and thus as agents and interrupting active agency denial when using the mad label, allows wider contextual issues to be deliberated when considering the behaviour of these women. For women convicted of infanticide and labeled as mad, statistics highlight that many of them do not actually meet the legal basis for the plea: puerperal psychosis.⁹³ Therefore, viewing these women as agents allows for consideration of why these women made the choice to kill their child outside of the confines of the “psy” discourses. A lack of support for mothers, failure of fathers to fulfil their paternal role, and social and financial pressures can therefore all be seriously contemplated when active agency denial ceases.

Within existing criminal legal discourse and practice, some women who kill their abusive partners are labelled as victims and thus have their agency actively denied. Currently, when these women are labelled as victims their new identity becomes that of a woman who is so profoundly victimised that she is incapable of making a choice with regards to how to act, or indeed that she is able to commit any sort of act with intention. However, recognising women as agents means that although the label of victim may still be attached to these women, it is used as a label which reflects their lived experience, rather than one which becomes their all-consuming new identity and actively denies their agency. Indeed, the concepts of agent and victim ‘[a]re usually understood to represent the opposing categories of a

⁹³ See chapter five, section 5.2 for a more detailed discussion on the defence of infanticide and the legal basis of the plea: puerperal psychosis.

dichotomy⁹⁴ and therefore women as agents cannot also have the identity of victims. However, that is not to say that these women have not been victimised, in the criminal and legal sense of the term, and therefore they may well be referred to as victims, without that becoming their identity.

Recognising battered women who kill as legal subjects exerting their agency is actually arguably more reflective of their murderous behaviour than the current system of agency denial. That is to say that these women made the choice to kill their abusive partners in order to alleviate the abuse they were suffering, but that their choice was one which was made within and thus limited by the confines of their abusive relationship. Interrupting passive agency denial and thus in turn interrupting active agency denial, creates a discursive space within which to ask the pertinent question of why these women chose to exercise their agency in this way, i.e. by killing their abuser. Indeed it also provides the opportunity for a new legal narrative to emerge, one which allows women to give an account of *their* experience, an opportunity '[t]o say in her own words how she perceives her own social reality.'⁹⁵ This has the potential to form the basis of tangible discussions on the existing legal and social provisions available to victims of domestic violence, such as the adequacy of existing legal injunctions, the issue of alternative accommodation and the societal response to such abuse. These discussions would arguably have more resonance and impact if they occurred in the context of a socio-legal discourse that does not actively deny the agency of these women by labelling them as victims.

⁹⁴ Chiu, 2000, p.1241

⁹⁵ Naffine, 1987, p.86

It must be noted here that acknowledging the agency of battered women who kill does not equate to these women being able to control or influence their abuse or their abuser. Agency is being used in this context as a term which refers to the individual woman's choice with regard to *her* actions and behaviours, not with regard to that of others. Similarly, as noted earlier in the thesis, the agency that women can exercise in this new theoretical model is still limited within existing social structures, one of which is the domination of the discursive construction of masculinity over femininity within a patriarchal society. Therefore it would be extremely problematic to suggest that even if battered women have agency they are in some way responsible for their abuse or capable of preventing it, because arguably they lack the power within existing patriarchal social structures to do so.

WKB currently have their agency denied through the invocation of an extra element of badness, which constructs them as monsters, as mythic Medusa-like creatures who are not human.⁹⁶ The use of the label bad actively denies the agency of these women by personifying them as evil, thus denying that it was a human that acted and so denying their human agency. Accepting women as legal subjects and agents means that their humanity is asserted beyond doubt. Therefore, when women who kill are acknowledged as agents and are labelled as bad the active agency denial that previously took place is interrupted. Instead, when the label of bad is attached to agentic women, it is used in such a way to suggest that it is a particular *type* of woman that has acted, i.e. a bad woman, rather than the label becoming the new identity of these women and denying their humanity. The label of

⁹⁶ See chapter five, section 5.4 at pp.209-210 for a more detailed discussion of how the label of bad actively denies the agency of women who kill.

bad is thus used in its colloquial, every day meaning in such a context that is, as 'lacking or failing to conform to moral virtue.'⁹⁷ Therefore when the label of bad is attached to women as agents what is being said is that this woman made the choice to act in the way that she did and she acted in a bad way. She is a woman who exercised her agency in a pejorative, bad way.

Interrupting the active agency denial associated with the use of the label bad also allows an arguably much needed discussion surrounding the motives and behaviours of these women who kill to occur. As Helen Birch noted, women like Myra Hindley bewilder us because we do not have a language to accurately represent these examples of female killing,⁹⁸ so we mythologise their actions and label such women as bad to explain their murderous behaviour and actively deny their agency. However, with women's agency being acknowledged in the new model being proposed, there is a tangible opportunity to develop an engagement and understanding of this type of crime committed by women. An article written by Yardley on the recent case of female serial killer Joanna Dennehy, who pleaded (and was subsequently found) guilty of the murders of three men,⁹⁹ highlights the importance of engaging with an approach that does not merely label these women as bad. As she explains; '[i]f we are to develop a more meaningful understanding of this type of crime, we need to resist the urge to dismiss her as a ... bad aberration

⁹⁷ Oxford Dictionaries, "bad" available at <http://www.oxforddictionaries.com/definition/english/bad>

⁹⁸ Birch, Helen, "If looks could kill – Myra Hindley and the iconography of evil" in Birch, Helen (Ed), *Moving Targets – Women, Murder and Representation* (London: Virago Press Ltd, 1993) p.61

⁹⁹ See chapter five, pp.201-202 for a more detailed discussion on the case of Joanne Dennehy.

and look at the bigger picture in which fatal violence emerged.’¹⁰⁰ Acknowledging women’s violence and interrupting active agency denial has the potential to allow this to happen through a presentation of women as having the ability to have chosen to kill, but contextualising this choice within their lived social experiences.

As discussed earlier in the chapter, acknowledging women as agents also has the effect of interrogating and questioning the existing gender discourse which surrounds appropriate femininity. One current consequence for WKB is that they are often sentenced far more harshly than WKV or WKM because they are viewed as doubly deviant, offending against both society and their gender. However, recognising women as legal subjects and the subsequent interrogation of feminine gender norms which could occur may have the consequence that agentical women who kill labelled as bad will not continue to be sentenced based on their perceived gender deviance, but purely on the crime that they have committed and their offending against the state.

6.5 Concluding Remarks

Drawing upon analysis in previous chapters of this thesis, this chapter has suggested an approach which could be taken within criminal legal discourse which would allow the acknowledgment of the agency of women who kill. Having

¹⁰⁰ The Guardian (2014a), “Women like Joanna Dennehy confuse us. Calling her mad or bad doesn’t help” (12th February 2014), available at <http://www.theguardian.com/commentisfree/2014/feb/12/women-like-joanna-dennehy-confuse-us-not-mad-or-bad>

acknowledged the importance of agency recognition within the context of women who kill, I have argued that altering the existing construction of the criminal legal subject found in the reasonable person, by removing any reference to sex or gender would actually make it gender neutral, rather than simply claiming to be, as is the case currently. This would allow women to be recognised as criminal legal subjects and thus have their agency passively acknowledged.

In turn, I have argued that once this occurs it would have the effect of interrupting the active agency denial which currently occurs when the labels mad, bad or victim are attached to these women and become their exclusive identities. That is not to say that these labels will no longer be attached to women who kill, but rather that recognising women as legal subjects and thus as agents would mean that when these labels are used, they would no longer become their new identities and thus actively deny the agency of these women.

Despite proposing a model for acknowledging the agency of women who kill, this chapter has also made it clear that any subsequent *exercise* of agency would currently be limited by social structures within a patriarchal society. However, I have also made it clear in my arguments and justifications for introducing this agency based model, that acknowledging women's agency is the first step in altering social structures and thus allowing women to successfully exercise their recognised agency within socio-legal discourse.

Chapter Seven – Thesis Conclusion

7.1 Initial Observations

The analysis conducted throughout this thesis leads to some initial observations. The first of these is that the concept of agency is one that is normatively gendered masculine. As discussed in chapter four, the notion of agency is not one that is associated with the constructions surrounding femininity. Agency is typically associated with the commonly associated masculine traits of rationality and the privileging of the mind over the body, with the consequence that men are constructed as agents. In contrast, the construction of femininity that focuses on women's inability to control their emotions, their control at the hands of their own bodies and a patriarchal society, as well as their construction as "ideal victims", combine to ensure that within societal discourse women's agency is denied. Indeed, women are constructed as individuals who are acted upon, rather than positively choosing to act themselves. The constraining role of social structures and societal norms in this agency denial are also evident, with them re-affirming women's agency denial and their subsequent inability to exercise agency. Therefore it is arguable that it is only by acting collectively that women's agency can currently be exercised within existing social structures.

A similar approach to agency denial is taken within criminal legal discourse where women's agency is passively denied. However, within such discourse there is rarely, if ever, the opportunity for women to collectively exercise their agency due to the nature of the criminal justice process which usually involves individuals as victims

or perpetrators, and the state.¹ Although the criminal legal subject claims to be gendered neutral, that is the reasonable person, the analysis undertaken in chapters two and four has argued that it is still gendered masculine, thus reflecting the historical construction of the legal subject as that of the reasonable man. Indeed, despite the apparent gender neutrality of the reasonable person test, amended and codified in The Coroners and Justice Act as: ‘a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D might have reacted in the same or a similar way to D’,² it has been argued that a discourse of masculinity still pervades this legal standard of subjecthood. This argument can, and indeed has been, further reinforced by the fact that the reasonable woman is a standard that has never been considered within legal discourse, not least because the terminology of reasonable woman conjoins two words that exist at the opposing sides of a dichotomy within socio-legal discourse.

The masculine gendering of the legal subject and the consequential denial of women’s status as legal subjects has the effect of passively denying the agency of women within criminal legal discourse by reflecting a pre-existing state of affairs in patriarchal society. The gendered dimension found within the criminal law more generally, reflected in the gendered nature of defences to murder, further reinforces this passive denial of agency. I have argued that excuse defences, such as diminished responsibility, are gendered feminine, whereas justification defences, such as self-defence, are gendered masculine. Justification defences accept responsibility for the

¹ This is also true for men. However, unlike women, men currently have their agency acknowledged within criminal legal discourse as a result of the masculine gendered legal subject. This was discussed in detail in chapters two, four and six.

² The Coroners and Justice Act 2009, section 54(1)(c)

defendant's actions whilst acknowledging that their behaviour was correct. Thus gendering these defences as masculine reinforces the passive denial of agency of women by associating responsibility, and thus choice and agency with men and masculinity.

The masculine gendered nature of agency and the legal subject reflects an overarching observation that can be made of the pervasive nature of gendered norms within both societal and legal discourse. Indeed, it has become apparent that gender discourse also has a significant role to play when exploring the labels attached to women who kill of mad, bad or victim. The labels mad and victim in particular are reflective of gendered constructions surrounding femininity, reflecting the notion of women as pathological and emotional individuals and of their status as "ideal victims". All three labels are utilised not just to explain the act of homicide perpetrated by these women, but also to explain their deviance from appropriate feminine behaviour as dictated by gender discourse. For example, the label of bad not only explains the act of killing but also the fact that the female perpetrator was a bad *woman* either in her lifestyle and its deviance from appropriate femininity, or in the specifics of the way in which she perpetrated the offence, or perhaps both.

7.2 Overall Conclusions

This thesis engaged critically with the existing academic literature on a number of concepts including labelling and construction theory and gender discourse so as to explore the impact these concepts have on, and their relationship to, the

concept of agency. I have argued that women who kill have their agency denied within socio-legal discourse. More specifically, I have suggested that their agency is denied both actively and passively. Passive agency denial occurs because as women their status within criminal legal discourse continues to be that of legal objects rather than legal subjects, thereby reflecting the broader position within patriarchal society that women are acted upon, rather than actors with agency. This is reflected in the construction of the criminal legal subject as the reasonable person, which I have argued is gendered masculine. Although pertaining to be a gender neutral construction, I have suggested that the inclusion and reference to an individual's sex within the reasonable person test,³ simultaneously enables and ensures the continuation of the masculine gendering of the legal subject. As agency is regarded as being the property of subjects, not objects, it is initially their status as *women* who lack legal subjecthood, which passively denies the agency of women who kill within criminal legal discourse.

When women commit homicide, both society and the law labels them as either mad, bad or victims. Which of the three labels is used depends on the specifics of their crime and their defence, as well as the degree to which their behaviour more generally is perceived as having deviated from the norms surrounding appropriate femininity. When these labels are attached to women who kill as objects, rather than subjects and agents, they become all-consuming and reflect a new identity for the women they are attached to. Each of the labels, when attached to women whose

³ The Coroners and Justice Act 2009, section 54(1)(c) refers to "a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D."

agency is passively denied, have the effect of actively denying their agency in slightly different ways. The mad label actively denies agency by utilising discourses of pathology and irrationality, thus presenting women as not intending or understanding what they were doing, and thus lacking the ability to have made the choice to act in that way. The bad label invokes imagery of a monstrous and mythical being that lacks humanity with the consequence that the woman is transformed into a Medusa-style character. The active agency denial apparent in this context is that of human agency, that is to say that the woman did not act as a human and thus did not have the ability to choose how to act in the context of her humanity and femininity. Finally, the victim label actively denies the agency of the women it is attached to because as they currently exist, the concepts of agency and victimisation are incompatible with one another: they sit at opposing sides of a dichotomy. The discourse of victimisation suggests that the woman was so victimised that she was unable to choose how to act and indeed did not act at all. Rather she was product of her batterer and victimisation at the hands of her partner.

The agency denial, both passive and active, of women who kill has been presented as problematic within this thesis and thus in need of reform for numerous reasons. These include, but are not limited to, the umbrella issues of concerns with justice for both women who kill and for their victims. As a result I have argued that numerous justifications can be advanced for the recognition of the agency of these women within criminal legal discourse. These include creating a discursive space within which the construction of, and norms surrounding appropriate femininity can be challenged, a more detailed engagement with societal responsibility for the homicidal actions of these women and a clearer acknowledgment that women are

capable of committing extreme acts of violence. I have therefore attempted to create a discursive space within which the agency of women who kill can be recognised and which will allow a model to be created which acknowledges their agency.

I have argued that women's agency needs to be passively acknowledged before active agency denial can be interrupted and the agency of women who kill can be effectively recognised within socio-legal discourse. I have suggested that the existing construction of the criminal legal subject, currently the reasonable person which is gendered masculine, needs to be (re)constructed. In my analysis I critically explored various potential (re)constructions, including introducing the concept of the reasonable woman and creating a universal subject to whom universal rights are ascribed. However I felt that both of these constructions would ultimately be too problematic to utilise and therefore concluded that the most effective approach would be to alter the existing composition of the reasonable person to one which is actually, rather than simply theoretically, gender neutral.

Therefore it was suggested that the existing reasonable person test, codified in the defence of loss of control,⁴ should remove any reference to the defendant's sex or gender and instead read as: 'a person with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.' Ensuring the reasonable person, and thus the legal subject is gender neutral potentially allows women to be recognised as legal subjects, whilst

⁴ See The Coroners and Justice Act section 54(1)(c) which defines the reasonable person as: 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way to D'

simultaneously allowing for a contextualisation of the circumstances of the homicidal actions of the female killer to occur. It is important to reiterate here that I acknowledge that even once women's agency is recognised through their status as legal subjects their ability to actually exercise this agency will arguably still be read through the prism of patriarchy. Indeed, I have made clear throughout my thesis that any agency exercise which occurs has to be contextualised within the existing social structures of a patriarchal society. However, I have also suggested that acknowledging women's agency in this way within criminal legal discourse is an initial step in ameliorating patriarchal discourse for women so that not only is their agency recognised but they can go on to also successfully exercise their agency within socio-legal discourse.

Passively recognising the agency of women within criminal legal discourse by altering the current definition of the reasonable person to acknowledge women as legal subjects and agents, has a direct impact on active agency denial. I have argued that although the existing labels of mad, bad and victim would still be attached to women who kill, by recognising them as legal subjects and agents, the active agency denial associated with the use of these labels would be interrupted. It is important to reiterate that nowhere in the thesis am I suggesting that as a result of agency recognition these labels will cease to be attached to women who kill. Indeed, within societal discourse labels have always been attached to those individuals who are perceived to be deviant in their behaviours and therefore I would suggest this is unlikely to change. However, I have argued that when such labels are attached to subjects with agency they are less influential and pervasive than when attached to objects who lack agency. Therefore, by passively acknowledging women's agency and

their status as legal subjects I have suggested that the active agency denial currently symbiotic to their labelling will be interrupted because the labels no longer become the new identities of the female subjects they are attached to. This proposed approach of dealing with both passive and active agency denial within criminal legal discourse ensures that the agency of women who kill is recognised.

7.3 Implications of This study

There are numerous potential implications that arise from the arguments put forward in this thesis and the ultimate acknowledgment of women as legal subjects with agency within criminal legal discourse that is being proposed. The first of which is the relationship between legal and societal discourse. Traditionally, the law and legal discourse has trailed behind societal discourse when exploring legal reform. This is perhaps most recently, accurately and clearly reflected in the context of legalising same-sex marriage. Indeed, a poll conducted in September 2008 found that a majority (55%) of Britons supported same-sex marriage, whilst 45% disagreed,⁵ whilst in June 2009 an opinion poll published in *The Times* reported that 61% of Britons agreed that gay couples should have an equal right to marriage and not just be limited to civil partnerships, with 33% disagreeing.⁶ However, it was not until March 2012 that the Government launched a consultation on legalising same-sex civil marriage in England and Wales, with The Marriage (Same-Sex Couples) Bill

⁵ The Guardian (2008a), "Sex uncovered poll: Homosexuality" (26th October 2008), available at <http://www.theguardian.com/lifeandstyle/2008/oct/26/relationships>

⁶ Religious Tolerance.org, "Same-sex civil partnerships and marriages in the UK 2004 to 2010: Increasing support for same-sex marriage in the UK", available at http://www.religioustolerance.org/hom_maruk3.htm

receiving Royal Assent in July 2013, and same-sex marriages being legally performed from midnight on 29th March 2014.

The six-year gap between a majority of people signalling support for same-sex marriage and the required legalisation being passed highlights how legal discourse often trails significantly behinds societal discourse when responding to and implementing reforms. However, I would argue that in the context of acknowledging women's agency, implementing the model suggested in this thesis would allow legal discourse the opportunity to take the lead in altering societal discourse, rather than the other way around. Indeed, the fact that societal discourse surrounding women and agency denial is reinforced by patriarchal institutions, such as the law and the legal system, means that for societal discourse to be sufficiently altered, I would suggest that it would have to be at least reflected in, if not initiated by legal discourse. So, by acknowledging women's agency within criminal legal discourse through adopting the proposed changes and agency based model suggested within this thesis, societal discourse would also be prompted to alter so as to allow women's agency to be acknowledged there too. I would argue that this would also then have the potential to ultimately alter existing social structures which would currently limit women's successful exercise of agency, even when acknowledged.

Further reinforcement for the argument of legal discourse taking the lead and initiating change within societal discourse can be found in the implications that adopting an agency-based model for women who kill could arguably have on gender discourse. More specifically, I would suggest that acknowledging women's agency might ameliorate some of the existing pejorative gender norms that surround

women and femininity. For example, I have argued that recognising women as legal subjects and agents and thereby interrupting active agency denial has the consequence that the labels attached to women who kill will no longer become their primary identity. Disrupting these labels in the context of primary identity implementation, I would argue, lessens the pervasiveness of the gender norms associated with their use.

Taking each of the labels individually: preventing mad from becoming the primary identity of homicidal women by acknowledging them as agents, creates a discursive space within which to interrogate and question the associated pejorative gender stereotypes and norms of women being ruled by their hormones and emotions, being inherently irrational and the construction of the defective feminine body. No longer attaching the bad label as a primary identity has the potential to prevent women who deviate from the norms typically associated with appropriate femininity from being labelled as deviant and therefore averting the reinforcement of all gender stereotypes. Finally, preventing the label of victim becoming the primary identity of homicidal women may arguably help to end the enforcement of norms such as passivity and weakness from being associated with women and femininity, as well as the notion of women as being “ideal victims”.

Indeed, I would argue that an additional implication of acknowledging women as legal subjects and agents within criminal legal discourse is that it may have an implication on the construction of women as ideal victims. As I noted in chapter

four⁷ of my thesis, women are constructed as ideal victims within criminal law because they are most legitimately given the status of a victim. Typically the ideal victim lacks agency and is seen as virtuous and blameless for the criminal behaviour to which they have been exposed. However by readily constructing women as ideal victims, when they do not meet the expected standards, particularly of perceived blamelessness outlined above, their status as “real” and “deserving” victims is questioned and undermined. By failing to meet the criteria expected of them through their construction as ideal victims, these women become imperfect victims.⁸ This is particularly the case where women are victims of domestic and sexual violence. As noted in chapter five,⁹ battered women who kill are expected to be passive, submissive, and meek in the face of violence from their partner, with those women who fail to do so, for example by attempting to fight back, being viewed as “underserving viragos”. Similarly, I would argue that to qualify as ideal and thus as true victims of rape women must not have engaged in in what may be perceived as “risk-taking behaviour” at the time of the rape, such as wearing revealing clothing, walking home alone in the dark, being intoxicated or acting in any way that could be perceived as “sexualised”.¹⁰

As I have argued elsewhere,¹¹ the continuing construction of women as ideal victims without agency means that if women are perceived as *attempting* to have exercised their agency in any way, for example by choosing to walk home alone at

⁷ See chapter four at p.140

⁸ Weare, Siobhan “You shouldn’t have to be perfect to ‘qualify’ as a rape victim” *The Conversation*, 2nd July 2014, available at <https://theconversation.com/you-shouldnt-have-to-be-perfect-to-qualify-as-a-rape-victim-26012>

⁹ See chapter five at pp.175-183

¹⁰ Weare, 2014

¹¹ Weare, 2014

night in what is considered to be revealing and sexualised clothing before being raped, their status as any sort of victim, ideal or otherwise is called into question. Similarly, a battered woman who is having an extra-marital affair and physically resists and fights back against her partner also has her status as a victim questioned.¹² This reflects the argument presented in this thesis that the current concepts of agency and victimisation are incompatible with one another. However, acknowledging women as legal subjects with agency would arguably alter and ameliorate the discourse surrounding this ideal victim construct. If women's subjecthood and agency is readily acknowledged within criminal legal discourse, then when these women do attempt to exercise their agency by making choices with regard to their behaviour it will no longer undermine the victimisation they have suffered. Moreover by acknowledging women's agency, a discursive space will be constructed within which the construction of the ideal victim could be undermined and thus deconstructed, allowing for women whose victimisation currently goes unrecognised because they are "imperfect victims", to have it appropriately recognised, regardless of their behavioural choices and agency exercise.

It should also be noted, that for such an approach to be truly effective there needs to be a simultaneous refocusing within societal discourse on women as agents rather than as victims. So rather than focusing on women as ideal victims, as the victims of men and of a patriarchal society more widely, societal discourse needs to think of women as agents who are fighting back against victimisation, empowering themselves and attempting to change their circumstances and experiences in any

¹² Weare, 2014

way that they can.¹³ A dual approach that focuses on altering both societal and legal discourse once women are acknowledged as legal subjects with agency, '[w]ould mean that all women who have been victimised, regardless of what decisions they made, could expect violations of their bodily rights to be rightly acknowledged – rather than dismissed when they fail to match an insidious and damaging stereotype.'¹⁴

Although the discussions within this thesis are focused within the context of women who kill, I would argue that the proposals regarding agency acknowledgment and labelling interruption are also applicable within the context of women as perpetrators of other serious criminal offences. In a current work in progress¹⁵ I have proposed that female co-perpetrators of child sexual abuse are labelled as victims in a similar way to women who kill. More specifically I argue that criminal legal and societal discourse responds to the actions of these female co-perpetrators by constructing them as victims of their male co-offender, thus suggesting that they are acting as a result of victimisation, coercion, violence and/or abuse from him. In the same way as women who kill labelled as victims have their agency actively denied, female co-perpetrators of child sexual abuse have their ability to have chosen to participate in the sexual abuse actively denied.

This discourse of victimisation and active agency denial is evidenced in particular case examples, for example the recent case involving Lost Prophets singer

¹³ Weare, 2014

¹⁴ Weare, 2014

¹⁵ Weare, Siobhan, "Denying the Agency of 'Victimised' Female Co-Perpetrators of Child Sexual Abuse: Issues For Their Child Victims" (not yet published)

Ian Watkins and two female co-defendants, *B* and *P*. The prosecutor in the case, Chris Clee QC, said of the two female defendants: ‘both ... admitted they have sexually abused their children at the *behest* of Ian Watkins’,¹⁶ thus suggesting there was an element of coercion involved. Similarly, in the media experts suggested that these women were groomed by Watkins into committing the abuse and that without such grooming and coercion it would have been unlikely these women would have abused their children.¹⁷ The use of language such as “grooming” suggests that these women were also the victims of Watkins. Even in the sentencing remarks, the judge acknowledged the role that Watkins played in the women’s commission of the sexual abuse. He noted how both women met Watkins when they were teenagers, were manipulated by him and his corrupting influences.¹⁸ Both women were also considered as falling below the threshold necessary for dangerousness,¹⁹ and were thus given determinate sentences of 14 and 17 years respectively.²⁰ Despite such lengthy jail terms, the discourse of victimisation which pervaded the legal process, reflected in the lack of dangerousness associated with these women, ensured that their agency was actively denied.

The active agency denial which takes place in the context of female co-perpetrated child sexual abuse has some specific consequences for the child victims including but not limited to: the silencing of victims, minimisation of the harm caused

¹⁶ Wales Online, “Ian Watkins trial: Lostprophets singer pleads guilty to attempting to rape a baby” 26th November 2013, available at <http://www.walesonline.co.uk/news/wales-news/ian-watkins-trial-lostprophets-singer-6343182>

¹⁷ BBC News Wales, “Lostprophets’ Ian Watkins groomed before baby abuse” 26th November 2013, available at <http://www.bbc.co.uk/news/uk-wales-25108690>

¹⁸ Judiciary of England and Wales, 2013b, pp.2-3

¹⁹ Judiciary of England and Wales, 2013b, p.9

²⁰ Judiciary of England and Wales, 2013b, p. 11

by these female co-perpetrators and the risk of future harm to vulnerable children posed by women who are constructed as non-ideal sex offenders. Thus, by acknowledging women as legal subjects and agents and interrupting the active denial of agency that is symbiotic to the labelling of female co-perpetrators, I would argue that it prevents the construction of these women as victims of their male co-offender being automatically assumed. Instead I would suggest that the discourse of victimisation would only be invoked in those cases where the case facts suggest it is wholly appropriate to do, rather than being the “go-to” response within criminal legal discourse as it is now. In turn, this could allow some of the existing issues for their child victims to be ameliorated.

For example, acknowledging women as agents and interrupting the active agency denial associated with the label of victim, would acknowledge the ability of these women to choose, however limited the choice, to actively participate in the sexual abuse. As a consequence I would argue that this could combat some of the consequences and issues mentioned above. For example, acknowledging the agency of female co-perpetrators of child sexual abuse would allow a discursive language to be created around this type of criminal behaviour perpetrated by women which, I suggest, would help to prevent the silencing of victims by making it easier for them to come forward and report their victimisation. In turn, victims may feel they are more likely to be believed when they report the abuse.

Implications of recognising women as legal subjects and agents are not just recognisable in the context of female defendants but also in that of women as the

victims of crime, particularly sexual violence. In a current work in progress,²¹ I suggest that the current construction of women as legal objects and the subsequent denials of agency which occur may have a role to play in the continuing low conviction rates in female rape trials. I argue that the importance of agency in this context can be seen when comparing male and female rape conviction rates. According to the most recent detailed statistics issued by the Ministry of Justice on Sexual Offending in England and Wales, in 2011 2,045 men were sent for trial at the Crown Court for the rape of a female (female rape). In total 1,044 of those men were found guilty, either because they pled guilty or because of a guilty verdict returned by the jury, that's an overall conviction rate of 51.1%.²² This rate can be broken down and analysed further, to explore the number of convictions which arose specifically as a result of the trial process and jury verdict, rather than a guilty plea or the defendant ultimately not being tried. So of those 2,045 men sent for trial, 1,594 pled not guilty and thus actually stood trial, with only 625 being found guilty by a jury.²³ That is a guilty verdict rate of 39.2%. These figures can be compared to those available for the rape of a male (male rape) in 2011. 144 men were sent to trial for raping a male, of which 90 were found guilty, either because they pled guilty or were found to be so by a jury, at the Crown Court. That is an overall conviction rate of

²¹ Weare, Siobhan "Comparing Male and Female Rape Convictions: The Role of Agency" (not yet published)

²² Gov.UK, "Sexual Offending Overview Tables"(10th January 2013), available at <https://www.gov.uk/government/statistics/an-overview-of-sexual-offending-in-england-and-wales> Table 4.6, *Rape of a Female*, year 2011

²³ "Sexual Offending Overview Tables", Table 4.6, *Rape of a Female*, year 2011

62.5%.²⁴ Breaking these figures down further, 99 men entered a not guilty plea, with 49 of them being found guilty by a jury. That is a guilty verdict rate of 49.5%.²⁵

As a *percentile proportion* of cases taken to the Crown Court in 2011, both the overall conviction rate and the guilty verdict rate was significantly higher in cases of male rape than in those of female rape. Thus, in 2011, the overall conviction rate in cases of male rape was 11.4% higher than female rape, and the guilty verdict rate was 10.3% higher. The article will therefore explore the role of agency as a *potential* contributing factor and thus as a *potential* explanatory factor for the continual proportionately lower conviction and guilty verdict rates in cases of female rape when compared to male rape.

Women's current status as legal objects means that there is no recognition of their agency, that is their ability to choose to act in a certain way. I argue that in the context of rape cases this denial of women's agency means that they are denied the ability to exercise choice when it comes to refusing to consent to sex. Indeed, the normative position in the context of heterosexual sexual activity is for both men and women to consent. That is to say that there is a presumption of consent. Thus the element of choice, and thus the exercise of agency available in the context of sex involves refusing to consent. This may take the form of, for example, saying "no", through body language, or by physical rejection.

This normative position of consenting and the agential element of refusing to consent to sex is reflected in the phrasing typically used within rape discourse that

²⁴ "Sexual Offending Overview Tables", Table 4.6, *Rape of a Male*, year 2011

²⁵ "Sexual Offending Overview Tables", Table 4.6, *Rape of a Male*, year 2011

“no means no”, as well as the legal definition of rape which refers to the victim not consenting, i.e. saying “no” to the penetration.²⁶ The failure to acknowledge women’s agency within criminal legal discourse is thus relevant in the context of rape because it does not readily recognise their ability to deviate from the normative presumption of consent by refusing to consent to sex. In contrast, the automatic acknowledgment of men as agents means that their ability to refuse to consent to sex is readily accepted. This relationship between agency and consent in cases of rape may therefore offer some explanation for the proportionately lower conviction rates in cases of female rape.

As well as being relevant to the issue of presumptive consent, it is submitted that agency is also relevant to the legal definition of rape. More specifically I suggest that it is of relevance when exploring the statutory requirement that it must be proved beyond reasonable doubt that the (male) perpetrator did not reasonably believe that the (male or female) victim consented.²⁷ This issue of the defendant’s reasonable belief in the victim’s consent goes to the heart of a rape trial and it is in this context that I suggest that the agency of the victim plays a significant role. In a scenario involving a male defendant and a female victim, the male defendant, as a legal subject has his agency automatically recognised within criminal legal discourse. The female victim however, constructed as a legal object, does not have her agency readily acknowledged and therefore her ability to deviate from the normative presumption of consent by refusing to consent to sex with the defendant is not automatically asserted. Therefore, in relation to section 1(1)(c) of The Sexual

²⁶ The Sexual Offences Act 2003, section 1(1)(b)

²⁷ The Sexual Offences Act 2003, section 1(1)(c)

Offences Act, the requirement of the defendant's reasonable belief in the victim's consent, may be more easily satisfied as her ability to refuse to do so is not readily acknowledged. This may therefore offer some explanation for the proportionately lower conviction rates in cases of female rape.

Therefore by implementing the suggestions made in this thesis, and acknowledging women as legal subjects with agency, there is the potential to combat some of the issues raised above with regard to female rape conviction rates by creating a new discursive space within criminal legal discourse with regards to women, agency and consent to sex which more clearly allows women's ability to refuse to consent to be acknowledged. Moreover, it is also arguable that by acknowledging women as subjects, some reiteration of men's status in this regard may occur, as well as focusing more broadly on the issue of rape convictions and therefore also potentially having a positive impact on the conviction rates for male rape.

7.4 Further Research

Having explored some of the key implications that arise as a result of the research conducted for, and arguments proposed within, this thesis, it is clear that there is a significant amount of future research which could be conducted in order to further the conclusions advanced here. The first piece of research, and the one that is perhaps most directly related to the female agency recognition model proposed in this thesis, could focus on the practical steps that need to be taken to ensure that the

agency-based model is successfully implemented by legal and criminal justice bodies and agencies. Indeed due to the word limit constraints of this thesis, a sufficiently detailed engagement with the practicalities of implementing the proposed agency-based system could not be undertaken. However, in order to give true credence to the proposals made in the thesis, there would be a clear benefit from engaging with the practical, as well as theoretical, side of things. Indeed, having critically engaged with the work of Butler in chapter two,²⁸ and criticised her for failing to sufficiently explore the practicalities within her research, I am aware that it would be all too easy to fall into the same trap.

Therefore future research projects could cover issues such as altering judicial and barrister training to direct them to eliminate the use of gendered language in criminal law trials. Similarly, members of the judiciary and legal profession could focus more on the issue of agency within the criminal trial process, highlighting to the jury that women, as recognised legal subjects are agents, but that their ability to choose how to behave may have been impaired, perhaps to a significant degree, by both internal and external factors, such as a psychiatric disorder or a violent and abusive relationship. There could also be jury directions given during criminal trials warning them not to take into account the gender of the defendant, unless it is of particular relevance to the trial, e.g. in cases involving infanticide which is a female specific defence.

There is also potential to suggest that a report could be prepared by The Law Commission, exploring the issue of “practically” recognising women as legal subjects

²⁸ See chapter two, section 2.5.2

through altering the reasonable person test, currently found in the defence of loss of control, codified in The Coroners and Justice Act 2009, to that which has been proposed in this thesis. Greater awareness of the issue of women's agency within criminal legal discourse could also be facilitated by a focus on the issue within legal education. For example, women's agency and issues such as the use of gendered language could be covered within undergraduate degrees in the criminal law, legal theory or gender and the law modules. Similarly, within postgraduate legal qualifications such as the Legal Practice Course (LPC) and the Bar Professional Training Course (BPTC), there could be a focus on ensuring that these future lawyers, barristers and judges acknowledge women's agency and do not include gendered language within documentation they produce or submissions that they make to the court.

Another area of further research to be considered is that of undertaking empirical research. Having understood and developed a theoretical basis and framework for acknowledging the agency of women who kill within criminal legal discourse, conducting empirical research would allow for a more practical approach to be explored. Indeed, conducting empirical research into the experiences of officials within the criminal justice system in dealing with women who kill would provide an additional dimension to the research conducted in this thesis, allowing an exploration of whether the theoretically based arguments and proposals advanced are, and indeed could be, reflected and implemented within the structures and agencies that currently exist within the justice system, or whether additional reform would be required. I would envisage this empirical research engaging with key gatekeepers and stakeholders within the criminal justice system including the Crown

Prosecution Service, defence barristers involved in cases of women who kill, prison officers and probation officers with experience of working with homicidal women. Engaging with a wide range of officials with experience of working with these women at different points during their time involved in the justice system would give a more complete understanding of the experiences, treatment of and perspectives on, women who kill.

One area explored within this thesis, was the influence of gendered language on criminal legal discourse. The importance of this issue within the context of this thesis and the agency-based model that has been proposed arguably makes it an area ripe for further research. Within the context of the areas explored and arguments made in this thesis, a particular area for future research could include a detailed engagement on the use of gendered language in judicial sentencing remarks and media reporting in cases of women who kill. I suggest that such a project could lend itself to using a text mining²⁹ approach, whereby words or clusters of words within these documents could be analysed to determine the similarities or relations between them in the context of gendered language. Understanding the full and detailed scope of the problem of gendered language use by the judiciary as well as within the media, would be useful not only as a piece of research in its own right, but also within the context of research on the practical approach to agency acknowledgment, discussed above. By understanding the extent of this problem, it will allow processes and structures to be implemented in an effort to combat it, as

²⁹ “Text mining can be defined as the art of extracting significant data from large amount of written texts. Text mining techniques allow to structure and categorize text contents which are initially non-organized and heterogeneous. It allows to identify trends, topics and tones” – Digital Marketing Glossary, “What is text mining definition?” available at <http://digitalmarketing-glossary.com/What-is-Text-mining-definition>

well as to reinforce the acknowledgement of women as legal subjects and agents in the theoretical agency-based model that has been suggested.

As well as exploring the influence of gendered language in judicial sentencing remarks, the continuation of writing feminist judgments would demonstrate a practical way in which judgments could be written that acknowledge women as legal subjects and agents. Indeed, continuing with the *Feminist Judgments* project and writing the 'missing' feminist judgments of key criminal cases would allow for the continued reiteration and highlighting of the issues of gendered language, gender bias, the silencing of women and agency denial, as well as demonstrating ways in which these issues can be overcome. In the *Feminist Judgments* Project the need for more such judgments to be written was highlighted,³⁰ particularly in relation to emphasising the continuing struggle for women in relation to legal subjecthood.³¹

As noted in chapter four,³² there are no detailed figures currently available for the use of the defences of loss of control and diminished responsibility that include a gender breakdown, since the introduction and changes made by The Coroners and Justice Act 2009. As such it would be useful to conduct further research into the prevalence and use of these defences by both men and women. In this thesis I have argued that excuse defences, such as diminished responsibility are gendered feminine, whereas justification defences, such as loss of control are gendered masculine. Therefore, to further substantiate the claims I am making based on the existing data available, a more detailed exploration of the use of these defences

³⁰ Hunter et al., 2010, p.28

³¹ Hunter et al., 2010, p.28

³² See chapter four, at p.160

would be useful. When collecting this data I would argue such research would benefit from not merely focusing on numerical data, e.g. how many women versus men successfully pleaded diminished responsibility post the 2009 Act, but also including a contextualisation within which these successful pleas were made, e.g. a brief analysis of the case facts etc.. Other than being useful in further substantiating the claims I have made regarding the gendering of defences, collecting and interrogating such data may also reveal additional patterns and intricacies, as yet unnoticed, and which may themselves be worthy of further research.

Looking outside of the specific confines and context of this thesis, I would suggest that there is also room for further research on the topic of agency and its denial, acknowledgment and application to different groups of people. As noted above, one of the implications of the research conducted in this thesis extends to exploring the labels attached to female co-perpetrators of child sexual abuse. Although I have already drafted an article on this area, the recent Children's Commissioner Report on Intrafamilial Child Sexual Abuse has highlighted that the majority of existing literature on the area focuses on male perpetrators,³³ and therefore more research needs to be conducted into female perpetrators of such abuse. As such I would suggest that additional research focusing on the issue of agency, perhaps alongside some empirical research into offending and reporting rates, could begin to fill this gap in the literature.

³³ Office of the Children's Commissioner, "It's a lonely journey": A Rapid Evidence Assessment on Intrafamilial Child Sexual Abuse" (3rd July 2014), available at http://www.childrenscommissioner.gov.uk/content/publications/content_821 p.12

Another area that could be of interest for future research is the agency of children within criminal legal discourse. Much like women, children are considered to be non-ideal offenders. Therefore it would be interesting to see if there are any similarities in the socio-legal response to child offenders, particularly of serious violent crimes such as homicide and sexual abuse, when compared with the issues raised in this thesis, especially in the context of labelling and active agency denial. It may be of particular interest to explore the impact of a child's age on agency denial or acknowledgment within criminal legal discourse, taking into consideration the fact that the age of criminal responsibility is 10.

7.5 Concluding Thoughts

The existing academic literature on women who kill has acknowledged the issue of agency denial and some of the consequences that this has for the treatment of these women within the criminal justice system. This thesis has made significant progress in attempting to address the issue of agency denial by proposing a new model that allows the agency of these women to be recognised within criminal legal discourse. It has created a platform from which further research can be conducted and reforms suggested to alter the existing gendered socio-legal response to women who kill.

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